Judicial Management of Mass Tort Bankruptcy Cases

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I. Introduction

During the past twenty years, the federal bankruptcy courts have taken on a role that Congress did not anticipate for them in 1978 when it enacted the current Bankruptcy Code. Beginning in 1982 with the chapter 11 filings of two asbestos products manufacturers—Johns-Manville Corporation and UNR Industries, Inc.—bankruptcy courts have become a forum for companies seeking the resolution of pending and threatened mass tort litigation against them under chapter 11 of the Bankruptcy Code. Although bankruptcy has often been a remedy of last resort, the features of the bankruptcy system that bring a halt to lawsuits against the debtor, facilitate a global resolution of its liabilities, and free the debtor from further responsibility for prebankruptcy claims have made bankruptcy a viable alternative for companies hoping to put their mass tort liability behind them. Moreover, the bankruptcy system's ability to use a company's future earning capacity to compensate its creditors and to equitably treat similarly situated tort claimants, regardless of where they reside or when their injuries manifest themselves, has made bankruptcy acceptable to tort claimants as a means of resolving their claims.

To date, over seventy companies, motivated primarily by their desire to reach a final resolution of their mass tort liabilities, have sought bankruptcy protection. This manual refers to these cases as "mass tort bankruptcy cases." Most of them have involved asbestos-related personal injury or property damage claims, but chapter 11 has also been used to resolve mass tort claims involving silicon gel breast implants and the Dalkon Shield contraceptive device.

The bankruptcy system was not designed specifically to deal in a single case with hundreds of thousands of unliquidated tort claims, including those involving injury that will not become manifest for many years. Thus, mass tort bankruptcy cases have presented many challenges to courts and litigants. Courts and litigants have had to face a host of legal issues—statutory and constitutional—usually with little or no appellate court guidance, as well as a series of unique logistical problems. Over time, some standard practices and legal interpretations have emerged, which sometimes are reflected in reported opinions but often are revealed or only hinted at by documents in case files and unreported orders and opinions. The relative absence of established doctrine, the novelty and complexity of some of

the issues presented, and the ever-evolving nature of mass tort bankruptcy practice make the task of presiding over one or more of these bankruptcy cases a challenge to any judge. Such an assignment may be interesting and intellectually stimulating, but also potentially frustrating and overwhelming.

Largely as a result of the complexity and unique challenges mass tort bankruptcy cases present, their resolution has usually been time-consuming and costly. According to a recent RAND report, the average duration of an asbestos bankruptcy case is six years,[1] and the costs involved in each case run into the multiple millions of dollars. One suggestion for reducing cost and delay in mass tort bankruptcy cases is preparation of educational materials that would provide judges new to these cases with the benefit of the experience of those who have handled similar cases. Each judge who presides over a mass tort bankruptcy case should not have to start at the beginning of the learning curve. The Federal Judicial Center commissioned this manual in response to this perceived need. It launched this effort by convening an Advisory Meeting on Mass Torts, attended by many of the bankruptcy, district, and circuit judges who have handled mass tort bankruptcy cases. It later circulated a draft of this manual for review by knowledgeable judges and practitioners.

The end product is a combination judicial manual–treatise–case study that provides information useful to bankruptcy and district judges who preside over some or all aspects of a mass tort bankruptcy case. It previews the major issues that are likely to arise in such a case and sets out the relevant law, often discussing conflicting points of view that courts have expressed. In many instances it provides a narrative of how courts handled these issues, not necessarily to endorse the approach taken, but sometimes simply to provide the context of how practices in mass tort bankruptcy cases have evolved. Where the law provides clear answers, or "best practices" can be identified on the basis of discussions at the advisory meeting and interviews with judges and practitioners, the manual makes specific suggestions (e.g., "the judge should hold a case management status conference"). This manual is not, however, a blueprint or recipe for the successful handling of a mass tort bankruptcy case. Every case is unique, and a successful outcome in the case will depend upon the judge's own wisdom and good judgment.

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1. Stephen J. Carroll et al., RAND Institute for Civil Justice, Asbestos Litigation 118 (2005).

As of this writing, federal legislation is pending that is designed to end the judicial resolution of asbestos claims, including resolution by the bankruptcy courts.[2] At this point, enactment of the legislation is uncertain. But even if some form of the Fairness in Asbestos Injury Resolution Act is passed, this manual should not be tossed aside as irrelevant. Other manufactured products or substances, unfortunately, may spawn mass tort litigation that will lead the manufacturers to seek a bankruptcy solution. If so, those bankruptcy cases, while having their own unique characteristics, will build on the asbestos and other mass tort bankruptcy cases that have come before. Furthermore, because this manual chronicles how asbestos and other mass tort bankruptcy cases have been handled, it can serve as a resource for policy makers and academics, as well as members of the judiciary and the bar, who study and seek to improve on the methods available for resolving similar claims held by large numbers of injured persons.

2. Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005).

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II. Initial Concerns

A. Overview

Part II addresses the following issues that are likely to arise at the outset of a mass tort bankruptcy case:

- *Early case management and administrative issues:* What outside resources will be needed to assist the clerk's office in the administration of the case, and how can they be obtained? How should the court handle first-day orders? What case management steps should the court take early in the case?
- *Division of labor and coordination with other judges:* What are the possible roles for the bankruptcy judge, the district judge, a multidistrict litigation transferee judge, and other judges before whom related litigation is pending? What factors affect how the work is actually distributed among the courts? What issues should the judges communicate about, and what are the ethical limitations on their communications?
- *Consolidation and coordination of pending mass tort litigation:* What happens with all of the pending tort suits when the debtor files for bankruptcy? When should lawsuits against the debtor be transferred to the bankruptcy district? When should lawsuits against non-debtor parties be transferred? What happens to these cases once they are in the bankruptcy or district court in which the bankruptcy is pending?
- *Expansion of the automatic stay to include non-debtor entities:* Under what circumstances should the bankruptcy court temporarily enjoin litigation against entities other than the debtor? Does the automatic stay ever provide such protection to non-debtors?
- *Emergency payments to tort claimants:* Does the bankruptcy court have authority to permit payment to injured tort claimants prior to confirmation of the reorganization plan?

B. Early Case Management and Administrative Issues

A mass tort bankruptcy case presents many of the same management and administrative challenges as other large chapter 11 cases do. In those cases,

just as in a mass tort bankruptcy, the complexity and size of the case present a host of logistical problems for the court. Other Federal Judicial Center publications address these issues.[3] This section does not repeat those discussions in full, but rather highlights some of the administrative and case management issues that the bankruptcy court will confront at the outset of a mass tort bankruptcy case.

The staff of the bankruptcy court's clerk's office is not likely to be large enough to handle the increased workload a mass tort bankruptcy case filing requires. Thus, the judge, as statutorily authorized,[4] may need to call on the debtor to provide additional personnel, equipment, and facilities in accordance with circuit council guidelines. Judges have required debtors in bankruptcy mega-cases to provide, among other things, "special employees of the estate" to assist in the administration of the case under the supervision of the clerk of court; computers, telephones, and other equipment; and additional office space. To reduce the burden on the clerk's office, judges in large chapter 11 cases have commonly called on debtors to provide outside claims and noticing agents and copy services, and off-site maintenance of a duplicate set of case files. It is advisable for the clerk of court, the debtor's counsel, the U.S. trustee,[5] and counsel for representative creditors (including tort claimants) to hold an early organizational meeting in order to formulate plans for a smooth handling of the logistical aspects of the case.

Just as in other bankruptcy mega-cases, at the time of filing the petition in a mass tort case, the debtor is likely to present and seek the bankruptcy judge's approval of a variety of proposed "first-day orders."[6] Typically, these orders will relate to matters affecting the debtor's ability to conduct the bankruptcy proceedings and to continue its business operations with

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3. *See* Conference on Large Chapter 11 Cases (Judicial Conference Committee on the Administration of the Bankruptcy System and Federal Judicial Center 2004); Case Management Manual for United States Bankruptcy Judges (Federal Judicial Center and Administrative Office of the United States Courts 1995) [hereinafter Case Management Manual]; S. Elizabeth Gibson, A Guide to the Judicial Management of Bankruptcy Mega-Cases (Federal Judicial Center 1992). *See also* Manual for Complex Litigation, Fourth (Federal Judicial Center 2004) [hereinafter MCL 4th]. The MCL 4th incorporates a draft of portions of this manual written in 2002. *See id.* § 22.5 and note 1160.

4. *See* 28 U.S.C. § 156(c) (2000) (authorizing the court's use in a bankruptcy case of facilities and services "pertain[ing] to the provision of notices, dockets, calendars, and other administrative information" that are paid for by the bankruptcy estate).

5. Throughout this manual, references to the "U.S. trustee" include the bankruptcy administrator in cases pending in North Carolina and Alabama.

6. *See generally* Debra Grassgreen, First-Day Motions Manual (American Bankruptcy Institute 2003).

minimal disruption. If the debtor has given little or no notice to other parties, the judge should scrutinize the motions to determine whether the relief sought is justified and whether the debtor has demonstrated sufficient cause to act without greater notice and an opportunity for a hearing. Even if the debtor demonstrates sufficient cause for immediate entry of some first-day orders, the judge should consider whether any of the orders should be limited in amount or duration, and should subject an extension to more extensive notice and a hearing. Some of the orders sought are likely to be relatively routine; others will seek dispensation from requirements that the bankruptcy court would normally impose on a debtor owing to the complex nature and size of the case. In ruling on the latter requests for relief, the judge should take into account not only the practical and logistical difficulties presented by a bankruptcy case of such complexity and size, but also the needs of the court and the parties in interest that are served by the requirements in question.

The judge should hold a case management status conference under 11 U.S.C. § 105(d)(1) on administrative matters as early in the case as possible in order to set the ground rules on such issues as noticing, filing, and service requirements; procedures for scheduling and hearing motions; ground rules concerning the need for local counsel; and procedures for the interim payment and allowance of professional fees and reimbursement of expenses. Such a status conference can contribute to the expeditious and economical handling of the case. Many of the lawyers in the case may be from out of town and will not be familiar with all of the regular practices and preferences of the court.

The matters addressed at the status conference should be set forth in a case management order, which can be posted on the court's Web site and amended or supplemented by additional orders as the case proceeds.

Because of the large number of parties in a mass tort bankruptcy case and the resulting volume of proceedings filed in the case, judges should establish at the outset of the case a regular schedule of motion hearings. Depending on the particular needs of the case, such omnibus hearing dates may be as frequent as once a week or every other week. As the case proceeds, the judge may adjust the schedule to reduce the frequency of hearing dates. Some judges who have established omnibus hearing dates have allowed the parties to schedule their motions for themselves, thus reducing the burden on the court's staff. Other judges prefer to retain more control over their docket and continue to have their clerk of court do the scheduling. Regard-

less of who does the scheduling, the judge should specify by administrative order early in the case the notice periods required and the time by which any objections must be filed. The early administrative order might also specify, for example, who has the burden of notifying the court that a specific matter has settled and thus should be removed from the court's docket.

Judges should also consider at the outset how to facilitate communications with what is likely to be a widely dispersed group of parties in interest and their counsel. Some judges use video and telephone conferences to reduce the necessity for travel. Other technologies, including a court Web site, party-created Web sites, recorded telephone messages, and LEXIS and Westlaw, are means of communicating actions taken in the case and matters on the docket for upcoming hearings. When out-of-town counsel know in advance what matters will and will not be heard at a court hearing, it may substantially reduce their need for travel.

Ongoing developments in case management and electronic case filing will greatly influence the management of these cases. The judge should therefore work closely with the clerk's office to learn what technologies are available to assist with case management and to ensure that the parties are aware of and able to use them.

C. Division of Labor and Coordination with Other Judges

A mass tort bankruptcy inevitably involves judges other than the bankruptcy judge assigned to the case. At the very least, it will involve judges who will hear appeals from the bankruptcy judge, including either district or bankruptcy appellate panel judges[7] and circuit judges.[8] The district court of the district in which the case is filed may also exercise original jurisdiction over certain aspects of the bankruptcy case by entering final judgments in non-core proceedings[9] and by partially withdrawing the reference of jurisdiction to the bankruptcy court as to core or non-core proceedings.[10] Moreover, litigation related to the bankruptcy case is likely to be pending or commenced during the course of the bankruptcy in other state and federal courts. Accordingly, at the outset of the bankruptcy case and throughout its duration, bankruptcy courts should consider the following:

7. *See* 28 U.S.C. § 158(a), (b) (2000).
8. *See id.* § 158(d).
9. *See id.* § 157(c)(1).
10. *See id.* § 157(d).

- whether there are aspects of the bankruptcy case that should or must be resolved by judges other than the assigned bankruptcy judge;
- whether and how knowledge and expertise other judges have already acquired about the tort claims or other related litigation can be used in the bankruptcy; and
- how proceedings in other courts can be coordinated with the proceedings in the bankruptcy court.

There are no settled answers to these questions, and the best method in any case will depend upon the preferences of the judges involved, the practices of their courts, and the particular needs of the case. Attention to these issues, however, may help the court achieve a more efficient and informed resolution of the bankruptcy case.

1. Involvement of the district court of the bankruptcy district

Assigning a single district judge to hear all appeals in a mass tort bankruptcy case will enable the judge and his or her staff to develop knowledge about the case that will expedite decision making and facilitate consistency in ruling.[11] It will also obviate the need to continually educate other district judges about the case. Whether or not districts generally assign all appeals in a particular bankruptcy case to the same judge, doing so is especially desirable in this context, given the complexity of mass tort bankruptcies. Once a district judge has been designated as the appellate judge, that judge can open permissible lines of communication with the bankruptcy judge to facilitate proper sequencing of decisions by both of them and to avoid unnecessary or duplicative efforts.[12] For similar reasons of efficiency and consistency, some courts of appeals have assigned all appeals from a single mass tort bankruptcy case to the same appellate panel.[13]

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11. In a federal circuit in which the judicial council has established a bankruptcy appellate panel (BAP), an appeal from a bankruptcy judge can be heard by the BAP if a majority of the district judges of the district in which the appeal is filed have so authorized and none of the parties to the appeal elects to have the appeal heard by a district judge. *Id.* § 158(b), (c). If all of those conditions are met in a mass tort bankruptcy case, the BAP should consider using the same panel to hear all appeals in the case.

12. Discussions between the judges, of course, must adhere to the bounds of judicial ethics. *See infra* text accompanying notes 43–44.

13. *See, e.g.,* Official Comm. of Tort Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 142 F.3d 433 (6th Cir. 1998); Lindsey v. Dow Chem. Co. (*In re* Dow Corning Corp.), 113 F.3d 565 (6th Cir. 1997); Tort Claimants' Comm. v. Dow Corning Corp. (*In re* Dow Corning Corp.), 103 F.3d 129 (6th Cir. 1996); Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482 (6th Cir. 1996) (appeals all

A district judge has the authority under certain circumstances to play more than an appellate role in a bankruptcy case. First, as is discussed below,[14] trials of personal injury and wrongful death claims must take place in the district court, either in the district in which the bankruptcy case is pending or in the district in which the claim arose.[15] Second, if all parties to a non-core proceeding do not consent to its determination by the bankruptcy judge, the district judge will have to review the bankruptcy judge's proposed findings of fact and conclusions of law and enter a final judgment in the proceeding, perhaps after a de novo review.[16] Finally, because bankruptcy subject-matter jurisdiction is conferred on the district courts and then automatically referred to bankruptcy courts, district courts are statutorily authorized "for cause" to withdraw the reference of any bankruptcy case or proceeding from the bankruptcy court and to exercise original jurisdiction themselves over the withdrawn case or proceeding; this action may be taken either on the district court's own motion or on the timely motion of a party.[17] When chapter 11 issues become intertwined with federal statutory issues involving interstate commerce, withdrawal of the reference is statutorily required.[18]

Although bankruptcy judges exercise jurisdiction in many mass tort cases, in a few cases district judges have withdrawn the reference with respect to various proceedings relating to the personal injury and wrongful death tort claims against the debtor. Perhaps the broadest withdrawal of the reference in a mass tort bankruptcy occurred in the *A.H. Robins* case.[19] The district judge in that case, who prior to the bankruptcy filing had been presiding over a large group of Dalkon Shield cases against Robins, partially withdrew the reference of jurisdiction from the bankruptcy court on the day the debtor filed its petition.[20] The withdrawal order specified seventeen categories of proceedings and motions that the district court would determine, including all "[p]roceedings involving the estimation or liquidation

decided by a panel composed of Chief Judge Martin, Circuit Judge Batchelder, and District Judge Wiseman).

14. *See infra* text accompanying notes 53–57.

15. 28 U.S.C. § 157(b)(5) (2000).

16. *Id.* § 157(c).

17. *Id.* § 157(d).

18. *Id.*

19. *In re* A.H. Robins Co., Bankr. No. 85-01307-R (Bankr. E.D. Va. filed Aug. 21, 1985).

20. Richard B. Sobol, Bending the Law 60–63 (1991).

of any personal injury tort or wrongful death claims against the estate."[21] The order broadly defined the latter category to include

- motions to establish procedures for filing and resolving the tort claims, including the establishment of bar dates;
- motions concerning procedures for and discovery in proceedings relating to the estimation or liquidation of the tort claims;
- requests for declaratory relief concerning the debtor's liability for the tort claims;
- the estimation or liquidation of the tort claims for purposes of allowance, confirmation, or distribution;
- motions concerning the automatic stay's application to tort claims; and
- requests for relief under section 105 with respect to a tort claim.[22]

In addition to the mass tort claims, the district court withdrew jurisdiction over motions for conversion or dismissal, appointment of committees, extensions of exclusivity, approval of disclosure statements, confirmation, appointment of a trustee, compensation for services, and enforcement of the automatic stay.[23]

In other mass tort bankruptcies in which a district judge has no prior involvement with the mass tort litigation, unlike the judge in *Robins*, the district judge should generally allow the bankruptcy judge to exercise jurisdiction over most aspects of the bankruptcy case.

Some district judges have withdrawn the reference of jurisdiction from bankruptcy courts in mass tort cases with respect to a narrower set of proceedings than those in *A.H. Robins*. In the *Dow Corning* case, for example, acting upon the recommendation of the bankruptcy judge,[24] the district judge withdrew jurisdiction to consider the debtor's "omnibus objection to disease claims," which sought a determination that the tort plaintiffs lacked proof that the debtor's product was a cause of their alleged diseases. The bankruptcy judge recommended withdrawal of the reference because a similar issue was likely to be raised in cases against the debtor's shareholders already pending in the district court[25] and because a ruling on the

21. Ackles v. A.H. Robins Co. (*In re* A.H. Robins Co.), 59 B.R. 99, 105 (Bankr. E.D. Va. 1986) (attaching Administrative Order No. 1), *aff'd sub nom.* Beard v. A.H. Robins Co., 828 F.2d 1029 (4th Cir. 1987).

22. *Id.* at 105–06.

23. *Id.* at 105–07.

24. *In re* Dow Corning Corp., 215 B.R. 526 (Bankr. E.D. Mich. 1997).

25. *Id.* at 527–29.

debtor's objection depended largely on application of *Daubert v. Merrell Dow Pharmaceuticals*,[26] an issue as to which the bankruptcy judge believed the district judge possessed greater expertise.[27]

Another district judge acting in a mass tort case withdrew the reference of jurisdiction with regard to the validity of the personal injury claims against the debtor, specifically including within the withdrawn proceedings motions to set a bar date, motions concerning notice to claimants, motions relating to the form to be used for proofs of claim, and motions for summary judgment based on threshold liability issues.[28] The judge's decision rested on the fact that the circuit was unresolved as to whether a bankruptcy judge has authority to decide dispositive pretrial motions concerning personal injury and wrongful death claims against a bankruptcy estate.[29] Rather than allowing the bankruptcy judge to rule on the debtor's expected summary judgment motion seeking the disallowance of the tort claims, since the court of appeals might hold that the judge lacked such authority, the district judge concluded that judicial economy supported withdrawal of the reference of jurisdiction over matters relating to the validity of the claims.[30]

Proceedings brought in the bankruptcy court during the course of a mass tort bankruptcy might trigger a district judge's mandatory withdrawal of the reference.[31] In the *Johns-Manville* bankruptcy, for example, the district judge held that 28 U.S.C. § 157(d) required withdrawal of the reference of jurisdiction over a proceeding against the debtor under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[32] The judge reasoned that the proceeding came within the terms of the mandatory withdrawal provision because its adjudication required a "significant interpretation of the CERCLA statute"—a statute "'rooted in the commerce clause'"—as well as an "assessment of the rela-

26. 509 U.S. 579 (1993).

27. *In re Dow Corning Corp.,* 215 B.R. at 530.

28. *In re* Babcock & Wilcox Co., No. CIV.A. 00-0558, 2000 WL 422372, at *5 (E.D. La. Apr. 17, 2000).

29. *Id.* at *4.

30. *Id.*

31. *See* 28 U.S.C. § 157(d) (2000) and *supra* text accompanying note 18.

32. United States v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 63 B.R. 600 (S.D.N.Y. 1986); *see also In re* Nat'l Gypsum Co., 134 B.R. 188 (N.D. Tex. 1991). *See* Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9661 (2000).

tionship of such CERCLA claims to the automatic stay arising under section 362(a)(1) of the Bankruptcy Code."[33]

For a number of reasons, then, including familiarity with the tort claims involved, greater expertise as to the legal issues raised, desire to avoid duplication of effort, jurisdictional limitations on the bankruptcy court's authority, and statutory command, a district judge might choose to withdraw the reference of one or more proceedings in a mass tort bankruptcy case. Once the withdrawal occurs, it will be especially important for the bankruptcy judge and district judge handling the various aspects of the bankruptcy case to have frequent communications about administrative matters so that the matters can proceed in a coordinated fashion.[34] This coordination will be easier if the two judges are in the same location, but that will not always be possible. Whatever means of communication is used, each judicial officer should know what the other is doing.

In some bankruptcy cases, following a partial withdrawal of the reference, the bankruptcy and district judges have held hearings at which they presided jointly and after which they issued joint rulings.[35] Such a manner of proceeding may allow coordination and consistency, but it presents questions about the jurisdictional status of both judges. Although 28 U.S.C. § 157(d) allows the district court to "withdraw, in whole or in part, any case or proceeding" referred to the bankruptcy judge, there is no indication that after such withdrawal, jurisdiction over the withdrawn matter can be shared by the bankruptcy and district judges. Either the bankruptcy judge has jurisdiction over a particular matter or proceeding (or part thereof) upon reference from the district court, or the district judge has jurisdiction over it, having withdrawn the reference from the bankruptcy court.[36] If the judges conduct joint hearings, therefore, they should clarify matters in which the bankruptcy judge is exercising original jurisdiction and those in which the district judge is exercising such jurisdiction (or serving as an appellate judge reviewing orders entered by the bankruptcy judge). If only one of the judges is exercising original jurisdiction

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33. *Johns-Manville Corp.*, 63 B.R. at 602–03 (quoting United States v. ILCO, 48 B.R. 1016, 1021 (N.D. Ala. 1985)).

34. *See infra* text accompanying notes 43–44.

35. *See, e.g., In re* A.H. Robins Co., 88 B.R. 742, 743 (E.D. Va. 1988) (Memorandum in re Confirmation Order jointly issued by District Judge Merhige and Bankruptcy Judge Shelley and noting that "[b]y agreement, the undersigned, with few exceptions, conducted all proceedings jointly"), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

36. *See* 28 U.S.C. §§ 157(a), (d), 1334 (2000).

over the matters before the court, the role of the other judge at the hearing should be fully explained.

2. Involvement of other courts

A mass tort bankruptcy case is typically filed in response to an avalanche of products liability lawsuits against the debtor, and thus frequently litigation involving the debtor and those associated with the debtor will be pending in other federal districts or in state courts. Some of these courts may have a long history of dealing with the tort litigation that led the debtor to seek bankruptcy protection or with related insurance coverage litigation that the products liability litigation spawned. The automatic stay under 11 U.S.C. § 362(a) will bring a halt to the prepetition litigation against the debtor and shift the focus of attention to the bankruptcy court. Nevertheless, the judge involved in the resolution of the bankruptcy case should consider whether any of the judges who were involved with the tort or related litigation prior to the debtor's bankruptcy filing could play a useful role in the bankruptcy case and whether creative use of interdistrict transfer or intercircuit assignment procedures might make their involvement possible.

a. MDL transferee judge. Prior to the bankruptcy filing, the proliferation of products liability lawsuits against the debtor and others may have led the Judicial Panel on Multidistrict Litigation to consolidate the federal litigation by transferring it to a single district court for pretrial purposes.[37] Depending on the time that has elapsed since the MDL transfer was ordered, the MDL transferee judge may have gained considerable knowledge about the tort litigation, including the potential scope of liability, possible defenses, insurance coverage, and settlement discussions. The MDL transferee judge may also continue to preside over litigation against codefendants of the debtor who have not filed for bankruptcy. The judge presiding over the bankruptcy case should therefore consider whether the MDL transferee judge should play a role in the bankruptcy case.

For example, at the request of the debtor in the *Dow Corning* bankruptcy, the MDL judge presiding over the breast implant litigation received an intercircuit assignment under 28 U.S.C. § 292(d) to "presid[e] over all breast implant and non-breast implant personal injury claims arising out of the reorganization of the Dow Corning Corporation and cases against the shareholders of the Dow Corning Corporation that have been

37. *See* 28 U.S.C. § 1407 (2000); *see also* MCL 4th, *supra* note 3, at 366–70 (discussing criteria for interdistrict transfers, including MDL).

transferred to the Eastern District of Michigan."[38] The debtor apparently hoped that the MDL transferee judge, who had been presiding over the breast implant litigation for five years, would preside over a trial of the causation issue in the breast implant cases against it and its shareholders, litigation that had been transferred to the district in which its bankruptcy case was pending. As it turned out, no causation trial was ever conducted, and the parties negotiated a resolution of the breast implant litigation that formed the basis of the reorganization plan that was confirmed. Thus, the MDL transferee judge in fact played only a limited role in the bankruptcy case.

Although an assignment of the MDL transferee judge to the bankruptcy district under 28 U.S.C. § 292 provides a means of utilizing that judge's expertise with the tort claims in the bankruptcy case, it presents some problems that might prevent frequent use of this statutory authority. First, the procedure required for an intercircuit assignment is somewhat cumbersome, requiring a certificate of necessity by the chief judge of the circuit in which the bankruptcy case is pending, consent by the chief judge of the circuit in which the MDL transferee judge sits, and a designation by the Chief Justice, following review by the Judicial Conference's Committee on Intercircuit Assignments.[39] Furthermore, an intercircuit assignment restricts the ability of the two circuits involved to lend or borrow judges for other purposes.[40] Perhaps even more significantly, a successful assignment of the MDL transferee judge to handle portions of a bankruptcy case requires the cooperation of the bankruptcy and district judges presiding over the case.[41] For that reason, such an assignment, when it is thought to be beneficial, should be initiated by judges of the bankruptcy district, rather than one of the parties. Ideally, when such an assignment occurs, the MDL transferee judge will be invited to participate in the bankruptcy case, rather than being imposed on the judge or judges presiding over the bankruptcy.

Assigning an MDL transferee judge to the bankruptcy district will be productive only if there is a useful role for the judge to play in the bank-

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38. Amended Joint Disclosure Statement With Respect to Amended Joint Plan of Reorganization at 48, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Feb. 4, 1999) (quoting Designation and Assignment of a Chief United States District Judge for Service in Another Circuit (June 27, 1997)).

39. *See* John F. Nangle, *Bankruptcy's Impact on Multidistrict Litigation: Legislative Reform as an Alternative to Existing Mechanisms*, 31 Ga. L. Rev. 1093, 1112–13 (1997).

40. *Id.* at 1113.

41. *Id.* at 1111.

ruptcy case. If causation is not seriously at issue and the bankruptcy court is going to let the parties attempt to negotiate a resolution of the tort claims, rather than estimating their value, the MDL transferee judge's familiarity with the litigation may be of little help. On the other hand, in some bankruptcy cases a trial or ruling on causation or other global liability issues may be needed or judicial estimation of the tort claims may be required; in such cases the bankruptcy judge should consider whether the MDL transferee judge is in the best position to preside over such matters. There may also be cases in which the participation of the MDL transferee judge is desirable to facilitate settlement of claims involving multiple defendants or establishment of joint claims resolution facilities.

It may be possible to utilize the MDL transferee judge's familiarity and expertise with the tort claims without an intercircuit assignment.[42] The judge or judges presiding over the bankruptcy case can instead informally consult with the MDL transferee judge within the bounds allowed by the rules of judicial ethics.[43] While a judge cannot decide matters based on information outside the record in the case, through informal consultation with the MDL transferee judge the bankruptcy judge may be able to acquire information about the context and history of the litigation that will be helpful in the judicial management of the reorganization proceedings. If through this informal consultation the judge acquires specific information that may have an impact on issues that are likely to come before the bankruptcy court, the judge should apprise the parties of this fact and allow them to respond to the information and any conclusions formed as a result.[44]

b. Other judges. Litigation pending in other courts may be of special importance to the bankruptcy proceedings, even if it does not involve tort claims against the debtor. For instance, the debtor may have previously filed suit against one or more of its insurers, seeking a declaration of cover-

42. Some possible means of utilizing the MDL transferee judge's expertise in the bankruptcy case present a number of procedural and substantive problems, however, and have never been used. These procedures include having the bankruptcy case transferred to the MDL transferee district by the bankruptcy judge pursuant to 28 U.S.C. § 1412 or by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. *See* Nangle, *supra* note 39, at 1103–08.

43. *See* Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. Rev. 1851, 1866 (1997) (discussing possible ethical concerns about the appropriateness of cooperation between judges).

44. *See id.* at 1868 ("Communication of public information among judges rarely seems to be a problem, but the more private, less susceptible to adversarial scrutiny, and more judgmental the communication, the greater the resistance.").

age. Because it is an action by, not against, the debtor, it will not be automatically stayed by the debtor's bankruptcy filing. Unless the parties obtain a transfer of the venue of the litigation or removal under 28 U.S.C. § 1452(a) to the bankruptcy court, or the debtor dismisses the lawsuit and refiles it in the bankruptcy court, the litigation may proceed where it was originally filed. In that event, the bankruptcy judge needs to be informed of the progress of that litigation through the parties or through permissible informal consultation with the judge presiding over it.[45] If it appears that the resolution of the litigation in the nonbankruptcy court will frustrate or delay progress in the bankruptcy case, the bankruptcy judge should encourage the parties to seek a change of venue or removal to the bankruptcy court or to initiate a new adversary proceeding there.

D. Consolidation and Coordination of Pending Mass Tort Litigation

Among the initial issues that the judge may have to confront will be what, if anything, the bankruptcy court should do with the hundreds, or even thousands, of personal injury tort cases pending against the debtor and others in state and federal courts at the time the bankruptcy petition is filed. One of the frequently cited advantages of using the bankruptcy system to resolve mass tort litigation is the system's capacity to consolidate the pending mass tort litigation in the district in which the bankruptcy case is filed.[46] Once the lawsuits are consolidated before a single court, they can be resolved in a coordinated and consistent manner under the supervision of the judge to whom they have been assigned, perhaps without the needless repetition of effort that dispersed litigation usually engenders. The bankruptcy filing itself largely accomplishes this consolidation and coordination with respect to the mass tort claims against the debtor company. Parties may go further, however, and ask the district judge to reinforce the scope of this consolidation by actually transferring the tort suits pending against the debtor to the bankruptcy district and even to expand the consolidation to

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45. *See id.* (noting that cooperation among judges in the form of "[s]uccessful coordination of pretrial activities by reconciling overlapping schedules and eliminating redundancies in case development" and "the reduction of duplication" rarely presents problems).

46. *See, e.g.,* Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 Loy. L.A. L. Rev. 451, 457 (1998); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. Pa. L. Rev. 2045, 2050–54 (2000). For a discussion of the advantages and disadvantages of aggregating mass tort claims and managing them in a single forum, see MCL 4th, *supra* note 3, at 355–58.

include claims against non-debtor parties. While there may be advantages of such a consolidation, the judge who is asked to approve the consolidation will be faced with a number of legal and practical questions.

1. Claims against the debtor

The Bankruptcy Code spells out rather clearly the effect of the mass tort defendant's bankruptcy filing on the litigation pending against it as of the petition date. The Bankruptcy Code stays the prosecution of these lawsuits in all courts and bars new lawsuits on prepetition claims.[47] Thus, the bankruptcy automatic stay provision itself provides a means of coordinating the mass tort litigation, because proceeding further against the debtor in any of the actions will require the permission of the presiding bankruptcy judge. Such permission should not be granted in most cases pending plan negotiations under chapter 11.

The bankruptcy filing achieves consolidation of the mass tort litigation against the debtor by virtue of the court's exclusive jurisdiction over the property of the debtor and of the estate[48] and the requirement that to participate in the bankruptcy (and thus be eligible to receive any of the assets of the estate), a creditor not listed by the debtor as having an undisputed, non-contingent, liquidated claim must file a proof of claim in the bankruptcy court.[49] The mass tort litigation against the debtor becomes consolidated in the district in which the debtor's bankruptcy case is pending because a tort plaintiff hoping to receive compensation for a preconfirmation debt must seek payment there.

The bankruptcy judge generally has authority to allow or disallow claims against the estate, since such action constitutes a core proceeding.[50] However, the Judicial Code prescribes special rules for the resolution of personal injury tort and wrongful death claims. It excludes from the definition of core proceedings the liquidation and estimation of such claims for purposes of distribution,[51] and it requires that the trials of such claims take place in federal district court, in the district of the bankruptcy case or the district in which the tort claim arose, as determined by the district court in which the bankruptcy case is pending.[52] Furthermore, notwithstanding

47. 11 U.S.C. § 362(a)(1) (2000).
48. *See* 28 U.S.C. § 1334(e) (2000).
49. *See* 11 U.S.C. §§ 501, 1111(a) (2000).
50. 28 U.S.C. § 157(b)(2)(B) (2000).
51. *Id.*
52. *Id.* § 157(b)(5).

bankruptcy, it preserves any jury trial rights with respect to the resolution of these claims that exist outside of bankruptcy.[53]

This special treatment of personal injury tort and wrongful death claims does not necessarily mean, however, that all of the thousands of such claims against the debtor must be tried to a jury in district court. Courts have allowed waiver of such jury trials by a tort claimant who accepts a reorganization plan's provisions for settlement or for alternative resolution methods.[54] Moreover, most courts have concluded that the bankruptcy court has authority to estimate the value of the mass tort claims for purposes of voting and confirmation and for determining the feasibility of the plan.[55] Thus, it is likely that most of the mass tort claims will never have to be tried in the district court.

Courts have consistently read 28 U.S.C. § 157(b)(5) as authorizing the district court in which the bankruptcy case is pending to transfer personal injury tort and wrongful death claims to its district.[56] But the bankruptcy case filing itself already provides consolidation and coordination of claims against the debtor. What is gained at the outset of the bankruptcy case by actually transferring the mass tort cases against the debtor from the federal and state courts in which they are pending to the district in which the bankruptcy case is filed?

Judges concluded in both the *Dow Corning* and *A.H. Robins* chapter 11 cases that such transfers were warranted. The district judge in *Dow Corning* stated:

> This Court is mindful that one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one

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53. *Id.* § 1411(a).

54. *See, e.g.,* A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1013 n.17 (4th Cir. 1986); *In re* Dow Corning Corp., 187 B.R. 919, 930 (E.D. Mich. 1995), *rev'd in part on other grounds*, 86 F.3d 482 (6th Cir. 1996); *In re* UNR Indus., Inc., 45 B.R. 322, 326 (N.D. Ill. 1984); Resnick, *supra* note 46, at 2053.

55. *See, e.g., A.H. Robins Co.*, 788 F.2d at 1012 (citing Roberts v. Johns-Manville Corp., 45 B.R. 823, 825–26 (S.D.N.Y. 1984)); *In re UNR Indus., Inc.*, 45 B.R. at 326–27; Resnick, *supra* note 46, at 2052–53. Courts are divided, however, over whether a bankruptcy judge is authorized to rule on dispositive motions seeking to disallow personal injury and wrongful death claims against the debtor. *Compare In re* U.S. Lines, Inc., Asbestosis Claimants v. U.S. Lines Reorganization Trust, 262 B.R. 223 (S.D.N.Y. 2001), *and In re* Dow Corning Corp., 215 B.R. 346 (Bankr. E.D. Mich. 1997), *with* Pettibone Corp. v. Easley, 935 F.2d 120 (7th Cir. 1991), *and In re* UNR Indus., Inc., 74 B.R. 146 (N.D. Ill. 1987).

56. *See, e.g.,* Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482, 496 (6th Cir. 1996); Murray v. Pan Am. World Airways, Inc. (*In re* Pan Am. Corp.), 16 F.3d 513, 516 (2d Cir. 1994); *A.H. Robins Co.*, 788 F.2d at 1010–11.

court, the district court where the bankruptcy is pending. Coordination is therefore assured.[57]

In the *A.H. Robins* bankruptcy, the Fourth Circuit concluded that "[n]o progress along estimating these contingent claims . . . can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized."[58]

In asbestos mass tort bankruptcies, however, judges have generally not transferred actions pending against the debtors to the bankruptcy district. In at least one of those cases, the bankruptcy court was able to estimate the value of the tort claims without having the pending cases transferred to its district.[59] In other cases, the parties were able to negotiate a value of the tort claims for structuring the reorganization plan, again without the court having to transfer all tort actions against the debtor to the district in which the bankruptcy case was pending.[60] Moreover, after the reorganization plans were confirmed, individual tort claims were resolved according to the terms of the plans, which established trusts to which all present and future asbestos claims were channeled for payment.[61]

Even the judges who approved the transfer of the actions pending against the debtor to the district in which the bankruptcy case was filed did not necessarily require the immediate physical transfer to that district of all the case files. In the *Dow Corning* case, the district judge found that "no physical transfer of case files or case records to the Eastern District of Michigan is necessary at this time."[62] Furthermore, the judge ordered that all removed cases continue to be transferred to the MDL judge for pretrial purposes.[63] In the *A.H. Robins* case, although the district judge apparently contemplated that the case files would eventually be transferred to the Eastern District of Virginia, the Fourth Circuit held that no actual transfer of

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57. *In re Dow Corning Corp.*, 187 B.R. at 929.

58. *A.H. Robins Co.*, 788 F.2d at 1014.

59. *See, e.g., In re* Eagle-Picher Indus., Inc., 189 B.R. 681 (Bankr. S.D. Ohio 1995).

60. *See, e.g., In re* UNR Indus., Inc., Bankr. No. 82B9841-9845, 1996 Bankr. LEXIS 1455 at *11 (Bankr. N.D. Ill. Aug. 13, 1996) (quoting disclosure statement explanation of how the value of asbestos claims was negotiated).

61. *See, e.g., In re* Eagle-Picher Indus., Inc., 203 B.R. 256, 279, 282 (S.D. Ohio 1996); *In re* UNR Indus., Inc., 143 B.R. 506, 514 (Bankr. N.D. Ill. 1992).

62. *In re Dow Corning Corp.*, 187 B.R. at 932.

63. *Id. But see* Maritime Asbestosis Legal Clinic v. U.S. Lines, Inc. (*In re* U.S. Lines, Inc.), 216 F.3d 228 (2d Cir. 2000) (holding that the district court lacked authority under section 157(b)(5) to transfer personal injury or wrongful death claims against the debtor to the MDL district unless the claims arose there).

the case files should take place until the individual plaintiff in each case was given notice of and an opportunity to object to the transfer of her case and the court's conditional order of transfer was made final.[64]

A decision concerning the transfer of the pending tort litigation against the debtor, therefore, may not be necessary in many mass tort bankruptcies because no one will seek it. When a debtor does seek a transfer, the district judge's decision whether to grant the transfer may depend on whether the judge determines that there is a need for additional control over the mass tort litigation while the bankruptcy case is pending and whether actual trial of any of the personal injury tort and wrongful death claims against the debtor is anticipated prior to confirmation of the reorganization plan.[65]

2. Claims against non-debtor codefendants

The provisions of the Bankruptcy Code that consolidate and coordinate the mass tort litigation against the debtor are not explicitly applicable to mass tort claims against the debtor's codefendants who have not filed for bankruptcy protection.[66] Accordingly, parties may seek rulings by the district judge that would expressly permit the consolidation of the pending litigation against these non-debtor parties with the litigation against the debtor itself in the district in which the debtor's bankruptcy case is pending. The

64. A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1016 n.18 (4th Cir. 1986). Ultimately, an overwhelming majority of the personal injury claims in the *A.H. Robins* case were resolved by nontrial options offered by the Claims Resolution Facility. *See* S. Elizabeth Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations 199–200 (Federal Judicial Center 2000). The trials of those claims that were not otherwise resolved were apparently dispersed around the country. *See* Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 645 (1992) (discussing the trust's employment of "several trial teams and counsel in all states"). *But see* David G. Epstein et al., Bankruptcy 870 n.9 (1993) (noting the planned opposition of the trustee of the Robins trust to any attempts by claimants to transfer their unresolved suits back to the original jurisdictions).

