THE THIRD WAY: MEDIATION OF PRODUCTS CLAIMS IN THE PIPER AIRCRAFT TRUST

WILLIAM J. WOODWARD, JR.*

INTRODUCTION

In 2007, Bankruptcy Judge Stephen Rhoads ordered some 1,170 bankruptcy preference actions brought by a debtor into a mandatory mediation program that the judge created through his order.[1] Nine mediators were named in the order by the court, and the debtors and their adversaries were ordered to either settle their cases or mediate them using procedures loosely specified in the Order and to be further developed by the individual mediators.[2] Parties to one of these preference actions were to split the mediators' fees (set by the court) and pay them in advance.[3] They were also required to split the mediators' expenses that mediators would bill to the parties following the mediation session.[4] Earlier, in 2004, the District Court of Delaware instituted a mandatory mediation program to address appeals from the Delaware Bankruptcy Court.[5] That system, at least by its rules, also requires that the parties split the costs of the mediator.[6]

These are just two examples of mandatory mediation in bankruptcy being instituted by the courts. Empirical study of such systems is difficult[7] but vitally

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* Professor of Law, Temple University. The author thanks Howard Berlin, Esq., Paul Singerman, Esq., Deborah Talenfeld, Esq., and Prof. David G. Epstein for their help in gathering much of the information in this Article and to Prof. Candace Zierdt for helpful comments on an earlier draft.

[1] *In re* Collins & Aikman Corp., 376 B.R. 815, 815–16 (Bankr. E.D. Mich. 2007) ("[T]he mediation procedures established in this order will promote the just, speedy and inexpensive resolution of these adversary proceedings.").

[2] *Id.* at 816 (appointing three mediators to handle Track III proceedings and some Track II proceedings; appointing six mediators to handle all other claims).

[3] *Id.* at 817 ("Each party shall pay its portion of the mediator's fee before the commencement of the mediation.").

[4] *Id.* at 817–18 ("The parties shall pay the mediator's reasonable expenses . . . with[in] 14 days after billing by the mediator.").

[5] *See* Standing Order, *In re* Procedures To Govern Mediation of Appeals From the United States Bankruptcy Court for the District of Delaware, July 23, 2004 (Robinson, C.J.), *available at* http://www.ded.uscourts.gov/Announce/MedAdminOrder.pdf (hereinafter Standing Order) (determining it necessary and appropriate to mandate mediation in order to more efficiently administer justice). A description of that Program found in Brian Grace, *Mandatory Mediation of Bankruptcy Court Appeals*, http://cache.zoominfo.com/CachedPage/?archive_id=0&page_id=1025695669&page_url=%2f%2fwww.adrlawinfo.com%2fdebankruptcymediation.html&page_last_updated=3%2f6%2f2008+12%3a24%3a08+AM&firstName=Brian&lastName=Grace (last visited Sep. 8, 2009). Mr. Grace's article suggests that docket control was a central motivator in the court's decision to mandate mediation of bankruptcy court appeals. *Id.*

[6] Standing Order, *supra* note 5 (stating "one-half of the mediator's fees shall be paid by the appellant(s) and one-half of such fees shall be paid by the appellee(s)").

[7] *See, e.g.*, STEVEN HARTWELL & GORDON BERMANT, ALTERNATIVE DISPUTE RESOLUTION IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA, FED. JUDICIAL CTR. (1988) (discussing difficulty of comparing its mediation program to programs in other jurisdictions); Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 820–22 (2000) [hereinafter Heise, *Justice Delayed?*] (identifying design

important because these systems could be delivering the broad promise of satisfying conflict resolution that mediation offers, they could simply be devices for clearing dockets or managing settlement conferences, or they could be something in between.[8] If, at the extreme, such systems operate simply to interpose a costly obstacle to judicial dispute resolution, they would raise serious public policy questions.

My focus here will be on a different use of mandatory ADR in bankruptcy, one that both has a remarkable history of success and that seems to bring the full promise of mediation into the bankruptcy context. After describing the background and process created, I will offer tentative reasons for its success and suggest some contexts where its lessons might be useful. A tentative conclusion from this single, small study is that the success of a mandatory mediation program in bankruptcy may well be very context-dependent, both on the kinds of cases the system handles and the wisdom and sensitivity of those who are central in the process.

I. THE PIPER TRUST BACKGROUND

In 1991, the Piper Aircraft Company filed a chapter 11 bankruptcy in part to address some of its products liability exposure.[9] The company had more than 50,000 planes in service, some of which dated to the 40's, and every so often one would crash, kill or injure some people, and trigger litigation.[10] Piper Aircraft

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problems in RAND Corporation's study of the Civil Justice Reform Act's pilot program including mediation referrals, noting these "difficulties [are] incident to almost any effort to study [such] issues"); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1488 (1994) (asserting "[d]espite the growing reliance on ADR, there is scant empirical research about its effectiveness . . . "). A recent study of ADR in the appeals process is Michael Heise, *Why ADR Programs Aren't More Appealing: an Empirical Perspective*, (Cornell Law Sch. Working Papers Series, Paper 51, 2008), *available at* http://lsr.nellco.org/cornell/clsops/papers/51 [hereinafter Heise, *Why ADR Programs*] (noting "[e]fforts to test ADR programs' efficacy require careful attention to research design considerations.").

[8] *See* Edmund V. Ludwig, *A Judge's View: The Trial/ ADR Interface*, 10 DISP. RESOL. MAG. 11, 11 (stating "[b]oth the Civil Justice Reform Act of 1991 and the Alternative Dispute Resolution Act of 1998 were aimed at judicial cost and delay reduction."). *See generally* Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241 (2006) (discussing whether ADR has been oversold by its proponents and evaluating mediation in three contexts); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) (recognizing ADR will be integral to judicial system for years to come).

[9] *See In re* Piper Aircraft Corp., 162 B.R. 619, 621 (Bankr. S.D. Fla. 1994) (explaining Piper's "economic drain" from cost of litigation product liability cases). The bankruptcy court's decision and Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L.J. 329 (1996) are the primary sources for the description in the text.

[10] *See, e.g.*, Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1442 (11th Cir. 1985) (affirming Rule 37 sanctions for Piper's attorney in lawsuit arising from 1976 Ireland crash of plane manufactured by Piper); *see also In re Piper*, 162 B.R. at 620–21 (noting accidents with Piper aircraft undoubtedly occur due to number of aircraft in operation); Davis, *supra* note 9, at 348 ("Since some [of Piper's] airplanes inevitably crash for one reason or another, and since the injured parties often sue the manufacturer, Piper experienced a continual flow of litigation . . . costing Piper over $30 million per year.").

Company, almost inevitably, would be one of the defendants.[11] The constant burden of this litigation brought the company to bankruptcy with the hope of putting litigation over the old planes behind it.

