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BANKRUPTCY AND MASS TORTS: THE COMMISSION'S PROPOSALS

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The past is of no importance.

The present is of no importance.

It is with the future that we have to deal.

—Oscar Wilde

Introduction

Mass tort litigation looms large on the American horizon. [1] A by−product of our highly technical, industrial and litigious society are claims regarding chemicals and other materials that sometimes prove to be toxic or hazardous to large numbers of persons. [2] In June of 1997, the United States Supreme Court, in its landmark decision in *Amchem Products., Inc. v. Windsor,* [3] held that class certification for settlement purposes only, comprising a class of plaintiffs exposed to asbestos containing materials, does not satisfy the requirements of the Federal Rules of Civil Procedure. [4] Among other things, there is a conflict of interest between presently injured plaintiffs and those who have not yet manifested an illness, the so−called future claimants. [5] This decision implies that, unless Congress approves amendments to the class action rules, bankruptcy may be a preferable alternative to class actions for the resolution of mass tort claims. [6]

As part of the Bankruptcy Reform Act of 1994, Congress enacted legislation, codified in section 524(g) of the Bankruptcy Code [7] , to deal with asbestos mass tort claims in chapter 11 reorganizations. [8] Congress also recognized the need for a mechanism to deal with non−asbestos mass tort claims. [9] The 1994 asbestos amendments, however, did not preclude the use of bankruptcy to deal with other types of mass future claims. [10] Nonetheless, because the Bankruptcy Code did not have express provisions to deal with mass future claims, uncertainty over the legality of these procedures limited access to capital markets and depressed the value of publicly traded securities. [11]

The National Bankruptcy Review Commission's proposals regarding mass claims are an attempt to fill this void. [12] The Commission recommends that (i) the definition of "claim" [13] be amended to include definitions for "mass future claim" and "holder of a mass future claim;" (ii) the power to appoint a mass future claims representative be added to the Bankruptcy Code; [14] (iii) the estimation provisions of the Bankruptcy Code [15] be amended to authorize estimation of mass future claims; (iv) the power to issue so−called channeling injunctions [16] be added to the Bankruptcy Code; and (v) the power to authorize sales of assets "free and clear" [17] be supplemented to authorize the Bankruptcy Court to relieve a purchaser from successor liability. [18] Only time will tell whether the Commission's proposals, if enacted, will make the bankruptcy court the preferred forum for mass tort resolution.

I. Definition of "Claim"

The Commission recommends the following:

2.1.1 *Definition of Mass Future Claim*

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

1) the act(s) or omission(s) occurred before or at the time of the order for relief;

2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;

3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;

4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and

5) the amount of such liability is reasonably capable of estimation.

The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim," which would be an entity that holds a mass future claim. [19]

On the surface, expanding the definition of "claim" seems like a good idea. As the commercial lawyers who invented "dragnet" clauses for lending agreements must have recognized, a more comprehensive definition is always better than a less inclusive one. However, the definition of "claim" in section 101(5) in the Bankruptcy Code is already as broad as it possibly can be. [20] 11 U.S.C. § 101(5)

"claim" means—

(A) 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; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. [21]

Indeed, the legislative history of section 101(5) makes it clear that:

the definition [of claim] is a significant departure from present law [under the former Bankruptcy Act]. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case.... [The new Bankruptcy Code,] by *this broadest possible definition,* and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, . . . conntemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court. [22]

Because of this all−encompassing definition of "claim", the term "future claim" is really an oxymoron. Despite the fact that the Bankruptcy Code's present definition of "claim" is the broadest possible one, problems have arisen, because bankruptcy courts have had difficulty deciding to bite the bullet and rule that unmanifested mass tort claims are "claims" within the meaning of the Bankruptcy Code's definition of "claim." [23]

Courts have also had differing views of when a claim arises for bankruptcy purposes. [24] A few courts have required some type of prepetition or preconfirmation relationship between a future claimant and the debtor. [25] Other courts

have only required that the debtor's culpable acts occurred prepetition—the so−called "conduct test." [26]