65. *Compare* Citibank, N.A. v. White Motor Corp. (*In re* White Motor Credit), 761 F.2d 270, 274 (6th Cir. 1985) ("[I]n large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, judicial health and survival, or at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts."), *with* Coker v. Pan Am. World Airways, Inc. (*In re* Pan Am. Corp.), 950 F.2d 839, 845 (2d Cir. 1991) ("Transfer [under section 157(b)(5)] should be the rule, abstention the exception.").

66. By their terms, these statutory provisions apply only to debtors, not other parties. The automatic stay prohibits the "commencement or continuation . . . of a judicial . . . proceeding *against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim *against the debtor* that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1) (2000) (emphasis added). Bankruptcy courts are granted exclusive jurisdiction over "all of the property, wherever located, *of the debtor* as of the commencement of such case, and of property *of the estate*." 28 U.S.C. § 1334(e) (2000) (emphasis added).

motivations for such requests may vary: to achieve the efficiencies of a unified resolution; to prevent the potential unfairness of continuing the prosecution of actions against derivative defendants while the actions against a major defendant, the debtor, are stayed; to prevent the dissipation of a jointly held asset; to delay. Whatever the reason for it, a motion to transfer the actions against these non-debtor parties to the district in which the debtor's bankruptcy case is pending raises a number of difficult and uncertain legal issues.

An initial issue that the bankruptcy judge may have to confront is whether the automatic stay applies to litigation against non-debtor codefendants and, if not, whether the judge should exercise the authority under 11 U.S.C. § 105(a) to expand the stay to prevent the continuation of the mass tort litigation against these non-debtor parties. This issue, which is discussed in more detail below,[67] frequently goes hand in hand or is raised alternatively with the question whether the litigation against non-debtor codefendants should be consolidated in the district in which the debtor's bankruptcy case is pending. The consolidation issue, in turn, rests on the scope of the bankruptcy court's subject-matter jurisdiction.

District courts (and by reference, bankruptcy courts) have subject-matter jurisdiction over cases under title 11 and over all civil proceedings arising under title 11, or arising in or related to cases under title 11.[68] Mass tort litigation against non-debtor parties falls within bankruptcy jurisdiction, if at all, only if it is "related to" a bankruptcy case.[69] The scope of this type of bankruptcy jurisdiction is much debated, and its application to personal injury tort claims against a chapter 11 debtor's codefendants has led to conflicting decisions. The most frequently used test for whether a proceeding comes within "related-to" jurisdiction is the one the Third Circuit announced in *Pacor, Inc. v. Higgins*.[70] Under that formulation, a proceeding is related to a bankruptcy case, and thus falls within federal subject-matter jurisdiction under section 1334(b), if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."[71] In other words, "the outcome [of the proceeding]

67. *See infra* section II.E.

68. 28 U.S.C. § 1334(a), (b) (2000).

69. Tort litigation by non-debtor plaintiffs against non-debtor defendants is not a "case[] under title 11," a "civil proceeding[] arising under title 11," or a "civil proceeding[] . . . arising in . . . [a] case[] under title 11." *Id.* § 1334(a), (b).

70. 743 F.2d 984 (3d Cir. 1984).

71. *Id.* at 994 (emphasis omitted).

could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and [could] in any way impact[] upon the handling and administration of the bankrupt estate."[72] Courts have emphasized different aspects of the *Pacor* test, and some have applied it more broadly than others;[73] at least one commentator has judged it to be "manifestly inadequate."[74] It nevertheless remains the test courts are likely to use in determining whether mass tort litigation against non-debtor codefendants comes within bankruptcy jurisdiction.

In mass tort litigation, the litigation against some codefendants is more likely to come within related-to jurisdiction than the litigation against others. Some courts have held that litigation against parties closely affiliated with the debtor, such as officers, directors, and shareholders, is related to the debtor's bankruptcy case because of joint insurance coverage or because of claims against the debtor for indemnification that are sure to result.[75] Direct claims against a debtor's insurers have also been found to come within related-to jurisdiction.[76]

The most far-reaching decision regarding mass tort litigation against non-debtor codefendants was the Sixth Circuit's in the *Dow Corning* case, which held that claims against other breast implant manufacturers fell within related-to jurisdiction, because the prosecution of such claims could lead to claims for contribution or indemnity against the debtor, Dow

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72. *Id.*

73. *Compare* Wood v. Wood (*In re* Wood), 825 F.2d 90 (5th Cir. 1986), *and* Kelley v. Nodine (*In re* Salem Mortgage Co.), 783 F.2d 626 (6th Cir. 1986), *with* Elscint, Inc. v. First Wis. Fin. Corp. (*In re* Xonics, Inc.), 813 F.2d 127 (7th Cir. 1987).

74. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 750 (2000). Professor Brubaker proposes that the same test used for supplemental jurisdiction in federal district courts be used for determining the scope of bankruptcy courts' related-to jurisdiction. *Id.* at 865, 867–68. According to his view, tort claims against a debtor's codefendants would fall within related-to jurisdiction if they and the tort claims against the debtor "derive from a common nucleus of operative fact." *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (announcing test for supplemental jurisdiction).

75. *See, e.g.,* Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482, 490–94 (6th Cir. 1996); *cf.* A.H. Robins v. Piccinin, 788 F.2d 994, 1007 (4th Cir. 1986) (affirming district court's exercise of bankruptcy jurisdiction to stay mass tort actions against officers, directors, and employees of the debtor).

76. *See, e.g.,* Coar v. Nat'l Union Fire Ins. Co., 19 F.3d 247 (5th Cir. 1994).

Corning.[77] Other courts have not read the jurisdictional statute this broadly.[78]

Even if a judge determines that mass tort claims against some or all of the debtor's codefendants come within bankruptcy jurisdiction, the judge must then determine whether the district court in which the bankruptcy case is pending has authority to transfer all of those claims from state and federal courts to the bankruptcy district. Section 157(b)(5) of title 28 authorizes the district court in which the bankruptcy case is pending to determine the place of trial of "personal injury tort and wrongful death claims." Other parts of that same statute refer more specifically to "personal injury tort or wrongful death claims *against the estate*."[79] A question therefore arises whether Congress intended the district court's authority to determine trial venue to be similarly limited to claims against the estate or whether it intended to confer broader authority in this provision that would extend to personal injury and wrongful death claims against non-debtor parties. Two courts of appeals have concluded that this broader authority does exist. The Sixth Circuit has held that "[s]ection 157(b)(5) should be read to allow a district court to fix venue for cases pending against non-debtor defendants which are 'related to' a debtor's bankruptcy proceedings pursuant to Section 1334(b)."[80] The Fourth Circuit reached a similar conclusion in the *A.H. Robins* case.[81]

In cases in which the courts approved the transfer of mass tort litigation against closely affiliated non-debtor parties, those claims ended up being resolved as part of the overall resolution of the tort claims in the debtor's plan of reorganization.[82] And as is discussed more fully in a subsequent section of this manual, those non-debtor parties were released from further liability upon confirmation of the debtor's plan.[83] There is no mass tort case to date, however, in which claims against unaffiliated non-debtor

77. *Lindsey*, 86 F.3d at 494.

78. *See, e.g., In re* Federal-Mogul Global, Inc., 300 F.3d 368 (3d Cir. 2002); Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984); *cf.* GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405 (Bankr. S.D.N.Y. 1983) (declining to extend scope of automatic stay to cover suits against non-debtor codefendants).

79. 28 U.S.C. § 157(b)(2)(B) (emphasis added).

80. *Lindsey*, 86 F.3d at 497.

81. A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1014 (4th Cir. 1986).

82. *See, e.g., In re* Dow Corning Corp., 255 B.R. 445, 475 (E.D. Mich. 2000); Vairo, *supra* note 64, at 629–30 (describing provisions of the *A.H. Robins* reorganization plan that released non-debtor parties from liability).

83. *See infra* section VI.E.

manufacturers have been resolved as part of the debtor's bankruptcy case. In *Dow Corning*, the one mass tort case in which related-to jurisdiction was found to cover such claims, the district court abstained from exercising its jurisdiction to transfer the litigation against the other breast implant manufacturers,[84] and the Sixth Circuit denied those parties' petitions for mandamus.[85] Thus, there has been no case in which the bankruptcy of one defendant has been used to achieve a global resolution of a mass tort litigation against an entire industry.[86]

The fact that a district court determines that it has authority under 28 U.S.C. § 157(b)(5) to transfer personal injury tort litigation pending against a debtor's codefendants does not mean that the court will necessarily choose to exercise that authority, especially at the outset of the bankruptcy case. If the goal of the transfer is to coordinate and consolidate all of the mass tort cases pending against the debtor and related parties, a favorable ruling by the court on a motion to expand the stay to cover the non-debtor parties may make transfer of the litigation to the bankruptcy district unnecessary. The litigation in state and federal courts around the country will have already been halted, and the debtor will most likely attempt to achieve the ultimate resolution of the litigation against these parties according to the terms of the plan of reorganization. Thus, there may be no need to incur the trouble and expense involved in physically transferring hundreds or thousands of cases to the bankruptcy district.[87]

Even if claims against non-debtor defendants are actually tried, the trials do not necessarily have to take place in the bankruptcy district. Courts have held that in addition to the venue options expressly included in section 157(b)(5)—the district in which the bankruptcy case is pending and the district in which the personal injury claim arose—the district judge has the option of abstaining and allowing the personal injury tort claims to

84. *In re* Dow Corning Corp., No. 95-CV-72397-DT, 1996 WL 511646, at *4 (E.D. Mich. July 30, 1996).

85. Lindsey v. Dow Chem. Corp. (*In re* Dow Corning Corp.), 113 F.3d 565, 572 (6th Cir. 1997).

86. *Cf.* GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405, 409 (Bankr. S.D.N.Y 1983) (rejecting codefendant manufacturers' proposal for "an industry-wide solution of the entire asbestos health-related problem," despite finding it "tempting"). *See also In re* Federal-Mogul Global, Inc., 300 F.3d 368 (3d Cir. 2002).

87. *See* Roberts v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 45 B.R. 823, 825 (S.D.N.Y. 1984) (Section 157(b)(5) "does not mandate that all personal injury and wrongful death claims be tried. It merely sets forth the procedure by which the forum for trial shall be designated for those . . . claimants who do not agree to another procedure for settling their claims.").

remain in the courts in which they are pending.[88] The Sixth Circuit has held that the abstention decision must be made on a case-by-case basis, rather than globally.[89] Other courts, however, may find that the factors governing abstention lend themselves to a categorical analysis when applied to a large number of similar cases against non-debtor defendants. Prior to making a final decision to transfer personal injury cases to the bankruptcy district, the district judge must give the individual plaintiffs in each case an opportunity to object to the relocation of their lawsuits.[90]

E. Expansion of the Automatic Stay to Include Non-debtor Entities

Just as non-debtor parties may seek the transfer of mass tort litigation against them to the bankruptcy district, where it can be consolidated along with the mass tort claims against the debtor, they may also seek to utilize the debtor's bankruptcy to gain a stay of the litigation against them. Thus, the bankruptcy judge may be asked to determine that litigation against non-debtor parties has been automatically stayed by virtue of section 362 or, in the alternative, to enter an order pursuant to section 105 temporarily enjoining the prosecution of the litigation against these non-debtor parties.[91] Although only the debtor itself is generally entitled to the benefit of the automatic stay in chapter 11 cases,[92] several courts have found circum-

88. Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (*In re* Dow Corning Corp.), 86 F.3d 482, 497 (6th Cir. 1996); Coker v. Pan Am. World Airways (*In re* Pan Am. Corp.), 950 F.2d 839, 844 (2d Cir. 1991); Citibank, N.A. v. White Motor Corp. (*In re* White Motor Credit), 761 F.2d 270, 271, 273 (6th Cir. 1985).

89. *Lindsey*, 113 F.3d at 569–70.

90. A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1014 (4th Cir. 1986) ("[D]ue process requires some form of notice and an opportunity for a hearing before there can be a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred finally from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.").

91. Courts in which the litigation sought to be stayed is pending may also be asked to declare that the automatic stay applies to non-debtors or to stay the litigation against non-debtors. Such courts have concluded that they have authority to enter the requested relief with respect to the cases before them. *See, e.g.,* Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); *In re* Related Asbestos Cases, 23 B.R. 523 (N.D. Cal. 1982); G.H. Ishii-Chang, *Litigation and Bankruptcy: The Dilemma of the Codefendant Stay*, 63 Am. Bankr. L.J. 257, 277–79 (1989). The bankruptcy court, however, has jurisdiction to enjoin litigation against non-debtors pending in other courts so long as that litigation is at least "related to" the bankruptcy case before it. Celotex Corp. v. Edwards, 514 U.S. 300, 307–10 (1995).

92. *See*, *e.g.,* Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197 (6th Cir. 1983); *Wedgeworth*, 706 F.2d at 544; *In re* Sunbeam Sec. Litig., 261 B.R. 534, 536 (S.D. Fla. 2001). In

stances in mass tort bankruptcies that justify expanding the scope of that protection.[93]

1. Expanded relief under section 362

According to section 362 of the Bankruptcy Code, the automatic stay halts litigation against the "debtor" and efforts to reach "property of the estate."[94] Therefore, in order to rule that litigation against non-debtor parties is also automatically stayed, a judge must conclude that the litigation in question is tantamount to litigation against the debtor or that it constitutes an effort to obtain possession of or exercise control over property of the estate. The judge must focus on the litigation's impact on the debtor and its estate, rather than on its impact on the non-debtor parties.[95]

The leading mass tort case that held that litigation against non-debtors was stayed by section 362 is *A.H. Robins Co. v. Piccinin*.[96] In that decision, the Fourth Circuit affirmed the district court's ruling that personal injury suits against various individual defendants who were closely associated with the debtor—its chairman of the board, its president, its chief medical officer, and the inventor of the Dalkon Shield, whom the debtor had agreed to indemnify—and litigation against the debtor's insurer were stayed pursuant to section 362(a)(1) and (3).[97] The court of appeals held that application of the automatic stay to non-debtors was appropriate only in "unusual

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limiting the benefit of the automatic stay to debtors in chapter 11 cases, courts have sometimes contrasted this limit with the automatic stay in chapter 13 cases, which is expressly made applicable to persons liable with the debtor on a debt. *See, e.g., Wedgeworth*, 706 F.2d at 544 (citing 11 U.S.C. § 1301(a)).

93. *See, e.g.,* Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (*In re* Eagle-Picher Indus., Inc.), 963 F.2d 855 (6th Cir. 1992); A.H. Robins v. Piccinin, 788 F.2d 994 (4th Cir. 1986); Johns-Manville Corp. v. Asbestos Litig. Group (*In re* Johns-Manville Corp.), 40 B.R. 219 (S.D.N.Y. 1984); W.R. Grace & Co. v. Chakarian (*In re* W.R. Grace & Co.), 42 Bankr. Ct. Dec. 270 (Bankr. D. Del. 2004).

94. 11 U.S.C. § 362(a) (2000).

95. *See, e.g., Am. Imaging Servs., Inc.*, 963 F.2d at 862 ("[I]t is for the protection of Eagle-Picher's numerous *creditors*, not for [non-debtor defendants] Hall and Ralston, that AISI is properly prohibited from proceeding with its action against Hall and Ralston . . . ."); Johns-Manville Corp. v. Asbestos Litig. Group (*In re* Johns-Manville Corp.), 26 B.R. 420, 430 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984) (enjoining under sections 362 and 105 suit against non-debtors because it "threatens adversely to impact on property of the debtor's estate as well as disrupt the reorganization proceedings and frustrate Manville's efforts to achieve financial rehabilitation"); Charles Jordan Tabb, The Law of Bankruptcy 170–71 (1997) (discussing the "very limited circumstances" under which actions against non-debtors may be stayed under section 362 in chapter 11 cases).

96. 788 F.2d 994 (4th Cir. 1986).

97. *Id.* at 1007.

circumstances."[98] It went on to explain that such unusual circumstances exist "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."[99] Of particular significance to the Fourth Circuit in concluding that the interests of the individual defendants were "so intimately intertwined with those of the debtor that the latter may be said to be the real party in interest"[100] was the individual defendants' absolute right to be indemnified by the debtor for any judgments rendered against them.[101]

The impact of the litigation against the non-debtors on Robins's products liability insurance was also of significance to the Fourth Circuit. Finding that the liability insurance policy issued by Aetna was an important asset of the estate,[102] the court held that litigation against non-debtors covered by that policy was also stayed under section 362(a)(3) because it constituted an attempt to obtain possession of or exercise control over property of the estate.[103] The court explained that "[a]ny action in which the judgment may diminish this 'important asset' is unquestionably subject to a stay under . . . subsection [(a)(3)]."[104]

The Fourth Circuit also upheld the application of the section 362(a)(3) stay to Aetna itself. The court explained that "a stay was authorized [against Aetna] under . . . § 362(a)(3) because Aetna might seek indemnification from Robins for any damages it had to pay, thus implicating the debtor's policy."[105]

98. *Id.* at 999.

99. *Id.*

100. *Id.* at 1001.

101. *Id.* at 1007.

102. *Id.* at 1001.

103. *Id.* at 1001–02; *see also* Forty-Eight Insulations, Inc. v. Lipke (*In re* Forty-Eight Insulations, Inc.), 54 B.R. 905 (Bankr. N.D. Ill. 1985).

104. *A.H. Robins,* 788 F.2d at 1001.

105. Oberg v. Aetna Cas. & Sur. Co. (*In re* A.H. Robins Co.), 828 F.2d 1023, 1025 (4th Cir. 1987) (footnote omitted). The court later approved extension of the stay to Aetna even when recovery was sought solely from Aetna's own assets and for actions taken solely by Aetna. *Id.* at 1025, 1026. The court found authority for extending the stay to this litigation against the non-debtor insurer, not under section 362(a)(3), but under section 105. The court based its decision on possible harm to the debtor caused by the litigation against its insurer, including the likelihood that the debtor's officers, directors, and employees would be required to participate in the litigation and would thus be diverted from their reorganization efforts. *Id.* at 1026.

While the Fourth Circuit upheld the application of section 362 to the litigation against defendants closely associated with the debtor and the debtor's insurer, the automatic stay provision will generally not protect unrelated non-debtor codefendants who have merely a joint tortfeasor relationship with the debtor. In several asbestos bankruptcies, for example, courts have rejected codefendant manufacturers' attempts to bring their cases within the scope of the debtor's automatic stay.[106] As one court observed:

> Nothing in the legislative history counsels that the automatic stay should be invoked in a manner which would advance the interests of some third party, such as the debtor's codefendants, rather than the debtor or its creditors. This Court concurs with the district court's conclusion that "it would distort congressional purpose to hold that a third party solvent codefendant should be shielded against his creditors by a device intended for the protection of the insolvent debtor" and creditors thereof.[107]

2. Preliminary injunction under section 105(a)

Because a judge will rarely be able to conclude that litigation against a non-debtor defendant is effectively litigation against the debtor, an order extending the stay to non-debtor litigation should generally rely on 11 U.S.C. § 105(a) rather than an expansive application of section 362.[108] Like the Fourth Circuit's interpretation of section 362(a), section 105(a) provides authority to extend the stay to litigation against non-debtor parties only if such litigation "would frustrate the statutory scheme or impact adversely on a debtor's ability to formulate a plan or on the debtor's property."[109] As one court explained:

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106. *See, e.g.,* Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405 (Bankr. S.D.N.Y. 1983).

107. *Lynch*, 710 F.2d at 1197.

108. *See, e.g.,* Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (*In re* Eagle-Picher Indus., Inc.), 963 F.2d 855 (6th Cir. 1992) (affirming grant of preliminary injunction enjoining prosecution of civil action against debtor's officers pursuant to section 105); A.H. Robins v. Piccinin, 788 F.2d 994 (4th Cir. 1986) (affirming grant of preliminary injunction enjoining litigation against debtor's insiders and insurer pursuant to section 105, in addition to relying on section 362 as basis for the stay); Johns-Manville Corp. v. Asbestos Litig. Group (*In re* Johns-Manville Corp.), 33 B.R. 254 (Bankr. S.D.N.Y. 1983) (granting preliminary injunction enjoining litigation against officers, directors, and employees of debtor "[b]ased upon the broad grant of power contained in Section 105(a)").

109. Johns-Manville Corp. v. Asbestos Litig. Group, 26 B.R. 420, 427 (Bankr. S.D.N.Y. 1983), *aff'd,* 40 B.R. 219 (S.D.N.Y. 1984).

> While section 105 vests the Bankruptcy Court with the authority to extend the stay, such an extension must be in aid of authority exercised by the court pursuant to some other provision of the Code, in this case, section 362. In order to issue a stay under section 105, the court must determine that such relief is at least appropriate to achieve the goals of a chapter 11 reorganization, and is necessary to protect the debtor.[110]

Accordingly, courts ruling on requests for extension of the stay to protect non-debtor parties in mass tort cases have generally restricted such relief to key officers and employees of the debtor, persons covered by the debtor's insurance policy, and in some instances the debtor's liability insurers.[111] They have declined to grant this relief under section 105(a) to alleged joint tortfeasors who are merely codefendants of the debtor.[112]

Because the extension of the stay of litigation under section 105(a) constitutes the entry of a preliminary injunction, courts have held that the general standards for the grant of a preliminary injunction apply.[113] Not all judges have agreed, however. Some have held that relief is authorized so long as it meets the statutory requirement of being "necessary or appropriate to carry out the provisions of . . . title [11]."[114] Assuming that a judge believes that the standards for a preliminary injunction must also be met, the judge most likely will apply some variation of a four-factor test:

- possible irreparable harm to the debtor and the estate;
- likelihood of success on the merits;
- whether a preliminary injunction would be in the public interest; and

110. Johns-Manville Corp. v. Asbestos Litig. Group (*In re* Johns-Manville Corp.), 40 B.R. 219, 225 (S.D.N.Y. 1984).

111. *See* Forty-Eight Insulations, Inc. v. Lipke (*In re* Forty-Eight Insulations, Inc.), 54 B.R. 905, 909 (Bankr. N.D. Ill. 1985); Epstein et al., *supra* note 64, at 126 (listing factors that increase chances of obtaining a stay of litigation against a non-debtor).

112. *See, e.g.,* Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983); Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405 (Bankr. S.D.N.Y. 1983).

113. *See, e.g., Am. Imaging Servs., Inc.,* 963 F.2d at 858.

114. 11 U.S.C. § 105(a) (2000). *See* LTV Steel Co. v. Bd. of Educ. (*In re* Chateaugay Corp.), 93 B.R. 26, 29 (S.D.N.Y. 1988) ("The usual grounds for injunctive relief such as irreparable injury need not be shown in a proceeding for an injunction under section 105(a)."); AP Indus., Inc. v. SN Phelps & Co. (*In re* AP Indus., Inc.), 117 B.R. 789, 802 (Bankr. S.D.N.Y. 1990) ("'Since injunctions in bankruptcy cases are authorized by statute, the usual equitable grounds for relief, such as irreparable damage, need not be shown.'") (quoting *In re* Neuman, 71 B.R. 567, 571 (S.D.N.Y. 1987)).

- possible hardship to others resulting from the granting of a preliminary injunction.[115]

A judge's application of these preliminary injunction factors in the context of an attempt to halt litigation in other courts against non-debtor parties is somewhat problematic. In a non-bankruptcy context, a plaintiff seeking a preliminary injunction is trying to stop acts by the defendant while a lawsuit challenging the legality of those acts is pending. To obtain the preliminary relief, therefore, the plaintiff must show that it may be irreparably harmed by the defendant's actions during the course of the lawsuit, that it is likely to succeed in proving that the acts are unlawful, that a preliminary injunction will be in the public interest, and that the defendant will not suffer undue hardship as a result of the granting of the injunction.[116] In the mass tort bankruptcy context, by contrast, one or more defendants involved in litigation pending in other courts are seeking a preliminary injunction of the lawsuits themselves, not out-of-court actions of the opposing party. Moreover, the defendants seeking the injunction do not usually argue that they are likely to prevail on the merits of that litigation.

Because a traditional application of the preliminary injunction standards does not fit well here, some courts have tailored the standards to apply in this particular context. Thus, as noted above, they require a showing that the litigation against the non-debtor will cause irreparable harm to the debtor and its reorganization efforts, rather than to the non-debtor.[117] Likewise, in discussing "likelihood of success on the merits," judges refer to the likelihood of the debtor's success in achieving a viable reorganization, as opposed to the likelihood of the defendants' success in the litigation to be enjoined.[118] Similarly, judges assess the public interest in the debtor's suc-

115. *See, e.g., Am. Imaging Servs., Inc.,* 963 F.2d at 858. Some courts, while still taking into account the same factors, apply an alternative test for a preliminary injunction: "[S]uch relief should be granted upon a showing of either '(1) probable success on the merits *and* possible irreparable harm, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Johns-Manville Corp. v. Asbestos Litig. Group (*In re* Johns-Manville Corp.), 26 B.R. 420, 430 (Bankr. S.D.N.Y. 1983) (quoting Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 250 (2d Cir. 1973)), *aff'd,* 40 B.R. 219 (S.D.N.Y. 1984).

116. *See* Fleming James, Jr., et al., Civil Procedure § 5.16 (5th ed. 2001).

117. *See, e.g.,* A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1008 (4th Cir. 1986); GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405, 416–17 (Bankr. S.D.N.Y. 1983).

118. *See, e.g., Am. Imaging Servs., Inc.,* 963 F.2d at 860; Epstein et al., *supra* note 64, at 126. *But see* Apollo Molded Prods., Inc. v. Kleinman (*In re* Apollo Molded Prods., Inc.), 83 B.R. 189,

cessful reorganization.[119] Finally, although courts will sometimes consider the possible harm to the tort plaintiffs that might result from a stay of their lawsuits, if the other three factors have been satisfied, some courts have concluded that that harm is outweighed by the benefits to be gained from the debtor's successful reorganization.[120] Thus, even when a judge applies the preliminary injunction standards, whether non-debtor parties are able to obtain a stay of the litigation against them depends primarily on a showing of the harm that prosecution of that litigation could cause the debtor and its reorganization efforts.

F. Emergency Payments to Tort Claimants

Because of the typical lengthy duration of a mass tort bankruptcy case and the accompanying stay of all pending litigation and judgment enforcement efforts against the debtor, some tort claimants may seek interim or emergency payments from the estate for medical treatments while the case is pending. Without a specific statutory authorization for the payment of prepetition unsecured creditors prior to reorganization plan confirmation, tort claimants seeking such treatment have based their request on the so-called "doctrine of necessity." This doctrine is discussed below.[121] Generally, payments pursuant to the doctrine of necessity are made in the early days of the bankruptcy case.[122] Accordingly, a request for emergency payments to tort claimants is one of the initial concerns a judge handling a mass tort bankruptcy case might face, although it could arise at any point in the case.

In one mass tort case, *A.H. Robins*, the district judge approved the creation of a $15 million "Emergency Treatment Fund" while the case was pending to cover the costs of surgery for tort claimants whose infertility resulting from the use of the debtor's product might be surgically corrected.[123] The tort claimants argued that time was of the essence with respect

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194 (Bankr. D. Mass. 1988) ("We disagree with those courts who have ruled that in the present context the requirement for likely success on the merits means merely that the Chapter 11 debtor must show it will probably be successful in its reorganizational efforts. We see no reason to depart from the more traditional requirement of likelihood of ultimate success in the litigation before the court.").

119. *See, e.g., Am. Imaging Servs., Inc.,* 963 F.2d at 862; *A.H. Robins Co.*, 788 F.2d at 1008.

120. *See, e.g., A.H. Robins Co.*, 788 F.2d at 1008.

121. *See infra* text accompanying notes 131–39.

122. *See* Conference on Large Chapter 11 Cases, *supra* note 3, at 7.

123. *See* Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 300 (4th Cir. 1987) (quoting from district court order).

to the surgery, because the younger the women were when they had the surgery, the more likely it was to restore their fertility. Delaying the surgery until the claimants received compensation pursuant to a confirmed plan, therefore, would mean that many of them would be unable to benefit from it. A claimant had to satisfy a number of requirements to receive benefits from the fund, and those benefits—which were in the form of payments made directly to hospitals and doctors—were to be deducted from her ultimate distribution under a confirmed plan.[124] The district judge relied on the court's equitable powers under section 105(a) as authority for his approval of the fund.[125]

Upon appeal by the Committee of Equity Security Holders, the order approving the fund was reversed by the Fourth Circuit.[126] In a brief opinion, the court of appeals held that there was no authority in the Bankruptcy Code for making a distribution to unsecured creditors in a chapter 11 case except pursuant to the terms of a confirmed plan of reorganization. The court stated that, while a bankruptcy court's equitable powers are broad, they do not permit the court to violate "the clear language and intent of the Bankruptcy Code."[127] As the court of appeals saw it, the Emergency Treatment Fund approved by the district judge "violate[d] the clear policy of Chapter 11 reorganizations by allowing piecemeal, preconfirmation payments to certain unsecured creditors."[128]

The Fourth Circuit's opinion reversing approval of the emergency fund has been the subject of a good deal of criticism,[129] principally on the ground that the court failed to discuss the doctrine of necessity, which has been applied by some bankruptcy courts to authorize payments to unse-

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124. *See id.* at 301. In his order approving the fund, the district judge assumed that a claimant with a compensable infertility claim would receive at least $15,000 under any plan that might be confirmed. Thus, an advance payment for surgery, expected to cost between $10,000 and $15,000, would merely represent an election by a tort claimant "to take a portion of her ultimate distribution in the form of medical assistance now rather than cash later." *Id.* If a claimant who received the emergency treatment ultimately had her claim disallowed or valued at less than $15,000, no repayment would be sought from her. *Id.*

125. *See id.*

126. *Id.* at 300.

127. *Id.* at 302.

128. *Id.*

129. *See, e.g.,* Russell A. Eisenberg & Frances F. Gecker, *The Doctrine of Necessity and Its Parameters*, 73 Marq. L. Rev. 1, 34–37 (1989); Jason A. Rosenthal, Note, *Courts of Inequity: The Bankruptcy Laws' Failure to Adequately Protect the Dalkon Shield Victims*, 45 Fla. L. Rev. 223 (1993).

cured creditors at the outset of a chapter 11 case.[130] Invoking this doctrine, judges have permitted the payment of outstanding wage and benefit claims of the debtor's employees, prepetition claims of key suppliers of the debtor, and prepetition claims of customers.[131] Judges approving such payments have found that making these payments early in the case was beneficial to all creditors, because it enhanced the likelihood of a successful reorganization by maintaining employee morale, retaining access to necessary supplies, or restoring customer support. Judges have frequently cited section 105(a) of the Bankruptcy Code as providing statutory support for this judicially created doctrine.[132] Other courts and commentators, however, have found no statutory support for the doctrine and have raised concerns about the possible economic blackmail that might result from recognition of the doctrine of necessity.[133] Recently, the Seventh Circuit held that payment of prepetition unsecured creditors is not authorized by section 105(a), 364(b), or 503 of the Bankruptcy Code. While the court left open the possibility that section 363(b)(1) might permit payment of prepetition critical vendors, it held that such payments would have to be supported by proof that disfavored creditors would fare as well with the debtor's reorganization as with its liquidation and that the vendors receiving payment would have otherwise ceased doing business with the debtor.[134]

In mass tort bankruptcies, judges have sometimes invoked the doctrine of necessity as a basis for authorizing early payment of certain unsecured creditors other than tort claimants. In the third month of the *Eagle-Picher* asbestos bankruptcy, for example, the bankruptcy judge authorized the debtor to pay the prepetition claims of certain toolmakers, over the objection of the Injury Claimants' Committee.[135] The judge found that the debtor had shown that the payment was "necessary to avert a serious threat to the Chapter 11 process," because failure to make the payment would

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130. *See generally* Chapter 11 Theory and Practice—A Guide to Reorganization §§ 7.87–7.93 (James F. Queenan, Jr., et al. eds., 1994); Eisenberg & Gecker, *supra* note 129, at 1–24.

131. *See, e.g., In re* Gulf Air, Inc., 112 B.R. 152 (Bankr. W.D. La. 1989) (authorizing immediate payment of prepetition employee wage and benefits claims); *In re* Ionosphere Clubs, Inc., 98 B.R. 174, 174–75 (Bankr. S.D.N.Y. 1989) (referring to earlier order authorizing debtor's payment prior to confirmation of prepetition wage, salary, benefits, and expenses claims of active employees).

132. *See, e.g.,* Eisenberg & Gecker, *supra* note 129, at 5–6; Rosenthal, *supra* note 129, at 233–38.

133. *See In re* FCX, Inc., 60 B.R. 405 (E.D.N.C. 1986); Charles Jordan Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 Am. Bankr. L.J. 75, 97 (1991).

134. *See In re* K-Mart, 359 F.3d 866 (7th Cir.), *cert. denied,* 125 S. Ct. 495 (2004).

135. *In re* Eagle-Picher Indus., Inc., 124 B.R. 1021 (Bankr. S.D. Ohio 1991).

"seriously jeopardize ongoing business relationships with customers" who had previously paid the debtor for the toolmakers' charges.[136] And on the day the *UNR* asbestos bankruptcy case was filed, the bankruptcy judge authorized the debtor to pay prepetition workers' compensation claims in order to preserve employee morale and to enable the debtor to remain as a self-insurer under various workers' compensation programs.[137]

Early payment for the medical treatment of injured tort claimants, however, is more difficult for courts to fit within the doctrine of necessity, even those courts that accept and are willing to apply the doctrine in appropriate cases. Persons asserting mass tort claims against a chapter 11 debtor are typically not persons on whom the company is dependent for its future success, such as current employees, suppliers, or customers. Thus, it is more difficult to argue that making payments to these claimants is necessary for a successful reorganization that will benefit all creditors. Claimants seek payment primarily for reasons of compassion rather than to enhance the likelihood of the debtor's reorganization.[138] Moreover, in cases in which courts have authorized the early payment of unsecured claims, such as for employee wages and debts to suppliers, the amount and liability of the claims have been undisputed. In some mass tort cases, by contrast, early in the case the debtor might dispute both aspects of a personal injury tort claim, and, even if not, the ultimate payout percentage for tort claims will most likely be unknown. The bankruptcy judge, therefore, will not have a basis for concluding that the emergency payments will alter the timing, but not the amount, of payment to the claimants in question. The best mass tort scenario, therefore, for authorizing emergency payments to tort claimants would be one in which liability is not disputed, the payout amounts are expected to be substantial, and claimants' receipt of medical treatment early in the case will significantly reduce their ultimate measure of damages, thus benefiting all creditors.

Even if a judge decides that the Bankruptcy Code authorizes and circumstances justify an emergency payment to some tort claimants in a particular case, the judge should proceed only after giving notice and an opportunity for a hearing to the various constituencies that might be affected

136. *Id.* at 1022–23.

137. *See In re* UNR Indus., Inc., 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (explaining basis for earlier order).

138. *See, e.g.*, Rosenthal, *supra* note 129, at 245 (noting that the doctrine of necessity does not adequately protect the health needs of personal injury tort claimants, because "the doctrine places undue focus on the debtor's interests rather than on the health interests of the tort victims").

by such an order.[139] These groups include the tort claimants' committee, any future claims representative who has been appointed, and other official committees; the judge should also provide notice to the U.S. trustee and the debtor if it is not the moving party. Unlike payments made to employees or suppliers at the outset of a case in order to maintain their needed cooperation with the business, payments to tort claimants for medical treatment prior to the confirmation of a plan will generally not require that the judge proceed on an emergency basis.

139. *See* Tabb, *supra* note 133, at 103–06.

III. Structuring the Committees

A. Overview

Part III addresses issues involving the representation of the tort claimants' interests in a mass tort bankruptcy case:

- *Number of committees:* Should a separate official committee be established to represent the tort claimants? When is more than one tort claimant committee needed? What factors should the court consider if it is requested to appoint an additional committee to ensure adequate representation of creditors?
- *Membership of the tort claimants' committee:* Are lawyers who represent tort claimants, rather than claimants themselves, eligible to serve as members of an official creditors' committee? Does their service present conflicts of interest between their duties to their own clients and their duties to the whole tort claimant group? Are there any advantages to having lawyers serve as committee members?
- *Court's role in committee appointments:* What are the respective roles with regard to committee appointments of the U.S. trustee and the bankruptcy judge? Does the judge have authority to change the size or membership of an existing committee? If so, under what circumstances may the judge do so?
- *Communication between the tort claimants' committee and tort claimants:* What methods of communication should the tort claimants' committee and its constituency establish in order to ensure that the committee is adequately representing the claimants' interests?
- *Containment of costs incurred by committees:* What steps can the bankruptcy judge take to reduce the fees and expenses incurred by the official committees? Are committee members authorized to be reimbursed for compensation they pay their own attorneys in connection with service on the committee? What procedures should be established for interim fee awards and expense reimbursement of professionals involved in the case that will allow sufficient scrutiny of fee and expense requests but not impose an unreasonable burden on the professionals? Should the court withhold fees in order to encourage progress in the case?
- *Representation of future claimants:* May the claims of persons who have not yet manifested any injuries or not yet been exposed to the

debtor's product be affected by the bankruptcy? Do these persons have claims that can be discharged? How can their due process rights be protected? What role does a future claims representative play in the bankruptcy case? What qualifications should the judge look for in appointing a future claims representative?

B. Number of Committees

The Bankruptcy Code provides that the U.S. trustee shall appoint a "committee of creditors holding unsecured claims" as soon as practicable after the beginning of a chapter 11 case,[140] and it further authorizes the U.S. trustee to appoint additional committees of creditors or equity security holders "as the United States trustee deems appropriate."[141] Congress declared in section 1102(b)(1) that a committee of creditors appointed pursuant to section 1102(a) "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on the committee."

Section 1102(a) also provides a role for the bankruptcy judge to play in the appointment of creditors' committees, although prior to recent amendments to the Bankruptcy Code, courts divided over the precise scope of that role and its relationship to the U.S. trustee's role.[142] At the very least, the Code authorizes the bankruptcy court "on request of a party in interest" to order the appointment of additional committees of creditors if necessary to ensure "adequate representation of creditors."[143] The U.S. trustee actually appoints members to any additional committee ordered by the court.[144]

In virtually all mass tort bankruptcies to date, U.S. trustees or bankruptcy courts have appointed at least one committee for the tort claimants, in addition to the official committee of unsecured creditors whose members are typically trade creditors, institutional lenders, and bondholders.[145]

140. 11 U.S.C. § 1102(a)(1) (2000).

141. *Id.* The interests of future tort claimants are represented in mass tort bankruptcy cases, not by committees, but by future claims representatives. *See infra* section III.G.

142. *See infra* section III.D.

143. 11 U.S.C. § 1102(a)(2) (2000).

144. *Id.*

145. *See, e.g., In re* Armstrong World Indus., Inc., 320 B.R. 523, 525 (D. Del. 2005); *In re* A.H. Robins Co., 88 B.R. 742, 744 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989); Gibson, *supra* note 64, at 71, 220 (discussing the appointment of tort claimant committees in the *A.H. Robins* and *Dow Corning* bankruptcies).

Thus, courts have recognized that the interests of the tort claimants and those of the commercial unsecured creditors are sufficiently distinct or even adverse to require separate representation.[146] In some mass tort bankruptcy cases, multiple creditors' committees have been sought because of the diversity of interests within the large group of unsecured creditors. For example, in the *Dow Corning* case, foreign tort claimants, physicians, health insurers, vendors, and employees sought the appointment of separate committees in addition to the Official Committee of Unsecured Creditors and the Official Committee of Tort Claimants.[147] Only the physicians' motion was granted. In asbestos bankruptcy cases, property damage claimants, codefendants, tort claimants with liquidated claims, and tort claimants alleging injuries that were due to non-asbestos products have sought separate representation. Generally only property damage claimants have been successful in obtaining an official committee.[148]

Such requests for the appointment of additional creditors' committees require the judge or U.S. trustee to determine whether the interests in question can be adequately represented by the existing committees or by other means and to consider the costs, monetary and otherwise, that will result from the appointment of additional committees. No bright-line rules guide this analysis; instead, the decision must be based on a careful balancing of competing concerns.

A judge ruling on a request for an additional committee under section 1102(a) should apply a presumption against such an appointment. As one court noted, "The reconciliation of differing interests of creditors within a single committee is the norm, and the appointment of a separate committee is an extraordinary remedy."[149] One reason courts have been disinclined to appoint multiple committees is their recognition that the existence of varying interests and potential conflicts on a committee of creditors is inevitable and perhaps even desirable. Viewing a committee as "a catalyst for negotiation and compromise," one court reasoned that the inclusion of creditors with diverse interests "within one committee may facilitate the consensual resolution of the conflicting priorities among the holders of unsecured

146. *See* Houser, *supra* note 46, at 465–66.

147. *See In re* Dow Corning Corp., 194 B.R. 121, 127–28 (Bankr. E.D. Mich. 1996), *rev'd in part on other grounds,* 212 B.R. 258 (E.D. Mich. 1997).

148. *See, e.g., In re Armstrong World Indus.,* 320 B.R. at 525.