One potential buyer of the company's assets desiring a "clean" sale required that future claimants be represented in the bankruptcy case, and that a fund be set aside to cover their claims.[12] The court appointed David G. Epstein, former law Dean and bankruptcy scholar, to represent those future claimants.[13] This class of claimants was comprised of persons, whether born or unborn, who would assert a claim against Piper at any time after confirmation of Piper's plan arising from a Piper plane built before that date.[14]

Epstein, in due course, filed a proof of claim in the amount of approximately $100 million,[15] a sum that dwarfed the claims of other creditors in the case. Litigation, of course, ensued and the upshot was that the bankruptcy court ruled that

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[11] The personal injury claims might, of course, also be brought against the pilot, a part manufacturer, those in charge of maintenance, or others that might, in some way, be connected to the accident. *See, e.g.*, Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 900 (Cal. 1963) (noting manufacturer of power tool was subject to liability when plaintiff was injured because manufacturer placed defective product in market); Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81, 82, 83 (N.Y. 1963) (allowing mother to bring wrongful death claim against plane manufacturer and airline when daughter was killed in airplane crash). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (extending liability to anyone selling defective products, indicating there can be multiple defendants).

[12] *See In re Piper*, 162 B.R. at 621 (acknowledging agreement to buy debtor's assets but requiring debtor to appoint legal representative and set aside money from sale for future product liability lawsuits); *see also* Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C. L. REV. 745, 784 (1993) (arguing procedural due process rights of future claimants are satisfied if legal representative is appointed for them). *But see* Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 453 (1999) (finding asbestos trust funds inadequate because future claimants due process rights would be violated).

[13] *See In re Piper*, 162 B.R. at 621. *See generally In re* H.K. Porter Co., 156 B.R. 16, 18–19 (Bankr. W.D. Pa. 1993) (authorizing legal representative to be appointed for individuals manifesting injuries from asbestos exposure after debtor's assets were distributed because future claimants are entitled to voice in bankruptcy proceedings); *In re* Johns-Manville Corp., 36 B.R. 743, 749 (Bankr. S.D.N.Y 1984) (emphasizing distinct and separate legal representative for future asbestos claimants was necessary to represent needs in reorganization plan). Professor Epstein was at that time in private practice.

[14] The class was defined as:

> All persons, whether known or unknown, born or unborn, who may, after the date of confirmation of Piper's chapter 11 plan of reorganization, assert a claim or claims for personal injury, property damage, wrongful death, damages, contribution and/or indemnification, based in whole or in part upon events occurring or arising after the Confirmation Date, including claims based on the law of product liability, against Piper or its successor arising out of or relating to aircraft or parts manufactured and sold, designed, distributed or supported by Piper prior to the Confirmation Date.

In re Piper, 162 B.R. at 621 n.1; *see also* 11 U.S.C. § 1122 (2006) (allowing plan to place similar claims and interests in one class); *In re* Boston Post Rd. P'ship, 154 B.R. 617, 620 (D. Conn. 1993) (explaining classes are necessary to guarantee similar priority given to similar claims during reorganization).

[15] *See In re Piper*, 162 B.R. at 621–22 (calculating amount based on statistical estimate of people likely to experience property damage or personal injury due to Piper's actions after confirmation of reorganization plan).

the class of claimants defined did not have "claims" as that term is used in the Code.[16] This finding was affirmed by the District Court,[17] and while an appeal to the 11th Circuit was pending,[18] the parties settled the case. In the process of settling the case, the parties created a trust for the benefit of the future claimants as they had been defined.[19] Though the settlement would have mooted the appeal, the 11th Circuit went ahead and eventually affirmed the bankruptcy court's determination.[20] And while the 11th Circuit's decision rejected the definition of "future claimant" used in the settlement, the settlement was unaffected by the appeal.[21] The chapter 11 case eventually closed, and the trust created through that settlement remains to this day.

The breakthrough that made the settlement possible came when Congress enacted a statute of repose[22] that protected Piper from many of the claims that might otherwise have been brought.[23] That, in turn, raised the price prospective buyers

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[16] *Id.* at 627–28 (opining that relationship between future, unknown or even unborn creditors, and pre-petition "claim" is too tentative to support legitimate claim under Bankruptcy Code).

[17] *See In re* Piper Aircraft Corp., 168 B.R. 434, 441 (S.D. Fla. 1994) (affirming opinion of bankruptcy court based on legislative history, case law, and policy considerations).

[18] *See* Davis, *supra* note 9, at 354 (noting 11th Circuit's decision to issue opinion about *In re Piper* to be "intriguing" because it knew case already settled).

[19] *See id.* (noting feasibility of fund for future claimants); *see also* Romeo Charlie Inc. v. Piper Aircraft Corp. (*In re* Piper Aircraft Corp.), 362 F.3d 736, 737 (11th Cir. 2004) (describing irrevocable trust set up in July 1995 to compensate "present and future" claimants); *In re* Denman & Co., 186 B.R. 707, 708 (Bankr. C.D. Cal. 1995) (recognizing creation of Piper trust funds).

[20] *See* Epstein v. Piper Aircraft Corp. (*In re* Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995).

[21] *See Epstein*, 58 F.3d at 1577–78 (modifying district court's test and adopting "Piper Test" to determine scope of what constitutes a claim). Apparently, no one challenged the settlement once the appeal was decided. *See* Davis, *supra* note 9, at 354 n.98 (noting parties believed appeal would have no effect on settlement agreement). On the related question, Professor Davis opines:

> As to why the parties agreed not to withdraw the appeal, it is the author's understanding that they felt there was no need to do so. Having informed the court of the settlement, they felt they had no further obligation to the court. Having arrived at an agreed confirmed plan, they believed the result of the appeal, no matter how it came out, would cause no harm. Moreover, and this is probably the weightiest factor, they were curious as to how it would come out.

Id.

[22] *See id.* at 349 (noting statute alleviated need to provide for future claims in plan); *see also* General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 Note, Pub. L. No. 103-298, 108 Stat. 1552 (1994) (creating 18-year period of repose for lawsuits against manufacturers of general aviation aircraft and component parts).

[23] *See* 49 U.S.C. § 40101(4)(c) (defining general aviation aircraft as having maximum seating capacity of fewer than twenty passengers and not engaging in scheduled passenger-carrying operations). *But see* Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1157 (9th Cir. 2000) (holding revised aircraft manual is new part of helicopter which commences period of repose anew). *See generally* Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 646 (E.D. Pa. 2004) (discussing difference between statute of repose and statute of limitations).

would be willing to pay for Piper's assets and made it feasible to create a fund that might satisfy future claimants.[24]

In classical bankruptcy fashion, the settlement carved "Old Piper" away from "New Piper." Any claim that a "future claimant" would bring would be diverted, through a "channeling injunction" [25] to a trust, created for future claimants' benefit, through the settlement.[26] While the problem of how to approach future claims that arise from past conduct will likely continue to fascinate students of bankruptcy law,[27] the success of the mandatory mediation program set up through the Piper Trust, my focus here, is probably without equal and worthy of study in its own right.