The definition proposed by the Commission adopts the "conduct test" for when a claim arises, based on the timing of debtor's conduct, not on the relationship of the parties or on the of discovery an injury. [27] The Commission's definition also makes it clear that future claims are dealt with as "claims" and not as "demands," as was the case with the asbestos provisions of section 524(g). [28] Thus, as "claims," mass future claims will be entitled to vote and will have the protection of the "best interest of creditors test" under section 1129(a)(7). [29]

The Commission's definition of mass future claims provides that the acts or omissions "*may* be sufficient to establish liability when injuries ultimately are manifested." [30] The Report states that "this language was chosen to recognize that use of the bankruptcy process to manage mass future claims is not, in itself, a concession of liability on those claims." [31] Until the *Dow Corning* case, [32] there had never been a mass tort bankruptcy case where liability was contested. [33] However, Dow Corning contests its liability for silicone−related claims and is using bankruptcy as a massive class action−type device to litigate its liability issues in a single forum. [34] Arguably, this proposal could strain the resources of the bankruptcy courts. [35] Thus, in the opinion of this writer, the Commission's proposal should be limited to only those debtors who do not contest liability. Otherwise, bankruptcy courts could become bogged down in liability contests, when they should be helping distressed debtors resolve their uncontested debts. [36]

In a change from present law, the Commission's mass future claim proposal will apply in chapter 7, as well as in chapter 11. [37] This is a mistake because chapter 7 cases must be left to a reasonably prompt termination and distribution. [38] It contravenes the policy of chapter 7 to appoint a mass future claims representative. [39]

Sections (3), (4), and (5) of the Commission's definition of a "mass future claims" perform a gatekeeping function and limit the definition to "significant mass tort" claims. [40] Therefore, future liabilities that are so unforeseeable or speculative that they are not reasonably capable of estimation will not be covered. [41] The Commission's criteria are, thus, in contrast with the 1994 asbestos provisions of section 524(g) which stipulate that "the actual amounts, numbers, and timing of such future demands, cannot be determined." [42] The *Manville* experience has shown that estimation of future claims *is* speculative. [43] Since future claims are largely speculative, even when there has been significant pre−bankruptcy litigation, will the Commission's definition exclude most mass tort claims?

Finally, the Commission report indicates that the definition of "mass future claim" does not include police and regulatory actions, such as environmental clean up orders. [44] There is nothing, however, in the proposed text of the statute that would exclude environmental and similar governmental claims. [45] When interpreting statutory language, great weight is usually given to the plain meaning of the statute. [46] Thus, the Commission's commentary may be insufficient to prevent environmental and similar claims from being covered by the statute.

II. Future Claims Representative

The Commission recommends the following:

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

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

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

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

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed. [47]

There are serious due process questions in compromising the rights of future claimants. [48] Problems with adequate notice were recognized most recently in the Supreme Court's decision in *Amchem Products., Inc. v. Windsor*. [49] The device of a future claims representative permits constructive notice to unknown parties. [50] Several mass tort bankruptcy cases have already recognized the necessity for a future claims representative and have used such a device, without there being an express requirement in the Code. [51] In the 1994 asbestos amendments adding section 524(g), the bankruptcy court must appoint a legal representative for post−confirmation injunctions to become enforceable. [52]

Based upon the experience of mass tort cases to date, codifying a requirement for a future claims representative for future claimants is a good idea. [53] Because the Commission's proposal treats future claims as "claims" rather than "demands," the future claims representative, in addition to the right to be heard, will also have power to file a claim and to vote the claim in connection with a plan of reorganization, unlike the case of the legal representative under section 524(g). [54]

III. Estimation

The Commission recommends the following:

2.1.3 Determination of Mass Future Claims

Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims. [55]

One of the hot topics of current bankruptcy law in the mass tort area is whether estimation can only be used for determining feasibility of a plan of reorganization, or whether it can be also used for determining distribution, thus capping future mass tort claims. [56] This problem has arisen because the personal injury bar successfully lobbied Congress in the 1980's to enact specific legislation barring Article I bankruptcy judges from resolving personal injury or wrongful death claims, and preserving the right to trial by jury. [57] Absent a change to the provisions governing bankruptcy jurisdiction, estimation of personal injury claims may have to take place in the district court, with a trial by jury. [58] Needless to say, the Commission's proposal will result in a cumbersome, costly, and time−consuming process. [59]