149. *In re* Trans World Airlines, Inc., Bankr. No. 92-115, 1992 WL 168152, at *3 (Bankr. D. Del. Mar. 20, 1992).

claims and thereby facilitate the negotiation of a consensual plan."[150] The existence of multiple committees, in contrast, may lead to greater divisiveness and increased complexity of the negotiation process, as well as to the added administrative costs of each official committee's retaining professionals at estate expense.[151]

At what point does the diversity of interests among creditors become so great as to make the appointment of separate committees appropriate? The statute says that point is reached when an additional committee is needed "to assure adequate representation of creditors."[152] Some courts have interpreted that statutory standard pragmatically. Separate committees are called for when "there exists conflict among the unsecured creditors which is so profound as to impede the [c]ommittee's ability to function"[153] or when the conflicts among creditors "impair the ability of the unsecured creditors committee to reach a consensus."[154] A leading treatise has suggested that the following factors be taken into consideration in ruling on a request for an additional committee:

- the "added complexity and added expense" that will result;
- "whether different groups of creditors are likely to be classified separately and treated differently under a plan"; and
- "whether having differently situated creditors on a single committee will create gridlock that would effectively render the committee unable to play a meaningful role in the case, particularly in plan negotiations."[155]

Because of the increased complexity of mass tort bankruptcy cases and the distinctive nature of the unsecured claims in such cases, judges might question whether special considerations should come into play in determining the appropriate number of creditors' committees. To some extent, the answer appears to be yes. As noted above, the appointment of an additional committee for tort claimants has been the uniform practice. Because

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150. *In re* Hills Stores Co., 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992).

151. *See* Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 Am. Bankr. L.J. 431, 462 (1995).

152. 11 U.S.C. § 1102(a)(2) (2000). The language quoted in text is the statutory standard for the appointment of additional committees by the court. The Bankruptcy Code also provides that a U.S. trustee may appoint an additional committee "as the U.S. trustee deems appropriate." *Id.* § 1102(a)(1).

153. *In re Hills Stores*, 137 B.R. at 7.

154. *In re* McLean Indus., Inc., 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987).

155. 7 Alan N. Resnick et al., Collier on Bankruptcy ¶ 1102.02[4][b] (15th ed. rev. 2004).

one of the major and potentially most divisive issues in mass tort bankruptcy cases is the determination of the value of the tort claims in relation to the commercial debt, the appointment of separate committees of tort claimants and commercial unsecured creditors has become routine. A combined unsecured creditors' committee is likely to result in gridlock.

But are additional unsecured creditors' committees needed to adequately represent the different types of tort debt asserted in a mass tort bankruptcy? In the mass tort class action context, for example, the Supreme Court has insisted upon a strict alignment of class members' interests and the interests of those who represent them in the class suit. Interpreting Federal Rule of Civil Procedure 23(a) and (b), the Court has indicated that subclasses may have to be created for claimants with different diseases and different degrees of manifestation of injury and with different entitlements to insurance coverage, and that each subclass must have its own counsel.[156] The named plaintiffs of a single class cannot be allowed to represent all of the varied tort claimants. Should the same requirements apply in the bankruptcy context to creditors' committee representation?[157]

The role of creditors' committees is sufficiently distinguishable from that of class representatives that the answer to that question is probably no. The precise categorization and separate representation of different tort interests required in the class action context is not required in the creditors' committee context because creditors' committees—unlike class representatives—do not have the authority to enter into settlements that are binding on those represented. Creditors' committees serve merely as negotiating agents for the creditors they represent.[158] The plan proponent must submit the terms of any plan negotiated by a committee and the debtor to the creditor body for a vote.[159] Moreover, while confirmation of a plan does not require unanimity, the Bankruptcy Code does provide substantive protections for those who are outvoted.[160] Thus, the requirements for adequacy of

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156. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626–27 (1997).

157. To the extent that the Court in *Ortiz* and *Amchem* was applying the requirements of Rule 23, the decisions are clearly inapplicable to the creditors' committee context in bankruptcy cases, a matter governed by different statutory authority. But those decisions are relevant to the representation of tort claimants by creditors' committees to the extent that the Court's reasoning was influenced by due process considerations. *See, e.g., Ortiz*, 527 U.S. at 846–47; *Amchem*, 521 U.S. at 623, 626 n.20.

158. *See* Epstein et al., *supra* note 64, § 10–11; Tabb, *supra* note 95, at 67.

159. *See* 11 U.S.C. § 1126 (2000).

160. *See id.* § 1129(a), (b).

representation may be less demanding in the creditors' committee context than in the class action context because fairness is ensured by other means.[161]

Judges presiding over mass tort bankruptcies to date have often rejected requests for a proliferation of tort-related committees. Typically two official committees have been appointed: a committee for the tort claimants and a committee for other unsecured creditors (usually named something like "unsecured creditors' committee," "trade creditors' committee," or "commercial creditors' committee"). In some cases in which the court found it appropriate to do so, it ordered the appointment of an additional committee for such groups as shareholders,[162] property damage claimants,[163] or physician claimants.[164]

A request for the appointment of an official committee should be denied if the judge determines that the group already has an adequate opportunity to have a meaningful voice in the bankruptcy case. Members of the group may already be represented on one of the official committees.[165] Moreover, creditors may form unofficial committees that may participate in hearings, advise constituents, and negotiate on behalf of their groups, although they are not assured of having their expenses reimbursed from the estate.[166] Likewise, even without the formation of a committee, official or otherwise, any party in interest is authorized by section 1109 of the Bankruptcy Code to be heard on any matter.[167] If the judge determines that an unofficial committee or a party has made a "substantial contribution" to the case, the judge can allow the reimbursement of actual, necessary expenses, including attorneys' fees, as an administrative expense.[168]

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161. *See Ortiz*, 527 U.S. at 846 (citing bankruptcy as a "'special remedial scheme'" that permissibly "'foreclos[es] successive litigation by nonlitigants'"); *id.* at 860 n.34 (referring to the "protections for creditors built into the Bankruptcy Code").

162. *See, e.g., In re* A.H. Robins Co., 88 B.R. 724, 744 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

163. *See, e.g., In re* Celotex Corp., 204 B.R. 586 (Bankr. M.D. Fla. 1996).

164. *See, e.g., In re* Dow Corning Corp., 194 B.R. 121, 146 (Bankr. E.D. Mich. 1996), *rev'd in part on other grounds*, 212 B.R. 258 (E.D. Mich. 1997).

165. *See, e.g., In re* Hills Stores Co., 137 B.R. 4, 7 (Bankr. S.D.N.Y. 1992); *In re* Shaffer-Gordon Assocs., Inc., 40 B.R. 956, 959 (Bankr. E.D. Pa. 1984).

166. *See, e.g., Hills Stores*, 137 B.R. at 8; Kenneth N. Klee & K. John Shaffer, *Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 1032 (1993).

167. 11 U.S.C. § 1109(b) (2000).

168. *Id.* § 503(b)(3)(D), (b)(4).

C. Membership of the Tort Claimants' Committee

In some mass tort bankruptcy cases, lawyers representing persons with tort claims against the debtor have served on the tort claimants' committee, rather than or in addition to actual claimants.[169] This practice has raised the question whether membership on a creditors' committee by a creditor's lawyer is statutorily authorized. The question is complicated by the issue of the bankruptcy judge's authority to review committee appointments made by a U.S. trustee, since the lawyer-versus-claimant issue may be raised by motion to the court following a U.S. trustee's appointment of plaintiffs' lawyers to a tort claimants' committee. The issue of judicial review of committee appointments is discussed below.[170] This section discusses the issue of statutory requirements for membership on a creditors' committee, regardless of which official has the ultimate authority to approve the appointment.

The Bankruptcy Code in section 1102(a)(1) provides for the appointment of a "committee of creditors holding unsecured claims"[171] and in section 1102(b)(1) states that a committee appointed under subsection (a) "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee."[172] Reading the phrase "committee of creditors" as meaning a committee "consisting of" or "made up of" creditors, some courts and commentators have concluded that the Code mandates that only unsecured creditors themselves be appointed to a creditors' committee.[173] They find support for

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169. *See, e.g.,* Van Arsdale v. Clemo, 825 F.2d 794, 796 (4th Cir. 1987) (describing membership of Dalkon Shield claimants' committee in *A.H. Robins* case as including two non-claimant plaintiffs' attorneys); *In re* Dow Corning Corp., 212 B.R. 258 (E.D. Mich. 1997) (upholding U.S. trustee's appointment of attorneys to tort claimants' committee); *In re* UNR Indus, Inc., 30 B.R. 613, 614 (Bankr. N.D. Ill. 1983) (listing attorneys appointed to asbestos-related plaintiffs' committee); Notice of Appointment of Injury Claimants' Committee, *In re* Eagle-Picher Indus., Inc., Consol. Case No. 1-91-00100 (Bankr. S.D. Ohio Jan. 14, 1991) (listing attorneys representing asbestos claimants appointed to injury claimants' committee).

170. *See infra* section III.D.

171. 11 U.S.C. § 1102(a)(1) (2000). The appointing official under this provision is the U.S. trustee.

172. *Id.* § 1102(b)(1). The provision does not specify whether extraordinary circumstances might justify the appointment of persons who do not hold claims against the debtor or merely the appointment of creditors who do not hold the largest claims.

173. *In re* Dow Corning Corp., 194 B.R. 121, 138 (Bankr. E.D. Mich. 1996), *rev'd*, 212 Bankr. 258 (E.D. Mich. 1997) (ordering "the United States trustee to appoint a new T[ort] C[laimants'] C[ommittee]—made up of persons who have claims against the Debtor"); *In re* Celotex Corp., 123 B.R. 917, 922 (Bankr. M.D. Fla. 1991) (finding that "the present committee is made up of legal representatives of selected members of the committee and does not comply with

this reading in section 1102(b)(1)'s instruction concerning who "ordinarily" should be appointed to such a committee; here the Code speaks only of those holding claims against the debtor. Moreover, some note that section 101(10) of the Bankruptcy Code excludes from the definition of "creditor" a creditor's "agent, attorney, or proxy," as section 1(11) of the Bankruptcy Act had provided, thereby reinforcing the view that a creditor's agent or representative is not eligible for appointment to a committee of creditors.[174]

Other courts have read the Bankruptcy Code as "provid[ing] no standards regarding who may serve on a [c]ommittee established pursuant to section 1102"[175] and as thus allowing great flexibility—at least in situations that are not "ordinary"—concerning who may be appointed.[176] Under this more flexible reading of section 1102, representatives of creditors are eligible for appointment. This reading of the statute is consistent with the fact that when a corporate creditor is appointed to committees, a corporate agent necessarily has to be designated to actually serve on the committee on the creditor's behalf; it is generally thought that the Code's language does not prohibit such committee service by the representative, regardless of whether that person is a lawyer, accountant, or officer or employee of the corporation.[177] Furthermore, outside the mass tort context, courts have approved the appointment to creditors' committees of union representatives on behalf of their members[178] and indenture trustees on behalf of bondholders they

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Section 1102 of the Bankruptcy Code"); Klee & Shaffer, *supra* note 166, at 1010 ("[T]he Code's definitions of "creditor" and "claim" suggest that only actual creditors, and not their representatives and agents, may sit on a creditors' committee . . . .").

174. *See, e.g., In re* Dow Corning Corp., 194 B.R. at 137; *In re* Altair Airlines, Inc., 25 B.R. 223, 224 (Bankr. E.D. Pa. 1982), *rev'd*, 727 F.2d 88 (3d Cir. 1984); Klee & Shaffer, *supra* note 166, at 1010.

175. *See e.g., In re* Northeast Dairy Coop. Fed'n, Inc., 59 B.R. 531, 533 (Bankr. N.D.N.Y. 1986).

176. *See In re* Dow Corning, Inc., 212 B.R. 258, 264 (E.D. Mich. 1997) ("It could be interpreted that in a matter that is not an 'ordinary' case, such as a mass tort case, the United States Trustee may appoint members who are not the largest creditors. . . . Nowhere in Section 1102 does it indicate that a person must be an actual creditor to be appointed by the United States Trustee to a committee of creditors.").

177. *See* 7 Collier on Bankruptcy, *supra* note 155, ¶ 1102.02[2][a][iii] ("Despite the lack of a specific reference in the Code to representatives, representatives of creditors have routinely been permitted to serve on committees. Indeed, a creditor that is not an individual, such as a corporation, will by definition have to designate an individual to represent it on the committee.") (footnote omitted); Klee & Shaffer, *supra* note 166, at 1009 ("In certain districts, creditors' committees are commonly comprised not of actual creditors, but rather of their representatives or agents, typically attorneys, financial advisors, and indenture trustees.").

178. *E.g., In re Northeast Dairy Coop. Fed'n, Inc.,* 59 B.R. at 531; *In re* Schatz Fed. Bearings Co., 5 B.R. 543 (Bankr. S.D.N.Y. 1980).

represent.[179] Thus, there is precedent in other types of bankruptcy cases for non-creditor representatives being appointed to and serving on creditors' committees.

Some courts and commentators have objected, however, that lawyers representing tort claimants face disqualifying conflicts of interest when they are appointed to tort claimants' committees. In particular, they contend that a lawyer committee member will have potentially conflicting duties of loyalty: one duty to his or her specific clients and another duty to the tort claimants as a whole, whom the committee represents.[180] As other courts and commentators have noted, however, this potential conflict is not all that different from the conflict actual creditors appointed to committees face; they too may have to choose between acting in their self-interest and acting in the interests of the creditor group as a whole.[181] Moreover, such a conflict exists anytime a representative of an institutional creditor serves on a committee on behalf of the institution.[182]

Although committee members owe a fiduciary duty to the creditors the committee represents, the proper functioning of a creditors' committee may be for each member to act in his or her self-interest, and thereby serve the interests of the creditor group as a whole, while seeking to arrive at a consensus with others on the committee. As one author has explained, credi-

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179. *E.g., In re* McLean Indus., Inc., 70 B.R. 852, 862 (Bankr. S.D.N.Y. 1987); *In re* Charter Co., 42 B.R. 251 (Bankr. M.D. Fla. 1984).

180. *See, e.g., In re* Dow Corning Corp., 194 B.R. 121, 135 (Bankr. E.D. Mich. 1996), *rev'd*, 212 B.R. 258 (E.D. Mich. 1997) ("[A]llowing attorneys to serve on committees in . . . [a representative] capacity places them in the unacceptable position of concurrently serving two masters with contrary interests."); *In re* Celotex Corp., 123 B.R. 917, 921–22 (Bankr. M.D. Fla. 1991) ("Each legal representative who sits on the committee has a fiduciary duty to its own client/member as well as a fiduciary duty to the committee and each of its constituents."); Klee & Shaffer, *supra* note 166, at 1011 ("[A] representative or agent may be disqualified from serving on a creditors' committee due to the agent's conflicting loyalties to his or her own client's particular interests and to the constituency of the creditors' committee as a whole.").

181. *See In re Dow Corning Corp.,* 212 B.R. at 264; *cf.* Carl A. Eklund & Lynn W. Roberts, *The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function*, 5 Am. Bankr. Inst. L. Rev. 129, 131 (1997) (referring to the need to balance "committee members' unavoidable self-interest with the committee's fiduciary obligations").

182. *See* Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees,* 43 UCLA L. Rev. 1547, 1590 n.178 (1996). Bussel suggests that a so-called conflict is inevitable with institutional committee members, since their "representatives always owe fiduciary duties to the institution's own constituents, who may have an interest that differs in some respect from that of all creditors 'represented' by the committee." He considers such a conflict to be a false one, however. He contends that "[a]ny 'fiduciary' obligation of a committee member should be consistent with asserting positions in the best interests of holders of the kind of claim the committee member holds." *Id.*

tors' committees are better explained by a quasi-legislative model than by a fiduciary model:

> True protection for nonmember creditors is not in appointing and holding other creditors to a position of trust, but in the balance of power created by: (i) the appointment of a committee that consists of members from the key constituencies and that employs competent professionals to advise it; (ii) the general supervisory role of the bankruptcy court over administration of the estate; (iii) creditors' rights to obtain relevant information and to vote their claims before confirmation of a plan that impairs their legal rights; and (iv) court review of the plan to ensure it meets with the substantive requirements of the Bankruptcy Code.[183]

According to this view of a committee member's role, a lawyer representing the interests of his or her tort claimant clients could also properly fulfill the role given to him or her as a member of the tort claimants' committee. Of course, if a lawyer's representation of multiple tort claimants with differing interests presents a conflict of interest outside of bankruptcy, that same conflict would exist in bankruptcy. The issue addressed here, however, is whether a conflict of interest is created merely by the appointment of a lawyer to the creditors' committee.

Whether or not the Bankruptcy Code limits committee membership to actual creditors, the key lawyers involved in the tort litigation against the debtor will need to be actively involved in the negotiation of a reorganization plan. For a consensual plan regarding the tort claims to be achieved, the lawyers representing a large percentage of the claimants will have to support it. Even if actual claimants are appointed to the tort claimants' committee, they will most likely participate through their lawyers, and the lawyers will become the major players in the negotiations with the debtor over the terms of a reorganization plan. The court's direct appointment of lawyers themselves, rather than the creditor clients, has the advantage of providing greater assurance that all of the key players are represented in the negotiations.[184] It also makes explicit the role that the lawyers are playing in the case.

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183. *See id.* at 1567. Bussel, although noting differences between legislative bodies and creditors' committees, explains that "at their cores, both the legislative process and the committee process are deliberative and function by compromising conflicting interests in light of practical realities and the general interest." *Id.*

184. *See* Bussel, *supra* note 182, at 1624 (suggesting that the U.S. trustee "should attempt to craft a committee with members 'representative' of the key constituencies, allocating seats on the committee in rough proportion to size and economic importance of each constituency").

D. Court's Role in Committee Appointments

Congress has given primary responsibility for the appointment and supervision of creditors' committees to the U.S. trustee. Section 1102(a)(1) of the Bankruptcy Code directs the U.S. trustee to appoint an unsecured creditors' committee "as soon as practicable after the order for relief" in a chapter 11 case, and 28 U.S.C. § 586(a)(3)(e) includes among the duties of a U.S. trustee the "monitoring [of] creditors' committees appointed under title 11." Congress has not always been clear, however, about the bankruptcy judge's authority over committee appointments. As a result, courts have disagreed over whether and under what circumstances the bankruptcy judge is authorized to review and reverse the U.S. trustee's decisions concerning the membership and size of an appointed committee.[185] A recent amendment to section 1102(a), however, should help to clarify this issue.

As previously discussed,[186] the Bankruptcy Code does give the bankruptcy court clear authority to order the appointment of committees in addition to the unsecured creditors' committee appointed by the U.S. trustee "if necessary to assure adequate representation of creditors or of equity security holders."[187] The Code grants this judicial authority in addition to the authority given to the U.S. trustee to "appoint additional committees of creditors or of equity security holders as the U.S. trustee deems appropriate."[188] Because of this dual authority to appoint "additional committees," it has been suggested that a party seeking such an appointment first seek relief from the U.S. trustee before requesting relief from the court.[189] However, courts have generally declined to read an exhaustion requirement into the statute.[190] Thus, a bankruptcy court, when presented with a request of a party in interest, may determine de novo whether the existing committee or committees provide adequate representation of the creditors or shareholders

185. One source states that "[n]o issue involving creditors' committees has been the subject of as much concern as the ability to alter the composition of a committee. . . . [N]o other body of law governing creditors' committees appears to be in such a current state of disarray." Klee & Shaffer, *supra* note 166, at 1032.

186. *See supra* section III.B.

187. 11 U.S.C. § 1102(a)(2) (2000).

188. *Id.* § 1102(a)(1).

189. *See* 7 Collier on Bankruptcy, *supra* note 155, ¶ 1102.07[1].

190. *See, e.g., In re* McLean Indus., Inc., 70 B.R. 852, 857 (Bankr. S.D.N.Y. 1987) ("It thus does not appear that Congress, in amending section 1102(a), had any intention of requiring a movant under section 1102(a)(2) to exhaust administrative remedies or to limit the bankruptcy court's consideration of the issues under section 1102(a)(2) to a review of the determination made by U.S. trustees.").

whose interests are in question and, if they do not, order the appointment of an additional committee.[191] The statute directs that the U.S. trustee make the actual appointment of members to the new committee.[192]

From 1986 to 2005, section 1102 of the Bankruptcy Code failed to make clear the extent to which a bankruptcy judge had authority to review U.S. trustee committee appointments or to alter the makeup of a committee short of ordering the appointment of an additional committee. This uncertainty resulted from Congress's amendment of the Bankruptcy Code in 1986.[193] At that time Congress implemented the U.S. trustee system on a nationwide basis and transferred committee appointment authority from bankruptcy judges to those officials. Congress also deleted section 1102(c),[194] which had authorized the bankruptcy court to "change the membership or the size of a committee [previously] appointed [by the court] . . . if the membership of such committee [was] not representative of the different kinds of claims or interests to be represented."[195] This deletion provoked conflicting decisions about the scope of judicial authority over committee appointments.

Some courts concluded that bankruptcy courts were left with no authority to review and change the composition of committees the U.S. trustee appointed.[196] Under their reading of the Bankruptcy Code, the appointment of committees was primarily an administrative task to be performed by the U.S. trustee, and the court's authority was limited to ordering the appointment of additional committees when needed for adequate representation. Because courts that adopted this view read section 1102 as intentionally eliminating most judicial oversight of committee appointments, they declined to find any such authority under either section 105(a) or the court's inherent powers.[197]

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191. *See, e.g., id.* at 857–58; *In re* Dow Corning Corp., 212 B.R. 258, 264 (E.D. Mich. 1997); *In re* Sharon Steel Corp., 100 B.R. 767, 785 (Bankr. W.D. Pa. 1989).

192. 11 U.S.C. § 1102(a)(2) (2000).

193. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

194. *Id.* § 221.

195. 11 U.S.C. § 1102(c) (1982).

196. *See, e.g.,* Smith v. Wheeler Tech., Inc. (*In re* Wheeler Tech., Inc.), 139 B.R. 235, 239 (B.A.P. 9th Cir. 1992); *In re* Dow Corning Corp., 212 B.R. 258, 264 (E.D. Mich. 1997); *In re* New Life Fellowship, Inc., 202 B.R. 994, 996–97 (Bankr. W.D. Okla. 1996); *In re* McLean Indus., Inc., 70 B.R. 852, 856 n.2, 860 (Bankr. S.D.N.Y. 1987).

197. *See, e.g., Smith*, 139 B.R. at 239; *In re New Life Fellowship*, 202 B.R. at 997.

Other courts, however, concluded that they retained broad authority to alter the size and membership of committees U.S. trustees appointed.[198] Their explanations of the scope of and basis for this authority varied. Some courts reasoned that section 1102(a)(2)'s conferral of authority to appoint an additional committee necessarily included authority for the "lesser included remedy" of altering the membership of an existing committee.[199] Others found such authority conferred by section 105(a) or included in the court's inherent powers.[200] Generally, according to this view of the judicial role in committee appointments, the court was not required to give deference to the decisions of the U.S. trustee.[201]

A third group of courts took a middle view. Rejecting the conclusion that Congress intended the U.S. trustee's appointment of committees to be unreviewable, these courts held that they had authority to alter the size or membership of a committee if they found that the U.S. trustee committed an abuse of discretion or acted arbitrarily or capriciously in appointing the committee.[202] Courts generally cited section 105(a) of the Bankruptcy Code as the source of their authority to review the U.S. trustee's appointment decisions.[203]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 restores to the bankruptcy court the authority to change the composition of a creditors' committee under certain circumstances. It adds section 1102(a)(4), which authorizes the court, "[o]n request of a party in interest and after notice and hearing," to order the U.S. trustee "to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of

198. *See, e.g., In re* Dow Corning Corp., 194 B.R. 121, 132 (Bankr. E.D. Mich. 1996), *rev'd*, 212 B.R. 258 (E.D. Mich. 1997); *In re* Sharon Steel Corp., 100 B.R. 767, 772–73 (Bankr. W.D. Pa. 1989); *In re* Public Serv. Co., 89 B.R. 1014, 1021 (Bankr. D.N.H. 1988); *In re* Texaco Inc., 79 B.R. 560, 566 (Bankr. S.D.N.Y. 1987).

199. *See In re Dow Corning Corp.*, 194 B.R. at 131; *In re Public Serv. Co.*, 89 B.R. at 1021.

200. *See In re Sharon Steel,* 100 B.R. at 774; *In re Public Serv. Co.*, 89 B.R. at 1021.

201. *See, e.g., In re Sharon Steel*, 100 B.R. at 786 ("[T]he provisions of the APA do not apply to the actions of the U.S. Trustee taken pursuant to § 1102 of the Bankruptcy Code and . . . court review of the U.S. Trustee's actions is *de novo*.").

202. *See, e.g.,* Bodenstein v. Lentz (*In re* Mercury Fin. Co.), 240 B.R. 270, 277 (N.D. Ill. 1999); *In re* Fas Mart Convenience Stores, Inc., 265 B.R. 427, 431 (Bankr. E.D. Va. 2001); *In re* Trans World Airlines, Inc., Bankr. No. 92-115, 1992 WL 168152 (Bankr. D. Del. 1992); *In re* Columbia Gas Sys., Inc., 133 B.R. 174, 176 (Bankr. D. Del. 1991).

203. *See, e.g., In re Fas Mart*, 265 B.R. at 431.

creditors or equity security holders."[204] This amendment, which takes effect in October 2005,[205] does not give the bankruptcy judge complete discretion to alter the composition of a committee, but it should go a long way toward resolving the conflict among the courts concerning judicial authority over committee composition. It is possible, however, that courts will continue to express differing views concerning the extent of their authority under section 105(a) to change the committee membership for reasons other than adequacy of representation.

E. Communication Between Tort Claimants' Committee and Tort Claimants

A tort claimants' committee typically represents the interests of thousands of persons who reside throughout the United States or even the world—often persons lacking sophisticated business experience or a familiarity with the bankruptcy process. Although many of the tort claimants may be represented by personal injury lawyers, some claimants whose interests will be affected by the bankruptcy may be unrepresented. Because of the tort claimants' remoteness from the bankruptcy proceedings, it is important that the committee representing them make special efforts to establish an effective means of communication with them. When the committee is composed primarily of lawyers, rather than claimants themselves,[206] communication between the committee and the claimants is especially important to ensure that the committee is truly serving the claimants' interests and not just the interests of the lawyers.

In considering how it might effectively communicate with its constituents, a tort claimants' committee needs to respect the need for confidentiality of certain matters that come before it.[207] Not everything the committee members are made privy to can be shared with their constituents. Moreo-

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204. Pub. L. No. 109-8, § 405(a), 119 Stat. 23, 105 (2005). The amendment also specifically authorizes the court to order the addition of a small business creditor to a creditors' committee "if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large." *Id.*

205. *Id.* § 1501(a), 119 Stat. at 216.

206. *See supra* section III.C.

207. *See* 7 Collier on Bankruptcy, *supra* note 155, ¶ 1103.05[2](a) ("If confidential information [shared with the committee] is disseminated to persons not entitled to receive it, the debtor's operations could be potentially damaged to the detriment of the constituency represented by the committee.").

ver, the means of communications the committee selects must not expose information from or about the claimants to persons who should not have access to it. Thus, for example, an Internet chat room established by the committee for tort claimants might inappropriately provide information to the debtor or other non-claimants who are able to access it.

It is not uncommon for a creditors' committee in a chapter 11 case to periodically send status reports to the creditors it represents in order to keep them informed about the case's progress and any significant developments.[208] Once a reorganization plan is proposed and approved for submission to a creditor vote, the committee may inform its constituents of its position on the plan. When the committee is a supporter or proponent of the plan, it can include a letter to this effect in the solicitation package.[209] When it opposes the plan, the creditors' committee is permitted to explain the reasons for its opposition in a separate mailing.[210]

Because of the large number of tort claimants typically represented by a tort claimants' committee, the cost of frequent mailings may be prohibitive. A more feasible means of communication might be a Web site created by the committee for the creditors it represents; such a site would be in addition to any Web site created by the court or the debtor for the case. In the *Dow Corning* bankruptcy, the tort claimants' committee created such a Web site.[211] It included the following:

- a section on frequently asked questions;
- information about developments in the case and subsequent appeals;
- access to plan documents and orders concerning confirmation;
- links to key opinions in the case;
- information about claims processing procedures; and
- a means of e-mailing questions and comments to the committee.

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208. For an example of a creditors' committee status report, see Chapter 11 Theory and Practice, *supra* note 130, at 10:163–10:167.

209. *See id.* at 10:75 ("When the plan is consensual, the committee will usually include a letter in the solicitation package urging creditors to vote in favor of the plan."); §§ 10:169–10:174 (including sample letters from a creditors' committee recommending acceptance of plan).

210. *See id.* at 10:175–10:176 (including a sample letter from a creditors' committee recommending rejection of a plan).

211. *See* http://www.tortcomm.org/ (last visited Aug. 22, 2005). The site is currently managed by the Claimants' Advisory Committee, which serves as the postconfirmation representative of the tort claimants' interests.

For the Web site to be an effective means of communication, of course, the committee should inform tort claimants of its existence early in the case.

Congress has recently addressed the need for improved communications between creditors' committees and the creditors they represent. The 2005 Bankruptcy Code amendments added a provision to section 1102(b) that requires a creditors' committee to "provide access to information" to its constituents, to "solicit and receive comments" from them, and to "be subject to a court order that compels any additional report or disclosure to be made to the creditors" represented by the committee.[212] This statutory requirement underscores that a committee's duty of care to its constituents includes keeping them informed and advising them of their rights.[213] The court should ensure that this duty is carried out.

F. Containment of Costs Incurred by Committees

High costs are one of the chief concerns about using bankruptcy as a mass tort litigation device.[214] To the extent that these costs are borne by the estate as administrative expenses, they diminish payments to tort claimants and other unsecured creditors and reduce the value, if any, left for shareholders. The expenses and professional fees incurred by the official committees in the case are significant sources of these costs. The bankruptcy court therefore needs to keep a close eye on these costs to ensure that estate assets are not unnecessarily depleted. Because the focus of this part of the manual is on the structuring of committees, the discussion concerns containing the fees and expenses incurred by the official committees. Some of the discussion is also applicable to containing the debtor in possession's costs.

1. Number of committees

One way to contain committee costs is to limit the number of committees appointed. As previously discussed, in a mass tort bankruptcy case it is likely that a number of groups will seek the appointment of additional committees (in addition to the official committee of unsecured creditors).[215] While the judge or U.S. trustee will consider several factors when deciding

212. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 405(b), 119 Stat. 23, 105.

213. *See* Chapter 11 Theory and Practice, *supra* note 130, at 10:51.

214. *See, e.g.,* Gibson, *supra* note 64, at 25–26 (discussing the higher costs of resolving mass torts by means of bankruptcy than by limited fund class actions).

215. *See supra* section III.B.

whether to appoint another committee,[216] one consideration should be the additional costs that will result. With the appointment of an additional committee comes the appointment of committee counsel and perhaps other professionals, as well as travel and other expenses of the committee members. Accordingly, the judge or U.S. trustee should consider whether there are other, less costly methods of providing adequate representation for the constituency that seeks its own committee. These methods might include recognizing unofficial committees, making appointments to existing committees, and providing opportunities for individual parties in interest to be heard.

2. Judicial control over committee fees and expenses

For the official committees that are appointed, the Bankruptcy Code gives the bankruptcy court an important oversight role with respect to the committees' costs. Section 330(a)(1) of the Bankruptcy Code gives the court the authority to award to a professional person employed by a chapter 11 official committee "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses." Section 331 authorizes the court to allow and disburse interim compensation and reimbursement to professionals during a chapter 11 case. Courts have read the Code as giving the bankruptcy court not only the power to review fee applications, but an inescapable duty to do so—even in the absence of objection by the U.S. trustee, the debtor, or any party in interest.[217] As the Third Circuit has explained, this duty "derives from the court's inherent obligation to monitor the debtor's estate and to serve the public interest."[218]

a. Eligibility for compensation and reimbursement. As noted above, professional persons employed by chapter 11 committees are permitted to seek compensation and reimbursement of their expenses from the court; such payments are made by the estate as administrative expenses.[219] These professional persons are committee counsel, accountants, investment advisors, and any others whose employment the court approves pursuant to section

216. *See id.*

217. *See, e.g., In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 841 (3d Cir. 1994); *In re* Martin, 817 F.2d 175, 180 (1st Cir. 1987); *In re* Wonder Corp. of Am., 82 B.R. 186, 191 (D. Conn. 1988).

218. *In re Busy Beaver*, 19 F.3d at 841.

219. 11 U.S.C. § 503(b)(2) (2000) (including as an administrative expense "compensation and reimbursement awarded under section 330(a)").

1103(a).[220] The Bankruptcy Code now also authorizes reimbursement of committee members for the expenses they incur "in the performance of the duties of such committee."[221] This provision, added by Congress in 1994,[222] resolved a split among the courts concerning the entitlement of committee members to reimbursement of their out-of-pocket costs as an administrative expense.[223]

Courts continued to disagree, however, over whether committee members were entitled to recover the compensation they paid their individually retained attorneys in connection with their service on the committee.[224] After section 503 was amended in 1994, it appeared to allow such expenditures as administrative expenses,[225] but this result seemed inconsistent with other provisions of the Bankruptcy Code.[226] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 included an amendment that resolves this issue and makes clear that committee members are not eligible for recovery of attorneys' and accountants' fees.[227]

b. Timing and procedure for compensation and reimbursement of professionals. As is true in all large, complex bankruptcies, professional fees and

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220. *Id.* § 330(a)(1) (authorizing award of compensation and reimbursement of expenses to, among others, "a professional person employed under section . . . 1103").

221. *Id.* § 503(b)(3)(F).

222. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 110, 108 Stat. 4106, 4113 (adding subsection (F) to § 503(b)(3)).

223. *See* H.R. Rep. No. 103-835, at 40 (1994) (noting that "the courts have split on the question of allowing reimbursement" and citing conflicting decisions).

224. *Compare, e.g.,* First Merchs. Acceptance Corp. v. J.C. Bradford & Co. (*In re* First Merchs. Acceptance Corp.), 198 F.3d 394 (3d Cir. 2000) (reading section 503(b)(3) and (b)(4) to allow reimbursement of committee members' attorneys' fees), *with In re* Firstplus Fin., Inc., 254 B.R. 888 (Bankr. N.D. Tex. 2000), *and In re* County of Orange, 179 B.R. 195 (Bankr. C.D. Cal. 1995) (concluding that Congress did not intend to allow reimbursement of committee members' legal fees as an administrative expense).

225. The 1994 amendments to section 503(b)(3) added committee members to the list of persons eligible to recover their "actual, necessary expenses" as administrative expenses. By doing so, the amendment made committee members eligible for reimbursement of attorney and accountant fees under section 503(b)(4). *See* 11 U.S.C. § 503(b)(3), (b)(4) (2000).

226. The court does not have to approve in advance the hiring of an attorney or accountant by an individual committee member, unlike the retention of professionals by a committee. *See id.* §1103(a). Thus, there is no opportunity for the court to consider possible conflicts of interest or the competence of the professional. Furthermore, if the court allowed individual committee members to hire their own professionals at the expense of the estate, it could result in large expenditures for overlapping or unnecessary services.

227. *See* Pub. L. No. 109-8, § 1208, 119 Stat. 23, 194 (amending section 503(b)(4) to eliminate committee members from the list of persons eligible to recover professional compensation as an administrative expense).

expenses in a mass tort bankruptcy case mount rapidly.[228] It is especially important therefore for the court to authorize a procedure that

- will provide professionals with frequent opportunities for compensation and reimbursement so that they are not forced to finance the bankruptcy themselves;
- will allow the judge and others sufficient time to scrutinize fee and expense applications to ensure that estate funds are not improperly paid out; and
- will not itself create an undue burden on the court and professionals.

The court should authorize such a procedure in the early stages of a mass tort bankruptcy case so that from the outset all parties and professionals involved have a clear understanding of the requirements for seeking interim compensation and reimbursement.[229]

Congress recognized that having to wait until the end of a lengthy bankruptcy case to obtain any compensation would discourage lawyers and other professionals from providing their services to debtors, trustees, and creditors' committees. Thus, in section 331 of the Bankruptcy Code, it authorized courts to allow interim compensation and reimbursement of expenses "not more than once every 120 days after an order for relief . . . or more often if the court permits."[230] Generally, courts presiding over mass tort bankruptcy cases have authorized such applications to be made on a more frequent basis, typically monthly, in order to reduce the financial burden on the professionals and to ease cash-flow problems for the debtor. One bankruptcy court has also pointed out that allowing monthly payment of interim fees in a large chapter 11 case eliminates the need for large prepetition retainers for the debtor's professionals and has the potential for alerting the court and parties "to an administratively insolvent debtor earlier than in the case where fees are allowed and paid less frequently."[231]

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228. For discussions of the issue of handling professional fees and expenses in bankruptcy mega-cases, *see generally* Gibson, *supra* note 3, at 18–22; Conference on Large Chapter 11 Cases, *supra* note 3, at 27–33; Case Management Manual, *supra* note 3, at 345–46; *see also* MCL 4th, *supra* note 3, at 183–207; Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center, 2d ed. 2005).

229. *Cf.* MCL 4th, *supra* note 3, § 14.21 (discussing establishment of guidelines and ground rules regarding fees at the outset of the case); Hirsch & Sheehey, *supra* note 228, at 107 (describing a judge's practice of requiring an estimated budget of professional fees). For an example of guidelines used by a U.S. trustee's office, *see* Hirsch & Sheehey, *supra* note 228, at 123–33.

230. 11 U.S.C. § 331 (2000).

231. *In re* Mariner Post-Acute Network, Inc., 257 B.R. 723, 728 (Bankr. D. Del. 2000).

In especially complex bankruptcy cases, including those involving mass torts, courts have developed interim compensation procedures designed to reduce the administrative burden on the court and parties, while still permitting careful judicial scrutiny of fee applications.[232] Although specific procedural details vary from court to court, in their administrative fee orders, these courts authorize interim payments to be made on a monthly basis, subject to subsequent court approval.[233] Typically, the approved procedure allows a professional entitled to seek interim compensation under section 331 to submit monthly statements to the debtor and provide copies to the U.S. trustee and official committees. The debtor is authorized to pay a certain percentage of the requested fees, as well as all expenses to which no objection is made. The professional then must seek the court's allowance of the interim compensation and expenses by submitting a formal fee application on a periodic (often quarterly) basis. The court, in ruling on the interim fee application, may allow the entire amount requested, thereby confirming the payment already made and authorizing the payment of the percentage held back, or it may allow a reduced amount, thereby approving payment of only some of the amount held back or even requiring disgorgement of a portion of the payments previously made.

While some courts have concluded that the Bankruptcy Code does not permit payment of interim compensation prior to any court approval,[234] others have found implicit authority for such a conditional interim payment in section 328.[235] Courts approving such a procedure, however, have stressed the need to restrict its availability to a limited set of cases.[236]

Ruling on fee applications imposes a significant judicial burden in large chapter 11 cases, but judges can enlist the assistance of others in this

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232. *See, e.g., In re* Order Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals (Bankr. S.D.N.Y. Jan. 24, 2000), *available at* http://www.nysb.uscourts.gov/orders/m219.pdf.

233. *See, e.g., id.*; *In re* Pittsburgh Corning Corp., 255 B.R. 162 (Bankr. W.D. Pa. 2000).

234. *See, e.g., In re* Commercial Fin. Serv., Inc., 231 B.R. 351, 356 (Bankr. N.D. Okla. 1999); Pennsylvania v. Cunningham & Chernicoff, P.C. (*In re* Pannebaker Custom Cabinet Corp.), 198 B.R. 453, 458 (Bankr. M.D. Pa. 1996).

235. *See, e.g.,* U.S. Tr. v. Knudsen Corp. (*In re* Knudsen Corp.), 84 B.R. 668, 671 (B.A.P. 9th Cir. 1988) (noting that section 328(a) authorizes retainers as part of compensation agreements and reasoning that "[i]t makes little sense that the court could allow payment of a lump sum or periodic retainer before fees are earned, but not after").

236. *See id.* at 672–73 (listing circumstances in which a court in a "rare case" can authorize conditional payment of interim compensation prior to allowance); *Mariner Post-Acute Network*, 257 B.R. at 730–31 (accepting *Knudsen* rationale but recognizing that additional factors might also support such an administrative fee order).

task. Review of fee applications is one of the statutorily assigned duties of the U.S. trustees, and the Executive Office for U.S. Trustees is developing software that can assist in this process.[237] In addition, the judge may require the professionals themselves to provide assistance by preparing their fee applications according to a standard, court-specified format.[238] Some judges have designated court-appointed fee examiners, creditors' committees, budget committees, or financial employees of the debtor to review fee applications and make recommendations.[239] Some judges delegate narrow tasks, such as categorizing elements of a request or applying clear guidelines, to a law clerk or secretary.[240] Regardless of the person chosen to review the fee applications, it is important that the judge continue to exercise his or her nondelegable duty to carefully review the fee applications before ruling on them.

c. Relationship between fee allowance and progress in the case. Sometimes judges presiding over complex chapter 11 cases have used their authority over allowance of fees as a case management tool. When the parties have not made satisfactory progress in the case, these judges have used the threat or actual act of a fee holdback or fee moratorium to get the parties' attention and to encourage greater efforts.[241] While the withholding of compensation may be called for in some rare situations, it is generally not appropriate. It punishes the earnest lawyer acting in good faith along with the obstructionist. Allowance or disallowance of fees on an individual basis is preferable.