The controlling trust document provides that any claim that does not successfully settle through mediation can proceed in litigation in a federal district court.[28] What is significant for our purposes is that, in the 14 years the Trust has been in existence, well over 100 claims have been brought against it – nearly all

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[24] *See* Davis, *supra* note 9, at 354 (stating Piper's market success under chapter 11 umbrella was additional factor in settlement's success). *But see In re* A.H. Robins Co., 251 B.R. 312, 314 (Bankr. E.D. Va. 2000) (stating Robins II was forced to effectuate acquisition of Robins I by American Home Products Corporation and merger made claimants' trust possible); *In re* Fairchild Aircraft Corp., 184 B.R. 910, 932–33 (Bankr. W.D. Tex. 1995) (noting debtor did not estimate number of aircraft likely to crash and thus trustee could not have protected these future interests in bankruptcy court).

[25] *See* Davis, *supra* note 9, at 336 (discussing injunction channels future claims through fund); *see also* 11 U.S.C. § 105 (2006) (authorizing use of injunction under court's equitable powers); *In re* Johns-Manville Corp., 97 B.R. 174, 177–78 (Bankr. S.D.N.Y. 1989) (discussing purpose of injunction was to prevent claimants from interfering with reorganized debtors). It is the same mechanism used in the far more famous A.H. Robins and Johns Manville bankruptcies. *See* Davis, *supra* note 9, at 336 (indicating in both of these cases large funds were created to meet needs of future claims); *see also In re A.H. Robins Co.*, 251 B.R. at 314 (acknowledging plan's purposes were to provide funds to trust in order to allow Robins I to be acquired by Robins II so that Robins II could continue business); *In re* Johns-Manville Corp., 68 B.R. 618, 621–22 (Bankr. S.D.N.Y. 1986) (discussing two trusts created were Asbestos Health Trust to resolve claims of victims of asbestos-related diseases and Property Damage Trust for resolving Class 5 asbestos-related property claims).

[26] *See, e.g.*, Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 702 (4th Cir. 1989) (approving reorganization plan with channeling injunction that created trust for future claims); *In re* Armstrong World Indus., Inc., 348 B.R. 136, 156, 158–59 (Bankr. D. Del. 2006) (finding asbestos personal injury channeling injunction in chapter 11 case satisfied statutory requirements); *In re Johns-Manville Corp.*, 68 B.R. at 626 (introducing mechanism of "channeling injunction" to establish trust for future asbestos claimants).

[27] *See* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy – Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339. 348–52 (2004) (discussing necessity of notice in future claims); Davis, *supra* note 9, at 329 (proposing solution for resolving issue of future claims); Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435, 442 (1999) (discussing future claims in reorganization and proposing two-part prescription); Nathan F. Coco, Note, *An Examination of Successor Liability in the Post-Bankruptcy Context*, 22 J. CORP. L. 345, 356 (1997) (considering issue of "whether a successor liability action constitutes a 'claim' within the meaning of the Bankruptcy Code").

[28] *See* Piper Aircraft Corporation Irrevocable Trust Agreement, July 17, 1995 (on file with author) [hereinafter Piper Trust Agreement]. Punitive damages may not be pursued but, apart from that restriction, trial would proceed much as it would absent the Trust's pretrial ADR requirements. *Id.*; *see also* Tung, *supra* note 27, at 464 n.104 (describing different claim processing options and indicating, if settlement fails, claimant may choose arbitration or trial); Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 918, 931 (2005) (stating more cases are settled before trial).

involving deaths – and *all* have arrived at consensual resolutions, either before or through the mediation process.[29] What, if anything, can we learn from this remarkable success story that might be useful in the design or implementation of other mediation programs?

II. THE STRUCTURE OF THE PIPER MEDIATION CLAIMS PROCESS

The mandatory mediation process created by the Piper Trust functions within its claims process and the structure of that process may well influence the success of the mediation process within it.

Once a "future claimant" files an action against Piper for damages,[30] the Trustee or a Piper-related defendant sends the claimant a specified notice about the channeling injunction and its effect on the action brought, the requirement that the action be asserted against the trust, the trust's assumption of the old company's obligations, and the procedures to be followed in proceeding against the trust.[31]

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[29] Telephone Interview with Howard Berlin, Trustee (July 31, 2009) [hereinafter Berlin Interview]; *see also* Michael S. Wilk & Rik H. Zafar, *Mediation of a Bankruptcy Case*, 12 AM. BANKR. INST. J., 12, 59 (May 2003) (listing chapter 11 cases where mediation was ordered and percentage of cases that settled at mediation stage); William J. Woodward, Jr., *Evaluating Bankruptcy Mediation*, 1999 J. DISP. RESOL. 1, 17 (1999) (concluding mediation is positive method based on small empirical study).

[30] A "future claim" covered by the Trust was expansively defined:

> 'Future Claim' shall mean all causes of action, rights and interests of all persons, whether known, or unknown, born or unborn, who may, after the Confirmation Date, assert a claim against the Debtor, NEWCO or the Trust for personal injury, property damage, wrongful death, damages, contribution and/or indemnification, based in whole or in part upon events occurring or arising after the Confirmation Date (including, without limitation, claims based on the law of product liability, design defects and failure to warn), but only to the extent that liability exists because of aircraft or aircraft parts manufactured, sold, designed, distributed. or supported by Old Piper or the Debtor prior to the Confirmation Date (including, without limitation, liability based on the law of product liability, design defects and failure to warn) unless and until such Future Claim becomes a Resolved Future Claim.

Piper Trust Agreement, *supra* note 28, at para. 1.1(b); *cf.* Tung, *supra* note 27, at 468 (mentioning different approaches in defining claim, arguing "conduct test" is most attractive); Coco, *supra* note 27, at 358–61 (describing various approaches to defining claim).

[31] *See* Piper Trust Agreement, *supra* note 28, at para. 4.9(a) ("Upon receipt of notice of an Asserted Liability Claim or Future Claim, the Trustee, NEWCO, or other Protected Party, as, the case may be, shall provide written notice to the Claimant that the Permanent Channeling Injunction requires that' the Asserted Liability Claim or Future Claim, as the case may be, shall be asserted and directed solely against the Trust, and that the Trust has, in accordance with this Agreement, the Permanent Channeling Injunction, and the Plan, assumed the obligations with respect to such Asserted Liability Claim or Future Claim and that all communications with respect thereto are to be directed to the. Trust, and that such Asserted Liability Claim or Future Claim shall be resolved only under the procedures contained in this Agreement. In the event notice of an asserted Present Claim or Future Claim is received by NEWCO or any Insurer, NEWCO or such Insurer shall immediately send a copy thereof to the Trustee and the Trustee shall thereafter assume control of the defense provided that NEWCO or any Insurer may engage, at its sole cost and expense, separate counsel to assist in the defense. The Trust may be substituted for the Debtor, NEWCO or any Insurer as a party in any legal proceedings commenced with respect to a person or entity asserting any such Product

The notice that arrives subsequently instructs the claimant to file three affidavits within a 90-day period following receipt of the notice.[32] The first (called the "Expert Affidavit") must be prepared by an expert witness and set forth (in very substantial, specified detail) the bases on which the claimant asserts liability, the expertise of the expert, and the sources from which the expert constructed the opinion.[33] The second (the "Second Affidavit") is designed to establish a basis for computing the claimant's damages and requires a description of the injuries, medical reports supporting those descriptions, and "the measures and formula utilized in calculating the Claimant's damages, with specific references to books, statutory citations, medical reports or analyses and payroll records and employment histories of the injured person(s)."[34] The third, called the "Location Affidavit," is to state the location and custodian of the offending aircraft and the parts that were alleged to be defective.[35] Once the Trustee gets the three affidavits, he has 180 days to create a response setting forth whether he thinks reasonable grounds exist to support the claim.[36] This response is to include either a settlement offer or a demand for mandatory mediation conducted by an entity agreed on by the Trust and approved by the Court.[37] The parties, if they agree, can follow the mediation proceedings with binding arbitration where the trustee again will pay the fees and the worst the claimant can do is to recover 75% of the Trustee's last settlement proposal.[38] Otherwise, the claimant can proceed to trial.[39] There has never been either an arbitration or a trial.[40]

Mediation is conducted by Resolute Systems, Inc., a provider of dispute resolution services.[41] Its mediation rules designed for the Piper cases include

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Liability Claim or Future Claim."); *cf.* 11 U.S.C. § 524(g) (2006) (stating similar process available for asbestos-related claims against companies that filed for chapter 11 bankruptcy); *In re* Chance Indus., Inc., 367 B.R. 689, 697 & n.20 (Bankr. D. Kan. 2006) (noting although confirmation order did not establish trust to pay claims or provide for channeling injunction as used in asbestos claims, process could be used in other areas to "balance rights" of both future claimants and debtors).

[32] *See* Piper Trust Agreement, *supra* note 28, at para. 4.10(d).

[33] *See id.* ("The Expert Affidavit shall set forth in detail: (i) a listing of each alleged defect in the aircraft or part manufactured, designed, distributed, sold and/or supported by Old Piper, the Debtor or NEWCO and which is alleged to have given rise to the injury or incident underlying the asserted Product Liability Claim or Future Claim; (ii) the date(s) that the airplanes or parts were inspected by the Expert; (iii) the Expert's knowledge in the fields of aircraft technology, engineering, mathematics, avionics or any other fields of study which qualify the Expert to render an opinion; and (iv) a listing of all information received and persons interviewed by the Expert in compiling his or her report, and copies of the reports and information utilized in formulating such opinion.").

[34] *Id.*

[35] *See id.*; *cf. In re* Hoffinger Indus., Inc., 307 B.R. 112, 123 (Bankr. E.D. Ark. 2004) (emphasizing connection between use of product and resulting injury to have valid claim); *In re* Piper Aircraft Corp., 168 B.R. 434, 436 (S.D. Fla. 1994) (acknowledging important element of claim is based on product sold or manufactured by Piper).

[36] Piper Trust Agreement, *supra* note 28, at para. 4.10(d).

[37] *Id.* at para. 4.10(e).

[38] *Id.* at para. 4.10(f)(ii).

[39] *Id.* at para. 4.10(g).

[40] *See* Berlin Interview, *supra* note 29.

[41] *See* Resolute Systems, LLC, http://www.resolutesystems.com/About/ (last visited Sept. 6, 2009).

standard provisions one would expect in a mediation process: the parties generally agree to a mediator selected from a list provided by RSI;[42] they are required to submit confidential statements of their case to the mediator in advance of the mediation;[43] and they are required to have someone with settlement authority present.[44] As usual, the mediator may not have conflicts of interest and must be impartial, and has no power to force a settlement.[45]

What may be different, and potentially significant, are two features. First, the Trust carries the cost of the mediator and any facility fee involved.[46] In many other contexts, the parties split the mediator's fee or the mediator is working on a pro bono basis.[47] Second, and equally important, while the Rules provide for the mediation to take place in a "major metropolitan city reasonably convenient to the parties,"[48] the Trustee reports that he usually travels to a location convenient to the claimant and conducts the mediation there.[49]

The 100% consensual settlement rate of disputes involving the Trust is an amazing record in any dispute resolution system. Unfortunately, much information that might help us understand this success is very difficult to find or is confidential. We don't know the size of the claims channeled to the Trust, and don't know how

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[42] *See* Mediation Rules for Piper Aircraft Corporation Irrevocable Trust, para. II (on file with author) [hereinafter Mediation Rules for Piper Aircraft].

[43] *Id.* at para. V.

[44] *Id.* at para. VI(b).

[45] *Id.* at para. XI; *see, e.g.*, Nielsen-Allen v. Indus. Maint. Corp., No. Civ. 2001/70 FR, 2004 WL 502567, at *3 (D. V.I. Jan. 28, 2004) (stating mediator only has power to facilitate settlement, not to decide); Michael A. Marra, *Drafting and Negotiating Tomorrow's Construction Contracts Today*, 567 PRAC. L. INSTI. REAL EST. L. & PRAC. HANDBOOK SERIES 487, 493 (2009) (observing mediators act as guides, and cannot force settlements on parties).

[46] Mediation Rules for Piper Aircraft, *supra* note 42, at para. XIV. *See generally In re* MII Liquidation, Inc. and AHP Liquidation, LLC, Nos. 05–06040–H11, 05–06041, 2007 WL 2478631, at §§5.05, 5.07 (Bankr. S.D. Cal. May 14, 2007) (stating mediation trust is responsible for costs and expenses, including fees and costs of Trustee); *In re* Russ Transmission, Inc., No. 205BK20041, 2006 WL 6022007 (Bankr. E.D. Cal. Apr. 14, 2006) (discussing chapter 11 trustee's motion for compensation of mediator, indicating sometimes estate is responsible for mediator's fees and other costs).

[47] *See, e.g.*, Bankr. E.D. Pa. R. 9019-3(f) (stating mediators volunteer time up to four hours, and can continue to volunteer or be paid by parties going forward); *In re* Collins & Aikman Corp., 376 B.R. 815, 817 (Bankr. E.D. Mich. 2007) (positing parties split fee and expenses); *In re* Sargeant Farms, Inc., 224 B.R. 842, 847 (M.D. Fla. 1998) (stating mediator's fees are divided equally among parties); *see also* Standing Order *supra*, note 5.