A judge can perhaps exert a greater impact on the progress of the case—and thus the ultimate reduction of costs—by ruling promptly on matters brought before the court. While withholding judgment can sometimes cause the parties to reach a settlement among themselves and eliminate appeals, the judge's decision of key issues can contribute to the progress of the parties' negotiations. As long as the resolution of an issue remains uncertain, the parties may be unwilling to commit themselves to a position, and they can use the absence of that ruling as an excuse for their

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237. *See* 28 U.S.C. § 586(a)(3)(A) (2000); Conference on Large Chapter 11 Cases, *supra* note 3, at 31.

238. *See* Hirsch & Sheehey, *supra* note 228, at 107–08 (discussing requirement that lawyers group activities by category).

239. *See* Conference on Large Chapter 11 Cases, *supra* note 3, at 30–33; Chapter 11 Theory and Practice, *supra* note 130, § 12:07; Hirsch & Sheehey, *supra* note 228, at 114–15.

240. *See* MCL 4th, *supra* note 3, at 207.

241. *See, e.g., In re* UNR Indus., Inc., 72 B.R. 796, 798 (Bankr. N.D. Ill. 1987) (referring to the bankruptcy court's imposition of an interim fee and expense moratorium three and a half years into the mass tort bankruptcy case).

lack of progress. Because the judge cannot know all that is taking place among the parties outside of court, he or she will generally be unable to predict whether withholding a decision will lead to compromise rather than stalemate. The judge's best course therefore is to go ahead and rule on the matters that have been properly presented.

G. Representation of Future Claimants

Undoubtedly the most challenging issue presented by mass tort bankruptcies is how the bankruptcy court should deal with future claims against the debtor during the case and in the reorganization plan. Because most mass tort bankruptcies are precipitated by the debtor's desire to achieve a global resolution of all of the tort claims that have been or will be asserted against it, the debtor will seek to discharge not only the claims of persons who are presently sick or injured by the debtor's product, but also the claims of persons who have been exposed to the offending product but have not yet manifested any injury. The debtor may also attempt to discharge the claims of persons who have not yet been exposed to the debtor's product but who will be exposed in the future and will suffer injury as a result. Judges presiding over mass tort bankruptcies have had to determine, with relatively little statutory guidance, whether such persons who have not yet suffered injury hold claims that may be discharged in the bankruptcy case and whether and under what circumstances the discharge of such claims can satisfy the requirements of due process.

Although many of the legal issues presented by the treatment of future claims in mass tort bankruptcies have not been definitively resolved, over time courts have developed procedures for handling future claims that have resulted in the elimination of the debtor's liability for these claims after confirmation of a reorganization plan. To some extent these procedures have been statutorily endorsed. This section reviews some of the statutory and constitutional issues presented by the debtor's attempt to discharge future claims in a mass tort bankruptcy and then discusses the procedures that courts have generally used to protect the interests of future claimants.

1. Legal issues concerning future claims

a. Do future claimants have "claims"? Judges presiding over the early mass tort bankruptcy cases struggled over the question whether persons who had not yet manifested any injury from exposure to the debtor's

product could be dealt with in the bankruptcy proceedings.[242] The specific legal issue presented was whether such persons were "creditors" in the case who held "claims" that, within the meaning of the Bankruptcy Code, could be discharged at the end of the case.[243] In the early cases, some courts expressed strong doubts that unknown persons who could not yet sue the debtor under state law had claims that were cognizable in bankruptcy. These doubts arose from an uncertainty that such persons had a "right to payment" as required by the statutory definition of "claim," as well as from practical and constitutional concerns about how such persons' rights might be affected by the bankruptcy without their active participation in the proceedings.[244] The conclusion that persons who would become sick in the future were not currently persons with claims meant that in a liquidation, these persons would not be eligible to participate in the distribution of assets[245]—a result unfavorable to future claimants—and that in a reorganization, their claims would not be subject to discharge[246]—a result unfavorable to the debtor and perhaps other creditors.

Eventually courts concluded that, in order for a mass tort bankruptcy case to result in an effective reorganization of the debtor, the mass tort

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242. *See, e.g., In re* Amatex Corp., 755 F.2d 1034 (3d Cir. 1985) (reversing denial by bankruptcy court, affirmed by district court, of request for appointment of representative for future asbestos claimants); *In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (granting motion for appointment of future claims representative); *In re* UNR Indus., Inc., 29 B.R. 741 (N.D. Ill. 1983) (denying application for appointment of a future claims representative), *appeal dismissed,* 725 F.2d 1111 (7th Cir. 1984).

243. The Bankruptcy Code defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . . ." 11 U.S.C. § 101(10)(A) (2000). "Claim" is defined, in part, to mean "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 101(5). Section 1141 provides that the confirmation of a plan in a chapter 11 case "discharges the debtor from any debt that arose before the date of such confirmation." *Id.* § 1141(d)(1)(A). "Debt," in turn, is defined by section 101 as "liability on a claim." *Id.* § 101(12).

244. *See, e.g., In re UNR Indus., Inc.,* 29 B.R. at 745 ("The putative claimants—who have been exposed to asbestos some time in their lives but do not now have or do not know that they have an asbestos-related disease—have no claims under state law, and therefore do not have claims cognizable under the Code."); *id.* at 747 ("It would be impossible for one legal representative to represent adequately the claims of tens of thousands of future claimants. . . . The practical and legal problems of notifying those who the legal representative would be able to bind . . . are insurmountable.").

245. Under 11 U.S.C. § 726(a), the U.S. trustee is directed to distribute the property of the estate in payment of several categories of "claims."

246. *Id.* §§ 1141 (specifying scope of chapter 11 discharge), 101(12) (defining "debt").

claims that the debtor would face in the future could not be ignored.[247] Some courts also reasoned that the bankruptcy proceedings would necessarily have an impact on these future claimants even if their claims were not formally recognized and dealt with.[248] Thus, courts began to conclude that, at the very least, these future claimants were "parties in interest" who had a right to be heard in the proceedings and who were entitled to representation.[249] As a result, courts began appointing future claims representatives to represent in the bankruptcy proceedings the interests of those persons who would be injured by the debtor's product sometime in the future. Often left unresolved by court decision was whether at the end of the bankruptcy the claims of these future claimants could be discharged.[250] Instead, the parties resolved the discharge issue themselves by negotiating a plan that was accepted by most tort claimants and the future claims representative and that required future claimants to proceed against a trust established to pay present and future tort claims; the confirmed plan eliminated the future claimants' rights against the reorganized debtor and related entities.

Congress partially validated the approach taken by the courts when it amended section 524 of the Bankruptcy Code in 1994 to add subsections (g) and (h).[251] This amendment, which was limited in its application to chapter 11 asbestos cases, authorizes courts, in connection with an order

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247. *See, e.g., In re UNR Indus., Inc.,* 725 F.2d 1111, 1119 (7th Cir. 1984) ("If future claims cannot be discharged before they ripen, UNR may not be able to emerge from bankruptcy with reasonable prospects for continued existence as a going concern."); *In re Johns-Manville Corp.,* 36 B.R. at 749 ("Any plan not dealing with [future claimants'] interests precludes a meaningful and effective reorganization and thus inures to the detriment of the reorganization body politic.").

248. *See, e.g., In re Amatex Corp.,* 755 F.2d at 1041 ("Whether or not future claimants have claims in the technical bankruptcy sense that can be affected by a reorganization plan, such individuals clearly have a practical stake in the outcome of the proceedings.").

249. *See, e.g., id.* at 1042; *In re* Forty-Eight Insulations, Inc., 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *In re Johns-Manville Corp.,* 36 B.R. at 749.

250. *See, e.g., In re Amatex Corp.,* 755 F.2d at 1043 ("At this juncture, . . . we do not know whether future claimants can or should be considered 'creditors' under the Code, whether constitutionally adequate notice can be provided to such a class, and how best to solve a whole host of other problems which have not been briefed."); *In re* UNR Indus., Inc., 46 B.R. 671, 676 (Bankr. N.D. Ill. 1985) ("The determination of whether putative asbestos disease victims are creditors of these estates, or whether their interests could be represented in these proceedings in a manner analogous to a class action, or whether these parties would be entitled to vote on a plan of reorganization, or whether their claims might be discharged in this bankruptcy proceeding, are all questions which can be properly addressed after putative asbestos disease victims commence actual participation in these cases."); *In re Johns-Manville Corp.,* 36 B.R. at 754 ("[I]t is unnecessary for this Court to face the dischargeability issue at this time in order to decide whether these claimants are parties in interest.").

251. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113–17.

confirming a reorganization plan, to issue an injunction that requires claimants—present and future—to proceed only against the tort claimant trust established by the plan.[252] Significantly, the amendment does not resolve the question whether previously exposed, yet currently uninjured, persons have "claims" as defined by the Code; instead, it refers to future "demands," which it defines in part as demands for payment that did not constitute claims during the bankruptcy proceedings.[253] For a channeling injunction to be valid and enforceable against future claimants, section 524(g) requires, among other things, that the court appoint during the bankruptcy proceedings "a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind."[254] Thus, embracing the approach previously arrived at by the courts, the amendment provides for the appointment of future claims representatives.

Although section 524(g) provides one framework for dealing with future mass tort claims in an asbestos bankruptcy, it leaves a number of questions unanswered. First, as noted above, it fails to clarify at what point a person exposed to a debtor's dangerous product acquires a "claim" against the debtor within the meaning of the Bankruptcy Code. Moreover, because the term *demand* is used nowhere else in the Code, the statutory recognition that a person has or will have a demand, but presently lacks a claim, confers on that person no legal rights of participation or substantive protection in the bankruptcy proceedings.[255]

Second, because of the limited applicability of section 524(g), questions remain concerning the appropriate treatment of future claims in mass tort bankruptcies that involve a product other than asbestos, in chapter 7 liquidations, and in cases that create a payment mechanism other than a trust having the characteristics described in that provision. Among the remaining uncertainties in such cases are the following:

- whether future claimants may participate in the bankruptcy proceedings either directly or through a court-appointed representative;

252. 11 U.S.C. § 524(g) (2000).

253. *Id.* § 524(g)(4)(B), (g)(5).

254. *Id.* § 524(g)(4)(B)(i). For a discussion of the requirements of section 524(g), *see infra* section VI.E.1.

255. *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years: National Bankruptcy Review Commission Final Report 321 (1997) [hereinafter NBRC Report] ("depriving demand holders of 'claim' status in the bankruptcy process strips parties with asbestos injuries of the other protections of the Bankruptcy Code").

- whether the rights of such persons may be dealt with by a reorganization plan;
- whether such persons are entitled to payment in a liquidation distribution; and
- whether the rights of such persons to proceed against the reorganized debtor and related entities may be terminated by the plan or a court-issued injunction.[256]

Additionally, even in chapter 11 asbestos cases, it is unclear whether section 524(g) provides the exclusive method for dealing with future claims or whether other methods may be used. The act amending section 524 included a provision stating that the amendment "shall not 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."[257] But the scope of that authority was unclear before the amendment, and uncertainties remain concerning the existence of any other authority to enjoin future claimants.

Finally, as a statutory provision, section 524(g) does not and cannot resolve the constitutional issues raised by the treatment of future claims in a mass tort bankruptcy. The next section discusses some of these due process concerns.[258]

b. May the rights of future claimants be affected by a mass tort bankruptcy consistent with the requirements of due process? The touchstone of procedural due process is the requirement that before a person's rights can be affected by a judicial proceeding, the person must be given notice of the proceeding and an opportunity to be heard.[259] While this entitlement to one's day in

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256. *See id.* at 320–22.

257. Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117.

258. The Subcommittee on Mass Torts of the Judicial Conference Committee on the Administration of the Bankruptcy System issued a report in 2003 analyzing the National Bankruptcy Review Commission's recommendations regarding mass torts. This report discusses the due process issues presented by the inclusion of future claims in a mass tort bankruptcy case. It is reprinted as an appendix to Georgene Vairo, *Mass Tort Bankruptcies: The Who, the Why, and the How*, 78 Am. Bankr. L.J. 93, 131–50 (2004). *See also* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?,* 78 Am. Bankr. L.J. 339 (2004).

259. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case.").

court is subject to some exceptions,[260] the constitutionality of an attempt to affect the legal rights of thousands of future mass tort claimants in a bankruptcy proceeding is far from obvious. Until the Supreme Court definitively addresses these due process concerns, they will lurk in the shadows of any mass tort bankruptcy resolution that terminates the rights of future claimants to proceed against any entities they believe are responsible for their injuries and that confines their collective recovery to an amount established without their consent or participation.

One of the unresolved due process issues is whether constitutionally adequate notice can be provided to future claimants. The Supreme Court has given conflicting signals. In *Mullane v. Central Hanover Bank & Trust Co.*,[261] the Court took a pragmatic approach to the notice requirement. It recognized that due process does not require personal notice to every person whose rights might be affected by a judicial proceeding, and it found that in situations in which no form of notice is "reasonably certain to inform those affected," due process is satisfied if "the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."[262] Thus, the Court held in *Mullane* that notice by publication in a single newspaper was sufficient with respect to "beneficiaries whose interests or addresses are unknown to the trustee."[263] The Court's conclusion relied in part on the belief that "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all."[264]

However, it will frequently be unlikely that any form of notice will be "reasonably certain to reach most" future mass tort claimants. As the Supreme Court itself stated in *Amchem Products, Inc. v. Windsor* in the context of class action notice:

> Many persons in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciated the significance of class notice, those without current afflictions

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260. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (discussing as exceptions to the day-in-court requirement lawsuits in which a non-party is "represented by someone with the same interests who is a party" and "special remedial scheme[s] . . . expressly foreclosing successive litigation by nonlitigants").

261. 339 U.S. 306 (1950).

262. *Id.* at 315.

263. *Id.* at 318.

264. *Id.* at 319.

> may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.[265]

Thus, the Court stated in *Amchem* that it "recognize[d] 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."[266] Whether it is possible to provide constitutionally adequate notice to future claimants in the bankruptcy context similarly remains an open question.

Most commentators who have supported the treatment of future claims in mass tort bankruptcies have concluded that the appointment of a future claims representative, not merely notice, is the key to satisfying due process.[267] As previously noted, the traditional practice in mass tort bankruptcies involving future claimants has been for the court to appoint a representative for the future claimants. The person appointed then participates in plan negotiations, appears in court, and raises objections on behalf of those persons who may in the future manifest injuries as a result of the debtor's prepetition conduct. Does the appointment of such a representative, in addition to the provision of constructive notice, suffice to satisfy due process? Again, the issue is unresolved.

Several factors give rise to this constitutional uncertainty. First is the relatively unprecedented nature of the future claims representative's relationship with the persons represented. The court appoints the future claims representative without the consent of the class of persons represented; thus, the representative is not like a true agent acting on a principal's behalf.[268] Nor is the representative like a guardian appointed for a minor or incompetent, since most of the persons represented possess the legal capacity to appear on their own behalf.[269] Moreover, unlike the named plaintiffs in a class action, the representative is invariably a lawyer who does not claim to be threatened with the same injury that the future claimants face. Accordingly, there is no similarity of interests so as to ensure "'that the

265. 521 U.S. 591, 628 (1997).

266. *Id.*

267. *See, e.g.,* NBRC Report, *supra* note 255, at 329–34; Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 Am. Bankr. L.J. 515, 515 (1995); Resnick, *supra* note 46, at 2079.

268. *See* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 Chap. L. Rev. 43, 59 (2000).

269. *But see* Bartell, *supra* note 258, at 355–67 (arguing that future mass tort claimants are "functionally incompetent" for purposes of the bankruptcy case and thus the future claims representative is similar to a guardian *ad litem*).

interests of the class members will be fairly and adequately protected in their absence.'"[270]

In addition, due process concerns might be raised about possible conflicts of interest within the class of future claimants. In other representational situations, the Supreme Court has insisted on a careful alignment between the interests of the representative and the interests of those represented and has prohibited the grouping together of class members with potentially adverse interests.[271] A similar insistence in the bankruptcy context might require, contrary to the prevailing practice, that more than one future claims representative be appointed so that, for example, the interests of seriously injured future claimants can be advocated separately from the interests of those who will suffer minor injury or assert weak legal claims.[272]

Finally, even if the appointment of a representative is sufficient in theory to satisfy the demands of due process, attention must be given to the quality of representation under current practice. In particular, it has been suggested that the representatives appointed in most mass tort cases have acted less as zealous advocates for the future claimants and more as honest brokers striving for a reorganization.[273] However, it should be recognized that a future claims representative may properly conclude that a successful reorganization, rather than a chapter 7 liquidation, is in the best interests of the future claimants.

Discussion of these legal issues concerning future claims is not meant as a prediction that the Supreme Court will one day prohibit their inclusion in the resolution of a mass tort bankruptcy. Instead, it is possible that the Court will eventually rule that the commands of due process are sufficiently flexible to accommodate what may be the best and fairest means available for resolving a mass tort. In the meantime, however, judges presiding over mass tort bankruptcies do not have the luxury of waiting for

270. *Amchem*, 521 U.S. at 626 n.20 (quoting Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157–58 n.13 (1982)).

271. *See id.* at 625–28; Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999).

272. *See* S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. Pa. L. Rev. 2095, 2114–15 (2000); *see also In re* Combustion Eng'g, Inc., 391 F.3d 190, 244 (3d Cir. 2004) (noting that "non-malignant claimants" may have interests "adverse to those of claimants with more severe injury").

273. *See* Tung, *supra* note 268, at 70–71 ("A judge—and certainly parties in interest—might be less interested in finding a person to provide zealous representation for future claimants than one who understands the paramount goal of reorganization. The ideal candidate may be one who will provide 'adequate' representation, understanding and subscribing to the ultimate aim of reorganizing the debtor.").

these difficult legal issues to be finally resolved. They have to proceed with the cases before them, drawing on the practices developed in earlier cases while being mindful of the constitutional, statutory, and practical issues presented by any effort to include the future claims within the bankruptcy resolution.

2. Appointment of future claims representatives

Because neither the Bankruptcy Code nor the Bankruptcy Rules set forth any procedures for the appointment of a future claims representative, courts and parties have had to devise them for themselves on a case-by-case basis. Typically, the debtor initiates the process by filing a motion requesting that the court appoint a future claims representative.[274] Occasionally, other participants in the bankruptcy have requested the appointment.[275] In chapter 11 reorganization cases in which it appears that the debtor faces significant tort liability long into the future based on its prebankruptcy activity, the appointment of a future claims representative has become the standard practice.[276] In contrast, the request for such an appointment in a mass tort liquidation[277] or in a case in which the existence of future tort liability is disputed[278] is likely to provoke opposition from parties already represented in the bankruptcy, and the judge will need to conduct a hearing before de-

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274. *See, e.g., In re* Amatex Corp., 755 F.2d 1034, 1036 (3d Cir. 1985) (referring to the debtor's application for the appointment of a guardian *ad litem* to represent future asbestos claimants on all issues before the court); *In re* UNR Indus., Inc., 46 B.R. 671, 673 (Bankr. N.D. Ill. 1985) (referring to the debtors' application for a legal representative for unknown putative asbestos-related claimants).

275. *See, e.g.,* Locks v. U.S. Tr., 157 B.R. 89, 90 (W.D. Pa. 1993) (referring to a motion for the appointment of a future claims representative filed by a plaintiffs' attorney who was a member of the unsecured creditors' committee); *In re* Johns-Manville Corp., 36 B.R. 743, 744 (Bankr. S.D.N.Y. 1984) (referring to a motion filed by Keene Corp., a codefendant of the debtor, to appoint a legal representative for asbestos-exposed future claimants).

276. *See, e.g.,* Tung, *supra* note 268, at 55 (describing the appointment of a future claims representative as an element of the "traditional approach" of mass tort bankruptcies).

277. In the *H.K. Porter* asbestos bankruptcy, for example, which was a chapter 11 liquidation, the bankruptcy court initially denied a motion to appoint a future claims representative, which was filed by a member of the unsecured creditors' committee. *See Locks*, 157 B.R. at 91. The district court affirmed the denial, holding that "appointment of a Futures representative is not mandatory in a Chapter 11 liquidation . . . [due to] the divergent goals of liquidations versus reorganizations . . . ." *Id.* at 96. Eventually, however, the bankruptcy court acted sua sponte and ordered the appointment of such a representative. *In re* H.K. Porter Co., 156 B.R. 16 (Bankr. W.D. Pa. 1993).

278. *See In re* Dow Corning Corp., 211 B.R. 545, 598 n.55 (Bankr. E.D. Mich. 1997) (discussing the denial of a motion to appoint a representative for future breast implant claimants on the ground that all such claimants were aware of their implants and thus were present, not future, claimants).

ciding whether to order the appointment. The judge's decision should be based on an assessment of the likely impact the bankruptcy will have on persons who in the future will suffer injuries of the same nature as those of the present tort claimants.

Unlike the appointment of creditors' committees, for which the U.S. trustee is given the primary responsibility, the appointment of a future claims representative rests with the court. Although some judges have designated persons of their own choosing to serve as future claims representatives,[279] generally judges have looked to the U.S. trustee to present names of qualified individuals, usually after seeking suggestions from the debtor and creditors' committees.[280] In deciding whom to appoint, judges should look for persons with the training and experience needed to deal competently with the tort, bankruptcy, corporate, financial, and constitutional issues that will be involved in representing the interests of future claimants. To avoid conflicts of interest, judges should limit their appointments to persons who do not represent any current claimants.[281]

3. Role of the future claims representative in the bankruptcy case

Although the Bankruptcy Code provides in some circumstances for the appointment of a future claims representative, it does not specify what role such a representative is to play in the bankruptcy proceedings, other than by its provision that refers to "protecting the rights of persons that might subsequently assert demands of such kind."[282] Because no other provision of the Code deals with the future claims representative's participation in the proceedings, the way in which the representative protects the rights of future claimants has evolved through practice. The National Bankruptcy Review Commission sought to formalize the rights and duties of future claims representatives. Its 1997 report called for amendments to the Code that would allow future claims representatives to file claims on behalf of classes of future mass tort claimants, cast votes on reorganization plans on

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279. *See* Richard B. Sobol, Bending the Law 110 (1991) (describing the district judge's selection of the future claims representative appointed in the *A.H. Robins* bankruptcy case).

280. *See, e.g., In re H.K. Porter Co.*, 156 B.R. at 19; *In re* Forty-Eight Insulations, Inc., 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *In re UNR Indus., Inc.,* 46 B.R. at 677.

281. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999) ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses . . ., with separate representation to eliminate conflicting interests of counsel."); NBRC Report, *supra* note 255, at 333 n. 825 ("This tension between present and future claimants is what also precludes the use of one representative for both groups.").

282. 11 U.S.C. § 524(g)(4)(B)(i) (2000).

behalf of the future claimants, and exercise all of the powers of a creditors' committee.[283] The proposed legislation was not enacted, however, leaving the role that the future claims representative is to play in the case for the court and parties to determine.

The primary role of the future claims representative in cases to date has been that of a negotiator.[284] Gaining the assent of the representative has been essential for arriving at a consensual plan of reorganization. Typically the debtor, the tort claimants' committee, the future claims representative, and the unsecured creditors' committee negotiate, in varying combinations, in an effort to arrive at an agreement concerning the ratio of tort debt to other unsecured debt; the division of tort debt between present and future claims; the terms for liquidation and payment of the tort claims; the percentage of payment for unsecured claims; and the amount, if any, to be provided to equity.[285] In cases in which the parties have not been able to reach agreement, future claims representatives have participated in claims estimation hearings, presenting their own experts concerning the value of the future claims.[286]

Contrary to the practices called for by the National Bankruptcy Review Commission, future claims representatives have not filed claims or voted on plans on behalf of the future claims they represent. Instead, their influence in the case has come through their persuasive abilities (both in court and in negotiations) and the likely concerns of other parties about the feasibility and legitimacy of confirming a plan to which the future claims representative objects. There is evidence that this potential veto power, as well as the representative's advocacy in court, has resulted in the improved treatment of future claimants in some reorganization plans.[287]

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283. NBRC Report*, supra* note 255, at 329–30.

284. *See, e.g.,* Tung, *supra* note 268, at 44 (describing the future claims representative's "mandate" as "to negotiate on behalf of future claimants").

285. *See, e.g., In re* UNR Indus., Inc., 212 B.R. 295, 298 (Bankr. N.D. Ill. 1997) (describing the negotiation history of the *UNR* asbestos bankruptcy); Gibson, *supra* note 64, at 90–91 (describing the negotiation history of the *Eagle-Picher* asbestos bankruptcy).

286. *See, e.g., In re* A.H. Robins Co., 88 B.R. 742, 747 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989) (describing the evidence presented at the claims estimation hearing by the expert for the future claims representative); *In re* Eagle-Picher Indus., Inc., 189 B.R. 681, 687–88 (Bankr. S.D. Ohio 1995) (same).

287. *See, e.g., In re* Nat'l Gypsum Co., 219 F.3d 478, 481 (5th Cir. 2000) (referring to the future claims representative's successful objection to a permanent injunction that would have prevented future claimants from seeking recovery from the debtor's successor); Gibson, *supra* note 64, at 208–09 (describing the successful efforts of the future claims representative in the *A.H. Robins*

One commentator has raised concerns that because future claims representatives are appointees of the court whose appointments have been sought and names suggested by other parties, they are more likely to take on the role of honest brokers seeking consensual reorganizations than that of zealous advocates for the interests of future claimants.[288] A judge appointing a future claims representative can diminish such concerns about adequacy of representation in a number of ways. First, in selecting the person to be appointed, the judge should value qualifications and experience that indicate the person's ability to be an effective advocate over those that indicate that the person was a team player in earlier cases. When a potential future claims representative has previously served in that capacity, the judge should consider the results the representative achieved for his or her constituents in the prior case. Second, for the representative to be effective, the court needs to define the class of persons represented as clearly as possible. The court needs to answer such questions as

- Is the future claims representative expected to act on behalf of persons injured only by a certain type of product manufactured by the debtor, or persons injured by multiple products?
- Is the representative acting on behalf of only persons exposed to the product prior to plan confirmation or on behalf of those exposed later as well?
- Is the representative expected to represent those who will suffer only slight or questionable injury as well as those who will be able to demonstrate serious injury?

Finally, the representative needs to be equipped to represent the constituency of future claimants with the same expertise as the creditors' committees possess. Thus, despite the additional costs, the court should authorize the future claims representative to hire counsel and financial experts as appropriate for the needs of the case.

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bankruptcy to amend the proposed plan to allow payment for future claimants who did not file a claim in the bankruptcy proceedings by the bar date).

288. *See* Tung, *supra* note 268, at 70–71.

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IV. Handling the Tort Claims

A. Overview

Part IV addresses issues presented by the vast numbers of tort claims that must be dealt with in the bankruptcy case:

- *Establishment of a bar date:* Is the court required to set a bar date for the filing of proofs of claim by the tort claimants, and is there any reason not to do so? What considerations go into the selection of a bar date for the tort claims?
- *Information to be provided in tort claimants' proofs of claim:* Should the court approve a special proof of claim form for tort claimants in place of the official form? If so, how much information should a claimant have to provide?
- *Notice of the bar date:* What are the due process requirements with respect to providing notice of the bar date to the tort claimants? How as a practical matter is it accomplished? What should the court consider in ruling on the sufficiency of a notice plan?
- *Resolution of causation and other liability issues:* If the debtor objects to large numbers of tort claims on the ground that it is not liable for the claimants' alleged injuries, when and how should these defenses be resolved? How can the court feasibly rule on thousands of objections? Can the objections be resolved on an aggregated basis? Under what circumstances can a judicial resolution be avoided?
- *Estimation of tort claims:* Does the bankruptcy judge have authority to estimate the value of personal injury tort claims? Does the statute authorize the estimation of the total tort liability? How can an accurate value be placed on present and future unliquidated tort claims? Should the claims estimation process be used as a means of litigating causation and other liability issues? Under what circumstances can a judicial estimation proceeding be avoided? How can the court assist the parties in negotiating an estimated value of the tort claims?
- *Use of court-appointed experts and advisors:* What authority does a bankruptcy judge have to appoint an expert or advisor to provide assistance in a mass tort bankruptcy case? What role may such an expert play? What procedural protections must the judge provide in appointing and communicating with its expert or advisor?

B. Establishment of a Bar Date

Most of the tort claims in a mass tort bankruptcy are unliquidated and disputed by the debtor; accordingly, the Bankruptcy Code requires the holders of these claims to file proofs of claim in order for their claims to be allowed.[289] The debtor will ask the court to establish a bar date for the filing of these proofs of claim, and any claims filed after that date will be disallowed. The tort claimants' committee often opposes such a request as being unnecessary or unfair.[290] Although judges presiding over some of the earliest asbestos bankruptcies declined to establish a bar date for the personal injury tort claims,[291] courts in some subsequent cases have imposed a bar date for all present personal injury claims, that is, those held by persons with manifest injuries, or for property damage claims, or for both.[292]

Federal Rule of Bankruptcy Procedure 3003(c)(3) provides that in a chapter 11 case, the "court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." It thus appears from the rule's language that the imposition of a bar date is mandatory. Some courts, however, have read the rule as not imposing an absolute requirement on the court, but as creating "something in the nature of a presumption that a bar date will be set,"[293] which can be overcome "upon good cause shown" for not setting a bar date.[294]

Courts imposing a bar date have justified its establishment in chapter 11 cases on the ground that it promotes certainty as to the identity of the

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289. 11 U.S.C. § 1111(a) (2000) (stating that a claim that is scheduled as disputed, contingent, or unliquidated is not "deemed filed"); *id.* § 502(a) (stating that a claim, proof of which is filed, is "deemed allowed" unless an objection is made).

290. *See, e.g., In re* Babcock & Wilcox Co., No. 00-0558, slip op. at 3 (E.D. La. Aug. 25, 2000); *In re* Eagle-Picher Indus., Inc., 137 B.R. 679, 680 (Bankr. S.D. Ohio 1992). *See also infra* text accompanying notes 296–97.

291. *See, e.g.,* Kane v. Johns-Manville Corp., 843 F.2d 636, 641 (2d Cir. 1988) (explaining that a combined proof of claim and voting form was used for asbestos health claims "only for voting"); *In re* UNR Indus., Inc., 71 B.R. 467, 476 n.21 (Bankr. N.D. Ill. 1987) (discussing action that could have been taken "*[h]ad* a bar date for the filing of claims been set in these proceedings") (emphasis added).

292. *See, e.g.,* Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1360 (4th Cir. 1987); Notice of Bar Date . . . For Filing Proofs of Claim on Account of Damage Caused by Asbestos to Property in the U.S. & Canada, *In re* Federal-Mogul Global, Inc., No. 01-10578 (Bankr. D. Del. June 13, 2002); *In re* Babcock & Wilcox Co., No. 00-0558, slip op. at 7–8 (E.D. La. Oct. 30, 2000); *In re* Dow Corning Corp., 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997); *In re* Celotex Corp., 204 B.R. 586, 593 (Bankr. M.D. Fla. 1996); *In re Eagle-Picher Indus., Inc.,* 137 B.R. at 681.

293. *See, e.g., In re Eagle-Picher Indus., Inc.,* 137 B.R. at 681.

294. *Id.* at 680.

creditors participating in the bankruptcy and the nature of their claims. As the Second Circuit has explained,

> A bar order serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization. To be sure, the amount of the claims may not be finally determined until adversary proceedings have been concluded, but establishing the identities and interests of the participants so that the claims-allowance process may begin is an essential function served by a bar order. Thus, a bar order does not "function merely as a procedural gauntlet," but as an integral part of the reorganization process.[295]

Representatives of tort claimants have opposed bar orders in mass tort bankruptcies on the ground that the filing in the bankruptcy case of proofs of claim by a specified date is unnecessary because tort claimants will eventually be paid pursuant to a trust mechanism with its own filing requirements, rather than directly from the bankruptcy estate.[296] They have also argued that the establishment of such a deadline for the filing of claims will result in the inequitable exclusion from payment of deserving claimants.[297] Even though payment of tort claimants will eventually be made according to procedures set up by the trust, identifying the universe of present tort claimants in the bankruptcy case serves two important purposes: It provides a starting point for placing an aggregate value on the present claims, and it permits identification of those persons who will be eligible to vote on the reorganization plan.[298] Moreover, imposing a deadline for filing, when applied only to present claimants, is no more inequitable than a statute of limitations or any other deadline that a litigant must observe in order to preserve his or her rights.[299]

When a judge issues a bar order in a mass tort bankruptcy case, the judge must take several factors into account in selecting the date by which claims must be filed. First, the judge must consider the amount of time that will be required to get notice of the bar date to potential claimants. The judge therefore will not be able to set a specific bar date until he or she ap-

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295. First Fid. Bank, N.A. v. Hooker Invs., Inc. (*In re* Hooker Invs., Inc.), 937 F.2d 833, 840 (2d Cir. 1991).

296. *See, e.g., In re* Babcock & Wilcox Co., No. 00-0558, slip op. at 5–6 (E.D. La. Aug. 25, 2000); *In re* Eagle-Picher Indus., Inc., 137 B.R. 679, 681 (Bankr. S.D. Ohio 1992).

297. *See, e.g., In re Eagle-Picher Indus., Inc.*, 137 B.R. at 681.

298. *See, e.g., In re Babcock & Wilcox Co.*, slip op. at 6–8.

299. *See, e.g., In re Eagle-Picher Indus., Inc.*, 137 B.R. at 682.

proves the debtor's notice plan. This consideration may lead the judge to select a later bar date for the personal injury claims than for the other claims, because of their large number and geographic dispersion.[300] Moreover, U.S. claimants may be required to file sooner than claimants in other countries.[301] The judge also needs to consider the urgency of the need for information about the universe of tort claims. A judge, for example, might impose an earlier bar date for tort claims than for other claims in order to facilitate the parties' negotiations over the value of the tort claims. Finally, the judge needs to take into account the amount of information that the tort claimants will be required to provide in their proofs of claim. If, as discussed below,[302] the court requires claimants to provide supporting information—such as diagnoses, medical reports, and work histories—in addition to the basic information on the official form,[303] it will need to give claimants greater time to complete and file their proofs of claim.[304]

Imposition of a bar date does not necessarily mean that all claims filed after that date will be disallowed. Individual tort claimants seeking to file late claims may argue that their failure to file was due to excusable neglect. Relying on the factors articulated by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*—"the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith"[305]—the judge will have to decide whether the creditor has made a sufficient showing to justify the tardy filing.[306] The judge may also determine that there is cause to allow a particular category of tort claims—

300. *See, e.g., In re* Celotex Corp., 204 B.R. 586, 592–593 (Bankr. M.D. Fla. 1996) (stating that the general claims bar date was Aug. 25, 1992, the asbestos property damage bar date was July 29, 1993, and the asbestos bodily injury bar date was Mar. 15, 1996).

301. *See, e.g., In re* Dow Corning Corp., 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997) (stating that the bar date for U.S. claimants was Jan. 15, 1997, and for foreign claimants, it was Feb. 14, 1997).

302. *See infra* section IV.C.

303. Official Bankr. Form 10.

304. *See, e.g., In re* Babcock & Wilcox Co., No. 00-0558, slip op. at 29 (E.D. La. Aug. 25, 2000) (rejecting debtor's request for a bar date five months from the bar date order and imposing a bar date nine months from the order "because of the extent of the information to be supplied, the large number of claims, and because a small number of law firms represents thousands of claimants").

305. 507 U.S. 380, 395 (1993).

306. In *Pioneer,* the Court explained that whether excusable neglect for a late filing exists within the meaning of Bankruptcy Rule 9006(b)(1) is ultimately an equitable determination. *Id.* at 395.

for example, those based on injury becoming manifest after the bar date but before plan confirmation—to be filed after the deadline.[307]

C. Information To Be Provided in Tort Claimants' Proofs of Claim

The Bankruptcy Code provides for creditors' filing of proofs of claim[308] but is silent as to the information that must be provided. That issue is governed by Federal Rule of Bankruptcy Procedure 3001(a), which states that a proof of claim "is a written statement setting forth a creditor's claim." The rule provides that a proof of claim "shall conform substantially to the appropriate Official Form," which at the present time is Official Bankruptcy Form 10. That one-page form calls for basic information about the identity of the creditor and the nature, basis, and amount of the claim. It also requires the attachment of copies of supporting documents.

Most creditors who file a proof a claim, then, merely have to fill out a few lines on a form, check a few information boxes, and attach a document or two. Upon filing that form with the court, they have done all that they need to do to have an allowed claim in the bankruptcy.[309] In a mass tort bankruptcy case, however, the debtor is likely to ask the court to require the submission of a more detailed proof of claim by the mass tort claimants. The debtor will argue that it needs more information than is required by Official Bankruptcy Form 10 in order to assess the validity of each tort claim. In ruling on such a request, the judge will have to determine whether and to what extent Rule 3001(a) permits the court to impose such special proof of claim requirements on mass tort claimants.

In a number of mass tort bankruptcy cases, courts have approved debtors' requests for special forms for proofs of claim. The length of these forms and the amount of information required of the tort claimants have varied. In the *A.H. Robins* case, the district court devised a two-step claims-filing process.[310] First, claimants were required to file a statement with the

307. *See, e.g.,* Order Confirming Amended Joint Plan of Reorganization as Modified at 5, *In re* Dow Corning Corp., No. 95-20512 (Bankr. E.D. Mich. Nov. 30, 1999), *aff'd,* 255 B.R. 445 (E.D. Mich. 2000), *rev'd in part on other grounds,* 280 F.3d 648 (6th Cir. 2002).

308. 11 U.S.C. § 501 (2000).

309. *See* 11 U.S.C. § 502(a) (2000) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed unless a party in interest . . . objects."); Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

310. *In re* A.H. Robins Co., 862 F.2d 1092, 1093 (4th Cir. 1988).

court that provided the claimant's name and address and indicated that the claimant was "'making a Dalkon Shield claim.'"[311] Then, the court sent to all persons who had filed the required statement of claim by the deadline a two-page questionnaire that requested basic identification information and information about the claimant's use of the Dalkon Shield, including the dates of insertion and removal of the device, the nature of the injuries allegedly suffered, and the names of physicians and clinics consulted. The claimant was not required to submit any medical records or physician statements with the completed questionnaire.[312]

In the *Babcock & Wilcox* bankruptcy case, the district judge approved a three-page proof of claim form for asbestos personal injury claimants that was accompanied by six pages of instructions.[313] The form required a claimant to provide identifying information; medical information, including specification of the type of asbestos-related injury alleged, year of diagnosis, and lung test results; and information concerning the claimant's history of exposure to asbestos from equipment manufactured by the debtor. The claimant was also required to attach copies of all diagnostic reports supporting the claimed asbestos-related medical condition.[314]

As a final example, in the *Federal-Mogul* case, the bankruptcy court approved a special proof of claim form for asbestos property damage claims.[315] This three-page form, accompanied by three pages of instructions, requested information about each building or site that was the basis of an asbestos property damage claim, the type and brand name of the asbestos-containing product installed there, the dates of installation and removal of that product, and the damages incurred as a result. The claimant was also required to attach copies of all supporting documents, such as "purchase orders, invoices, contracts, specifications, architectural drawings, appraisals, environmental reports, [and] product samples or test results."[316]

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311. *Id.* (quoting the notice to claimants approved by the district court).

312. *Id.*

313. Order Regarding Debtors' Motion for Entry of an Order Establishing a Bar Date, Approving the Proof of Claim Form, and Approving the Form and Manner of Notice, *In re* Babcock & Wilcox Co., No. 00-0558 (E.D. La. Oct. 30, 2000).

314. *Id.* at Ex. B.

315. Order (A) Establishing Bar Date for Filing Proofs of Claim on Account [of] Asbestos-Related Damage to Property Located in the United States and Canada; (B) Approving Proposed Proof of Claim Form for Such Asbestos-Related Property Damage Claims; and (C) Approving Scope and Manner of Notice of Bar Date for Asbestos-Related Property Damage Claims, *In re* Federal-Mogul Global, Inc., No. 01-10578 (Bankr. D. Del. June 4, 2002).

316. *Id.* at Ex. C.

If those documents were too voluminous to attach, the claimant could instead provide a summary of the documents, including an indication of their location, and a consent to their production upon request by the debtor.[317]

For a judge to authorize the use of a special proof of claim form for mass tort claimants, he or she must conclude both that the Official Form 10 is inappropriate for the types of claims those creditors hold—thus justifying a departure from the norm—and that the special form "conform[s] substantially to the . . . Official Form."[318] Form 10 requires that, in order to set forth the basis for a claim, a creditor check the appropriate box describing the nature of the claim (such as "Personal injury/wrongful death"). Form 10 also states that the creditor "must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed."[319] The form provides an illustrative list of the types of documents called for: "promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien."[320] Because mass tort claims rarely lend themselves to documentary proof of this type, a judge might reasonably conclude that a more specific request for information is appropriate.

If a judge does authorize the use of a special claim form designed specifically for mass tort claims, he or she should ensure that the task of supplying the requested information does not impose an undue burden on the tort claimants. To conform substantially to Official Form 10, the special claim form should elicit basic information about the nature and basis of the claim without creating an obstacle that will discourage persons from filing legitimate claims. As did the district judge in *In re Babcock & Wilcox*,[321] the judge should consider each of the non-standard requests for information in the proposed claim form and weigh the need for that information against the claimant's burden of producing it. A proof of claim is not the exclusive means by which a debtor can obtain information about a creditor's claim; discovery is also available.[322] A proof of claim is, however, the

317. *Id.*

318. Fed. R. Bankr. P. 3001(a).

319. Official Bankr. Form 10 (Instructions for Proof of Claim Form).

320. *Id.* at item 8.