[48] Mediation Rules for Piper Aircraft, *supra* note 42, at para. IV; *see* Notice of Motions, *In re* UAL Corp., et al., No. 02–48191, 2004 WL 5552139 (Bankr. N.D. Ill. Dec. 3, 2004) (noting mediation only to take place in Chicago). *But see In re* Teligent Servs., Inc., No. 01–12974, 2003 WL 23965397 (Bankr. S.D.N.Y. Oct. 15, 2003) (pointing out mediator willing to travel to New York, Dallas, Chicago, or Los Angeles for convenience of claimants).

[49] Berlin Interview, *supra* note 29; *see also In re* Grossman's Inc., No. 97-00695(PJW), 1997 WL 33446688, at *3 (Bankr. D. Del. Dec. 18, 1997) (indicating mediator will travel to location mutually agreed upon by parties); *In re Teligent Servs., Inc.*, 2003 WL 23965397, at sect. *The Defendants' Respective Objections are Moot or Specious* (stating mediators prepared to travel for suit at convenience of parties).

"generous" the settlements of those claims are.[50] There are, however, some tentative lessons that we might draw from even the limited information that we do have.

In setting up the Trust and its ADR procedures, the trust designers had a wide range of options. In particular, they might have made dispute resolution an expensive process for the claimant by requiring the claimant to pay, or split, the costs of the mediator, or by requiring the mediation process to occur in Florida where the bankruptcy case was filed. By raising the costs of resolving a claim, such a design, by some reckoning, would reduce the pre-mediation settlement value of claimants' claims[51] and induce settlements before the claimant incurred the expense of the mediation process. The trust designers did the opposite by underwriting much of the total cost of the mediation process.[52]

An economic analyst might observe that by putting the Trust to the expense of supplying the mediator and of traveling to the claimant's location, the Trust designers apparently believed that the particular form of mediation process they were building into the process would "pay off." Looked at a little differently, carrying much of the expense of dispute resolution is consistent with the Trustee's role as a fiduciary for the future claimants. Whatever the reasons for this aspect of the design, the design itself might well *signal* that the Trust takes seriously its fiduciary role and is sincerely interested in arriving at a just outcome in the claimant's particular case. The very structure of the process suggests that, unlike most adversaries, the Trustee is there to help, not to fight.

There is a related implication of this design. The Trustee *is* a fiduciary for the claimants and, in that sense, is not adversarial in the normal, non-bankruptcy sense.[53] This is a common feature in most settings in which claimants make claims on limited bankruptcy funds. It seems quite different in its degree of "adversariness" from the situation in which the Trustee, still a fiduciary for all the

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[50] Obviously, at the extreme, if the Trust were paying 100% of the amounts claimed, all disputes would end consensually.

[51] The travel expenses would probably loom largest here since they would imply either substantially larger expenses for claimant's lawyer, local counsel, or both. One could expect that some smaller claims would simply be deterred by such trust provisions. *Cf.* Vimar Seguros Y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 536 (1995) (Stevens, J., dissenting) (discussing burdens of costs and inconvenience in foreign and domestic forums for arbitration); Carnival Cruise Lines v. Shute, 499 U.S. 585, 604 (1991) (Stevens, J., dissenting) (noting heavy financial burden on individuals to defend in forum located across country); Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 935 (C.D. Cal. 2005) (discussing suits brought in federal court promote settlement due to added inconvenience and travel expenses to parties residing some distance away).

[52] *See, e.g.*, Walter v. 02HR, LLC, No. 07-CV-1129-T-24TGW, 2008 WL 2359915, at *1 (M.D. Fla. June 5, 2008) (ordering parties to split cost of mediation); *cf. In re Collins & Aikman Corp.*, 376 B.R. at 817 (requiring fees and reasonable expenses be shared equally by parties); Susan E. Cowell, *Pretrial Mediation of Complex Scientific Cases: A Proposal to Reduce Jury and Judicial Confusion*, 75 CHI.-KENT L. REV. 981, 1010–11 (2000) (noting little incentive exists to prolong mediation since parties share costs).

[53] *See* Zastrow v. Journal Commc'ns., Inc., 718 N.W.2d 51, 58 (Wis. 2006) (stating trustees are fiduciaries in managing trust); RESTATEMENT (SECOND) OF TRUSTS § 170 (1992) (indicating trustee has fiduciary duty and duty of loyalty); *see, e.g.*, Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and The New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 905 & n.22 (1993) (stating "fiduciary" applies to different types of relationships).

creditors, is making preference or other claims on some group of them for the "benefit" of all of them.[54] Situations in which the Trustee administers a limited fund for the benefit of all the claimants might be naturally better suited to mediated settlements in bankruptcy than other cases.

Beyond the structure of the controversies involved, the actual operation of the Piper Trust dispute resolution process may also be important to its success. The mediation procedures require that the Trustee or a representative physically attend, and that the claimant attend if possible;[55] the Trustee has made it his practice to personally attend.[56] The Trustee's traveling to the claimant's location, a reversal of the usual expectation of someone making a claim for compensation on someone else, probably signals that he considers the claimant and claim important, emphasizing as it were, the fiduciary side of his role.

This is amplified by the Trustee's actual practice once he is on the scene. The Trustee reports that the Piper cases typically involve a death and that the mediation process gives him an opportunity to express condolences and explain his role in the process as fiduciary.[57] It may well be that claimants and their lawyers come to understand the setting as far less adversarial than do claimants in other dispute-resolution settings and that this facilitates consensual resolution. This unusual, and complex realignment of "adversaries" might also permit a more multi-dimensional expression of interests in these mediation sessions than is likely to be common in other bankruptcy settings.[58]

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[54] *See, e.g.*, *In re Collins & Aikman Corp*., 376 B.R. at 815. In *In re Collins & Aikman Corp*., the debtor is, as are all debtors in possession in bankruptcy, acting as fiduciary for all creditors, including those 1,170 against whom the debtor is bringing preference actions. But if those creditors have received preferences, they will pay in 100% of their value and will, in return, get a somewhat larger percentage distribution on their claims. This is a no-win situation for the preference defendants—the status quo can only get worse. If the mediation process in the Collins & Aikman bankruptcy enjoys a good success rate, it will not be on account of reduced adversariness as might be present in the Piper setting. *See* Charles Jordan Tabb, *Rethinking Preferences*, 43 S.C. L. REV. 981, 991 (1992) (discussing implications of bankruptcy preference law where preferred creditor returns money paid); *see also* Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 757–58 (1984) (describing preference law and collective proceedings); *cf.* Michael J. Herbert, *The Trustee Versus the Trade Creditor: A Critique of Section 547(c)(1), (2) & (4) of the Bankruptcy Code*, 17 U. RICH. L. REV. 667, 696 (1983) (critiquing rationales for preference law).

[55] Mediation Rules for Piper Aircraft, *supra* note 42, at para. VI(b); *cf. In re Collins & Aikman Corp.*, 376 B.R. at 817 (ordering counsel and representatives to appear in person, subject to exceptions); *In re* Adoption of New CR 53.4, No. 25700-A-586, 1996 Wash. LEXIS 713, at *4 (Sup. Ct. of Wash. Nov. 15, 1996) (requiring all parties and insurers attend mediation in person).

[56] *See* Berlin Interview, *supra* note 29.

[57] *Id.*

[58] *See* Steven R. Wirth & Joseph P. Mitchell, Note, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation*, 6 AM. BANKR. INST. L. REV. 213, 234 (1998) (concluding parties in bankruptcy proceeding who plan to continue communicating in future would greatly benefit from mediation); *see also* 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, 436–37 (1995) (discussing bankruptcy courts expressing interest in mediation); *cf.* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" In Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 870 & n.36 (2008) (positing mediation is on rise, since mutual agreements have higher compliance rate).

The other feature of the Piper Trust process that might bear on its success rate is the forced information exchange that precedes settlement talks and mediation. Others have suggested that information exchange is important (perhaps critically important) in parties' moving closer to settlement.[59] This may be particularly true in the Piper setting.

A Piper claimant that files suit might well be surprised by the notice she receives in response about the channeling injunction and the procedures that are to be followed if the claimant wants redress.[60] Whatever the knowledge of the claimant and her lawyer about the claim at the time it is first asserted, it is very unlikely that she will have developed the substantial investigation and expert witness material by the time she gets the Trustee's notice. Creating the Expert Affidavit and the Second Affidavit[61] will require serious pretrial work, the kind that, in other contexts, is often postponed until counsel is forced to do it either through discovery demands or a motion for summary judgment.

We might expect that, in extremely weak liability cases, the burden of preparing these documents might, in a few cases, tempt some claimants to accept token

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[59] *See* Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 86 (1995) (observing connection between transmitting information and increasing likelihood of settlement); Heise, *Justice Delayed?*, *supra* note 7, at 6 (endorsing facilitation of information between parties as principal contribution of alternative dispute resolution programs). *But see* Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 753 (1994-1995) (arguing early exchange of information will not promote settlement).

[60] *See* Piper Trust Agreement, *supra* note 28, at para. 4.10(a). This section makes it make this crystal clear to a claimant. It provides, in suitably ominous bold print:

> THE FAILURE OF A CLAIMANT TO COMPLY WITH ANY OF THE PROCEDURES CONTAINED IN THIS AGREEMENT SHALL BAR SUCH CLAIMANT FROM THE FURTHER PROSECUTION OF ITS CLAIM OR FUTURE CLAIM AND OF THE RIGHT TO RECEIVE DISTRIBUTIONS UNDER THE PLAN AND THIS AGREEMENT. STRICT COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS AGREEMENT IS MANDATORY. THE FAILURE OF A HOLDER OF A PRESENT CLAIM TO HAVE FILED A FORM PROOF OF CLAIM AGAINST THE DEBTOR IN ACCORDANCE WITH THE COURT ORDERS DATED AUGUST 26, 1991 AND APRIL 8, 1994, ALONG WITH A COMPLETED FORM. QUESTIONNAIRE (WHICH WAS APPROVED BY ORDER OF THE COURT DATED APRIL 8, 1994), SHALL BAR THE CLAIMANT FROM PROSECUTION OF ITS CLAIM AGAINST NEWCO, THE DEBTOR, AND THIS TRUST AND FROM RECEIVING DISTRIBUTIONS UNDER THIS AGREEMENT AND UNDER THE PLAN. ANY HOLDER OF AN ASSERTED PRODUCT LIABILITY CLAIM WHO HAS NOT TIMELY FILED OR ASSERTED A CLAIM AGAINST THE DEBTOR WILL NOT BE PERMITTED TO PARTICIPATE IN DISTRIBUTIONS UNDER THE PLAN. THE TRUST PROCEDURES FOR PRESENT CLAIMS AND FUTURE CLAIMS INCLUDE MANDATORY PRE-SUIT INVESTIGATION AND MEDIATION. BINDING ARBITRATION SHALL BE AVAILABLE UPON WRITTEN AGREEMENT OF THE PARTIES.

Id.

[61] *See supra* text accompanying note 33 (listing specific requirements for Expert Affidavit).

settlements.[62] But the Trust seems to make the three affidavits invariable requirements to the assertion of a claim.[63] Information is not available on whether the Trustee has the discretion to settle in the absence of the required documents and, if he has that discretion, to what extent he does so.[64] In the absence of better information, one is probably safe to assume that nearly all cases proceed through the document preparation stage.[65] The investigation involved in preparing the affidavits will give the claimant a better idea of the strengths and weaknesses of her case. The Trustee's own investigation, necessitated by the claimants' affidavits, will similarly deepen his understanding of the case. This information exchange is probably a critical ingredient in the settlement success of the Piper Trust. But the substantial information exchange that is part of the Piper process is not a sufficient explanation.

Rather, as suggested earlier, the mediation session itself seems to play a key role in the consensual resolution of a great many of these cases, though the Trustee could not give a precise number or percentage. Instead of simply negotiating a settlement in response to the Trustee's offer, the parties in most of these cases elect to participate in mediation (and incur the expense of appearing).

What role, then, does the mediation session play within the Piper Trust? Perhaps it provides the claimant an opportunity simply to appear in person. It may be important that the claimant be able to tell a story and have an interested audience available to listen (and, indeed, in these cases, as suggested earlier, perhaps to sympathize). Since the cases usually involve death or very serious injury, the truncated exchange of information may not be "enough" to give the claim (or the victim) the attention they arguably deserve. The Trustee does report that, at times

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[62] *See, e.g.*, Davis, *supra* note 9, at 335 (noting while cases like *In re Piper Aircraft Corp.* have succeeded in safeguarding corporations' viability, adequacy of compensation for future claimants is questionable). *But see, e.g.*, Berlin Interview, *supra* note 29 (revealing one hundred percent success rate in reaching harmonious resolutions of claims); Piper Trust Agreement, *supra* note 28, at para. 4.10(e) (stating next step after claimant submits affidavits is Trustee's response either offering settlement or demanding mediation, fees for which will be paid by Trustee). While the Notice sets a ninety-day deadline for the documents the Trustee can and does agree to extend the deadlines when appropriate. *See* Piper Trust Agreement, *supra* note 28, at para. 4.10(d).

[63] *See* Piper Trust Agreement, *supra* note 28, at para. 4.10(a) (mandating strict compliance with terms and conditions of Trust Agreement and warning failure to adhere to procedures will result in bar of claimant's action and distribution rights).