321. *In re* Babcock & Wilcox, No. 00-0558, slip op. at 19–27 (E.D. La. Aug. 25, 2000).

322. *See* Fed. R. Bankr. P. 9014(c) (making discovery rules applicable to contested matters unless the court otherwise directs); Fed. R. Bankr. P. 2004 (authorizing the examination of any

exclusive means by which a claimant with a disputed or unliquidated claim becomes eligible for participation in the bankruptcy case.[323] The judge should therefore guard against an overzealous attempt at information gathering at this stage of the case.

D. Notice of the Bar Date

If the court imposes a bar date, failure to file a proof of claim by the deadline will generally lead to the disallowance of an unscheduled or unliquidated tort claim[324] and ultimately to the claim's discharge without payment.[325] Due process therefore requires that the debtor give tort claimants adequate notice of the bar date and of their need to file a proof of claim.[326] In mass tort bankruptcy cases, which may involve hundreds of thousands of claimants dispersed throughout the United States or even throughout the world, compliance with this constitutional requirement will be costly. The court nevertheless should ensure that the debtor's plan for providing notice of the bar date to tort claimants, many of whom will be unknown to the debtor, fully satisfies the requirements of due process enunciated by the Supreme Court.

The leading decision on the due process requirement of notice is *Mullane v. Central Hanover Bank & Trust Co.,*[327] which the Supreme Court issued in 1950 and has relied on ever since.[328] The Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[329] In very

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entity relating to the liabilities of the debtor or to any matter that may affect the administration of the debtor's estate).

323. *See* 11 U.S.C. § 1111(a) (2000) (stating that a claim that is scheduled as disputed, contingent, or unliquidated is not "deemed filed"); *id.* § 502(a) (stating that a claim, proof of which is filed, is "deemed allowed" unless an objection is made).

324. *See id.* § 502(b)(9).

325. *See id.* § 1141(d)(1)(A).

326. *In re* Babcock & Wilcox, slip op. at 9–10; Waterman S.S. Corp. v. Aguiar (*In re* Waterman S.S. Corp.), 157 B.R. 220, 221 (S.D.N.Y. 1997); Bailey v. Jamesway Corp. (*In re* Jamesway Corp.), Nos. 95 B 44821, 96/8389A, 1997 WL 327105, at *8 (Bankr. S.D.N.Y. June 12, 1997).

327. 339 U.S. 306 (1950).

328. *See, e.g.,* Dusenbery v. United States, 534 U.S. 161, 168 (2002) ("Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice.").

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

pragmatic terms, the Court explained that "[t]he means employed [for providing notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[330] How that task is actually carried out depends upon whether the person to be notified is someone "whose interests or addresses are [known or] unknown" to the person required to give notice.[331] In *Mullane*, the Court held that it was constitutionally insufficient to provide notice by publication to present beneficiaries with addresses known by the trustee. These beneficiaries were required to be notified directly by mail.[332] In contrast, with respect to persons whose identities, interests, or addresses were unknown, the Court held that due process was satisfied if "the form chosen [to provide notice was] not substantially less likely to bring home notice than other of the feasible and customary substitutes."[333] Thus, even if notice by publication most likely will not reach the intended recipient, such notice is constitutionally sufficient so long as "it is not reasonably possible or practicable to give more adequate warning."[334]

Following this instruction from the Supreme Court, debtors in mass tort bankruptcies have mailed bar date notices directly to potential claimants whose names and addresses were known to them, as well as to plaintiffs' attorneys involved in the litigation.[335] Because of prior litigation and settlement efforts, these debtors already had the names and addresses of thousands of such claimants. In some cases the list of known claimants was augmented by names supplied by plaintiffs' attorneys upon the court's direction.[336] Although mailing notices to large numbers of tort claimants is costly, it does not generally involve any logistical or legal difficulties.

The provision of notice to the universe of unknown potential tort claimants, however, is a much more complex and costly endeavor. In the

330. *Id.* at 315.

331. *Id.* at 318.

332. *Id.*

333. *Id.* at 315.

334. *Id.* at 317.

335. *See, e.g.,* Order Regarding Debtors' Motion for Entry of an Order Establishing a Bar Date, Approving the Proof of Claim Forms, and Approving the Form and Manner of Notice, *In re* Babcock & Wilcox Co., No. 00-0558 (E.D. La. Oct. 30, 2000); Order Setting Bar Date (Asbestos-Related Claims), *In re* Eagle-Picher Indus., Inc., No. 1-91-00100 (Bankr. S.D. Ohio June 11, 1992).

336. *See, e.g.,* Order Setting Bar Date, Ex. 1, *In re Eagle-Picher Indus., Inc.* (Bar Date Notice Plan requiring direct mailed notice to "all persons (and their attorneys) whose names were furnished to the debtors prior to the date hereof in response to the First Meeting Order, or in response to any notice, order or letter of this court directing that names be furnished").

A.H. Robins bankruptcy case, for example, the debtor engaged in a $4 million (in 1986 dollars) notice campaign[337] that involved running paid ads in eight magazines and 233 newspapers in the United States; broadcasting television announcements on network and cable television over a three-week period; and using press conferences, press releases, and public service announcements to media outlets, public health officials, and U.S. embassies to reach potential claimants in ninety foreign countries.[338] The 1996 notice effort in the *Dow Corning* bankruptcy case cost some $8 million.[339] It "included press releases, public relations initiatives, television and print advertising, direct mail, targeted mailings to specific interest groups, internet postings, and a toll-free telephone number."[340]

The court's role in this notification process is not to dictate the means of providing notice of the bar date to known and unknown tort claimants, but to rule on the adequacy of the debtor's proposed plan for giving notice. Mass tort debtors typically hire media or noticing consultants to devise a notice dissemination plan. That plan will describe the target audience for the notice campaign, identifying the characteristics of the group likely to include potential claimants, and then set forth a strategy for reaching that target audience, using an array of media. In the *Babcock & Wilcox* asbestos bankruptcy case, for example, the notice dissemination plan described the target audience as all adults, but especially "men 35+, with a further emphasis on the core audience of men 55+."[341] The plan then set forth a notice program using "paid notices on national television and [in] well-read national magazines, as well as [in] more than 900 newspapers in large cities and small towns via Sunday newspaper supplements."[342] In addition, notices in Spanish were planned for Puerto Rico, and further exposure was to be achieved by means of news articles, on-line communications, and the use of third-party organizations.[343]

The debtor's notification plan needs to provide sufficient detail to enable the judge to determine that the method of giving notice is "reasonably

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337. Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1361 (4th Cir. 1987).

338. *Id.*

339. *In re* Dow Corning Corp., 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997).

340. *Id.*

341. Order Regarding Debtors' Motion for Entry of an Order Establishing a Bar Date, Approving the Proof of Claim Forms, and Approving the Form and Manner of Notice (Ex. G), *In re* Babcock & Wilcox Co., No. 00-0558 (E.D. La. Oct. 30, 2000).

342. *Id.*

343. *Id.*

calculated, under all the circumstances, to apprise interested parties" of the bar date. For that reason, the bankruptcy judge presiding over the *Eagle-Picher* case insisted that the debtor provide a plan with greater specificity, "including identification of media, with an explanation for why such media are to be utilized, and why other media are not to be utilized, the frequency of any publication and/or broadcast, and a program based on real lead times for the particular media involved as to when the program is to begin."[344]

Courts approving such notice plans have not insisted on perfection, however, just reasonableness under the circumstances. As the Fourth Circuit explained in the *A.H. Robins* case:

> The court must balance the needs of notification of potential claimants with the interests of existing creditors and claimants. A bankrupt estate's resources are always limited and the bankruptcy court must use discretion in balancing these interests when deciding how much to spend on notification.[345]

Accordingly, courts have approved bar date notice plans that were projected to reach approximately 90% of the target audience, rejecting arguments that a 100% projection should be required.[346]

As previously discussed,[347] any attempt to give notice to persons who have not yet manifested any injuries from the debtor's product raises difficulties of an even greater magnitude. The Supreme Court itself has questioned whether "notice sufficient under the Constitution . . . could ever be given to legions so unselfconscious and amorphous."[348] For that reason, in mass tort bankruptcy cases involving future claimants, the bar date has generally not been used as a barrier to relief for persons whose injuries have not become manifest by that deadline; instead, those persons have been allowed to seek recovery from trusts when they do experience injuries, even though they did not file proofs of claim.[349]

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344. *In re* Eagle-Picher Indus., Inc., 137 B.R. 679, 682 (Bankr. S.D. Ohio 1992).

345. Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1364 (4th Cir. 1987).

346. *In re* Babcock & Wilcox, No. 00-0558, slip op. at 13–14 (E.D. La. Aug. 25, 2000).

347. *See supra* section III.G.1.b.

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

349. *See, e.g., In re* Babcock & Wilcox, No. 00-0558, slip op. at 5 (E.D. La. Aug. 25, 2000) ("Debtors do not seek a bar date for any future asbestos-related claims . . . ."); Order Setting Bar Date (Asbestos-Related Claims), *In re* Eagle-Picher Indus., Inc., No. 1-91-00100 (Bankr. S.D. Ohio June 11, 1992) ("The Bar Date has no applicability to future asbestos-related claimants.").

E. Resolution of Causation and Other Liability Issues

As previously discussed,[350] one of the advantages of bankruptcy as a mass tort resolution device is that it centralizes the previously dispersed litigation in one court, where it can be resolved on a global basis. Once that litigation has been brought into the bankruptcy court, chapter 11 offers a process that promotes negotiation among the various constituencies with the goal of arriving at a consensual plan of reorganization. But what if the parties to the tort litigation—the debtor and the tort claimants—fundamentally disagree over the validity of all or a large portion of the hundreds of thousands of tort claims that are asserted against the debtor, and as a result, they are unable to negotiate a settlement? How does the court resolve the overarching liability issues in a way that is efficient (or at least feasible) and that also satisfies the due process rights of all of the parties? Unfortunately, there exists little precedent to guide courts facing these questions, and the answers are not spelled out any more clearly in the bankruptcy context than they are in the non-bankruptcy litigation context.

When the first wave of asbestos bankruptcies were filed, the litigation against the debtors had already matured to the point that the debtors did not seriously dispute the general causation issue in the bankruptcy proceedings; that is, they did not seek to establish that asbestos did not cause the types of diseases the claimants alleged.[351] The major liability issue in these bankruptcies, therefore, was the total amount of liability, not whether the debtors were liable at all.[352] Determination of the amount of that liability, whether by judicial estimation or the parties' negotiations, was largely based on historical settlement values.[353] Individual causation issues—whether a particular claimant had been exposed to the debtor's asbestos product and whether the claimant suffered from an asbestos-related disease or impairment—were left to the postconfirmation, claims-payment phase of

350. *See supra* section II.D.

351. *See In re* Dow Corning Corp., 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997) ("The present case is perhaps the *first* mass tort bankruptcy where liability has been disputed by a debtor.") (emphasis added).

352. *See id.* ("In substantially all of the mass tort bankruptcy cases which preceded this one, the major questions were how much would be needed to satisfy the thousands of tort claims; how best to raise the money; and what would be the best methodology to fairly apportion those funds among the claimants.").

353. *See, e.g., In re* Eagle-Picher Indus., Inc., 189 B.R. 681, 691 (Bankr. S.D. Ohio 1995) ("Valuation of claims should be based upon settlement values for claims close to the filing date of the bankruptcy case . . . .").

the case. Accordingly, the judges presiding over those bankruptcy cases were generally not called upon to resolve significant causation or other liability issues.

In some of the more recent mass tort bankruptcies, however, debtors have argued against using prebankruptcy settlement values as the basis for valuing the tort claims.[354] Instead, they have argued that the amounts that they paid in the past to settle cases included a premium for disposing of the cases on a low transaction-cost basis without regard to the merits of the claims; therefore, those settlement values do not reflect the amount that such cases are actually worth. Furthermore, they contend, they have valid defenses to the tort claims as a whole or to large categories of claims, which they seek to have the court resolve in their favor. For example, some debtors have argued that scientific evidence does not support the claim that their product caused some of the diseases alleged by claimants[355] or that large groups of claims are barred by applicable statutes of repose, the government contractor defense, or other defenses.[356] They have thus called upon the judges presiding over their bankruptcy cases to rule on their defenses and to eliminate large numbers of allegedly unmeritorious tort claims before any value is placed on their tort liability as a whole.

Despite these vigorous attempts by debtors to reduce their tort liability by challenging the validity of large numbers of claims, courts have generally refrained from ruling on the asserted defenses, leaving the evaluation of the claims to the parties' negotiations.[357] Settlements leading to consensual plans in several cases have eliminated the need for judicial rulings on the debtor's defenses, as well as the appeals that would surely follow any such rulings.[358]

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354. *E.g., In re* USG Corp., 290 B.R. 223, 224 (Bankr. D. Del. 2003) (explaining debtor's proposal to challenge validity of asbestos claims by "unimpaired" claimants and alternative proposal by Asbestos Claimants' Committee to estimate claims based on the debtor's "prepetition settlements and litigation history"); B&W's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claim Filed Here at 26, *In re* Babcock & Wilcox Co., No. CIV.A .00-0558 (E.D. La. Oct. 18, 2001) ("B&W's pre-petition settlement program did not determine B&W's true tort liability because it was designed to settle large numbers of claims at minimal transaction costs. B&W did not seek to 'separate the wheat from the chaff' . . . .").

355. *E.g., In re USG Corp.*, 290 B.R. at 225; *In re* Dow Corning Corp., 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997).

356. *E.g., In re* Babcock & Wilcox Co., No. CIV.A. 00-0558, 2000 WL 422372, at *4 (E.D. La. Apr. 17, 2000).

357. *See, e.g., In re* Dow Corning Corp., 211 B.R. at 593.

358. *See, e.g.,* Findings of Fact & Conclusions of Law Regarding Core Matters & Proposed Findings of Fact, Conclusions of Law & Recommendations to the Dist. Ct. with respect to Non-

A judge, therefore, who is presented with a debtor's request to adjudicate defenses to tort claims filed in a mass tort bankruptcy case should carefully consider the need for such litigation in the bankruptcy proceedings. If prior to bankruptcy the debtor was unsuccessful in litigating the defenses that it now raises, claimants may argue that it is now estopped from asserting them. If that occurs, the judge will have to determine whether the applicable state law precludes the debtor from raising those defenses against other claimants pursuant to the doctrine of offensive, nonmutual issue preclusion.[359] If it does, the full faith and credit statute requires a federal court to give the resolution of those issues the same preclusive effect that the courts of the rendering state would give it.[360] Absent new evidence[361] or other facts supporting an exception to issue preclusion,[362] the bankruptcy court should not allow the debtor to relitigate the issues.

If, however, issue preclusion is not asserted or is determined not to apply, then the judge must consider whether it is necessary for the court and parties to incur the substantial costs and delay involved in such litigation. On the one hand, if the debtor asserts defenses to claims filed in the bankruptcy that it is not precluded from litigating, then section 502(b) of the Bankruptcy Code requires a ruling on those defenses in order to determine the allowability of the claims.[363] On the other hand, if other developments in the case might eliminate the need for a judicial determination of the validity of numerous defenses involving thousands of claims, then the judge would avoid unnecessary costs and delay by refraining from ruling on the defenses until it becomes necessary. In the *USG* bankruptcy

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core Matters at 6–7, *In re* Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. Oct. 8, 2004) (discussing settlement among debtor, tort claimants' committee, and future claims representative); Gibson, *supra* note 64, at 223 (discussing the consensual resolution of the *Dow Corning* bankruptcy case).

359. The Supreme Court in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329 (1979), recognized the availability of this doctrine in appropriate cases as a matter of federal common law, *id.*, and a number of state courts have accepted the doctrine as well.

360. 28 U.S.C. § 1738 (2000).

361. *See* Restatement (Second) of Judgments § 29(8) (1982) (including as a reason not to apply issue preclusion in subsequent litigation with others the existence of "[o]ther compelling circumstances mak[ing] it appropriate that the party be permitted to relitigate the issue"); *id.* at cmt. j ("Important among such other circumstances is the disclosure that the prior determination was plainly wrong or that new evidence has become available that could likely lead to a different result.").

362. *See id.* §§ 28, 29.

363. 11 U.S.C. § 502(b)(1) (2000) ("[T]he court . . . shall allow such claim . . . except to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law, for a reason other than because such claim is contingent or unmatured[.]").

case, for example, the judge declined to rule on the debtor's defenses to the non-cancer claims that had been asserted against it, including the claims of the so-called unimpaired claimants, because of the possibility that the cancer claims alone would be sufficient to render the debtor insolvent.[364] If that were the case, the judge reasoned, "existing equity will get nothing under any plan of reorganization[,] . . . [and] [t]he debtors-in-possession will have no stake, and presumably no interest, in pressing for the elimination of the majority of the claims they now argue are invalid."[365] Thus, the court determined that "it is far more practical to estimate the universe of cancer claimants by themselves than to undergo a merit-based estimation of all the tort claimants."[366] Likewise, a judge might refrain from ruling on a debtor's proffered defenses if the judge believes that the parties are likely to reach a consensual resolution of the value and method of compensation of the tort claims.[367]

If it becomes necessary for the judge to resolve causation and other defenses in a mass tort bankruptcy case, the Bankruptcy Code and Rules suggest alternative contexts in which these liability issues might be litigated and resolved. This preconfirmation litigation might be undertaken as part of the claims allowance process, and the judge would rule on the debtor's objections to specific tort claims either individually or on an aggregated basis.[368] Or the debtor might raise its defenses and seek their resolution as part of the process of estimating the value of the debtor's tort liability.[369] Either resolution method presents an issue concerning who has authority to make such a determination. Normally the allowance of claims and their

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364. *In re* USG Corp., 290 B.R. 223, 226 (Bankr. D. Del. 2003).

365. *Id.*

366. *Id.*

367. *See In re* Dow Corning Corp., 211 B.R. 545, 593 (Bankr. E.D. Mich. 1997) ("*If* it becomes clear to this Court that hope for a consensual plan is lost and liquidation of claims through litigation becomes necessary, we will recommend that the District Court schedule staggered consolidated general causation trials.") (emphasis added).

368. *See* 11 U.S.C. § 502(b)(1) (2000); Fed. R. Bankr. P. 3007; *see also In re* Babcock & Wilcox Co., No. CIV.A. 00-0558, 2000 WL 422372, at *2, *4 (E.D. La. Apr. 17, 2000) (noting the debtor's intention to file objections to proofs of claim filed by tort claimants in order to challenge the validity of the claims); *cf.* MCL 4th, *supra* note 3, § 22.315 (discussing application of a test-case approach to mass tort litigation); *id.* § 22.93 (discussing possible mass tort trial structures).

369. *See* 11 U.S.C. § 502(c) (2000); *see also In re* USG Corp., 290 B.R. 223, 227 (Bankr. D. Del. 2003) ("[T]he Court will hold an estimation hearing under 11 U.S.C. § 502(c). At this time, debtors will be permitted to present their defenses.").

estimation are core matters that the bankruptcy judge may determine.[370] The special statutory provisions concerning wrongful death and personal injury tort claims,[371] however, have led some courts to conclude that the district judge must rule on potentially dispositive defenses to such claims.[372]

Regardless of which judge presides over the proceedings to determine the validity of the debtor's defenses, the judge must consider devising a feasible means for litigating the large number of claims involved. Federal Rule of Civil Procedure 42, which is incorporated into the Bankruptcy Rules,[373] provides that when actions pending in the same court involve a common question of law or fact, the court "may order a joint hearing or trial of any or all the matters in issue in the actions," and "it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."[374] The court might use this procedural device to resolve common issues presented by a debtor's objections to multiple claims. Resolving these issues in a way that avoids unwieldy litigation yet satisfies the due process rights of the claimants will require care and creativity on the part of the parties and the court. Unlike the class action rule, Rule 42 provides no express authority for a court to appoint a single group of lawyers to represent all of the claimants in the consolidated proceedings,[375] nor does the tort claimants' committee necessarily have this right.[376] Therefore,

370. 28 U.S.C. § 157(b)(2)(B) (2000).

371. *Id.* (excluding from the list of core matters "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11"); *id.* at (b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending."); *id.* § 1411(a) ("[T]his chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.").

372. *See In re Babcock & Wilcox*, 2000 WL 422372, at *3 (collecting conflicting decisions).

373. Fed. R. Bankr. P. 7042 (making Rule 42 applicable in adversary proceedings); *id.* at 9014(c) (making Rule 7042 applicable in contested matters unless the court directs otherwise). *See also* MCL 4th, *supra* note 3, § 10.123 (discussing consolidation under Rule 42(a) of related litigation, including adversary proceedings in bankruptcy court); *id.* § 11.63 (discussing structure of trials, including consolidated trials); *id.* § 22.31 (discussing criteria for aggregating mass tort claims).

374. Fed. R. Civ. P. 42(a).

375. *See id.*; *see also* MCL 4th, *supra* note 3, § 14.211 (discussing district court's authority to appoint counsel to represent claimants in class actions and in multidistrict consolidated litigation).

376. *See* 11 U.S.C. § 1103(c) (2000) (listing powers of a committee appointed under section 102 of the Code).

each claimant might be able to insist on the participation of his or her lawyer in the common-issues hearing, since the hearing will affect the allowance of his or her individual claim. If so, the consolidation could yield an unmanageable proceeding if a single trial is used. Estimation proceedings, on the other hand, might be conducted on an aggregated basis, and the tort claimants' committee could represent all of the tort claimants.[377] It therefore may be more manageable to litigate broadly applicable defenses in that context, assuming that the Bankruptcy Code provides authority for estimation of a group of claims, rather than individual claims.[378]

To date, a variety of aggregative approaches have been suggested in mass tort bankruptcies for resolving common issues or liquidating tort claims prior to confirmation;[379] none has actually been used, however. Efforts outside bankruptcy to adjudicate large numbers of tort claims or defenses on a group basis have encountered many procedural and constitutional obstacles.[380] Efforts to litigate mass tort claims in the bankruptcy

377. *See, e.g., In re* Eagle-Picher Indus., Inc., 189 B.R. 681, 683 (Bankr. S.D. Ohio 1995) (referring to Injury Claimants' Committee's role at the estimation hearing).

378. *See infra* section IV.F.

379. For example, in the *Dow Corning* bankruptcy, the debtor proposed that a trial be conducted as part of the claims estimation process on the issue of the disease-causing potential of silicone gel. Only scientific evidence meeting the *Daubert* standard would have been admissible. "Based upon the admissible scientific evidence, the Court would estimate the total aggregate value of all contingent breast implant claims." *In re* Dow Corning Corp., 211 B.R. 545, 555 (Bankr. E.D. Mich. 1997). In addition, the debtor reserved the right to have a "single common-issue causation trial before the District Court, seeking disallowance of some or all of the breast implant claims." *Id.* at 556. The tort claimants' committee in the case proposed an alternative plan, under which a series of summary jury trials would have been conducted at four different locations, and "[d]ata obtained through the summary jury trials would be used by the Court to assist in estimating the total value of all nondisease breast implant claims." *Id.* at 559. The committee proposed that the value of the breast implant disease claims be estimated on the basis of prebankruptcy settlements and verdicts. *Id. See also In re* USG Corp., 290 B.R. 223, 226 (Bankr. D. Del. 2003) (describing debtors' proposal "to litigate their defenses in relation to a sample of one percent of claimants, and extrapolate the results over the entire claimant pool to arrive at an estimated total allowed claim"); Debtors' Motion for a Case Management Order Establishing a Protocol for Litigating Asbestos Personal-Injury Claims at 17–18, *In re* Babcock & Wilcox Co., No. CIV.A.00-0558 (E.D. La. Oct. 18, 2001) (describing debtors' proposal to file an objection and move for summary judgment with regard to a small number of "exemplar claimants in a particular category" and then, if the court sustained its defenses to the exemplar claims, to file "omnibus objections/summary judgment motions applicable to all similarly situated claimants," and the claimants would bear the burden of showing cause why their claims should not be disallowed). *See also* MCL 4th, *supra* note 3, § 22.93 (discussing structure of mass tort trials).

380. *See, e.g.,* Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998) (holding that individual jury determinations of liability, injury, and damages are required by the Seventh Amendment in asbestos mass tort personal injury context); *In re* Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997) (overturning district court plan to use the results of a bellwether trial of 30

court face the same obstacles. A consensual resolution that would eliminate the need for uncharted procedures followed by lengthy appeals is thus strongly preferable.

F. Estimation of Tort Claims

One of the biggest challenges presented by a mass tort bankruptcy case is quantifying the debtor's mass tort liability. Even if a bar date is imposed for the filing of tort claims, the claims for which a proof of claim is filed will generally be unliquidated and disputed; thus, the face amount demanded will not be accepted as the allowed amount. Furthermore, most mass tort bankruptcies will require a valuation of the debtor's future tort liability, and for these claims generally no proofs of claim will be filed. Because this mass tort liability is usually the factor that precipitated the bankruptcy, being able to put a dollar value on it will be essential to the parties' negotiation of a reorganization plan.[381] Likewise, the court will need a basis for judging the amount of the tort liability in order to confirm the reorganization plan: feasibility, the best interests test, whether the plan is fair and equitable, and whether it discriminates unfairly against a nonaccepting class all may depend on the aggregate amount of the tort liability.

The challenge, of course, is to find a cost- and time-efficient, but accurate, way to value the tort claims. Because the need to efficiently determine the value of unliquidated and disputed claims is not unique to mass tort bankruptcy cases, the Bankruptcy Code provides a possible solution: estimation. Section 502(c) provides that "[t]here 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

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cases to determine 3,000 others because the selected cases were not sufficiently representative); *In re* Fibreboard, 893 F.2d 706 (5th Cir. 1990) (holding that, as a matter of Texas law, plaintiffs must show specific causation and individual injuries to establish a claim). *But see* Hilao v. Marcos, 103 F.3d 767 (9th Cir. 1996) (holding that, on balance, in an "extraordinarily unusual" case involving 10,000 injury claims, the use of statistical sampling and extrapolation to determine individual personal injury recoveries did not violate due process). *See generally* MCL 4th, *supra* note 3, § 22.93.

381. *In re* A.H. Robins Co., 880 F.2d 709, 720 (4th Cir. 1989) ("As a basis for any plan of reorganization it was necessary that an estimation be made of the unliquidated claims against the debtor under Section 502(c) of the Bankruptcy Code . . . ."); *In re* Eagle-Picher Indus., Inc., 189 B.R. 681, 682 (Bankr. S.D. Ohio 1995) ("All of the parties herein understand that the purposes of estimation of asbestos claims are, first, so that a proper allocation of plan funding assets can be made as between the unsecured creditors and the PI Trust created by the plan, and, second, whether there is any equity available for equity security holders.").

the administration of the case . . . ."[382] Commentators often cite the availability of estimation of total liability as one of the advantages of using bankruptcy to resolve mass tort claims.[383]

Congress, however, has excluded from the scope of core proceedings that a bankruptcy judge is permitted to hear and determine "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate *for purposes of distribution* in a [bankruptcy] case."[384] Section 157 of title 28 provides that personal injury tort and wrongful death claims shall be tried in the district court, rather than in the bankruptcy court,[385] and section 1411 of title 28 preserves the right to a jury trial for such claims.[386] In the end, though, courts and commentators generally agree that these statutory restrictions do not prevent a bankruptcy judge from estimating the value of tort claims for purposes of the negotiation and confirmation of a reorganization plan, even if the maximum aggregate payment to tort claimants will be based on this estimate.[387] In mass tort bankruptcy cases to date, the practical effect of the statutory limitations has been minimal because the parties have for the most part agreed to resolve claims by creating a trust; few claims end up being litigated in the courts.

Section 502(c) provides for the court's estimation of *individual* unliquidated claims in order to avoid undue delay in the administration of the bankruptcy case. In mass tort bankruptcies, however, courts have relied on this provision as providing them with authority to estimate the *total amount* of all the tort claims, present and future, that will be dealt with under the plan.[388] The Fourth Circuit concluded that "'Congress' goals would be achieved equally well by assigning a dollar value to the whole of the asbestos plaintiffs' claims as by assigning a dollar value to each individual claim.'"[389] The court further concluded that allowing the bankruptcy court to estimate the aggregate tort liability is consistent with the statutory

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382. 11 U.S.C. § 502(c) (2000) (emphasis added).

383. *See, e.g.,* Houser, *supra* note 46, at 471; Resnick, *supra* note 46, at 2056–58.

384. 28 U.S.C. § 157(b)(2)(B) (2000) (emphasis added).

385. *Id.* § 157(b)(5).

386. *Id.* § 1411(a).

387. *See, e.g.,* Roberts v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 45 B.R. 823, 826 (S.D.N.Y. 1984); Houser, *supra* note 46, at 468.

388. *See, e.g., In re* Eagle-Picher Indus., Inc., 189 B.R. 681, 692 (Bankr. S.D. Ohio 1995).

389. *In re* A.H. Robins Co., 880 F.2d 709, 720 n.13 (4th Cir. 1989) (quoting Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings,* 96 Harv. L. Rev. 1121, 1132–33 (1983) (emphasis omitted)).

requirements for district courts to determine the recovery rights of individual tort claimants.[390]

Just because the bankruptcy court has the authority to estimate the debtor's tort liability does not mean that it does so in every mass tort case. In most cases to date, the key parties—the debtor, the tort claimants' committee, the future claims representative, and the unsecured creditors' committee—have negotiated the value of the tort claims in the course of arriving at a jointly proposed plan, and the judge has confirmed the plan on the basis of the evidence submitted without conducting a separate estimation proceeding.[391] Even under those circumstances, however, the judge needs to understand the basis for the tort liability figure the parties arrived at in order to determine whether to confirm the plan.

If a judicial estimation is required, neither section 502(c) nor any provision of the Bankruptcy Rules provides any guidance about the method the judge should use. As a result, courts have held that the estimation method to be used is left to the bankruptcy court's discretion.[392] In bankruptcy cases not involving mass torts, a variety of approaches have been suggested and used.[393] In mass tort cases, however, courts have traditionally used the historical settlement values for different categories of the tort claims and a prediction based on epidemiological data of the incidence and types of future claims.[394] The judicial estimation process used in two mass tort bankruptcy cases—*A.H. Robins* and *Eagle-Picher*—illustrates this traditional approach.

The *A.H. Robins* case, filed in 1985, was precipitated by the assertion of thousands of claims against the debtor arising from the use of its birth

390. *Id.*

391. *See, e.g.,* Gibson, *supra* note 64, at 170–72 (discussing the negotiation of the value of the tort claims in the *UNR* case and confirmation of the plan based on that value); *id.* at 224–27 (same for the *Dow-Corning* case).

392. *See, e.g.,* Addison v. Langston (*In re* Brints Cotton Mktg., Inc.), 737 F.2d 1338, 1341 (5th Cir. 1984); Bittner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982); *In re* Thomson McKinnon Sec., Inc., 143 B.R. 612, 619 (Bankr. S.D.N.Y. 1992); *In re* Baldwin-United Corp., 55 B.R. 885, 899 (Bankr. S.D. Ohio 1985).

393. Included among these methods are the ultimate merits test, the present probability test, the forced settlement model, the use of arbitration awards, the market value approach, the summary jury trial approach, and even the full jury trial of the claim. *See generally* Alison J. Brehm et al., *To Be or Not to Be: The Undiscovered Country of Claims Estimation in Bankruptcy*, 8 J. Bankr. L. & Prac. 197, 248–55 (1999).

394. *See* Fred S. Hodara & Robert J. Stark, *Protecting Distributions for Commercial Creditors in Asbestos-Related Chapter 11 Cases*, 10 J. Bankr. L. & Prac. 383, 398–99 (2001).

control device, the Dalkon Shield.[395] The court began the process of placing a value on the tort claims with the setting of a bar date for Dalkon Shield claims. Almost 200,000 claimants completed the two-step process required for filing a proof of claim.[396] The court then appointed an expert to compile a database of information about the claims. All tort claimants were required to complete a two-page questionnaire, and 6,000 of the tort claimants were sent a fifty-page questionnaire requesting detailed information about their use of the product, their injuries, and the evidence supporting their claims.[397] Researchers also compiled information about the Dalkon Shield claims that were resolved prior to bankruptcy. Based on that information, they were able to determine the historical monetary values of different types of Dalkon Shield claims.[398]

This data-gathering process lasted over a year and a half and cost some $5 million. The database was then made available to the debtor, the official committees, the future claims representative, the debtor's insurer, and their experts for their use in connection with the claims estimation hearing.[399] The district judge presiding over the bankruptcy case had determined that "only an estimation of the personal injury claims en masse would bring forth additional prospective purchasers or those interested in merging with Robins[,]" because of the need to set a cap on the tort liability.[400] Accordingly, he granted the request of the debtor and the equity security holders' committee to estimate the aggregate value of the tort claims.

The estimation hearing extended over a period of seven days. Robins, the official committees, the future claims representative, and the insurer each presented their own experts, who testified as to their estimates of the total tort liability. Their estimates ranged from a low of $800 million (Robins) to a high of $7 billion (tort claimants' committee).[401] The expert for the future claims' representative testified only as to the value of the future claims ($660 million).[402] These experts presented "extensive medical,

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395. *In re* A.H. Robins Co., 880 F.2d 709, 717 (4th Cir. 1989).

396. *In re* A.H. Robins Co., 88 B.R. 742, 745 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

397. Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 699 (4th Cir. 1989).

398. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 682–84 (1989).

399. *In re A.H. Robins*, 88 B.R. at 746.

400. *Id.*

401. *Id.* at 747.

402. *Id.*

statistical, epidemiological, and other expert testimony."[403] During the estimation hearing, the district judge "requested experts for the various parties in interest to recalculate their estimates using various assumptions, different from those used by those experts in their original analyses."[404]

The court announced its finding that "the sum of $2.475 billion, payable over a reasonable period of time, is sufficient to pay in full all Dalkon Shield personal injury claims as well as expenses of the Trusts established to administer the claims."[405] The court gave no explanation of its basis for reaching this conclusion, and the figure the court selected was not one that any of the experts had suggested. It is therefore impossible to tell the exact methodology the court used in making its estimate. The finding nevertheless was upheld by the Fourth Circuit as not being clearly erroneous.[406]

The basis for the estimate of tort liability in the *Eagle-Picher* bankruptcy case was more transparent; in fact, the estimation decision in that case represents the most detailed judicial opinion on the estimation of claims in a mass tort bankruptcy.[407] In that asbestos bankruptcy case, the court granted the debtor's motion to estimate the asbestos-related liability after the debtor, tort claimants' committee, and future claims representative had negotiated a value of $1.5 billion for those claims. The unsecured creditors' committee, however, insisted that the tort liability amount was much less, and it refused to support a plan based on the negotiated figure. All of the parties therefore agreed that a judicial estimation was required.[408]

Unlike the *Robins* case, *Eagle-Picher* involved no additional information gathering regarding individual claims before the estimation hearing. The bankruptcy court denied the motion of the unsecured creditors' committee for the initiation of information-gathering procedures, concluding that "because of the depth of information provided by debtors' closed claims database, reliable information for the valuation of claims is available without further information."[409]

At the estimation hearing, each of the key constituencies—debtor, tort claimants' committee, future claims representative, unsecured creditors'

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403. *Id.* at 746–47.

404. *Id.* at 747.

405. *Id.*

406. Menard-Sanford v. Mabey, (*In re* A.H. Robins Co.), 880 F.2d 694, 700 (4th Cir. 1989).

407. *See In re* Eagle-Picher Indus., Inc., 189 B.R. 681 (Bankr. S.D. Ohio 1995).

408. *Id.* at 682.

409. *Id.* at 692.

committee, and equity committee—presented expert testimony concerning the value of the tort claims. As in the *Robins* case, the expert for the future claims representative testified only as to the value of the future claims. Even though three of the parties (debtor, tort claimants' committee, and future claims representative) had previously agreed on the $1.5 billion valuation of the claims, they each presented their own experts, who expressed different conclusions as to the estimated value.

All of the experts who testified, except the expert for the equity committee, based their valuations of the open prepetition claims asserted against the debtor on analyses of the claims that had been resolved before bankruptcy.[410] The debtor's expert, for example, identified six disease categories among the closed claims, determined an average settlement amount for each category, and then applied those closed-case averages to each of the open prepetition claims by category. He arrived at an estimate of $353 million (in 1990 dollars).[411] The expert for the tort claimants' committee expanded on this approach by performing a number of analyses that took into account different variables, such as disease type, occupation, claimant's state, law firm representing the claimant, and year the claim was filed. His estimate of the open claims was $492 million (in 1991 dollars).[412]

The expert for the equity committee rejected this closed-case analysis. He instead based his estimate of the prepetition claims on the experience of the trust fund created by the *UNR* asbestos bankruptcy case, noting that 78% of the claims filed in the *Eagle-Picher* case by the bar date were in the UNR trust database. His estimate was $201 million for all of the open prepetition claims and those additional claims filed by the bar date.[413]

In evaluating the expert testimony, the bankruptcy judge concluded that "it is sound to value the open prepetition claims based upon the closed prepetition claims of the debtors[,]" because "the only sound approach is, if possible, to begin with what is known."[414] He elaborated:

> To begin without utilizing information known about these debtors and their history in the handling of claims which have been asserted against them in the past, and their disposition, is to ignore a valuable experiential resource. Debtors have a database containing detailed information about each of the closed claims. From the database it is possible to associate with each claim

410. *Id.* at 684–85.
411. *Id.* at 684.
412. *Id.*
413. *Id.* at 686.
414. *Id.*

> characteristics such as occupation of the claimant, nature of the disease, the amount which was paid to the claimant, as well as a number of other factors . . . . Because much of the same information is known about the open prepetition claims . . . , it is possible to ascertain with some degree of accuracy what the settlement figures for those claims would be had they been resolved prepetition.[415]

The judge therefore rejected the testimony of the equity committee's expert. He found that the opinion of the expert for the tort claimants' committee "rest[ed] on the soundest basis" because of the large number of variables he took into account.[416] After discounting that expert's estimate to the value as of the petition filing date, the judge estimated the open prepetition claims to be worth $478 million.[417]

A bigger challenge was the bankruptcy court's need to estimate the future claims (which the court defined as all claims that had been or would be asserted against the debtor after the bankruptcy petition date). As the court stated, "estimation of the value of future claims requires a leap into the unknown."[418] All of the experts, again except for the one the equity committee presented, relied on the work of an epidemiologist in projecting the number and type of claims that would be asserted in the future.[419] While the experts differed as to the expected ending date for the asbestos claims, all except the equity committee's expert used the closed-claims values for each disease category in computing an estimate of the total future claims liability.[420] There were variations in the analyses of these experts. The debtor's expert, for example, adjusted the forecast of the number and types of future claims based on the actual claims experience of the Manville and UNR trusts,[421] and the tort claimants' expert made adjustments to take into account filing trends against other defendants during the previous five years.[422] The expert for the equity committee again based his estimate of the future claims on the values paid out by the UNR trust.[423] The estimates of

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415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.* at 687.
419. *Id.*
420. *Id.* at 687–90.
421. *Id.* at 689.
422. *Id.*
423. *Id.* at 690.

the future claims liability by the various experts ranged from $125 million (equity committee) to $2.6 billion (tort claimants).[424]

The judge again rejected the equity committee expert's testimony, which was based on UNR trust payouts. He stated that "the amount that the UNR Trust actually paid out to claimants . . . is simply not the same thing as estimating the value of future claims as of the filing date of the bankruptcy case."[425] The court had previously held that it was the value of the claims themselves, as "distinguished from estimating the value which claimants might take in satisfaction of their claims," that was to be estimated under section 502(c).[426]

The *Eagle-Picher* opinion listed seven factors that should be taken into account in estimating future claims:

- claims history of the debtor, with possible adjustment to take into account general trends in the rate of claims filing;
- estimate of number of future claims;
- categorization of claims by disease, occupation, and other factors;
- settlement values just prior to the bankruptcy filing;
- indemnification increase over time;
- lag time between filing and payment; and
- discount rate to determine value as of bankruptcy filing.[427]

The bankruptcy judge concluded that the estimate of the debtor's expert came closest to satisfying the listed criteria. Because his estimate stated a value in 1995 dollars, however, the judge discounted it to the value as of the filing date, arriving at a figure of just over $2 billion.[428]

When the judge added the estimate for prepetition claims to the estimate for the future claims, he reached a total figure for the aggregate tort liability of $2.5 billion.[429] That amount exceeded by $1 billion the figure that the debtor, tort claimants' committee, and future claims representative had previously agreed to and that the unsecured creditors' committee had rejected as too large. Eventually the four constituencies reached agreement on a plan based on a $2 billion estimate of the tort liability.[430]

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424. *Id.* at 688–90.
425. *Id.* at 692.
426. *Id.* at 683.
427. *Id.* at 690–91.
428. *Id.* at 692.
429. *Id.*
430. *In re* Eagle-Picher Indus., Inc., 203 B.R. 256, 262 (S.D. Ohio 1996).