[64] *See In re* Marples, 266 B.R. 202 (Bankr. D. Idaho 2001) (noting trustee's ability to settle is limited); *In re* Flanagan, 503 F.3d 171 (2d Cir. Conn. 2007) (stating decision to settle is within trustee's discretion); *see also In re* Dorland, 374 B.R. 765 (Bankr. D. Colo. 2007) (recognizing trustee's full authority to represent estate, and debtor's lack thereof). The Trustee reported that nearly all cases have involved deaths. Assuming a Piper plane was somehow connected to the accident, it is a little hard to believe that a good plaintiff's lawyer cannot develop a minimally-viable claim against Piper for redress, that such a lawyer would not be able to find a compliant expert, or that the case would be so weak that the lawyer and claimant would give up before engaging an expert.

[65] Since most cases are death cases, see *supra* note 29, the facts necessary to prepare the Second Affidavit (concerning damages and calculation of damages) will always be available even where the existence of liability is questionable. But it is probably true statistically that at least *some* claims initially asserted against Piper have no legal basis for liability. Whether such claims also lacked experts who could form and assert a contrary opinion through the Expert Affidavit is an entirely different question.

(and to the Trustee's surprise), the claimant's lawyer will not allow clients to sit in on the actual mediation sessions.[66] One of the well-known strengths of mediation is its expansive potential to go beyond what litigation and arbitration can deliver.[67] Clients cannot as easily realize that potential when their lawyers keep them from the mediation sessions in these cases.

III. LESSONS FROM PIPER?

Is there something we can learn from the Piper mediation process that might be useful elsewhere? We cannot discount the unusual alignment of the parties, or the particular talents of the Trustee, as playing large roles in the success of mediation in Piper. But even if limited to cases where multiple claimants make claims on a limited fund and a talented Trustee is found to administer the fund, there are some situations where the lessons of Piper might be put to work.

Since the innovative use to which Manville first put the bankruptcy law, we have had recurring "Manville problems" for which the Code has been pressed into service. Those are situations in which past conduct continues to inflict injuries on "new" people – "future claimants" – in Manville's case, those who continue to get sick from exposure to asbestos.[68] The most obvious recent cases are those of Chrysler and General Motors, both of which made cars that will continue to fail and inflict injury in the future on persons who are not identifiable today.

Both auto makers' chapter 11 plans initially relegated claims analogous to those of Piper's "future claimants" to the "old" entities (where those claimants would have received little or nothing) and purported to discharge them through bankruptcy.[69] New buyers were (obviously) not technically affected but it isn't hard to imagine a

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[66] *See* Berlin Interview, *supra* note 29; *cf.* Riskin & Welsh, *supra* note 58, at 880 & n.86, 888 & n.139 (2008) (indicating lawyer decided not to have client present during mediation due to concern of client losing control). *But see* Frank V. Ariano, *A Lawyer's Guide to Preparing Clients for Family Law Mediation*, ILL. B.J. 600, 602 (2002) (encouraging lawyers to prepare clients for mediation setting and "good-faith participation").

[67] *See* Bruce E. Meyerson, *The Dispute Resolution Profession Should Not Celebrate The Vanishing Trial*, 7 CARDOZO J. CONFLICT RESOL. 77, 78 (2005) (stating "[m]ediation provides great party satisfaction and permits the utilization of creative solutions to problems in ways that litigation cannot."); *see also* Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487, 1494 (D. Utah 1995) (positing success of mediation is due to strengths of mediator and parties' revealing information); *cf.* Riskin & Welsh, *supra* note 58, at 863 (noting mediation provides "attention to underlying interests, the real concerns of the parties").

[68] *See In re* Johns-Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (stating "claim" can be defined broadly); *see also* 11 U.S.C. § 101(5)(A) (2006) (defining "claim"); H.R. REP. NO. 95-595, at 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266 (illustrating Congress' intent to create broad definition of "claim" so "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case").

[69] Whether that is possible is the subject of much debate. *See, e.g.*, Bartell, *supra* note 27, at 341 (discussing whether Congress's intention having broad definition of "claim" includes future tort victims); George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 268–69 n.125 (2002) (citing cases stating no claim until actual injury occurs); Tung, *supra* note 27, at 507 (citing approach to future claimants sacrifices "predictability and finality"); *see also* Davis, *supra* note 9, at 344 (discussing dischargeability of future claims).

significant pause in a buyer's decision to buy from either company if the seller had just disclaimed all responsibility for the quality of its past products. Whether for simple business reasons or for other reasons,[70] both new entities emerging from those chapter 11 filings have since switched their positions and decided to recognize those claims,[71] apparently without any limitations.[72]

The Piper case might have supplied a third kind of alternative: the creation of a fund (that might be replenished periodically by the new auto companies[73]) to satisfy the claims of those injured by cars bought before the bankruptcies in accidents that occurred afterwards. Of course, the scale of such a program would be entirely

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[70] In GM's case, at least, the objections of many State Attorney Generals to the Plan may have contributed to the decision that the new entity would recognize the "future" claims arising from the "old" products. *See* Mike Spector, *Behind the GM Product-Liability Talks*, WALL ST. J., June 29, 2009, http://blogs.wsj.com/deals/2009/06/29/behind-the-gm-product-liability-talks/ [hereinafter Spector, *Behind the GM Product-Liability*] (noting possible due process problems for future tort victims led GM's position change). *See generally* Jared Gall, *Chrysler Reneges on Product-Liability Renege*, CAR AND DRIVER, Aug. 28, 2009, http://blog.caranddriver.com/chrysler-reneges-on-product-liability-renege/ (arguing Chrysler accepted tort claims with increase consumer confidence goal); Adina Rosenbaum, *Chrysler Assumes Post Bankruptcy Product Liability Claims*, PUBLIC CITIZEN, Aug. 28, 2009, http://citizenvox.org/2009/08/28/chrysler-assumes-post-bankruptcy-product-liability-claims/ (discussing Chrysler decision to change position with future tort victims without judicial intervention).

[71] *See* Gall, *supra* note 70 (recognizing Chrysler's letter to Congress stating it would begin honoring certain product liability claims); Mike Spector, *GM Agrees to Liability for Defects After Bankruptcy*, WALL ST. J., June 29, 2009, http://online.wsj.com/article/SB124614495545265019.html [hereinafter Spector, *GM Agrees to Liability*] (observing pressure from Attorney General led to position change); *GM to Accept Liability for Future Claims*, THE IRISH TIMES, June 29, 2009, http://www.irishtimes.com/newspaper/breaking/2009/0629/breaking6.htm (citing GM statement regarding decision to cover future products liability claims).