The estimation approach of the equity committee's expert in *Eagle-Picher*, which the bankruptcy court rejected, in some ways foreshadowed the approach debtors have suggested in more recent mass tort cases. That is, both the equity committee in *Eagle-Picher* and more recently several asbestos defendant-debtors have argued that the amounts for which the companies previously were willing to settle large numbers of claims in order to avoid the costs of litigation overstated the actual value of those claims.[431] They have contended that an estimation under section 502(c) requires consideration of the actual strength of the claims on the merits.[432] The *Eagle-Picher* expert sought to do such an evaluation by considering the payments actually made for what he argued were equivalent claims in another bankruptcy case. Debtors in cases such as *Dow Corning*, *Babcock & Wilcox*, and *USG Corporation* sought to do so by seeking to litigate various defenses that could eliminate large categories of claims.[433]

As previously discussed,[434] a mass tort debtor may seek to litigate such defenses either by objecting to specific claims that tort claimants have filed or by seeking a court ruling on the defenses as part of a claims estimation procedure. Regardless of the procedural context, the court may have to determine whether the debtor is precluded by prior litigation from raising the defenses against new claimants. If the debtor can no longer assert those defenses because of issue preclusion, then they should not be a basis for disallowing claims or for discounting the overall amount of tort liability. If, however, the debtor is not precluded under the governing law, then the debtor (or equity committee) should be entitled to raise and seek a judicial determination of the validity of the defenses as part of a judicial estimation process.[435] The possibility that large numbers of unmeritorious claims have been asserted in the bankruptcy case against the debtor or are likely to be asserted in the future bears directly on the aggregate amount of the debtor's tort liability. If there are in fact serious defenses the debtor is still legally entitled to assert against large numbers of claims, then they must be resolved in some manner—either by negotiation or by judicial ruling—

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431. *See supra* note 354.

432. *See In re Eagle-Picher Indus., Inc.,* 189 B.R. at 685.

433. *See supra* notes 351, 354.

434. *See supra* section IV.E.

435. *See* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims, Congress having 'generally left the determination of property rights in the assets of a bankrupt's estate to state law.'") (citations omitted) (quoting Butner v. Ill. Dep't of Revenue, 440 U.S. 48, 54 (1979)).

before a fair determination can be made of the extent to which the tort claimants as a group are entitled to assets that would otherwise go to other unsecured creditors or be retained by shareholders.

The traditional use of historical settlement values as a basis for estimating present and future tort liability rests on the assumption that the amount by which claims were resolved in the past approximates the value that claims will have in the future. If, however, current and future claims are significantly different from prebankruptcy claims or if the amount the debtor previously paid to settle claims does not accurately reflect their actual value, then an estimate of the debtor's present and future tort liability should not be based exclusively on those historical values. A debtor or the tort claimants' committee should have the opportunity prior to a judicial estimation to establish the invalidity of past settlement values as a basis for valuing present and future claims.

In estimating the debtor's present and future tort liability in the *Owens-Corning* bankruptcy, the district judge concluded that "the claims are to be appraised on the basis of what would have been a fair resolution of the claims in the absence of bankruptcy."[436] That conclusion, however, did not mean that "historical results can properly be extrapolated into the future."[437] Instead, the judge noted, "some of the past results have been skewed by factors which can and should be avoided in the future."[438] The court identified the following factors as ones "unlikely to be replicated":

- venue shopping;
- mass screenings;
- erroneous x-ray interpretations;
- overpayments to unimpaired claimants;
- group lawsuits;
- global settlements; and
- punitive damages.[439]

The judge found most credible the expert witnesses whose testimony properly reflected these changed circumstances.[440]

In many mass tort cases the parties themselves have resolved these issues by negotiation, and they have proposed a reorganization plan that is

436. Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 722 (D. Del. 2005).
437. *Id.*
438. *Id.* at 722–23.
439. *Id.* at 723.
440. *Id.* at 725.

structured around an agreed-upon value of the tort liability. As one court explained, referring to the *Armstrong World Industries* bankruptcy, "In that and other cases, the value of asbestos liability is based upon the private parties' own assessment of that liability, as adjusted by mutual, self-interested compromise. The ultimate result is no less legitimate, however, than one imposed by the Court."[441] A negotiated solution is preferable to a judicially imposed one, because it eliminates costly and time-consuming litigation and appeals. Thus, a judge should refrain from ruling on the debtor's proffered defenses and from conducting an estimation proceeding until it becomes clear that no consensual resolution is possible.

Some courts have appointed a mediator to assist the parties in resolving the issue of the value of the tort claims.[442] Although the Bankruptcy Code and Rules contain no express authorization for the appointment of a mediator, courts have relied on several Code provisions in making such appointments. Some courts have appointed an examiner pursuant to section 1104(c) to serve as a mediator, although that role might be seen as going beyond the scope of the investigatory duties described for an examiner in sections 1104 and 1106. Some other courts have instructed the future claims representative to serve in this capacity. It is preferable, however, for the court to appoint a neutral person who does not represent any of the interests with a stake in the estimation. The court may make such an appointment pursuant to section 105 of the Code[443] or, in some districts, pursuant to local rules providing for court-ordered mediation. Whatever the legal authority it relies on for the appointment, the court needs to appoint someone it has confidence in and the parties can trust. It is also important for the court to set out clearly the ground rules for the mediation, including the duties of the parties with respect to the mediation, the authority of the mediator, the rules concerning communications with the mediator and among the parties, and provisions for the mediator's communication with the court.[444]

If, even with the intervention of a mediator, the parties are unable to arrive at a consensual resolution of the value of the tort claims (or of the ratio of the tort claims to the other unsecured claims), the court will have to

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441. *In re* USG Corp., 290 B.R. 223, 225 n.2 (Bankr. D. Del. 2003).

442. *See, e.g.,* Gibson, *supra* note 64, at 75 (discussing the appointment of a mediator in the *Eagle-Picher* bankruptcy case); *id.* at 224 (discussing the appointment of a mediator in the *Dow-Corning* bankruptcy case).

443. *See* 7 Collier on Bankruptcy, *supra* note 155, ¶ 1104.03[6][b].

444. *See also infra* section V.B (discussing use of a mediator to facilitate plan negotiation).

estimate the amount of the tort liability. At that point the judge will have to rule on any defenses the debtor raises that could affect the overall value of the claims. An adjudication of this type is fraught with procedural complexities. As one court pointed out, litigation of the debtor's defenses to thousands of claims, even if limited to a statistically reliable sample, raises both constitutional and logistical questions.[445] The court noted that proceeding in this manner raises questions about impairing the right to a jury trial and that even a sample of "one percent of the debtor's 190,000 claimants [would] still [be] an unmanageable 1,900 individual litigants, each of whom presumably would insist on exercising the full panoply of discovery and trial rights."[446]

It appears, however, that the claims estimation process offers a more flexible procedure for the resolution of such defenses than does the claims objection and allowance process. No individual claims need to be disallowed as a result of the court's ruling. Instead, the court's acceptance or rejection of the various defenses would be considered at this point only in estimating the aggregate amount of the tort liability. For example, if the court sustained a defense applicable to 15% of the present claims, the parties' experts and then the court could take that reduction into account in arriving at an estimate of the value of the present claims. Because the defenses would be litigated in the aggregate, the tort claimants' committee could conduct the estimation litigation, and the thousands of tort claimants and their lawyers would not participate individually.

Even if the debtor does not seek to litigate defenses to large numbers of the tort claims, the task of placing an accurate value on thousands of present claims as well as claims expected to arise for years into the future presents a huge challenge for the court. As one bankruptcy judge explained: "Given the numerous variables involved in estimating exposure, latency periods, products identification, etc., any estimation of asbestos liabilities is problematical, to say the least. Assumptions must be made that result in huge ranges of possible results. Predicting the future is always uncertain . . . ."[447] Another bankruptcy judge presiding over a mass tort case asserted that estimation of mass tort liability "rests on the shaky foundation that judges

445. *In re* USG Corp., 290 B.R. 223, 226 (Bankr. D. Del. 2003).
446. *Id.*
447. *In re* Babcock & Wilcox Co., 274 B.R. 230, 262 (Bankr. E.D. La. 2002).

can accurately estimate the results of a series of extremely speculative problems."[448]

Regardless of the difficulty of the task, courts have in the past and will in the future be called upon to make such estimations. A judge faced with such a task must therefore approach it as the judge would any other complex scientific or technical problem. The judge must hear the evidence presented by all the parties, including expert testimony, and must judge its credibility and scientific validity. Then the judge should base his or her findings and conclusions on a clearly articulated set of principles, as the judge did in the *Eagle-Picher* case.[449] Finally, the judge should announce the court's estimates of the debtor's present and future tort liability and explain how those amounts were determined. As is discussed in the next section, the judge might consider appointing an expert to provide useful assistance in making this estimation.

G. Use of Court-Appointed Experts and Advisors

Judges presiding over mass tort lawsuits and over mass tort bankruptcy cases have in several instances appointed persons to serve in the case who had expertise that was valuable to the court in the handling of the tort claims. Judges have used court-appointed experts to evaluate scientific evidence concerning a product's causation of particular diseases,[450] to provide a neutral opinion concerning the likely volume and type of future tort claims,[451] and to generally advise the judge on various aspects of the mass tort litigation.[452]

In some cases, judges have appointed experts pursuant to Federal Rule of Evidence 706(a) and in other cases, pursuant to the court's inherent authority. While there is therefore precedent and authority for a judge presiding over a mass tort bankruptcy case to appoint one or more experts or advisors, the judge should carefully determine the need for such an expert before making an appointment and should ensure that the proper roles of the judge and the parties are maintained.

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448. *In re* Dow Corning Corp., 211 B.R. 545, 562 n.16 (Bankr. E.D. Mich. 1997).

449. *See In re* Eagle-Picher Indus., Inc., 189 B.R. 681, 690–91 (Bankr. S.D. Ohio 1995).

450. *See In re* Silicone Gel Breast Implant Prods. Liab. Litig., MDL No. 926, Order 31 (N.D. Ala. May 30, 1996).

451. *See In re* Joint E. & S. Dists. Asbestos Litig., 830 F. Supp. 686, 689–91 (E.D.N.Y. & S.D.N.Y. 1993).

452. *See In re* Kensington Int'l Ltd., 368 F.3d 289 (3d Cir. 2004).

Mass tort bankruptcy cases present courts with "problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple"; therefore, these cases are appropriate for the appointment of experts.[453] If the judge decides to appoint one or more experts or advisors, the court's precise authority for doing so depends on the role that the expert is to play in the bankruptcy case. Federal Rule of Evidence 706(a), which applies to cases and proceedings under the Bankruptcy Code,[454] authorizes the court on its own motion or on the motion of any party to appoint "expert witnesses." These experts "may be called to testify by the court or any party" and are "subject to cross-examination by each party."[455] Experts appointed under this rule therefore are expected to be witnesses at trial, providing evidence that augments that provided by the parties' experts.[456]

The judge might also appoint experts for roles other than providing testimony at trial. Sometimes referred to as technical advisors or consultants, these experts might perform such tasks as "analyzing and evaluating reports prepared by the parties' experts or attorneys"[457] or more broadly educating the court or serving as a "sounding board for the judge."[458] In appointing such experts, who are not intended to serve as witnesses, a judge should rely on the court's "inherent authority to appoint persons unconnected with the court to aid [the] judge[] in the performance of specific judicial duties."[459]

In non-jury cases, district courts have sometimes appointed special masters under Federal Rule of Civil Procedure 53 in order to obtain expertise in a particular field, rather than appointing experts pursuant to Rule 706(a) or their inherent authority.[460] Such an appointment, however, is not an option in a mass tort bankruptcy case. Federal Rule of Bankruptcy Procedure 9031 provides that Federal Rule of Civil Procedure 53 is inap-

453. Reilly v. United States, 863 F.2d 149, 157 (1st Cir. 1988).

454. Fed. R. Evid. 1101(a); Fed. R. Bankr. P. 9017.

455. Fed. R. Evid. 706(a).

456. *See Reilly*, 863 F.2d at 155 ("[T]he grasp of Rule 706 is confined to court-appointed expert witnesses; the rule does not embrace expert advisors or consultants."). *But see* MCL 4th, *supra* note 3, § 11.52 (stating that a special master might be appointed pursuant to Rule 706(a) "even though the master will not testify").

457. MCL 4th, *supra* note 3, § 11.51.

458. *Reilly,* 863 F.2d at 158.

459. *Ex parte* Peterson, 253 U.S. 300, 312 (1920).

460. *See* MCL 4th, *supra* note 3, § 11.52.

plicable in "cases under the Code." The advisory committee note explains that "[t]his rule precludes the appointment of masters in [bankruptcy] cases and proceedings." The prohibition applies regardless of whether a bankruptcy judge or a district judge is exercising jurisdiction.[461]

Before making an appointment, a judge should carefully consider whether there is a need for a court-appointed expert in the case that cannot be satisfied by the parties and their experts. He or she should also weigh the possible advantages and disadvantages of such an appointment.[462] For example, on the issue of the number or value of present and future tort claims, an expert appointed by the court may provide a neutral view that will assist the judge in evaluating the widely varying testimony of the parties' experts. Such an appointment may also create a climate in which a negotiated resolution is more likely or the range of expert views is narrowed.[463] However, waiting for the expert to form an opinion and produce findings or a report may result in costs to the estate and delay in the proceedings. Because the mass tort claims may involve a field in which the range of expertise is narrow, it may also be difficult for the judge to identify someone with the requisite expertise who is in fact neutral.[464]

Federal Rule of Evidence 706 prescribes several procedural safeguards in the appointment of experts pursuant to its authority. If the court is going to appoint an expert witness under Rule 706(a), it must proceed by means of an order to show cause, giving the parties an opportunity to show why an expert should not be appointed. The judge may seek names of experts from the parties and may appoint someone agreed upon by them or someone of the judge's own choosing. The expert must agree to serve in the case. The judge must either provide the expert with a written order specifying his or her duties, which must be filed with the clerk, or must inform the expert of the duties at a conference in which the parties have a right to participate. If the expert makes findings, they must be made available to the

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461. *See* R. Spencer Clift III, *Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?*, 31 U. Mem. L. Rev. 353, 366 (2001).

462. *See generally* MCL 4th, *supra* note 3, § 11.51 (discussing use of court-appointed experts and technical advisors); *see also id.* § 22.56 (discussing possible use of court-appointed expert for estimating mass tort claims); *id.* § 22.87 (discussing use of court-appointed experts to assist with evaluation of scientific evidence).

463. *See* Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 Ind. L. Rev. 225, 234–35 (1998).

464. *But see In re* Kensington Int'l Ltd., 368 F.3d 289, 321 (3d Cir. 2004) (Fuentes, J., dissenting) ("Any person with expertise in a given field invariably forms opinions about that field.").

parties, and the expert is subject to being deposed by any party, as well as being cross-examined at trial by any party.

If an expert or advisor is appointed, not pursuant to Rule 706, but pursuant to the court's inherent power, the procedural requirements of Rule 706 are not directly applicable.[465] That does not mean, however, that the appointment may be made without concern for the rights of the parties.[466] As a matter of fundamental fairness, a court appointing an advisor or nontestifying expert should

- advise the parties of the name of the expert to be appointed and the role that expert is to play;
- give the expert and parties written instructions concerning the expert's duties in the case; and
- require that the expert either prepare a written report or submit an affidavit at the conclusion of his or her duties attesting to the expert's compliance with the court's instructions.[467]

Regardless of whether experts are appointed by the court pursuant to Rule 706(a) or pursuant to the court's inherent authority, the judge should be especially cautious about engaging in ex parte communications with them. Ex parte communications "are always suspicious" and should be engaged in only rarely.[468] Because such conversations with the judge are typically not recorded, there is no basis for parties to know whether they exceeded proper bounds and no way for an appellate court to provide meaningful review.[469] Furthermore, it is inconsistent with our adversarial system of justice to deprive parties of their right "to challenge, to comment upon, or even to know what the judge is being told."[470]

If experts are appointed pursuant to Rule 706(a), "the parties must be afforded the opportunity to evaluate the[ir] report and test its validity."[471] The experts should submit their evidence to the court in a manner that allows the parties to cross-examine them, as the rule requires. The judge

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465. Reilly v. United States, 863 F.2d 149, 156 (1st Cir. 1988) ("Rule 706, while intended to circumscribe a court's right to designate expert witnesses, was not intended to subsume the judiciary's inherent power to appoint technical advisors.").

466. *Id.* at 159.

467. *See id.* at 159–60; MCL 4th, *supra* note 3, § 11.51.

468. MCL 4th, *supra* note 3, § 11.51.

469. *In re* Kensington Int'l Ltd., 368 F.3d 289, 309–10 (3d Cir. 2004).

470. Michael J. Saks, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706,* 35 Jurimetrics J. 233, 240 (1995) (book review).

471. *In re* Joint E. & S. Dists. Asbestos Litig., 830 F. Supp. 686, 694 (E.D.N.Y. & S.D.N.Y. 1993).

should not meet privately with the experts to preview their findings and conclusions. In one case, a judge held an ex parte meeting with a panel of experts and discussed with them the validity of their methodology; in the case on appeal, the court of appeals removed the judge because he had obtained "personal knowledge of disputed evidentiary facts."[472]

When an expert is appointed to advise the court or to serve as a "sounding board" for the judge, courts have recognized the need for "the judge and the advisor [to] be able to communicate informally, in a frank and open fashion."[473] It is important, however, that the judge not discuss the merits of the case with the expert[474] or allow the expert to usurp the judicial role.[475] The judge should document in some way his or her conversations with the expert so that the parties can be made aware of the substance of the advice and have an opportunity to respond.[476]

Because of the important role that court-appointed experts and advisors can play in a mass tort bankruptcy case, a judge should exercise care in selecting the individuals to appoint. An expert appointed under Rule 706(a) should be someone "whose fairness and expertise in the field cannot reasonably be questioned and who can communicate effectively as a witness."[477] As Rule 706(a) suggests, the judge should ask the parties to provide names of experts who should be considered for appointment, and should attempt to select someone who is acceptable to the major participants in the bankruptcy case. When the judge appoints advisors or consultants, it is likely that these experts will have close contact with the judge. It is therefore especially important that these experts be free of any conflict of interest that might give rise to questions about the judge's impartiality. The court should also ensure that the past and ongoing activities of the advisors do not present any conflict of interest with their advisory duties.[478]

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472. *In re* Edgar, 93 F.3d 256, 258 (7th Cir. 1996) (relying on 28 U.S.C. § 455(b)).

473. Reilly v. United States, 863 F.2d 149, 160 n.8 (1st Cir. 1988).

474. *See In re* Kensington Int'l Ltd., 368 F.3d 289, 307 (3d Cir. 2004) ("[W]hen *ex parte* discussions between the judge and the panel [of advisors] veer into the merits, recusal may follow.").

475. *See Reilly*, 863 F.2d at 157–58.

476. *See Kensington*, 368 F.3d at 305.

477. MCL 4th, *supra* note 3, § 11.51.

478. *See Kensington*, 368 F.3d at 303–06. In *Kensington*, the Third Circuit ordered the recusal of a district judge in three asbestos bankruptcy cases because it concluded that his impartiality might reasonably be questioned. The court reached this conclusion after determining that two court-appointed advisors had a conflict of interest that could not be disassociated from the judge and that the judge's ex parte communications with the advisors constituted an abuse of discretion. *Id.* at 318.

V. Negotiating the Plan

A. Overview

Part V addresses the steps that the judge can take to facilitate the parties' negotiation of a consensual plan in a mass tort bankruptcy case. It also addresses the issues the judge may face when all parties in interest do not achieve a settlement.

- *Plan negotiations in a free-fall bankruptcy:* What actions can the bankruptcy judge take to reduce the time needed to negotiate a consensual plan? How might the judge use a mediator effectively? How are negotiations affected by the timing of the court's rulings?
- *Extension of exclusivity:* How can the judge use his or her rulings on requests to extend the debtor's period of exclusivity to encourage progress in the case? What factors should the judge take into account in deciding whether to terminate exclusivity?
- *Handling of prepackaged bankruptcies:* What special issues must the judge be alert to when the debtor seeks confirmation of a prepackaged mass tort bankruptcy plan of reorganization? Should the judge appoint in the bankruptcy case the future claims representative who participated in the prebankruptcy negotiations? May the judge confirm a plan that provides less favorable treatment to tort claimants than was received by other tort claimants just prior to the bankruptcy filing?
- *Dealing with insurance issues:* Where should litigation concerning the debtor's insurance coverage take place, and when should coverage issues be resolved? Are the debtor's insurers parties in interest who may vote on the plan, object to confirmation, or appeal from confirmation?

B. Plan Negotiations in a Free-Fall Bankruptcy

Most mass tort bankruptcy cases are eventually resolved by means of negotiation and settlement rather than litigation and judicial resolution of competing positions.[479] The key terms of the plan of reorganization, particularly

479. *See, e.g.,* Gibson, *supra* note 64, at 170 (discussing negotiated resolution of key issues in the *UNR* bankruptcy); *id.* at 224 (discussing settlement in the *Dow Corning* bankruptcy). *But see*

those concerning the value and treatment of the tort claims, are usually the result of a negotiated agreement among most, if not all, of the major constituencies.[480] When a mass tort debtor seeks bankruptcy protection without prenegotiating the terms of its plan—a so-called "free-fall" situation—this process of arriving at a consensual solution during the bankruptcy case can be lengthy and expensive. The presiding judge therefore needs to consider what role he or she might play in encouraging and facilitating an expeditious negotiated resolution.

Typically in mass tort bankruptcy cases, after an extended period of contentiousness, the debtor and the tort claimants (represented by the tort claimants' committee and the future claims representative) attempt to reach an agreement concerning (1) the value of the tort claims in relation to other unsecured claims and (2) the treatment that those claims will receive under the plan.[481] The participants in these negotiations may also include parent or affiliated companies that will be contributing to the plan and insurers with whom the debtor is attempting to reach a settlement concerning its coverage and partial funding of the plan. Because the tort claimants group is not monolithic, considerable effort may be required to arrive at terms that will be acceptable to all present and future claimants. Once those parties reach an agreement on a joint plan, they then negotiate with other constituencies (e.g., unsecured creditors' committee, banks, equity interest holders, government creditors) in an effort to arrive at a plan that can be confirmed consensually, thereby avoiding claims estimation proceedings, litigation, and appeals.[482] If all of the constituencies cannot be brought on board, those parties that have settled will jointly propose a plan and seek a cramdown of any dissenting classes.[483]

Since settlement among most of the key constituencies in the case is the likely outcome, what can a bankruptcy judge do to reduce the time needed to reach such a resolution? Although there are no hard and fast rules for facilitating a settlement, and the circumstances of particular mass tort bank-

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In re Armstrong World Indus., Inc., 320 B.R. 523, 527–28 (D. Del. 2005) (discussing unsecured creditors' committee's objection to confirmation of plan that it had previously supported, along with the debtor and the tort claimants).

480. *See, e.g.,* Gibson, *supra* note 64, at 170, 224.

481. *See, e.g., id.* at 90–91 (discussing negotiations between the debtor and representatives of present and future claimants in the *Eagle-Picher* bankruptcy).

482. *See, e.g., id.*

483. *See, e.g., id.* at 235 (discussing confirmation process in the *Dow Corning* bankruptcy case and cramdown of three dissenting classes).

ruptcies will vary, there are actions the judge can take to influence the negotiation's success:

1. Unwillingness to accept unproductive acrimony and squabbling among the parties

As a result of the debtor's prebankruptcy litigation, there may be a significant amount of animosity among the parties at the outset of the bankruptcy case. Such hard feelings can produce entrenched positions that favor litigation over consensual resolutions.[484] However, often many of the lawyers and other professionals in the case will have been involved in other mass tort bankruptcy cases in which settlements were successfully negotiated. That experience means that they come into the bankruptcy case with a framework for engaging in negotiations on a reorganization plan. The judge presiding over the case should therefore encourage serious settlement discussions sooner rather than later in the case. He or she should indicate at the outset of the case that unreasonable positions and unnecessary litigation will not be tolerated.

2. Decisions on the extension or lifting of exclusivity

As is discussed more fully in the next section,[485] the court's ruling on exclusivity can significantly affect the parties' willingness to engage in negotiations over a plan. If the debtor's exclusive right to file a plan remains in effect, other parties know that their best opportunity to enhance their treatment under the plan comes through negotiating with the debtor. Lifting exclusivity, in contrast, will give rise to competing plans, litigation, and appeals.[486] The judge therefore needs to give the debtor sufficient time at the beginning of the case to negotiate a consensual plan. Such an effort will invariably require some extension of the exclusivity period, although recent amendments to the Bankruptcy Code will significantly reduce the court's authority to grant such extensions.[487] The judge can condition continued extensions on demonstration of progress in negotiations.

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484. *See, e.g., id.* at 70–75 (discussing "ill will" in the initial phase of the *Eagle-Picher* bankruptcy case that was "displayed in frequent litigation . . . and a disinclination to compromise").

485. *See infra* section V.C.

486. *See, e.g., In re* UNR Indus., Inc., 72 B.R. 789, 792–93 (Bankr. N.D. Ill. 1987).

487. *See infra* text accompanying notes 510–13.

3. Appointment of a mediator

In a number of mass tort bankruptcy cases, courts have appointed a neutral third party to assist the parties in reaching a consensual resolution.[488] Because of the complexity and multifaceted nature of the required negotiations, it is not feasible for the presiding judge or another judge to serve in this capacity; an outside mediator should be appointed. Often the debtor or other parties have requested that the court appoint a mediator, sometimes at a point several years into the case. The court has authority, however, to make such an appointment sua sponte pursuant to local bankruptcy or district court rules.[489] Rather than waiting to be asked, therefore, the judge should determine early in the case whether the appointment of a mediator might enable the parties to engage in serious negotiations and avoid expending time and resources on litigation.[490] In some situations it might even be advisable to consider appointing more than one mediator.[491] If such an appointment were to be made, the members of the mediation team could concentrate on different issues, engage in mediation with different combinations of parties, or use different mediation approaches in a vigorous attempt to arrive at a consensual resolution.

Although the judge presiding over one mass tort bankruptcy case appointed an experienced mediator with no prior mass tort experience,[492] several other judges have appointed an individual with extensive expertise in

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488. *See, e.g.,* Order Appointing Mediator *Nunc Pro Tunc* to May 1, 2002 and Directing Mediation, *In re* Owens Corning, No. 00-3837 (Bankr. D. Del. July 22, 2002); Joint Disclosure Statement at 97, *In re* Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. Dec. 19, 2002) (discussing appointment of a mediator "to assist the Debtors, the ACC, and the FCR in their attempts to move the case towards a consensual resolution"); Order Appointing Mediator, *In re* Eagle-Picher Indus., Inc., No. 1-91-00100 (Bankr. S.D. Ohio June 5, 1992); Gibson, *supra* note 64, at 224 (discussing appointment of a mediator in the *Dow Corning* bankruptcy to assist the debtor, shareholders, and tort claimants in negotiating a settlement).

489. *See* 11 U.S.C. § 105(a), (d) (2000); 28 U.S.C. § 651(b) (2000); *In re* Sargeant Farms, Inc., 224 B.R. 842, 847 (Bankr. M.D. Fla. 1998) ("[I]t is quite apparent the bankruptcy court has the authority and power to promulgate rules associated with court-annexed mediation and, where necessary, to require parties to participate in the same."); David B. Young, *Alternative Dispute Resolution in Bankruptcy*, 861 PLI/Comm 863, 894–900 (2004); *see, e.g.,* Del. Local Bankr. R. 9019-1(a), 9019-3 (authorizing the court to refer any matter arising in a bankruptcy case to mediation without the parties' consent).

490. *See* Civil Litigation Management Manual 68–70 (Federal Judicial Center 2001).

491. This suggestion was included in a proposal to the Federal Judicial Center for a demonstration project on the "focused processing" of asbestos-driven bankruptcy cases. The proposal, developed by attorney Deanne Siemer, was never implemented. Proposal for a Demonstration Project: Focused Processing for Asbestos-Driven Bankruptcy Cases (Draft submitted 9/6/02).

492. *See* Order Appointing Mediator, *In re* Eagle-Picher Indus., Inc., No. 1-91-00100 (Bankr. S.D. Ohio June 5, 1992).

mediating mass tort bankruptcy cases.[493] There is an advantage to bringing in someone who is already knowledgeable about the pertinent issues that need to be addressed and how they have been resolved in other cases, and is familiar with many of the parties who will be involved in the negotiations. However, using a repeat player as a mediator may alienate any parties who believe they received unfair treatment in the earlier cases, and it may confine discussions unnecessarily to the way things were done in other cases. Therefore, after seeking suggestions of mediators from the parties, the judge will need to balance those competing considerations in making an appointment.

The order appointing a mediator should specify the terms of the appointment, including the amount and timing of compensation and the length of the appointment. The order should also designate the issues on which mediation is sought, the frequency of mediation sessions if not left up to the mediator, the judge's expectations concerning confidentiality and reports, and the impact, if any, of the negotiations on other proceedings in the case.

4. Timing of rulings on key issues

The court's ruling, or failure to rule, on key issues in the bankruptcy case can have a significant effect on the success of the negotiations. The parties may not be willing to engage in serious negotiations so long as there are important unresolved issues. For example, they may say that they cannot negotiate a plan until the court rules on omnibus objections to the tort claims, motions for the substantive consolidation of related debtors' cases, fraudulent transfer actions, or insurance coverage disputes. However, the bankruptcy court's ruling on these important issues may lead to appeals that will engender even more delay and expense before the parties are willing to negotiate the value and treatment of the tort claims and other terms of a plan. Moreover, a number of mass tort bankruptcy cases have been resolved by settlement without the court ruling on issues that were said to be crucial to one or more of the parties.[494]

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493. *See, e.g.,* Order Appointing Mediator *Nunc Pro Tunc* to May 1, 2002 and Directing Mediation, *In re* Owens Corning, No. 00-3837 (Bankr. D. Del. July 22, 2002); Joint Disclosure Statement at 97, *In re* Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. Dec. 19, 2002) (discussing appointment of the same individual as mediator); Gibson, *supra* note 64, at 224 (discussing appointment of the same mediator in the *Dow Corning* bankruptcy).

494. *See, e.g.,* Gibson, *supra* note 64, at 223 (discussing consensual resolution of the *Dow Corning* bankruptcy case without the issuance of a ruling on the debtor's omnibus objection to claims based on lack of causation); *see also* Ex Parte Unopposed Joint Motion to Further Continue

So how will a judge know whether making a ruling or withholding a ruling will be more likely to encourage settlement? The judge will not know for sure, unfortunately. Although the parties will want as much certainty as possible, uncertainty can create pressure to settle. Moreover, the goal in settlement is to avoid the costs of obtaining a judicial resolution of ultimate issues. The judge therefore needs to consider whether an issue raised by one of the parties is a fundamental one whose resolution is necessary for the parties to structure a settlement or whether it is one on which the parties may be able to arrive at a compromise.[495]

If a judge believes, however, that with encouragement it may be possible to achieve a negotiated settlement early in a mass tort case, he or she might consider staging the case by focusing the parties' efforts initially on mediation of the tort claims. All litigation could be put on hold for a stated period of time while the parties attempt to arrive at the basic terms of a consensual plan. At the end of the mediation period, the judge could consider whether to extend the period further, allow the litigation of some issues while continuing the mediation effort, or abandon the mediation effort altogether. At least for some cases in which the mass tort is fully mature and patterns for resolution in bankruptcy have been well established, such as those involving asbestos, this approach might significantly reduce the time required for a resolution.[496]

C. Extension of Exclusivity

In a chapter 11 case in which no trustee is appointed, section 1121(b) of the Bankruptcy Code gives the debtor the exclusive right to file a reorganization plan in the case for a period of 120 days after the date of the order for relief. If the debtor files a plan within that time period, then it has the exclusive right to obtain acceptances of its plan until 180 days after the date of the order for relief.[497] The court may reduce or increase both of these

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and Reschedule Hearing on Debtors' Joint Motion for Entry of a Case Management Order(s) Respecting Procedures Governing the Debtors' First Omnibus Objections to Asbestos Related Claims, *In re* Babcock & Wilcox Co., No. 00-0558 (E.D. La. Feb. 5, 2004) (seeking further continuation of hearing on omnibus objection because the previously filed consensual plan might render the objections moot).

495. *See generally* MCL 4th, *supra* note 3, § 13.11.

496. The idea of staging a mass tort bankruptcy case by initially focusing on settlement efforts was at the core of Ms. Siemer's proposal for a demonstration project on focused processing of asbestos bankruptcy cases. *See supra* note 491.

497. 11 U.S.C. § 1121(c)(3) (2000).

time periods, however, for cause.[498] A recent amendment to section 1121, which takes effect in October 2005, will significantly restrict the court's authority to extend both time periods.[499]

A debtor seeking an extension of the exclusivity period bears the burden of establishing cause for granting its motion.[500] Determination of cause is left to the bankruptcy court's discretion, based on the particular facts and circumstances of the case before it. Courts have frequently identified the following factors to be considered in determining whether there is cause to increase the period of exclusivity:

- the size and complexity of the case;
- the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and to prepare adequate information;
- the existence of good faith progress toward reorganization;
- the debtor's payment of its bills as they become due;
- the debtor's demonstration of reasonable prospects for its filing a viable plan;
- the debtor's progress in negotiations with its creditors;
- the time that has elapsed in the case;
- concern that the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
- the existence of an unresolved contingency.[501]

In ruling on motions to extend exclusivity, judges are guided by the congressional intent underlying section 1121.[502] In particular, judges have pointed to legislative history indicating that "'an extension should not be

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498. *Id.* § 1121(d).

499. *See infra* text accompanying notes 510–13.

500. *See, e.g., In re* Dow Corning Corp., 208 B.R. 661, 663 (Bankr. E.D. Mich. 1997); *In re* Homestead Partners, Ltd., 197 B.R. 706 (Bankr. N.D. Ga. 1996).

501. *In re* Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); *see also In re* Gibson & Cushman Dredging Corp., 101 B.R. 405, 409–10 (E.D.N.Y. 1989); *In re Dow Corning*, 208 B.R. at 664–65.

502. *See generally* Tabb, *supra* note 95, at 809 (describing congressional compromise underlying section 1121, "which gives the debtor the first chance to put an acceptable plan together," thus avoiding deterring the debtor from "filing for needed chapter 11 relief, and at the outset [requiring] all parties . . . to sit down together at the bargaining table," while not giving the debtor "the power to stall creditors into submission").

employed as a tactical device to put pressure on parties in interest [to] yield to a plan they consider unsatisfactory.'"[503]

In mass tort bankruptcy cases, courts typically grant several extensions of the debtor's exclusivity period. Some sources cite six years as the average duration of an asbestos bankruptcy case.[504] The fact that the debtor has generally retained exclusivity throughout these cases means that numerous extensions have been granted. In some cases bankruptcy courts have granted successive motions to extend exclusivity to a definite date;[505] in other cases they have extended exclusivity for an indefinite period and the extension is dependent upon continuing progress in the case.[506] In cases in which the court has granted an indefinite or lengthy extension of exclusivity, it has placed the burden on non-debtor parties who seek to reduce or terminate the debtor's exclusivity period to show cause under section 1121(d).[507]

The complexity of mass tort bankruptcy cases has been the primary justification for repeated extensions of exclusivity. Unless a plan is negotiated in advance of bankruptcy, it is unrealistic to think that the debtor will be able to file a consensual plan within a matter of months. Thus, courts have been willing to give debtors years, rather than months, to file a plan. Although courts have been concerned about the mounting costs engendered by these lengthy cases, they have been even more concerned about the greater harms that could result from terminating exclusivity. One court explained its decision to continue exclusivity as follows:

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503. Official Unsecured Creditors' Comm. v. Eagle-Picher Indus., Inc. (*In re* Eagle-Picher Indus., Inc.), 176 B.R. 143, 147 (Bankr. S.D. Ohio 1994) (quoting S. Rep. No. 95-989, at 118 (1978)).

504. *See, e.g., In re* Owens Corning, No. 00-3837, 2004 Bankr. LEXIS 78, at *122 (Bankr. D. Del. Feb. 2, 2004); Stephen J. Carroll et al., RAND Inst. for Civil Justice, Asbestos Litigation 118 (2005).

505. *See, e.g., In re* UNR Indus., Inc., 72 B.R. 789, 796 (Bankr. N.D. Ill. 1987) ("The time in which UNR shall have the exclusive right to file plans of reorganization is hereby extended for an additional 60 days, until July 31, 1987, or until such other date as the Court shall, upon notice to the parties, determine.").

506. *See, e.g., In re* Dow Corning Corp., 208 B.R. 661, 662–63 (Bankr. E.D. Mich. 1997) ("The May 16, 1996, order extended the Debtor's exclusive period to file a plan until 21 days after the Court ruled on the competing estimation motions and also extended the Debtor's exclusivity period to seek acceptances to that plan 'until further order of the Court.'"); *Official Unsecured Creditors' Comm.,* 176 B.R. at 146 ("[T]he court has upon timely motion extended that [exclusive] period, and pursuant to our mediation order, exclusivity is to continue at least until 60 days after impasse is declared.").

507. *In re Dow Corning Corp.,* 208 B.R. at 663 ("As a general rule, the party seeking to terminate or modify a debtor's exclusivity period bears the burden of proof since it is the moving party who seeks to change the status quo.").

> In the opinion of this Court a negotiated, consensual plan of reorganization is the best route to take. The alternative which might be brought on if the exclusive period were ended could be disastrous. The claims in this case could very well exceed the value of the corporation, leaving nothing or very little for equity shareholders. With everything to lose, the equity shareholders have every incentive to litigate those legal issues which have a bearing on UNR's solvency. . . . At best, these matters could be resolved in five years. Realistically, after all the appeals are taken, it could take a decade to resolve these matters. If the UNR bankruptcy has to be resolved through litigation there would be few winners, if any.[508]

As another court put it, "The end of exclusivity would result in competing plans . . . . The problems and complexities in the slow and painful process of building this consensus . . . would exponentially explode in the context of competing plans advanced by parochial interests."[509]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 includes an amendment to section 1121(d) that will significantly restrict the court's authority to grant repeated extensions of the debtor's period of exclusivity.[510] According to new section 1121(d)(2), which takes effect in October 2005,[511] a court may not extend the 120-day exclusivity period "beyond a date that is 18 months after the date of the order for relief,"[512] and the 180-day period may not be extended beyond 20 months after the order for relief.[513] It remains to be seen whether the impact of this amendment in mass tort bankruptcy cases will be to expedite the parties' negotiations and reduce the time required for plan confirmation or, alternatively, to give rise to competing plans, increased litigation, and an increased time for resolution.

To facilitate the negotiation of a consensual plan, some courts have coupled the extension of exclusivity with the appointment of a mediator or examiner to assist the parties in resolving their differences.[514] The court has

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508. *In re UNR Indus., Inc.*, 72 B.R. at 792–93; *see also In re Dow Corning Corp.*, 208 B.R. at 669–70 (taking into account the "chaos factor" caused by terminating exclusivity); *Official Unsecured Creditors' Comm.,* 176 B.R. at 148 (expressing view that terminating exclusivity would undermine prospects for prompt resolution of the case).

509. Manville Corp. v. Equity Security Holders Comm. (*In re* Johns-Manville Corp.), 66 B.R. 517, 537 (Bankr. S.D.N.Y. 1986).

510. Pub. L. No. 109-8, § 411, 119 Stat. 23, 106–07 (2005).

511. *Id.* § 1501(a), 119 Stat. at 216.

512. *Id.* § 411, 119 Stat. at 106.

513. *Id.*, 119 Stat. at 107.

514. *See, e.g., In re* Keene Corp., 188 B.R. 903, 912 n.11 (Bankr. S.D.N.Y. 1995) ("Following an evidentiary hearing in connection with Keene's motion to extend exclusivity, we appointed an examiner to supervise plan negotiations and report back to the Court. To ensure that supervised

then tied the continuation of exclusivity to continued progress in the negotiations and directed the mediator to report back to the court periodically.[515] This technique is one that a judge should consider using in a mass tort bankruptcy case.

The court's control over exclusivity should be seen as a means to an end. When the court is asked to extend or terminate the debtor's exclusive period for filing a plan, "the primary consideration should be whether . . . doing so would facilitate moving the case forward."[516] If the court can strike a proper balance between giving the debtor time to negotiate a consensual plan and preventing the case from languishing unnecessarily, the prospects for a successful conclusion of the bankruptcy will be enhanced.

D. Handling of Prepackaged Bankruptcies

A recent development in the evolution of mass tort bankruptcies has been the use of so-called prepackaged chapter 11 plans.[517] Companies' attempts to use these plans to resolve mass tort liability have raised a number of legal issues that have received only limited appellate court guidance. However, these plans offer the promise of a more expeditious and less expensive means of confirming a reorganization plan that relieves the debtor from further tort liability and establishes a trust for payment of present and future tort claims.[518] In considering the confirmation of such plans, judges should ensure that the interests of those groups without a direct voice in the prepetition negotiations, including future tort claimants and insurers, are not unfairly treated by the plan's terms.

The statutory authority for prepackaged mass tort bankruptcies is section 1126(b) of the Bankruptcy Code.[519] That provision permits the court to consider in the confirmation process votes on the plan by creditors and

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negotiations took place, we *directed* the parties to meet every Thursday afternoon from at least 2:00 p.m. to 5:00 p.m., and gave them the option to meet more frequently.").