[72] *See* Rosenbaum, *supra* note 70 (stating Chrysler would assume liability for all injured after bankruptcy by vehicles sold before bankruptcy); Spector, *GM Agrees to Liability*, *supra* note 71 (recognizing GM's decision to assume all responsibility); Gall, *supra* note 70 (stating Chrysler will honor all claims). Commentators have pointed out that these buyers of "old" GM cars who suffer personal injury in the future are effectively being treated better than secured creditors. *See* posting of JDP, *GM Product Liability Plaintiffs Better Off Than Secured Creditors*, to Products Liability Prof Blog, http://lawprofessors.typepad.com/products_liability/2009/07/gm-product-liability-plaintiffs-become-secured-creditors.html (July 2, 2009) (noting "new GM" responsible for defective products created during "old GM" placing such creditors ahead of other unsecured creditors). But maybe the reaction of the Attorneys General and the actions of the auto makers actually get the priorities "right" as a matter of public policy. The law of secured credit is clearly to the contrary, but the priority choices reflected in UCC Article 9 are not inevitable. Indeed, many would argue that, on many policy levels, involuntary tort creditors who suffer personal, physical injury ought not be forced out of the money by voluntary bank creditors who condition their loans on the surrender of collateral. *See* Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for The Priority of Secured Creditors in Bankruptcy: Further Thoughts And A Reply To Critics*, 82 CORNELL L. REV. 1279, 1297 (1997) (noting some commentators believe tort creditors should receive full compensation from tortfeasor, even if tortfeasor is bankrupt); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1569 (1991) (advocating tort claimants' priority in bankruptcy proceedings); *see also* Hanoch Dagan, *Restitution in Bankruptcy: Why All Involuntary Creditors Should be Preferred*, 78 AM. BANKR. L.J. 247, 276 (2004) (arguing involuntary creditors should receive preference over consensual creditors).

[73] The Piper Trust allows for replenishment of the Trust fund by the new entity should triggering events defined by the Trust require it. *See* Piper Trust Agreement, *supra* note 28, at para. 6.5; *see also* Gall, *supra* note 70 (explaining pre- and post- bankruptcy Chrysler company and result on tort claims); Spector, *GM Agrees to Liability*, *supra* note 71 (detailing GM's new company and future product liability claims).

different and far harder to manage but, when compared to the total burden that litigating the claims represents, no more difficult in relative terms than the system created in Piper. The Piper experience shows that a mandatory alternative dispute resolution process, with mediation at its center, can produce consensual outcomes that might well be more satisfying to the claimants than litigated outcomes or ordinary settlements.

Apart from the potential of such systems to save the new companies money and to avoid the distraction of "old company" litigation, a Piper solution might be as good, from a marketing perspective, as was the new companies' assuming liability as they did during the Summer of 2009. Suppose new Chrysler or GM created a special trust fund for its "loyal customers," one that included a special, expedited process for finding redress from that fund even though "the bankruptcy law did not require it." Could we not trust Madison Avenue to develop a campaign to distinguish these "responsible" companies that "stand behind their products" from the run-of-the-mill (non-bankrupt) car companies that simply attempt to escape their responsibility by fighting their customers over their products cases in court?

CONCLUSION

What success rate might the Piper experience suggest for the 1,170 (more or less) preference cases that Judge Rhodes ordered to mandatory mediation, or for the Delaware District Court's mandatory mediation of bankruptcy appeals? There are many differences between Piper's and these programs and, while one might be tempted to stop there, we might nonetheless speculate about reasons for the inevitably lower[74] rate of consensual settlement.

The preference cases may be far less multi-dimensional than are the Piper cases. Preferences are more clearly "just" about money,[75] certainly not about death or personal injury and the emotions that come with them. In addition, the Trustee in those cases is trying to get money *from* the creditors, not to give them money from a limited fund that must be preserved for others like them. And the time frame in

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[74] As pointed out earlier, the Piper Trust has a 100% rate of consensual settlements. *See supra* note 50 and accompanying text; *see also* Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV. 1259, 1267 (1995) (highlighting use of ADR to negotiate mutually amenable reorganization plan); *see also* Anne M. Burr, *Building Reform From the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation*, 12 OHIO ST. J. ON DISP. RESOL. 311, 341 & n.141 (1997) ("Bankruptcy courts also use ADR to effect consensual plans of reorganization and expedite the debtor's emergence from [c]hapter 11." (citing Mabey et al., *supra*, at 1282-1283)).

[75] A debtor often "prefers" (pays) one creditor before others for reasons ranging from creditor coercion (e.g., "if you're late, we'll terminate you.") to creditor favoritism because of the personal or business relationship the parties have developed over time. The latter cases could become multi-dimensional but not in the same way as death cases. *See, e.g., In re* Noffsinger, 316 B.R. 283, 286 (Bankr. W.D. Ky. 2004) (discussing creditor coercion and illegality); *In re* Chapman, 146 B.R. 411, 412 (Bankr. N.D. Ill. 1992) (exemplifying creditor favoritism paying student loans first); *see also* Stephen L. Sepinuck, *Rethinking Unfair Discrimination in Chapter 13*, 74 AM. BANKR. L.J. 341, 348 (2000) (discussing efforts to eradicate favoritism among creditors of same priority).

these other programs seems, by comparison, very truncated. The Piper Trustee handles about a half-dozen claims a year and requires substantial preparation and information exchange before the mediation takes place. The mediators appointed by Judge Rhodes will have to mediate many times that number of cases in a comparable time period; it is unclear from the general order whether substantial exchange of new information will take place before the preference mediations. Finally, the Piper Trust underwrites much of the dispute resolution expense; the Trustee even travels to the claimant. Mediator fees and expenses in the preference cases are, for the most part, shared by the parties. The "meter is running" in the preference cases in a way it is not in the Piper cases.

The Delaware program shares many of these features of the preference cases, though the range of issues that might be in dispute in a bankruptcy appeal is far broader. But, in addition, in the Delaware situation, the facts have already been fully developed by the parties well before one or the other takes an appeal. To the extent that fresh information sharing contributes to the success of the Piper situation, that feature is missing in the Delaware program.[76]

In the final analysis, the Piper Trust may simply remind us of some of the features of mediation that contribute to its great potential, such as party information sharing, a process design that focuses on listening, and a process that, itself, communicates a desire to do justice. Piper adds to that the bankruptcy-specific role of an "adversary" (the Trustee) charged with "caring" for the claimant, one who, in fact, communicates that role in many cases in person. The success of this particular dispute resolution process is a testament to the wisdom of those who set it up and of those who continue to administer it.

But Piper need not be relegated to the unique: companies that build dangerous things will continue to have financial difficulty and the question of how our society handles the "old" products liability while giving the "new" company a chance to succeed will continue to arise. The Piper case shows a "third way" of handling that "old" liability, one that in many cases will turn out to be better than the alternatives for everyone involved, including, most significantly, both the emerging new company and the claimants.

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[76] *See* Grace, *supra* note 5 (detailing Delaware mediation program). *See generally* Standing Order *In re* Procedures To Govern Mediation of Appeals From the United States Bankruptcy Court for the District of Delaware dated July 23, 2004 (Robinson, C.J.), *available at* http://www.ded.uscourts.gov/Announce/MedAdminOrder.pdf. *Compare* Heise, *Justice Delayed?*, *supra* note 7, at 21 (discussing slightly unsuccessful information sharing in ADR), *with* Berlin Interview, *supra* note 29 (explaining success of Piper consensual settlements).