515. *See, e.g., id.*; *Official Unsecured Creditors' Comm.,* 176 B.R. at 146.

516. *In re Dow Corning Corp.*, 208 B.R. at 670.

517. *See* Ronald Barliant et al., *From Free-fall to Free-for-all: The Rise of Pre-Packaged Asbestos Bankruptcies,* 12 Am. Bankr. Inst. L. Rev. 441 (2004).

518. The Third Circuit recently vacated the confirmation of one mass tort prepackaged chapter 11 plan, but in doing so suggested that "pre-packaged bankruptcy may yet provide debtors and claimants with a vehicle for the general resolution of asbestos liability." *In re* Combustion Eng'g, Inc., 391 F.3d 190, 201 (3d Cir. 2004).

519. Some bankruptcy courts have issued administrative orders establishing procedural guidelines for prepackaged chapter 11 cases. *See, e.g.,* Admin. Order 201 (Bankr. S.D.N.Y. Feb. 2, 1999); Gen. Order No. 03-11 (Bankr. S.D. Ind. Sept. 18, 2003).

shareholders taken before the commencement of the bankruptcy case, so long as the voting was preceded by adequate disclosure as defined by either section 1125(a) of the Code or applicable nonbankruptcy law. Because the plan has already been negotiated and voted on when the debtor files for bankruptcy, the case can proceed directly to the confirmation stage. Depending on the court's calendar, it is possible that just a few weeks into the case the court can hold a hearing at which it considers both the adequacy of the prepetition disclosure and whether the plan should be confirmed. If used in a mass tort case, this process can shorten to a few weeks or months what typically would be a case that lasts several years. However, until the appellate courts definitively resolve the legal issues surrounding a mass tort prepackaged bankruptcy, the pursuit of appeals by parties who object to the plan confirmation order may delay plan implementation for an extended period, thus reducing some of the hoped-for benefits of this method.

The first prepackaged mass tort bankruptcy was filed in 1998 by Fuller-Austin Installation Company in the District of Delaware.[520] Less than a year before the filing, the company initiated negotiations with a group of attorneys representing a large number of asbestos claimants. These attorneys agreed to cease filing new cases against Fuller-Austin while the negotiations were pending, although they proceeded with already-filed cases. The company, its parent, the group of plaintiffs' attorneys, and a representative selected by the company to represent future claimants negotiated a reorganization plan that provided for a trust to pay present and future asbestos claims.[521] The trust was to be funded by insurance proceeds and a cash contribution from the parent company. The debtor submitted the plan, accompanied by disclosure materials, to creditors for approval. The vote was overwhelmingly favorable.[522]

Fuller-Austin then filed a chapter 11 petition on September 4, 1998. At that time it also filed with the bankruptcy court the disclosure statement, the plan of reorganization, the notice to creditors, and an affidavit of accountants certifying the results of the voting on the plan. It also obtained court approval of the legal representative of future claimants and retention of counsel for the representative, along with other first-day orders. Ten days after filing, the company sought approval of its disclosure statement

520. *In re* Fuller-Austin Insulation Co., No. 98-2038-JJF (D. Del. filed Sept. 4, 1998).

521. 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, 449 (1999).

522. *Id.* at 450.

and confirmation of the plan of reorganization.[523] A group of insurers objected to approval of the disclosure statement and confirmation, stating that the plan would "'summarily adjudicate the[ir] liability . . . under excess insurance policies'" and thus affect the resolution of pending coverage litigation against the debtor.[524] They contended that the plan sought to bind them to a determination of liability contrary to the terms of their insurance agreements with the debtor.

In response to the insurers' objections, the debtor amended the plan to add a provision stating that all claims and defenses of the insurers would be resolved in the coverage litigation and that the insurers' rights under the insurance policies would be unaffected by the plan and confirmation order. In light of that change, the district court held that the insurers were not parties in interest with standing to object to confirmation or approval of the disclosure statement. The court therefore dismissed their objections[525] and later confirmed the plan.

In some of the more recently filed prepackaged asbestos bankruptcy cases, the payment of the tort claims has been structured differently than it was in the *Fuller-Austin* case.[526] In these cases, the debtor company, often with its parent corporation, negotiated with a group of plaintiffs' lawyers a two-part structure for the resolution of asbestos claims. A prebankruptcy trust was established to pay a large group of existing claims according to a schedule negotiated with the lawyers representing the plaintiffs. Some of the claims were paid in full, others received only partial payment, and the rest were to be paid in bankruptcy.[527] The debtor and the plaintiffs' lawyers then negotiated a plan of reorganization with the added participation of a designated future claims representative. The plan provided for the creation of a bankruptcy trust under the authority of section 524(g) of the Bankruptcy Code, which would be used to pay the remaining present claims and all future claims. Often full funding of the bankruptcy trust was left to rest on the outcome of coverage litigation with the debtor's insurers. Fol-

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523. *In re* Fuller-Austin Insulation, No. 98-2038-JJF, 1998 WL 812388 (D. Del. Nov. 10, 1998) at *1.

524. *Id.* (quoting insurers' objections).

525. *Id.* at *3.

526. *See generally* Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. Tex. L. Rev. 883, 889–906 (2003).

527. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 205, 238 (3d Cir. 2004) (describing structure of prebankruptcy settlement trust, which provided payments to asbestos claimants ranging from 37.5% to 95% of the liquidated value of their claims, and left the unpaid portion to be paid by the bankruptcy trust).

lowing overwhelming approval of the plan by asbestos claimants, the debtor filed a chapter 11 bankruptcy and promptly sought approval of the disclosure statement and confirmation of the plan.

Confirmation in several of these cases was opposed by insurance companies that had not settled with the debtor and by some asbestos claimants whose lawyers had not participated in the prebankruptcy negotiations.[528] In the *Combustion Engineering*[529] and *J.T. Thorpe*[530] cases, the plans were confirmed, but the Third Circuit vacated the confirmation order in *Combustion Engineering*.[531] In the *ACandS* case, the bankruptcy court denied confirmation.[532]

Because of the novelty of this means of resolving mass tort liabilities, prepackaged plans present a number of yet-to-be-resolved legal issues. The following discussion highlights some of these issues.

1. Role of the future claims representative

As previously discussed,[533] the appointment of a future claims representative is essential to the protection of the due process rights of future claimants. Moreover, the appointment of such a representative is statutorily required for the issuance of a channeling injunction pursuant to section 524(g) of the Bankruptcy Code.[534] The judge presiding over a mass tort bankruptcy case must therefore make a careful decision concerning whom to appoint to this important position. In a prepackaged bankruptcy, however, a future claims representative is designated prior to the bankruptcy filing and thus by someone other than the judge. Once the bankruptcy case is filed, the judge will be asked to appoint the previously designated representative as the future claims representative in the case. The bankruptcy judge at that point will have to either approve the person who has already served in that position or deny the request and appoint someone new. The

528. *See, e.g., id.* at 213–14 (listing groups of insurers and cancer claimants who appealed from confirmation of the prepackaged plan); *In re Fuller-Austin*, 1998 WL 812388 at *1 (noting that insurers filed objections to confirmation); *In re* ACandS, Inc., 311 B.R. 36, 41 (Bankr. D. Del. 2004) (stating that an insurer "raised numerous objections to the plan under § 1129").

529. *In re* Combustion Eng'g, Inc., 295 B.R. 459 (Bankr. D. Del. 2003), *vacated & remanded,* 391 F.3d 190 (3d Cir. 2004).

530. *In re* J.T. Thorpe Co., 308 B.R. 782 (Bankr. S.D. Tex. 2003), *aff'd,* 2004 WL 720263 (S.D. Tex. 2004).

531. *In re* Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004).

532. *In re* ACandS, Inc., 311 B.R. 36 (Bankr. D. Del. 2004).

533. *See supra* section III.G.1.b.

534. 11 U.S.C. § 524(g)(4)(B)(i) (2000).

latter choice permits an independent future claims representative to review the plan previously agreed to by the prepetition representative,[535] but it will necessarily cause significant delay in the confirmation process. The debtor might contend that because only a small group of lawyers serve as future claims representatives in the asbestos bankruptcies, the person it selected to negotiate a prepackaged plan on behalf of the future claimants is likely to be among those whom the court would appoint in any event. Even if that is so, the fact that the prepetition representative was selected and paid directly by the debtor, rather than being an appointee of the court, raises concerns that the court must consider in deciding whether to appoint that person as the future claims representative in the bankruptcy case.[536]

Of perhaps even greater significance than the issue of who initially appoints the future claims representative is the issue of the role the representative is allowed to play in the negotiations leading up to the prepackaged plan. Courts and commentators have raised concerns about the fact that in some of the recent prepackaged cases the future claims representative was designated after the debtor and the plaintiffs' attorneys had negotiated the terms of settlement of their existing cases and after the debtor had transferred substantial assets to the prebankruptcy trust.[537] Thus, "the hands of the person chosen by the debtor to negotiate plan terms on behalf of future claimants are tied by the terms of the deal already negotiated by the debtor and [attorneys for present claimants]."[538] Furthermore, because the negotiations take place outside the judicial process, the future claims representative

535. *See* Resnick, *supra* note 46, at 2080–81 ("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.").

536. *See* Barliant et al., *supra* note 517, at 453 ("[W]here the FCR is selected and compensated by his adversaries, the bargain agreed to is questionable."); Plevin et al., *supra* note 526, at 916–17 ("[B]ecause the person representing future claimants is not a court appointee when the negotiations are taking place, the debtor has the ability to terminate him or her if the negotiations get too tough.").

537. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 245 (3d Cir. 2004) (noting possible due process concerns presented by the fact that "the first phase of the integrated global settlement—the establishment of the CE Settlement Trust—included neither representation nor funding for future and other non-participating claimants").

538. Plevin et al., *supra* note 526, at 915. *But see In re Combustion Eng'g, Inc.*, 391 F.3d at 206 (noting that during the negotiations the future claims representative insisted that the debtor's parent corporation increase its financial contribution to the plan).

does not have access to discovery to compel the debtor to turn over information that it does not choose to reveal.[539]

The serious due process issues presented by the inclusion of future claimants within the scope of any bankruptcy resolution of mass tort claims are exacerbated by the use of a prepackaged plan.[540] Therefore, when presented with such a plan and a request to approve the future claims representative who was involved with its negotiation, a bankruptcy judge should not only carefully scrutinize the representative's qualifications, but also examine the role the representative played in negotiating the plan to determine the adequacy of representation of future claimants' interests.

2. Inequality of treatment of claims

A noticeable difference between prepackaged asbestos bankruptcy cases and traditional asbestos bankruptcy cases is the two-trust-fund structure of the recent prepackaged cases. The result of establishing a prebankruptcy trust to pay some of the present claims and a postbankruptcy trust to pay the other present claims and all future claims is that similar claims may end up being treated very differently. Some asbestos claimants will be paid in full, while other claimants with similar diseases and similar evidence of exposure may be paid very little or nothing at all. This disparity of treatment was one of the reasons that the Third Circuit overturned the confirmation order in the *Combustion Engineering* case.[541]

The difference in treatment of similar claims in the *J.T. Thorpe* prepackaged case was summarized by a commentator as follows:

> [S]ome current claimants were paid in full, right before the filing of the bankruptcy case, by the pre-petition trust; other current claimants received full or partial security interests for their claims against the post-petition trust; still other current claimants did not receive any security, and faced the prospect of being paid only pennies on the dollar by the post-petition trust (and, in contrast to those current claimants paid before the bankruptcy case was filed, would be paid only after a considerable delay). . . . Since future claimants cannot qualify for payment by the pre-petition trusts, they will receive much lower recoveries than current claimants with similar diseases or conditions.[542]

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539. Plevin et al., *supra* note 526, at 916. If the future claims representative were to be denied information that he or she sought, a serious question would be presented as to whether the prebankruptcy disclosure was adequate.

540. *See In re Combustion Eng'g, Inc.*, 391 F.3d at 245.

541. *See id.* at 239.

542. Plevin et al., *supra* note 526, at 911.

In the *ACandS* case, differences in treatment of similar claims led the bankruptcy judge to deny confirmation of the plan.[543] The judge concluded that the plan discriminated between present and future claims and even among present claims, not because of medical differences, but "rather because, for whatever reason, the[] [favored claimants] were first in line and able to carve out seemingly unassailable security interests."[544] Such discrimination, he held, was inconsistent with section 524(g)(2)(B)(ii)(V) of the Bankruptcy Code, and thus the plan did not comply with the applicable provisions of title 11, as required by section 1129(a)(1). The judge also concluded that the plan was not proposed in good faith, as required by section 1129(a)(3), because it was "fundamentally unfair that one claimant with non-symptomatic pleural plaques will be paid in full, while someone with mesothelioma runs the substantial risk of receiving nothing."[545]

Similarly, the Third Circuit concluded in the *Combustion Engineering* case that "the pre-petition payments to the CE Settlement Trust participants and the use of stub claims to secure confirmation votes may violate the Bankruptcy Code and the 'equality among creditors' principle that underlies it."[546] The court of appeals expressed concern that the debtors' "pre-petition side agreement with a privileged group of asbestos claimants"[547] might have "impermissibly discriminate[d] against certain asbestos personal injury claimants,"[548] might have constituted an avoidable preference,[549] and might have violated the good faith requirement of section 1129(a)(3).[550] The court vacated the confirmation order and remanded the case to the district court for fact finding on all of these and other issues.

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543. *In re* ACandS, Inc., 311 B.R. 36, 42 (Bankr. D. Del. 2004). *Cf.* MCL 4th, *supra* note 3, § 22.923 (discussing criteria for approval of a class action settlement, including avoiding dissimilar treatment for class members with similar claims).

544. *Id.*

545. *Id.* at 43.

546. *In re Combustion Eng'g, Inc.*, 391 F.3d at 202. The court noted expert testimony stating that "while CE Settlement Trust participants recover, on average, 59% of the liquidated value of their claims, future claimants would recover 18% of the liquidated value of their claims under the Asbestos PI Trust." *Id.* at 242.

547. *Id.* at 244.

548. *Id.* at 239. The court of appeals also agreed with appellants that the use of stub claims, which allowed claimants paid by the prebankruptcy trust to vote on the bankruptcy plan based on the unpaid portion of their claims, may have constituted "artificial impairment" under section 1129(a)(10). *Id.* at 242–45.

549. *Id.* at 240. Combustion Engineering transferred some $400 million in assets to the prebankruptcy trust eighty-seven days before it filed its bankruptcy petition, and thus the transfer fell within the preference period. *Id.* at 238.

550. *Id.* at 247.

Some courts, however, have confirmed prepackaged plans that provided less favorable treatment for claimants paid by the postbankruptcy trust than was received by those paid by the prebankruptcy trust.[551] In support of that position, section 524(g) only requires that "the *trust* [created by the confirmed plan] . . . value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."[552] It does not require that payments from the bankruptcy trust be substantially similar to payments that were made *before* bankruptcy. The Bankruptcy Code therefore might be read as permitting in this context, as in bankruptcy generally, less favorable treatment for claimants who are paid pursuant to a confirmed plan than was received by other claimants prior to bankruptcy, so long as the prebankruptcy payments were made outside the preference period and cannot otherwise be avoided.

Whether or not a court finds the two-trust structure of the prepackaged asbestos bankruptcies to violate section 524(g) or more general bankruptcy policy favoring equality of treatment depends on how the court views the debtor's proposed resolution of the tort claims. If the court views the plan creating the postbankruptcy trust in isolation, then only that trust has to provide even-handed treatment to the claims it pays. If the court views the plan as one element of a package of negotiations leading up to a dual-trust structure, then the court is likely to conclude that similar claims should receive similar treatment regardless of which trust pays them. The Third Circuit in *Combustion Engineering* took the latter, more realistic view, and, as a result, vacated confirmation of the plan.[553]

3. Self-dealing of prepetition committee

A concern closely related to the inequality of treatment of similar claims involves the role played by the prepetition committee of plaintiffs' counsel who negotiate the prepackaged plan with the debtor. Critics have com-

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551. *See In re* J.T. Thorpe Co., 308 B.R. 782 (Bankr. S.D. Tex. 2003), *aff'd*, 2004 WL 720263 (S.D. Tex. 2004); *In re* Combustion Eng'g, Inc., 295 B.R. 459 (Bankr. D. Del.), *vacated & remanded,* 391 F.3d 190 (3d Cir. 2004).

552. 11 U.S.C. § 524(g)(2)(B)(ii)(V) (2000) (emphasis added).

553. *See In re Combustion Eng'g, Inc.*, 391 F.3d at 241 ("[W]e consider the bankruptcy scheme as an integrated whole in order to evaluate whether Plan confirmation is warranted."); *id.* at 241 n.55 ("Only after analyzing the totality of circumstances surrounding a reorganization plan can the court exercise the informed, independent judgment which is an essential prerequisite for confirmation of a plan.") (internal quotation marks omitted); *id.* at 242 (referring to the "interdependent, two-trust framework").

plained that this handpicked group negotiates favorable settlement terms for its own clients, leaving other present and all future claimants to seek compensation under less favorable terms from the postbankruptcy trust.[554] Unlike an official committee of unsecured creditors appointed during a chapter 11 case, these attorneys owe no fiduciary duty to claimants other than their clients.[555]

The "obvious self-dealing" of the prepetition committee was one of the chief factors that led the bankruptcy judge in the *ACandS* case to decline to confirm the plan on the ground of lack of good faith.[556] In another case, the plaintiffs' lawyer who negotiated the prepackaged plan with the debtor and then encouraged other plaintiffs' attorneys to support it received a payment of $20 million from the debtor's parent corporation for his efforts. The bankruptcy court determined that the attorney had an actual conflict of interest as a result of the payment and barred him from any further participation with the postbankruptcy trust. The court concluded, however, that the prepetition solicitation and vote were not tainted by this conflict and that the plan could be confirmed.[557]

A judge presented with a prepackaged mass tort plan needs to be fully informed about the circumstances surrounding the prepetition negotiations in order to determine whether the process has been tainted by conflicts of interest or self-interested actions by the participants. This information may affect the judge's ruling on a number of critical issues, including the adequacy of prepetition disclosure and the effect of the prepetition vote, the adequacy of representation of future claimants, the membership of any postpetition tort claimants' committee, and the fairness of any differences in treatment of similar claims.

E. Dealing with Insurance Issues

In some mass tort bankruptcy cases, a critical issue in the negotiation of the reorganization plan will be the amount of insurance that will be available for compensation of the tort claimants. If the prepetition tort litigation did not already exhaust the debtor's available insurance, the debtor and other

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554. *See, e.g.,* Plevin et al., *supra* note 526, at 910–11. *See also In re Combustion Eng'g, Inc.*, 391 F.3d at 245 ("[A] disfavored group of asbestos claimants, including the future claimants and the Certain Cancer Claimants, were not involved in the first phase of this integrated settlement.").

555. Plevin et al., *supra* note 526, at 910.

556. *In re* ACandS, Inc., 311 B.R. 36, 43 (Bankr. D. Del. 2004).

557. *In re* Combustion Engineering, Inc., 295 B.R. 459 (Bankr. D. Del. 2003), *vacated & remanded on other grounds*, 391 F.3d 190 (3d Cir. 2004).

parties may look to the insurers to play a significant role in the funding of the tort claimant trust. The insurers, however, may very well dispute the existence and scope of their liability under their respective policies with the debtor if those issues were not resolved prior to the debtor's bankruptcy. They may also challenge the methods the debtor and others propose for resolving the tort claims, as well as the total value attributed to those claims. And those insurers that do agree to contribute to the funding of the trust will expect in return to receive protection from further litigation related to the debtor's product, which may raise issues about the court's authority to authorize such protection.

Because of the critical role that insurance may play, a judge presiding over a mass tort bankruptcy should ascertain in the early stages of the case the amount of the debtor's unexhausted insurance coverage and whether coverage is disputed. This information will help the judge determine whether resolution of insurance issues is likely to be a key to the successful negotiation of the plan and how directly involved the bankruptcy court needs to be in promoting a resolution of those issues.

1. Coverage litigation

At the time that a mass tort debtor files for bankruptcy, lawsuits may already be pending in state or federal court between the debtor and insurers to determine the scope of insurance coverage for the tort claims. Any such suits brought by an insurer against the debtor will be halted by the automatic stay,[558] which may lead the insurer to seek relief from the stay in the bankruptcy court so that the issue can be resolved in the non-bankruptcy court.[559] A prepetition coverage suit brought by the debtor will not be stayed, and the debtor may seek to remove or transfer any pending coverage litigation to the bankruptcy court presiding over its chapter 11 case.[560] Furthermore, whether or not prepetition coverage suits are pending, the debtor may initiate an adversary proceeding in the bankruptcy court to determine the existence and scope of insurance coverage.[561] The bankruptcy court

558. *See* 11 U.S.C. § 362(a)(1) (2000) (providing that the filing of a bankruptcy petition operates as a stay of "the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the [bankruptcy] case").

559. *See id.* § 362(d)(1) (authorizing the court to grant relief from the stay "for cause").

560. *See, e.g.*, Certain Underwriters at Lloyd's London v. ABB Lummus Global, Inc., No. 03 Civ. 7248(JGK), 2004 WL 224505 (S.D.N.Y. 2004).

561. *See, e.g.*, U.S. Brass Corp. v. Aetna Cas. & Sur. Co. (*In re* U.S. Brass Corp.), 173 B.R. 1006 (Bankr. E.D. Tex. 1994).

therefore may have to determine where and when these coverage issues should be resolved.

Whether in response to a request for relief from the stay or a motion to remand or abstain, the bankruptcy judge's determination of where the coverage issues should be resolved will require that the bankruptcy judge consider a number of factors, including the following:

- the importance of the coverage issue to the plan negotiations;
- the novelty and complexity of the state insurance law issues;
- the likely time frame for a resolution in the non-bankruptcy court; and
- whether the judge wants to directly oversee the resolution of the coverage issues.[562]

Although there is some disagreement among courts over whether a coverage dispute between a debtor and its insurer is a core or non-core proceeding,[563] it clearly comes within section 1334(b)'s conferral of bankruptcy jurisdiction, since it is at least related to the bankruptcy case.[564] Thus, the bankruptcy court has authority to hear the proceeding if it so chooses. That decision may, however, be affected by the timing issue.

All insurance coverage issues do not necessarily have to be resolved prior to plan confirmation.[565] Litigation over some policies might be deferred because the debtor assigns its rights under the policies to the trust, which following confirmation will pursue litigation to determine the extent of coverage.[566] Alternatively, the plan may provide that the debtor will continue to prosecute coverage actions, and the insurance proceeds resulting from any successful suits will go to either the debtor or the trust.[567] De-

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562. *See, e.g.*, U.S. Brass Corp. v. Cal. Union Ins. Co., 198 B.R. 940, 947–49 (N.D. Ill. 1996), *aff'd*, 110 F.3d 1261 (7th Cir. 1997).

563. *Compare, e.g.,* U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Assoc. (*In re* U.S. Lines), 197 F.3d 631 (2d Cir. 1999) (holding that a coverage suit was a core proceeding), *with In re* U.S. Brass Corp., 110 F.3d 1261 (7th Cir. 1997) (holding that coverage suits were non-core proceedings).

564. *See, e.g.*, *In re U.S. Brass Corp.*, 110 F.3d at 1268–69.

565. *See, e.g.*, Harbison-Walker Refractories Co. v. Ace Prop. & Cas. Ins. Co. (*In re* Global Indus. Techs., Inc.), 303 B.R. 753, 759 n.10 (Bankr. W.D. Pa. 2004) ("[A]t some point insurance companies who do not settle with the debtors will have an opportunity to resolve coverage issues in an appropriate forum and within the parameters of either the bankruptcy case or the post-bankruptcy Asbestos PI Trust and the corresponding Trust Distribution Procedures."), *vacated & modified in part on other grounds*, 2004 WL 555418 (Bankr. W.D. Pa. Feb. 3, 2004).

566. *See, e.g.*, *In re* Fuller-Austin Insulation, No. 98-2038-JJF, 1998 WL 812388 at *2 (D. Del. Nov. 10, 1998).

567. *See, e.g.*, UNR Indus., Inc. v. Cont'l Cas. Co., 942 F.2d 1101 (7th Cir. 1991).

pending on the clarity of the governing state law and on the importance of these postconfirmation suits to implementation of the plan, the bankruptcy judge may decide that the suits should be resolved in the bankruptcy court or that their resolution is appropriately left to the non-bankruptcy courts in which they were originally filed.

In cases in which the disputed insurance proceeds will be essential for the funding of the tort claimant trust, however, it may not be possible to negotiate and confirm a plan until the coverage issues are resolved. In such cases, the bankruptcy court will want to ensure as expeditious a resolution as possible, and, for that reason, may decide to exercise jurisdiction itself over any coverage action that has been transferred to it or brought before it as an adversary proceeding. As with other issues critical to the plan negotiations, the judge should consider actions he or she can take to promote the parties' settlement of coverage issues, thereby eliminating the need for costly litigation, which is likely to be followed by time-consuming appeals. Among the steps the judge should consider is the appointment of a mediator to facilitate a settlement between the debtor and its insurers.[568]

If the debtor does reach a settlement with one or more insurers, whether in connection with a proceeding in the bankruptcy court or elsewhere, the bankruptcy court will have to approve the settlement pursuant to Federal Rule of Bankruptcy Procedure 9019. The debtor must give notice of its request for approval to creditors and the U.S. trustee, and it is possible that some tort claimants will object to the amount of the settlement or to the terms of payment of the insurance proceeds to the trust.[569] To approve the settlement, the bankruptcy judge will have to determine that it is fair and equitable and in the best interests of the estate.[570] The judge will have to make an independent judgment after becoming familiar with the underlying facts and considering such factors as the following:

- the likely outcome of the litigation as compared with the benefits provided by the settlement;
- the cost and delay that the litigation would involve if the settlement were not approved;
- the support for the settlement by the affected class;
- the experience and knowledge of counsel supporting the settlement;

568. *See supra* section V.B.3.
569. *See, e.g., In re* Dow Corning Corp., 198 B.R. 214, 221 (Bankr. E.D. Mich. 1996).
570. *See, e.g., id.* at 222.

- the benefits members of the class would receive as a result of the settlement;
- the nature and scope of releases to be granted in exchange for the settlement; and
- the extent to which the settlement resulted from arm's-length bargaining.[571]

The terms of the settlement, if approved, will most likely be included in the debtor's reorganization plan in order to enhance its binding effect on all parties to the bankruptcy proceedings.

2. Possible objections by insurers to the use of insurance proceeds to fund the tort claimant trust

If the debtor does not enter into settlements with all of its insurers, some of the non-settling insurers may seek to object to confirmation of the plan and to appeal from the confirmation order if they believe that the plan adversely affects their rights under their policies with the debtor. In past cases insurers have objected that the assignment to the tort claimant trust of the debtor's rights under the policies violates anti-assignment provisions of the policies[572] and that the combination of insurance proceeds into a single fund without insurer consent impermissibly applies proceeds to non-covered claims.[573] Insurers have also objected that the plan fails to preserve coverage defenses under their policies or their rights against non-debtors.[574] They have been especially concerned that future litigation will attempt to bind them to the estimated value of the tort claims the court relied on in establishing the trust and confirming the plan.[575]

Courts have not always found insurers to have standing to object to confirmation or to other rulings in the bankruptcy case or to appeal from the order confirming the plan.[576] Generally the issue has turned on

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571. *See id.* at 223; *In re* Texaco Inc., 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988).

572. *See, e.g., In re* Combustion Eng'g, Inc., 391 F.3d 190, 218 (3d Cir. 2004).

573. *See, e.g.,* Robert B. Millner & Mark D. Plevin, *Insurance Coverage in the New Millennium*, SG004 ALI-ABA 79, 100–01 (2001).

574. *See, e.g.*, *id.* at 100–02.

575. This concern is based on the Seventh Circuit's decision in *UNR Indus., Inc. v. Cont'l Cas. Co.*, 942 F.2d 1101 (7th Cir. 1991). In that case, the court held that UNR's bankruptcy and confirmed plan resulted in a "judgment or settlement" against the debtor-insured in the amount of $254 million, the negotiated value of the asbestos claims, and that that valuation was binding on the insurer.

576. *See, e.g., In re Combustion Eng'g, Inc.*, 391 F.3d at 220 (holding that insurers were not "persons aggrieved" who could challenge on appeal most aspects of the plan and its confirmation); *In re* Fuller-Austin Insulation, No. 98-2038-JJF, 1998 WL 812388 at *3 (D. Del. Nov. 10, 1998)

whether the insurers can show that their interests are adversely affected by the plan or ruling. To head off challenges by non-settling insurers, some debtors have included provisions in their plans disavowing any intent to affect the rights of those insurers under their policies or prepetition settlements.[577] These provisions have been effective in preventing the insurers from being able to vote on the plan,[578] object to confirmation,[579] or challenge on appeal certain provisions of the confirmed plan.[580] However, if adequate trust funding is dependent on the insurance proceeds the debtor seeks from these insurers, preservation of all of the insurers' rights and defenses may undermine plan feasibility or at least the equality of treatment of future claimants.[581]

3. Protection of insurers against further litigation

Insurance companies that do settle with the debtor during plan negotiations will want protection from further litigation in exchange for their contribution of insurance proceeds to fund the trust. Insurers will seek this protection because their main motivation in settling is likely to be the desire to achieve a final resolution of their involvement in the debtor's mass tort litigation. In a mass tort bankruptcy case involving asbestos, such protection is permitted under section 524(g)(2)(B) of the Bankruptcy Code if a detailed set of conditions is satisfied. In other mass tort bankruptcies, however, the authority of the court to approve provisions insulating non-debtors such as the insurers from further liability or to enter channeling injunctions having that effect is less certain, and the issue is one on which the courts are divided.[582]

(holding that insurers were not parties in interest with standing to object to plan confirmation or approval of the disclosure statement).

577. *See* Harbison-Walker Refractories Co. v. Ace Prop. & Cas. Ins. Co. (*In re* Global Indus. Techs., Inc.), 303 B.R. 753, 761 n.11 (Bankr. W.D. Pa. 2004) ("In the asbestos cases pending before this court, the proposed plans of reorganization typically preserve insurers' rights to contest claims that are to be paid under the Asbestos PI Trusts created under the plans."), *vacated & modified in part on other grounds*, 2004 WL 555418 (Bankr. W.D. Pa. Feb. 3, 2004).

578. *See, e.g., In re* Combustion Eng'g, Inc., 295 B.R. 459, 474 (Bankr. D. Del. 2003), *vacated and remanded on other grounds,* 391 F.3d 190 (3d Cir. 2004).

579. *See, e.g., In re Fuller-Austin Insulation*, 1998 U.S. Dist. LEXIS 18340, at *13.

580. *See, e.g., In re Combustion Eng'g, Inc.*, 391 F.3d at 220.

581. *See* Plevin et al., *supra* note 526, at 920.

582. A discussion of these issues is presented in section VI.E.2, *infra*.

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VI. Plan Confirmation

A. Overview

Part VI addresses the following issues that might arise in a mass tort bankruptcy case in connection with the confirmation of the plan:

- *Voting by tort claimants:* How can the court efficiently manage voting by large numbers of tort claimants? May lawyers vote for their clients? How are the unliquidated tort claims valued for purposes of voting? Are tort claimants eligible to vote if no bar date was imposed and they did not file proofs of claim?
- *Confirmation hearing:* Under what circumstances should a bankruptcy judge and a district judge jointly preside over a confirmation hearing? What role does each judge play at such a hearing?
- *Confirmation issues:* What objections are likely to be raised at the confirmation hearing in a mass tort bankruptcy case?
- *Scope of the discharge and channeling injunction:* In an asbestos mass tort bankruptcy, what are the requirements for obtaining an injunction that protects non-debtors as well as the debtor from further tort liability? Does the court have authority to extend similar protection to non-debtors in non-asbestos cases? Does it have jurisdiction to enjoin litigation between non-debtor parties?

B. Voting by Tort Claimants

Central to the confirmation process in chapter 11 is the debtor's submission of the plan of reorganization, along with an approved disclosure statement, to impaired classes of creditors and shareholders for their vote. Section 1126(a) of the Bankruptcy Code provides that the holder of an allowed claim or interest may accept or reject a plan. Subsection (c) of that provision specifies the voting requirements for acceptance by a class of creditors: approval by more than one-half in number of those voting in the class and by those holding at least two-thirds in amount of the claims held by the voting creditors. In an asbestos mass tort chapter 11 case, an additional voting requirement is imposed by section 524(g) if a channeling injunction is to be issued. For such an injunction to be valid, the class of

mass tort claimants must approve the plan by a vote of at least 75% of those voting in the class.[583]

Voting in a mass tort bankruptcy case presents both legal and logistical problems. If the court has imposed a bar date, many thousands of tort claimants may have filed claims that are unliquidated and disputed. How are these claims to be valued for voting purposes? And if no bar date has been imposed, the universe of eligible tort claimants is undefined. Who are the claimants who are eligible to vote? How can the court efficiently handle the voting process by such a large group?

In cases in which the court has imposed a bar date for the filing of proofs of claim by tort claimants, voting should be limited to claimants who filed by that deadline, even if other present and future claimants may be permitted eventually to recover from the trust created by the plan if it is confirmed. Only those claimants who filed proofs of claim, or who had them filed on their behalf, have allowed claims entitling them to vote.[584] A claimant's lawyer may, however, be able to cast a vote on the claimant's behalf. It is a common practice in mass tort bankruptcy cases to send master ballots directly to all lawyers known to be representing persons with tort claims against the debtor and to allow them to vote to accept or reject the plan on behalf of each client who has authorized them to do so.[585] This practice, which facilitates voting by large numbers of claimants, is authorized by Federal Rule of Bankruptcy Procedure 3018(c). That rule permits voting by "an authorized agent" for a creditor or equity security holder.[586] Claimants who have not authorized attorney voting or who have personally signed proofs of claim should be sent solicitation packages directly for individual voting.

If a bar date has not been imposed for mass tort claims, there will not be a finite list of eligible voters. Nevertheless, in some cases of this type, courts have used master ballots for voting by tort claimants. Courts have sent ballots to attorneys who have represented plaintiffs in cases filed against the debtor prior to bankruptcy and to tort claimants' lawyers who

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583. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

584. *See id.* § 1126(a); Fed. R. Bankr. P. 3003(c)(2).

585. *See, e.g.*, *In re* Combustion Eng'g, Inc., 391 F.3d 190, 245 n.66 (3d Cir. 2004) (noting that "the entire solicitation and voting process was conducted through a small group of law firms who collectively represented hundreds of thousands of individual claimants"); Gibson, *supra* note 64, at 80 (describing voting process in the *Eagle-Picher* bankruptcy).

586. *See In re Combustion Eng'g, Inc.*, 391 F.3d at 245 n.66 ("Where the voting process is managed almost entirely by proxy, it is reasonable to require a valid power of attorney for each ballot to ensure claimants are properly informed about the plan and that their votes are valid.").

have participated in the bankruptcy case. These attorneys then have identified and cast votes on behalf of each client who has given them authority to vote. In addition, courts have sent solicitation packages directly to additional claimants identified by themselves or by their attorneys as persons desiring to vote on their own behalf.[587]

According to section 1126(a), however, only holders of claims "allowed under section 502" are authorized to vote to accept or reject a plan. For a claim to be allowed—if it is not scheduled by the debtor as undisputed, non-contingent, and liquidated—proof of the claim must be filed.[588] Thus, Federal Rule of Bankruptcy Procedure 3003(c)(2) provides that any creditor whose claim is not scheduled or is scheduled as disputed, contingent, or unliquidated and who does not file a timely proof of claim "shall not be treated as a creditor with respect to such claim for the purposes of voting." Allowing voting by holders of unliquidated tort claims who have not filed proofs of claim, therefore, is contrary to the Bankruptcy Code and Rules. Although Rule 3018(a) authorizes the bankruptcy court to temporarily allow a claim for voting purposes, that rule deals with the situation in which an objection is made to a filed claim.[589] It does not address the situation in which no proof of claim has been filed.

In a case in which no bar date for tort claims has been imposed, the debtor may attempt to comply with the allowed claim requirement for voting by including in the solicitation package a proof of claim form along with the ballot and disclosure statement.[590] That practice is also of questionable validity. Even if the claimant could be deemed to have filed the proof of claim just seconds before submitting the ballot and then to have had the claim automatically allowed, this practice eliminates the opportunity for a party in interest to object to the claim.[591] Although "creative voting scheme[s]" such as this one have been implemented in some mass tort

587. *See, e.g.,* Ballot Solicitation and Tabulation Procedures, *In re* Armstrong World Indus., Inc., No. 00-4471 (Bankr. D. Del. 2003), *at* http://www.armstrong.com/common/uscorp/content/files/4195.pdf (last visited Jan. 8, 2005).

588. 11 U.S.C. §§ 1111(a), 502(a) (2000).

589. "*Notwithstanding 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" (emphasis added).

590. *See, e.g.,* Kane v. Johns-Manville Corp., 843 F.2d 636, 646 (2d Cir. 1988) (describing voting procedure in which "proofs of claims and votes were simultaneously solicited from present claimants in a combined mailing form").

591. 11 U.S.C. § 502(a) (2000); Fed. R. Bankr. P. 3007.

bankruptcy cases,[592] compliance with the Bankruptcy Code and Rules requires imposition of a bar date and the filing of proofs of claim before voting on a plan is undertaken.

Even if a bar date for mass tort claims has been set and proofs of claim have been filed, most of the claims will be unliquidated at the time the plan of reorganization is voted on. The resulting uncertainty about claim amounts presents difficulties for vote tabulation. How can it be determined for the class of tort claimants whether there was satisfaction of section 1126(c)'s requirement that "at least two-thirds in amount" of the voting claims approved the plan? If the court can only determine satisfaction of that requirement by liquidating all of the thousands of tort claims, voting by the tort claimant class will be infeasible.[593]

Courts have devised two ways of dealing with the problem of tort claim value for voting purposes. A number of courts have temporarily allowed all tort claims within a single class at the same amount, typically one dollar.[594] As a result of this equal weighting of all of the claims, the class of tort claimants will have accepted the plan under section 1126(c) if at least two-thirds of the votes have been cast in favor of the plan. Determination of individual claim amounts can then await the trust distribution process. Although Federal Rule of Bankruptcy Procedure 3018(a) permits a court to "temporarily allow [a] claim or interest in an amount which the court deems proper for the purposes of accepting or rejecting a plan," allowing all tort claims at the same amount runs the risk of giving too great a relative weight to insubstantial claims to the possible detriment of more serious claims.[595]

In some other mass tort cases, all involving asbestos, courts have approved a special voting procedure for the personal injury claimants that assigns a claim amount for voting purposes based on the disease category the claimant's alleged injury falls within. At the time of voting, a tort

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592. *Kane*, 843 F.2d at 646.

593. *See, e.g., In re* A.H. Robins Co., 88 B.R. 742, 747 (E.D. Va. 1988) ("Any attempt to evaluate each individual claim for purposes of voting on the Debtor's Plan of Reorganization would, as a practical matter, be an act of futility, and would be so time consuming as to impose on many, many deserving claimants further intolerable delay all not only to their detriment, but to the detriment of the financial well being of the estate as well."), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

594. *See, e.g., Kane,* 843 F.2d at 646; *In re A.H. Robins Co.,* 88 B.R. at 747; Gibson, *supra* note 64, at 80, 225 (describing voting in the *Eagle-Picher* and *Dow Corning* cases).

595. *See* S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?,* 148 U. Pa. L. Rev. 2095, 2112 (2000).

claimant indicates on the ballot which type of disease is alleged, and a dollar value is assigned based on that designation. Claim amounts under such a classification system ranged in the *Armstrong World Industries* case from $400 to $130,500,[596] and in the *Babcock & Wilcox* case from $0 to $90,000.[597] Because this voting procedure uses the disease categories and average values that will eventually apply in the trust distribution process, it more accurately aligns voting strength with ultimate claim value.

In most, if not all, of the decided mass tort bankruptcy cases, tort claimants have approved the plan of reorganization by overwhelming numbers.[598] This result is not surprising, since the cases have been resolved by the debtor's negotiation and settlement with the tort claimants' committee, and that committee has jointly proposed the plan with the debtor and urged its approval. As a result of the overwhelming support by tort claimants, however, the voting procedures typically used in these cases have received virtually no appellate scrutiny. Challenges, for example, to the validity of simultaneous claims filing and voting and to allowance of all claims at the same nominal amount have escaped serious appellate review, because courts have concluded that any error these voting procedures might involve would be harmless.[599] Bankruptcy judges presiding over mass tort cases therefore will most likely have the ultimate responsibility for ensuring that the voting procedures used for the tort claimants comply with the Bankruptcy Code and Rules.

C. Confirmation Hearing

The confirmation hearing in a mass tort case proceeds for the most part in the same manner as a confirmation hearing in any chapter 11 case. Section 1128 of the Bankruptcy Code requires the court, after notice, to hold a

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596. Ballot for Accepting or Rejecting Armstrong World Industries, Inc.'s Plan of Reorganization for Individual Holders of Class 7 Asbestos Personal Injury Claims at 2, *In re* Armstrong World Indus., Inc., No. 00-4471 (Bankr. D. Del. 2003).

597. Memorandum from Motley Rice LLC, to Motley Rice Co-Counsel 4–6 (July 29, 2003), *available at* http://bankruptcy.motleyrice.com/babcockandwilcox/Voting%20Procedures%20Memo%20for%20Co-Counsel%207-25-03.doc.

598. *See, e.g.,* Gibson, *supra* note 64, at 81 (noting approval by over 96% of the class of asbestos and lead personal injury claimants in the *Eagle-Picher* bankruptcy case); *id.* at 172 (noting approval of over 96% of asbestos claimants in the *UNR* bankruptcy); *id.* at 198 (noting approval by over 94% of tort claimants in the *A.H. Robins* bankruptcy); *id.* at 225 (noting approval by 95.5% of U.S. breast implant claimants in the *Dow Corning* bankruptcy).

599. Kane v. Johns-Manville Corp., 843 F.2d 636, 647 (2d Cir. 1988); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 698 (4th Cir. 1989).

hearing on confirmation of a chapter 11 plan, and it permits any party in interest to object to confirmation.[600] In cases in which no objection has been filed, Federal Rule of Bankruptcy Procedure 3020(b)(2) provides that the court does not have to receive evidence concerning whether the plan was proposed in good faith and not by any means forbidden by law. By implication, the rule requires the court to conduct a confirmation hearing and receive evidence on the other statutory requirements for confirmation.[601] Thus, in a mass tort case, as in more routine chapter 11 cases, the court receives evidence from proponents of the reorganization plan seeking to establish that the requirements of section 1129 have been satisfied, and it hears from any parties in interest that have filed timely objections to plan confirmation.

There is one important way in which the confirmation hearing in some mass tort bankruptcy cases has differed from the norm: The hearing has been conducted jointly by the bankruptcy judge who has been presiding over the case and a district judge. There are several reasons why this procedure has been followed. In one case in which a joint hearing was used, the district judge had at the outset of the case withdrawn the reference of jurisdiction to the bankruptcy judge with respect to many of the issues involving the mass tort claims, and both judges had jointly presided over proceedings throughout the case.[602] They followed the same procedure with the confirmation hearing, after which both judges entered the confirmation order.[603] In another mass tort case, which involved claims of injury from asbestos products, the judge used the joint hearing procedure to shorten the time needed for compliance with 11 U.S.C. § 524(g). Under that provision, a channeling injunction in a mass tort bankruptcy case involving asbestos is not valid and enforceable unless the confirmation order is "issued or affirmed by the district court that has jurisdiction over the reorganization case."[604] A joint hearing and a jointly issued confirmation order in the *Eagle-Picher* case shortened the time required for obtaining the dis-

600. 11 U.S.C. § 1128(a) & (b) (2000).

601. *See* Lawrence R. Ahern III & Nancy Fraas MacLean, Bankruptcy Procedure Manual § 3020.03 (2004).

602. *See* Ackles v. A.H. Robins Co. (*In re* A.H. Robins Co.), 59 B.R. 99, 105–07 (Bankr. E.D. Va. 1986) (attaching as Ex. A the order withdrawing the reference), *aff'd sub nom.* Beard v. A.H. Robins Co., 828 F.2d 1029 (4th Cir. 1987).

603. *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988), *aff'd sub nom.* Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

604. 11 U.S.C. § 524(g)(3)(A) (2000).

trict court's approval of confirmation and resulted in significant tax savings to the debtor.[605]

Collapsing the confirmation and appeal processes into one step that results in a joint order by the bankruptcy judge and the district judge allows for a significant time savings in the case, as it eliminates one layer of decision making and permits direct review of the confirmation order by the court of appeals should an objector appeal. As previously discussed in another chapter of this manual, however, if both a bankruptcy judge and a district judge are presiding at the same hearing, they need to clarify the roles that each is playing and the authority each is exercising.[606] If the bankruptcy judge is exercising original jurisdiction pursuant to 28 U.S.C. § 157, then the district judge's exercise of appellate jurisdiction needs to be clarified. If the district judge is exercising original jurisdiction, having withdrawn the reference as to confirmation of the case, then the bankruptcy judge's role needs to be explained.

D. Confirmation Issues

Section 1129(a) of the Bankruptcy Code allows a bankruptcy court to confirm a chapter 11 plan only if all of the requirements it sets forth are satisfied. These statutory requirements are therefore the focus of any chapter 11 confirmation hearing, including those conducted in mass tort cases. Additionally, in mass tort cases involving asbestos, the requirements of section 524(g) will have to be satisfied in order for the court to issue a valid and enforceable channeling injunction protecting non-debtor third parties, and therefore the confirmation hearing will also concern the satisfaction of those requirements. Because most mass tort bankruptcy cases are eventually resolved by negotiation among the key constituencies, the major players in these cases—the debtor, tort claimants' committee, future claims representative, unsecured creditors' committee—typically support the plan and join in submitting evidence at the hearing in support of confirmation. Objection to confirmation, therefore, is left to dissenting groups or individuals, such as tort claimants who were in the small minority that voted against the plan, shareholders whose interests in the debtor company are to be elimi-

605. *In re* Eagle-Picher Indus., Inc., 203 B.R. 256 (S.D. Ohio 1996).

606. *See supra* section II.C.1.

nated, commercial creditors who rejected the settlement reached regarding the treatment of tort claims, or non-settling insurers.[607]

Objections to confirmation of reorganization plans in mass tort bankruptcy cases have typically raised some combination of the following challenges:

- whether the plan has been proposed in good faith;[608]
- whether the plan can be crammed down on any rejecting classes;[609]
- whether the best-interests-of-creditors test is satisfied (that is, whether objecting creditors are receiving under the plan at least as much as they would have received in a chapter 7 liquidation);[610] and
- whether the plan is feasible.[611]

The latter two objections often challenge the inclusion of future claims within the plan's coverage (which reduces assets available to pay present unsecured claims) and the accuracy of the claims estimation and the sufficiency of the trust funding.[612] Objectors may also raise a variety of other legal issues by asserting, pursuant to section 1129(a)(1) and (2), that the proponent of the plan or the plan itself does not comply with the applicable provisions of the Bankruptcy Code.[613]

In confirming a plan, the court's duty to determine that each of the applicable statutory requirements set forth in section 1129 has been satisfied exists whether or not objections have been raised as to specific re-

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607. *See, e.g.*, Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002) (noting that certain tort claimants who voted against the plan, including the United States, appealed from the confirmation order); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 696 (4th Cir. 1989) (noting that certain personal injury claimants who voted against the plan appealed from the confirmation order); *In re* Fuller-Austin Insulation, No. 98-2038-JJF, 1998 WL 812388 (D. Del. Nov. 10, 1998) at *1 (noting that insurers filed objections to confirmation); *In re* Eagle-Picher Indus., Inc., 203 B.R. 256 (S.D. Ohio 1996) (listing the objecting parties as a general unsecured creditor who voted against the plan, stockholders whose interests were cancelled by the plan, and a preference defendant).

608. *See, e.g.*, Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 649 (2d Cir. 1988).

609. *See, e.g.*, *In re* Armstrong World Indus., Inc., 320 B.R. 523 (D. Del. 2005) (denying plan confirmation because of the plan's failure to satisfy the cramdown requirement of 11 U.S.C. § 1129(b)(2)(B)(ii)); *In re Eagle-Picher Indus., Inc.*, 203 B.R. at 277.

610. *See, e.g., id.* at 274–75; *In re* Dow Corning Corp., 244 B.R. 721 (Bankr. E.D. Mich. 1999).

611. *See, e.g.*, *Kane*, 843 F.2d at 650; *In re Dow Corning Corp.*, 244 B.R. at 732–33.

612. *See, e.g., Kane*, 843 F.2d at 649–50; *In re Eagle-Picher Indus., Inc.*, 203 B.R. at 274–75.

613. *See, e.g.*, Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 661–63 (discussing challenge to the classification of claims).

quirements and even if objectors have not presented evidence opposing the showing made by the proponents.[614] The court's findings on these issues should provide sufficient discussion of or reference to the underlying evidence to permit meaningful appellate review.[615]

E. Scope of the Discharge and Channeling Injunction

In a mass tort bankruptcy case, the proposed plan will most likely provide for the release of entities in addition to the debtor from liability for the tort claims, and the debtor will seek a "channeling injunction" prohibiting efforts to recover on the tort claims except those that follow procedures established by the plan. If approved, these protective provisions will preclude present and future tort claimants from attempting to expand liability beyond the debtor to related entities that might be liable because of successor liability, fraudulent transfer, piercing of the corporate veil, or other legal theories.[616] The debtor will insist on these protective provisions for a number of reasons:

- to protect non-debtor entities in order to prevent the assertion of claims against them that could lead to indemnification claims against the debtor itself;
- to protect other parties, such as insurers or parent companies, in order to induce them to contribute substantial assets to the tort claimant trust; and
- to protect asset purchasers in order to achieve a higher sales price.

Whatever the motivation behind these provisions, the expansion of the discharge to cover non-debtor parties is a controversial issue that has divided the courts of appeals. However, Congress has provided express statutory authority for channeling injunctions in asbestos-related mass tort bankruptcies if a complex set of conditions is satisfied.

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614. 7 Collier on Bankruptcy, *supra* note 155, ¶ 1129.02[5].

615. *See Class Five Nev. Claimants*, 280 F.3d at 658 (remanding case for further findings where existing findings "were no more than conclusory statements that restated elements of the test in the form of factual conclusions . . . [and] provided no explanation or discussion of the evidence underlying these findings").

616. *See* Susan Power Johnston & Katherine Porter, *Extension of Section 524(g) of the Bankruptcy Code to Nondebtor Parents, Affiliates, and Transaction Parties,* 59 Bus. Law. 503, 503–510 (2004) (discussing legal theories for expanding mass torts liability beyond the actual manufacturer of the injury-causing product).

1. Channeling injunctions in asbestos cases

In 1994, Congress amended the Bankruptcy Code to provide authority for channeling injunctions in chapter 11 cases involving claims against the debtor for "personal injury, wrongful death, or property-damage . . . allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products."[617] The provisions, which were codified in section 524(g) of the Code, were modeled on the claims resolution procedures adopted in the *Johns-Manville* bankruptcy case[618] and as a result are quite specific and complex. If all of the statutory requirements are met, section 524(g)(1)(B) permits the issuance of an "injunction . . . [preventing] entities from taking legal action for the purpose of . . . recovering . . . with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust" of the type described elsewhere in the provision.

To qualify for the protection that section 524(g) offers, the trust created by a plan of reorganization must satisfy the following requirements:[619]

- the trust must assume the debtor's liability for damages arising out of exposure of claimants to the debtor's asbestos or asbestos-containing products;[620]
- the trust must be funded by securities of the debtor and by the debtor's obligation to make future payments to the trust, including dividends;[621]
- the trust must own a majority of the voting shares of the debtor company or of a parent or subsidiary of the debtor;[622] and
- the trust must use its assets to pay claims of present tort claimants and "demands"[623] of future tort claimants.[624]

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617. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4114 (1994).

618. H.R. Rep. No. 103-835, at 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348.

619. *See also In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 n.45 (3d Cir. 2004) (discussing the statutory requirements for a section 524(g) injunction).

620. 11 U.S.C. § 524(g)(2)(B)(i)(I) (2000).

621. *Id.* § 524(g)(2)(B)(i)(II). The Third Circuit in dicta concluded that the "implication of this requirement is that the reorganized debtor must be a going concern, such that it is able to make future payments into the trust to provide an 'evergreen' funding source for future asbestos claimants." *In re Combustion Eng'g, Inc.*, 391 F.3d at 248.

622. 11 U.S.C. § 524(g)(2)(B)(i)(III) (2000).

623. Section 524(g) uses the term *demands,* which is not used elsewhere in the Bankruptcy Code. It defines *demand* to "mean a demand for payment, present or future, that—(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization; (B) arises out

In addition to these requirements for the trust, section 524(g) requires that the court make the following findings in order for the channeling injunction to be valid:

- the debtor is likely to be subject to substantial future demands for payment as a result of exposure to its asbestos products;[625]
- the timing, amount, and numbers of the future demands cannot be determined;[626]
- the pursuit of these future demands outside of the compensation procedure created by the reorganization plan would most likely threaten the plan's purpose to provide equitable treatment of present claims and future demands;[627]
- the terms of the channeling injunction were set forth in the reorganization plan and in the disclosure statement;[628]
- the affected tort claimant class approved the reorganization plan by a vote of at least 75% of those voting;[629] and
- the trust will operate in a way that provides reasonable assurance that it will value and pay present claims and future demands in substantially the same manner.[630]

Furthermore, for the channeling injunction to be enforceable against future demands, the court, during the chapter 11 case, must appoint a legal representative to protect the rights of future claimants.[631] The court must also determine that including the debtor or third parties within the protection of the channeling injunction is fair and equitable with respect to the future claimants in light of the benefits to be provided the trust on behalf of the protected parties.[632]

If all of the above requirements are satisfied, the court may enter a valid channeling injunction. It will take effect after the time for appeal from the

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of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under [this provision], and pursuant to the plan, is to be paid by a trust described in [this provision]." *Id.* § 524(g)(5).

624. *Id.* § 524(g)(2)(B)(i)(IV).

625. *Id.* § 524(g)(2)(B)(ii)(I).

626. *Id.* § 524(g)(2)(B)(ii)(II).

627. *Id.* § 524(g)(2)(B)(ii)(III).

628. *Id.* § 524(g)(2)(B)(ii)(IV)(aa).

629. *Id.* § 524(g)(2)(B)(ii)(IV)(bb).

630. *Id.* § 524(g)(2)(B)(ii)(V).

631. *Id.* § 524(g)(4)(B)(i).

632. *Id.* § 524(g)(4)(B)(ii).

district court's order either confirming the reorganization plan or affirming the bankruptcy court's confirmation order.[633] The injunction may be revoked or modified only on direct appeal,[634] and the district court that issues or affirms the injunction has exclusive jurisdiction over any proceeding involving its "validity, application, construction, or modification."[635]

A channeling injunction entered pursuant to section 524(g) is enforceable against "all entities that it addresses,"[636] and, notwithstanding section 524(e), it may protect from liability non-debtor third parties identified by name or group if the basis of their alleged liability is one of the following relationships:

- ownership of a financial interest in the debtor, of an affiliate of the debtor, or of a predecessor in interest of the debtor;[637]
- involvement in the management of the debtor or a predecessor in interest or service as an officer, director, or employee of the debtor or related party;[638]
- provision of insurance to the debtor or a related party;[639] or
- involvement in a transaction changing the corporate structure or affecting the financial condition of the debtor or a related party.[640]

The entry of a valid channeling injunction also protects successors in interest, transferees, and lenders. An entity that pursuant to the plan or thereafter becomes a successor to or transferee of any assets of the debtor or of the trust is protected from any liability resulting from that status, and no lender to the debtor, to the trust, to a successor, or to a transferee shall be held liable as a result of making the loan.[641]

Since the enactment of section 524(g), numerous companies with asbestos liability have used chapter 11 to obtain a global resolution of the tort claims against them and affiliated companies.[642] Their plans of reorganization have established trusts according to the specifications of section 524(g)

633. *Id.* § 524(g)(3)(A)(i).
634. *Id.*
635. *Id.* § 524(g)(2)(A).
636. *Id.* § 524(g)(4)(A)(i).
637. *Id.* § 524(g)(4)(A)(ii)(I).
638. *Id.* § 524(g)(4)(A)(ii)(II).
639. *Id.* § 524(g)(4)(A)(ii)(III).
640. *Id.* § 524(g)(4)(A)(ii)(IV).
641. *Id.* § 524(g)(3)(A)(ii), (iii).
642. *See, e.g.,* Fred S. Hodara & Robert J. Stark, *Protecting Distributions for Commercial Creditors in Asbestos-Related Chapter 11 Cases,* 10 J. Bankr. L. & Prac. 383, 399–409 (2001) (discussing asbestos-related mass tort bankruptcy cases).

to assume the debtor's asbestos liability and to provide compensation to present and future claimants. Part of the confirmation process in these cases has involved a demonstration to the court that all of section 524(g)'s requirements have been satisfied and that a channeling injunction can therefore be validly entered, and courts entering these injunctions have made the findings required by section 524(g).[643]

As debtors have become more creative in their attempts to obtain the protection of section 524(g) for a broad group of affiliated entities, courts have had to resolve issues concerning the scope and meaning of some of the statutory requirements. For example, in the *Combustion Engineering* case, the debtor sought a release and injunctive relief for its affiliates with respect to their own asbestos liability that was independent of and unrelated to activities of the debtor.[644] The Third Circuit agreed with the bankruptcy court that section 524(g) does not authorize such protection, because it "limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor."[645] In reaching this conclusion, the court of appeals relied on the language of section 524(g)(4)(A)(ii), which authorizes a channeling injunction to protect certain third parties who are "alleged to be directly or indirectly liable for the *conduct of, claims against, or demands on the debtor*," not for their independent liability.[646] The court also noted that the statute allows this protection only for entities with certain defined relationships with the debtor, which the affiliates in this case did not satisfy. Because section 524(g) did not authorize a channeling injunction to protect the affiliates against non-derivative claims, the Third Circuit further held that the bankruptcy court lacked authority under 11 U.S.C. § 105(a) to grant that relief.[647]

Section 524(g)(2)(B)(i)(III) requires that the trust own or under certain circumstances be entitled to own a majority of the voting shares of the debtor, the debtor's parent, or a subsidiary of the debtor. Because of the disjunctive language used in this provision, the bankruptcy court in *Combustion Engineering* rejected the argument that the trust had to own a majority of the voting shares of the debtor's parent corporation. Ownership of

643. *See, e.g., In re* Eagle-Picher Indus., Inc., 203 B.R. 256, 279–281 (S.D. Ohio 1996).
644. *In re* Combustion Eng'g, Inc., 391 F.3d 190, 204, 210 (3d Cir. 2004).
645. *Id. at* 234.
646. 11 U.S.C. § 524(g)(4)(A)(ii) (2000) (emphasis added).
647. *In re Combustion Eng'g, Inc.*, 391 F.3d at 233–34.

a majority interest in the debtor was sufficient.[648] That conclusion might seem to pave the way for inadequately funded trusts. For example, a debtor of limited value might seek to use chapter 11 and section 524(g) to discharge its asbestos liability and that of wealthier non-debtor affiliates by contributing only the debtor's stock. Such an effort, however, is unlikely to succeed. First, the debtor would have to persuade at least 75% of the voting tort claimants to accept the plan. Furthermore, although section 524(g) does not mandate that the trust own a majority interest in other companies, it does require that the court determine that inclusion of the affiliates within the protection of the channeling injunction is "fair and equitable with respect to [future claimants], in light of the benefits provided, or to be provided, to such trust on behalf of . . . such third party."[649] If the court deems the trust to be inadequately funded with respect to future claims, it can deny injunctive relief to third parties if they have not provided sufficient benefits to the trust.

As was discussed in another section of this manual,[650] some companies facing asbestos liability have used prepackaged chapter 11 plans in order to gain the protection offered by section 524(g) without incurring the large cost and lengthy duration of a typical "free fall" bankruptcy. By its terms, section 524(g) is equally applicable to both types of asbestos bankruptcies. The dual-trust structure, however, that has been used in some of the prepackaged asbestos bankruptcy cases raises questions about compliance with the requirement that present claims and future demands be paid in substantially the same manner.[651]

2. Mass tort cases in which section 524(g) does not apply

Section 524(g)'s limitation in scope to chapter 11 cases in which claims are asserted for asbestos-related injuries or property damage means that it does not apply to mass tort bankruptcy cases involving other products. In those cases if the plan seeks to release non-debtors from tort liability, the court will have to determine whether it has authority to approve such relief. Congress's enactment of an asbestos-specific provision that confers such authority does not necessarily preclude the discharge of third parties in all other circumstances, however. An uncodified provision of the act that

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648. *In re* Combustion Eng'g, Inc., 295 B.R. 459, 489 n.47 (Bankr. D. Del. 2003), *vacated & remanded on other grounds*, 391 F.3d 190 (3d Cir. 2004).

649. 11 U.S.C. § 524(g)(4)(B)(ii) (2000).

650. *See supra* section V.D.

651. *See* discussion at section V.D.2 *supra*.

added section 524(g) to the Bankruptcy Code stated that the provision's enactment should not "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."[652]

The issue therefore that is squarely presented is whether the court has authority outside of section 524(g) to enjoin tort claimants from pursuing claims against entities other than the debtor. The courts of appeals are divided over whether such authority exists. The Ninth and Tenth Circuits have held that bankruptcy courts lack authority in non-asbestos cases to release third parties from liability and to permanently enjoin efforts to collect from them.[653] These courts have relied on section 524(e), which provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." They have read that provision as prohibiting the bankruptcy court from exercising its equitable authority under section 105(a) to enter injunctive relief that would effectively extend the discharge to non-debtor parties.[654] In conflict with these decisions are those of the Second, Fourth, and Sixth Circuits.[655] These courts have read section 524(e) as being merely declarative of the effect of the discharge itself[656] and have found authority in section 105(a) for the bankruptcy court under "unusual circumstances" to supplement the discharge by permanently enjoining collection efforts against non-debtors.[657] Other courts of appeals have rendered decisions that fall

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652. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994). The Third Circuit, without citing this provision, held that section 524(g) "limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor." *In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 (3d Cir. 2004). Concluding that "§ 105(a) cannot trump specific provisions of the Bankruptcy Code," the court held that the bankruptcy court had no authority under that provision to enter an injunction protecting third parties that would not be permitted under section 524(g). *Id.* at 236, 237. The court expressly limited its holding, however, to asbestos cases, offering no opinion on the limits of section 105(a) in cases in which section 524(g) does not apply. *Id.* at 237 n.50.

653. Resorts Int'l, Inc. v. Lowenschuss (*In re* Lowenschuss), 67 F.3d 1394 (9th Cir. 1995); Landsing Diversified Props.-II v. First Nat'l Bank & Trust Co. (*In re* W. Real Estate Fund, Inc.), 922 F.2d 592 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991); Am. Hardwoods, Inc. v. Deutsche Credit Corp., 885 F.2d 621 (9th Cir. 1989).

654. *See, e.g., Am. Hardwoods, Inc.,* 885 F.2d at 626.

655. Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Inc.), 280 F.3d 648 (6th Cir. 2002); Sec. & Exch. Comm'n v. Drexel Burnham Lambert Group, Inc. (*In re* Drexel Burnham Lambert Group, Inc.), 960 F.2d 285 (2d Cir. 1992); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989); MacArthur v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89 (2d Cir. 1988).

656. *See, e.g., In re Dow Corning Corp.*, 280 F.3d at 657.

657. *See, e.g., id.* at 658.

somewhere in the middle.[658] Concluding that section 524(e) is not necessarily dispositive of the issue, they have left open the possibility that there might be circumstances under which a bankruptcy court could authorize the release of third parties with accompanying injunctive relief.[659]

a. Subject-matter jurisdiction. Some courts have concluded that a request to enjoin litigation against non-debtor third parties presents a question not only of the court's substantive authority to do so, but also of the court's jurisdiction.[660] Because the bankruptcy court is being asked to take action with respect to suits in which non-debtors are suing other non-debtors, these courts have examined whether the affected suits fall within the bankruptcy court's "related-to" jurisdiction under 28 U.S.C. § 1334(b). If not, then they have concluded that the court lacks jurisdiction to enter the channeling injunction, even if that relief is an element of the debtor's reorganization plan.[661]

The Third Circuit's *Combustion Engineering* opinion contains the most detailed appellate examination of the bankruptcy court's jurisdiction to enter channeling injunctions to protect non-debtors. The court held that the record in that case lacked sufficient findings to support the bankruptcy court's exercise of related-to jurisdiction in entering a channeling injunction under section 105(a) to protect non-debtor corporations from their own independent asbestos liability.[662] It concluded that jurisdiction was not established by the lateral corporate relationship of the companies with the debtor,[663] the fact that the parent corporation's financial contribution to the plan depended upon the protection of these companies,[664] the theoretical possibility that the companies might seek indemnification from the

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658. Gillman v. Cont'l Airlines (*In re* Cont'l Airlines), 203 F.3d 203 (3d Cir. 2000); Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746 (5th Cir. 1995); *In re* Specialty Equip. Cos., 3 F.3d 1043 (5th Cir. 1993).

659. *See, e.g., Gillman*, 203 F.3d at 214 ("The hallmarks of permissible non-consensual releases—fairness, necessity to the reorganization, and specific factual findings to support these conclusions—are all absent here.").

660. *See, e.g., In re* Combustion Eng'g, Inc., 391 F.3d 190, 224 (3d Cir. 2004); Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 751 (5th Cir. 1995).

661. *See, e.g., In re Combustion Eng'g, Inc.*, 391 F.3d at 225 ("'Related to' jurisdiction must therefore exist independently of any plan provision purporting to involve or enjoin claims against non-debtors.").

662. *See id.* at 202.

663. *See id.* at 227–28. The court noted, however, that "[s]uch an affiliation could be relevant to the jurisdictional inquiry if supported by factual findings demonstrating that a suit against [one of the protected companies] would deplete the estate or affect its administration." *Id.* at 228.

664. *See id.* at 228 ("[T]he boundaries of bankruptcy jurisdiction cannot be extended simply to facilitate a particular plan of reorganization.").

debtor,[665] or the parties' assertion that the companies and the debtor shared insurance coverage with a single cap.[666] While the court's remand for further findings might have established the existence of related-to jurisdiction, such a remand became unnecessary because the court went on to hold that the bankruptcy court lacked authority under the Bankruptcy Code to grant the requested relief.[667]

As is discussed in the next subsection, courts that have approved the entry of channeling injunctions under section 105(a) to protect non-debtor parties from mass tort liability have done so only under narrow circumstances in which there is a close identity between the protected entities and the debtor. Although the jurisdictional analysis is distinct from the question of the court's equitable authority to grant the relief, some of the factors supporting the issuance of the injunction under section 105(a) may also support the existence of related-to jurisdiction.[668] The *Combustion Engineering* decision, however, illustrates that a broad application of that equitable authority might exceed the jurisdictional reach of the bankruptcy court.

b. Authority under section 105(a). Courts of appeals that have upheld the authority of bankruptcy courts to enter injunctions under section 105(a) to protect third parties have done so in the context of non-asbestos mass tort and other complex bankruptcies. The most recent of these decisions was the Sixth Circuit's decision in the *Dow Corning* case.[669] In that case, the debtor's plan sought to release the debtor's insurers and shareholders from further liability for silicone-implant products liability claims and to enjoin claimants from suing those parties on such claims. These provisions were included in the plan in exchange for the insurers' and shareholders' contributions to the $2.35 billion fund established to pay the tort claims.[670] The bankruptcy court approved the non-debtor releases, but felt compelled to interpret them as only applying to consenting claim-

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665. *See id.* at 230. The court noted that cases in which courts had "exercis[ed] 'related to' jurisdiction over personal injury claims against non-debtors based on the potential for indemnification claims against the debtor ha[d] . . . involved either express indemnification obligations . . . or derivative liability." *Id.* at 231.

666. *See id.* at 233.

667. *See id.*

668. *See id.* at 224 n.35 (discussing possible relevance of "identity of interest" inquiry under section 105(a) to analysis of related-to jurisdiction).

669. Class Five Nev. Claimants v. Dow Corning Corp. (*In re* Dow Corning Inc.), 280 F.3d 648 (6th Cir. 2002).

670. *Id.* at 655.

ants—that is, those who had voted to accept the plan.[671] The district court rejected the bankruptcy court's narrowing interpretation and upheld the court's authority to approve the provisions even with respect to non-consenting claimants.[672] In the case on appeal, the Sixth Circuit agreed with the district court that "under certain circumstances, a bankruptcy court may enjoin a non-consenting creditor's claim against a non-debtor to facilitate a Chapter 11 plan of reorganization,"[673] but remanded the case for further findings needed to support the injunction.[674]

The Sixth Circuit held that under appropriate circumstances, sections 105(a) and 1123(b)(6) authorize a bankruptcy court to enjoin non-consenting creditors' claims against non-debtors in order to facilitate a reorganization plan under chapter 11[675] and that such relief is not prohibited by section 524(e) or by any non-bankruptcy law limitation on the bankruptcy court's equity power.[676] Then relying on decisions of the Second and Fourth Circuits that had upheld permanent injunctions in mass tort cases protecting non-debtor parties from collection efforts, the court of appeals explained the "unusual circumstances" under which such injunctive relief is appropriate:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those

671. *Id.*

672. *Id.* at 655–56.

673. *Id.* at 653.

674. *Id.* at 658.

675. *Id.* at 656–657.

676. *Id.* at 657–58. The Sixth Circuit rejected the bankruptcy court's reading of *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), as limiting the court's equitable powers under the Bankruptcy Code to the granting of traditional equitable relief. *Grupo Mexicano* was distinguishable, said the court of appeals, because the bankruptcy court had statutory authority to enter the type of injunctive relief at issue and thus was "not confined to traditional equity jurisprudence available at the enactment of the Judiciary Act of 1789." 280 F.3d at 657.

> claimants who choose not to settle to recover in full; and (7) The bankruptcy court made a record of specific findings that support its conclusions.[677]

Upon remand of the case, the district court entered the required findings of fact and upheld the channeling injunction protecting the debtor's corporate shareholders, insurers, and certain affiliates.[678]

If, then, a non-asbestos mass tort bankruptcy case is filed within a circuit that recognizes a bankruptcy court's authority under unusual circumstances to approve non-debtor releases and channeling injunctions, the court, in ruling on the confirmation of a plan containing these provisions, will need to determine whether the circumstances presented by the case support an exercise of equitable discretion to grant that relief. If the court does approve the release provisions and enters a channeling injunction, the judge should make specific findings that the required circumstances are present.

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677. *Id.* at 658. The Sixth Circuit's list of factors supporting the granting of injunctive relief protecting third parties expanded upon the factors that were articulated by the bankruptcy court in *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 934–37 (Bankr. W.D. Mo. 1994).

678. *In re* Dow Corning Corp., 287 B.R. 396 (E.D. Mich. 2002).

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VII. Postconfirmation Jurisdiction

A. Overview

Part VII addresses the scope of the bankruptcy court's jurisdiction following the confirmation of the plan in a mass tort bankruptcy case. It discusses the following issues:

- *Postconfirmation jurisdiction generally:* What is the source of the bankruptcy court's jurisdiction following confirmation of a plan? Is its jurisdiction diminished once the estate is terminated?
- *Judicial supervision of the trust and claims facility operation:* What actions may the bankruptcy court take with respect to the tort claimant trust and the payment of tort claimants?

B. Postconfirmation Jurisdiction Generally

The scope of a bankruptcy court's jurisdiction following the confirmation of a chapter 11 plan is a question that has confounded courts and commentators and produced a variety of answers in even routine bankruptcy contexts.[679] The answers are no more certain in a mass tort bankruptcy case. Nevertheless, some generally accepted principles can be stated that might guide a court's decision whether to exercise authority over matters that arise following plan confirmation.

First and most important is the fact that the source of the bankruptcy court's jurisdiction does not change after plan confirmation. Sections 1334 and 157 of title 28 of the United States Code remain the basis for the exercise of bankruptcy jurisdiction by the district and bankruptcy courts. Thus, even after plan confirmation, a bankruptcy court can exercise jurisdiction over any civil proceedings arising under title 11 or any civil proceedings arising in or related to the bankruptcy case.[680]

Although the statutory source of bankruptcy jurisdiction remains the same, the fact of plan confirmation may affect the scope of that jurisdiction. The Third Circuit, for example, explained that the postconfirmation context of a dispute may affect the determination of whether it falls within re-

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679. *See generally* Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. Rev. 621, 622–44 (1993).

680. *See* 8 Collier on Bankruptcy, *supra* note 155, ¶ 1142.04[1]. As the Collier treatise points out, however, even if the bankruptcy court has jurisdiction over a postconfirmation proceeding, it should consider whether abstention is more appropriate than exercising jurisdiction itself.

lated-to jurisdiction, because "bankruptcy court jurisdiction 'must be confined within appropriate limits and [not be permitted to] extend indefinitely . . . .'"[681] The court held, however, that "though the scope of bankruptcy court jurisdiction diminishes with plan confirmation, bankruptcy court jurisdiction does not disappear entirely."[682] Instead, because the bankruptcy estate ceases to exist upon plan confirmation, the inquiry shifts from the proceeding's impact on the estate to "whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter."[683] The Third Circuit explained that "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus."[684]

Second, although the statutes actually conferring bankruptcy jurisdiction on the federal courts are set forth in title 28 of the United States Code, substantive provisions of the Bankruptcy Code may be read as confirming the existence of postconfirmation jurisdiction. Several provisions give the court authority to take action following the confirmation of a chapter 11 plan,[685] and it can be inferred that Congress intended the courts to have jurisdiction to exercise this authority. Some courts cite these provisions as conferring jurisdiction on them. It is more accurate, however, to view these provisions as demonstrating Congress's intent that the conferral of jurisdiction in 28 U.S.C. § 1334 not cease upon plan confirmation. Moreover, if a postconfirmation claim is based on any of these provisions of the Bankruptcy Code, the resulting proceeding is one that "arises under title 11" and thus one that the court can hear pursuant to section 1334(b).

Finally, because only Congress can confer jurisdiction on the federal courts, neither the parties themselves nor the court can create postconfirmation jurisdiction through the terms of a chapter 11 plan or a confirmation order. Provisions retaining jurisdiction may be useful in clarifying the existence of jurisdiction provided by section 1334, but they may not extend the scope of postconfirmation jurisdiction beyond the statutory grant. Logically, the absence of such retention provisions should not negate the juris-

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681. Binder v. Price Waterhouse & Co. (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 164 (3d Cir. 2004) (quoting Donaldson v. Bernstein, 104 F.3d 547, 553 (3d Cir. 1997)).

682. *Id.* at 165.

683. *Id.* at 166–67.

684. *Id.* at 167.

685. *See, e.g.*, 11 U.S.C. §§ 1112(b)(6)–(9), 1123(b)(3)(B), 1127(b), 1142(b), 1144 (2000).

diction that Congress has conferred, but some courts have held that a retention-of-jurisdiction provision in a plan is required for their exercise of postconfirmation jurisdiction.[686] Others disagree.[687]

Despite conflicting decisions about the precise scope of postconfirmation jurisdiction, there is ample authority to support the court's exercise of jurisdiction over proceedings requiring the interpretation of a confirmed plan of reorganization or seeking to implement its provisions,[688] seeking postconfirmation conversion or dismissal of the bankruptcy case or the revocation of confirmation,[689] or seeking enforcement of a court order.[690] On the other hand, courts have generally been reluctant to exercise postconfirmation jurisdiction over proceedings involving the corporate affairs of a reorganized debtor.[691]

C. Judicial Supervision of the Trust and Claims Facility Operation

Courts presiding over mass tort bankruptcy cases have continued to exercise jurisdiction after plan confirmation over proceedings involving or affecting the trust or other facility that was established to pay the tort claims. The following are some examples of postconfirmation matters over which bankruptcy or district courts have exercised jurisdiction in mass tort cases:

- removal of trustees;[692]
- limitation of fees for claimants' attorneys;[693]
- entry of orders governing procedures for litigated and arbitrated claims against the trust;[694]

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686. *See, e.g.*, Hosp. & Prop. Damage Claimants v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 7 F.3d 32, 34 (2d Cir. 1993).

687. *See, e.g.*, U.S. Tr. v. Gryphon at the Stone Mansion, Inc., 216 B.R. 764, 769 (W.D. Pa. 1997), *aff'd*, 166 F.3d 552 (3d Cir. 1999).

688. *See, e.g.*, U.S. Brass Corp. v. Travelers Ins. Group (*In re* U.S. Brass Corp.), 301 F.3d 296, 304 (5th Cir. 2002).

689. *See, e.g.*, Ogden v. Ogden Modulars, Inc. (*In re* Ogden Modulars, Inc.), 180 B.R. 544 (Bankr. E.D. Mo. 1995).

690. *See, e.g.*, United States v. Mourad, 289 F.3d 174, 180 (1st Cir. 2002).

691. *See, e.g.*, *In re* Jr. Food Mart of Ark., Inc., 161 B.R. 691 (Bankr. E.D. Ark. 1993).

692. *See* Blum v. Unnamed Claimants (*In re* A.H. Robins Co.), 880 F.2d 779 (4th Cir. 1989).

693. *See* Bergstrom v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co.), 86 F.3d 364 (4th Cir. 1996).

694. *See* Vairo, *supra* note 64, at 647 (discussing administrative order entered by district court in *Robins* case).

- interpretation of confirmed plans and confirmation orders;[695]
- enforcement of channeling injunctions;[696]
- oversight of continued funding of the trust;[697]
- receipt of annual reports and financial statements of the trust and settlement of accounts of trustees;[698] and
- claimants' suits against the trust or litigation facility.[699]

Frequently courts have taken these postconfirmation actions with little discussion of the source of their jurisdictional authority, other than a reference to retention-of-jurisdiction provisions in the confirmed plans. When bankruptcy courts have engaged in a statutory jurisdictional analysis, however, they have generally determined that either "arising-in" or "related-to" jurisdiction gives them authority to hear a proceeding involving or affecting the administration of a trust established by a confirmed plan to pay tort claimants. In the *A.H. Robins* case, for example, the Fourth Circuit held that the district court (which had withdrawn the reference) had arising-in jurisdiction to limit the fees paid to attorneys for claimants who had received a pro rata distribution of surplus trust funds. This matter was one that arose in the bankruptcy case, said the court, because "[w]ithout the bankruptcy, there would have been no pro rata distribution. This is unique to this bankruptcy proceeding."[700]

More frequently courts have concluded that related-to jurisdiction extends to proceedings involving the tort claimant trust. Viewing the trust as the successor to the estate, these courts have applied the *Pacor* test[701] and upheld the exercise of jurisdiction over proceedings that could affect the

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695. *See id.* at 651 (discussing postconfirmation proceeding in which district court in *Robins* case interpreted the plan term "unreleased claim").

696. *See* Order Enforcing the Plan and the Confirmation Order to Stay Actions of James and Patricia Grant, *In re* Eagle-Picher Indus., Inc., No. 1-91-00100 (Bankr. S.D. Ohio Apr. 1, 1998).

697. *See In re* Nat'l Gypsum Co., 257 B.R. 184, 222 (Bankr. N.D. Tex. 2000).

698. *See* Order Approving Annual Report and Account of the Trustees . . . of the Eagle-Picher Indus., Inc. Personal Injury Settlement Trust for the Period from November 14, 1996 through December 31, 1996, *In re* Eagle-Picher Indus., Inc., No. 1-91-00100 (Bankr. S.D. Ohio June 16, 1997).

699. *See In re* Dow Corning Litig., No. Civ.A. 00-CV-00001, 2004 WL 2282909, at *1 (E.D. Mich. Sept. 29, 2004).

700. Bergstrom v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co.), 86 F.3d 364, 372 (4th Cir. 1996).

701. *See* Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) ("[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any affect on the estate being administered in bankruptcy.").

way in which the trust administers its assets.[702] The Third Circuit, applying a slightly different analysis, has approved of the exercise of related-to jurisdiction in such cases because "where there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement, retention of postconfirmation bankruptcy court jurisdiction is normally appropriate."[703]

All postconfirmation proceedings involving a tort claimant trust have not been found to come within bankruptcy jurisdiction, however. One district court found that it lacked jurisdiction over an action brought by an asbestos claimant trust against cigarette manufacturers seeking contribution for the injuries to some of the tort claimants caused by the manufacturers. The district judge held that the court did not have related-to jurisdiction because the action would not affect the discharged debtor, the administration of the already terminated bankruptcy case, the terminated estate, or the distribution to creditors, since the claimants were no longer creditors of the estate.[704] The court's "power to supervise the Trust," said the judge, "does not provide a general jurisdictional grant enabling the bankruptcy court to entertain any litigation that involves an entity that is a product of the Plan."[705] The court's analysis rested on a narrower interpretation of postconfirmation related-to jurisdiction than was applied in cases treating the trust as the successor to the estate. The Third Circuit has reconciled these decisions by noting that the suit against the cigarette manufacturers "would have had no impact on any integral aspect of the bankruptcy plan or proceeding."[706] Thus, according to the Third Circuit, the suit lacked the close nexus required for postconfirmation jurisdiction.

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702. *See, e.g., id.*; Nat'l Gypsum Co. v. NGC Settlement Trust (*In re* Nat'l Gypsum Co.), No. CIV. A. 398-CV-1032P, 1999 WL 354230, at *3 (N.D. Tex. 1999) ("The outcome of this suit will impact the way the Trust handles and administers the bankruptcy estate and could alter the Trust's rights, liabilities, options, or freedom of action . . . .), *rev'd on other grounds*, 219 F.3d 478 (5th Cir. 2000).

703. Binder v. Price Waterhouse & Co. (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 168–69 (3d Cir. 2004).

704. Falise v. Am. Tobacco Co., 241 B.R. 48 (E.D.N.Y. 1999).

705. *Id.* at 62.

706. *Binder*, 372 F.3d at 168.

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U.S. Tr. v. Knudsen Corp. (*In re* Knudsen Corp.), 84 B.R. 668 (B.A.P. 9th Cir. 1988), 56

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W.R. Grace & Co. v. Chakarian (*In re* W.R. Grace & Co.), 42 Bankr. Ct. Dec. 270 (Bankr. D. Del. 2004), 27

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