Since estimation decisions are fraught with possibilities for error, [60] the Commission's proposal, by capping claims, will shift from the debtor to the claimants the risk of loss. [61] The Commission believes that this harsh result will be ameliorated in those cases where fully consensual plans involve a trust owning one hundred percent of a company's stock. [62] In such cases, there will be no need for an actual estimation, because the claimholders already own everything. [63] Further, the Commission states that nothing in its proposal precludes the parties from agreeing that there will be future adjustments to a trust. [64]

In the opinion of this writer, the Commission has missed the mark. The Commission should have recognized, as the persons who drafted section 524(g) apparently did, that the amounts of future claims cannot be determined. [65] Instead of mandating that the courts should engage in the cumbersome, costly, and time−consuming process of a jury trial to "estimate" personal injury and wrongful death claims, [66] the Commission could have concluded that any plan of

reorganization discharging such claims may have to involve a trust owning one hundred percent of the company's stock. [67] As is indicated above, in such cases, there will be no need for an actual estimation, because the claimholders already own everything. [68]

IV. Injunctions

The Commission recommends the following:

2.1.4 Channeling Injunctions

Section 524 should authorize courts to issue channeling injunctions.

The channeling device, first used in *Manville*, [69] diverts future claimants from the reorganized debtor to a trust or a pool of assets from which they will receive compensation. [70] Channeling injunctions have also been used to protect insurers of the debtor and other third parties. [71] As a result, channeling injunctions are critical to any scheme to resolve mass future claims. [72]

The Commission recognizes that its proposal on channeling injunctions is far less detailed in terms of conditions for issuance than the 1994 asbestos amendments in section 524(g). [73] In the opinion of this writer, that is a mistake. The Commission should have specified, in detail, the conditions under which such sweeping channeling injunctions could be issued. [74] A channeling injunction could affect the rights of persons not appearing before the court, perhaps even unborn at the time of issuance. There should be specific safeguards regarding the exercise of such broad power. One such safeguard the author would recommend is the 75 percent vote requirement of section 524(g), which effectively prevents a cramdown of a plan of reorganization with a channeling injunction against future claimants. [75] The Commission's view is that this and other provisions of section 524(g) give claimants too much "leverage." [76] However, the channeling injunction is a very broad power. Debtors should not have an unfettered right to use it.

V. Successor Liability

2.1.5 Plan Confirmation and Discharge; Successor Liability

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser. [77]

Ordinarily, a corporation buying assets of another corporation is not liable for the debts and other liabilities of the seller. [78] However, successor liability is an exception, where (i) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (ii) the transaction is deemed a consolidation or merger of the two corporations; (iii) the buyer is merely a continuation of the selling corporation; or (iv) the transaction is entered into fraudulently to escape liability for the seller's debts and other liabilities. [79]

The Commission's proposal is a needed improvement to resolve an unfairness noted by commentators. [80] This proposal requires the appointment of a mass future claims representative in order to protect the successor from liability. [81] In addition, this proposal would not authorize the discharge of a debtor's obligation on any liability based on postpetition acts. [82]

Conclusion

To the extent that the Commission's proposals cover other types of liabilities than asbestos, they are an improvement upon the Bankruptcy Code's mass tort provisions dealing solely with asbestos claims. [83] However, to the extent that the Commission's proposals seek to delete creditor protections, such as the anti−cramdown provisions of section 524(g), [84] they trample on the rights of present and future claimants. The Commission's proposals for mass future claims are, thus, a mixed bag.

There can be no doubt that mass torts are wracking our legal system. In recent years, various ideas have been circulated in an attempt to solve the legal system's crisis over mass torts. [85] The Commission's proposals are really an attempt to reform the tort system, under the guise of amending certain provisions of the Bankruptcy Code. However, it is unclear why bankruptcy courts should become the battlefield for a litigation crisis that our entire court system has been unable to conquer. The purpose of the Bankruptcy Code should be to resolve bankruptcy cases, not the mass tort problem plaguing our legal system. There should be a limit to how many of society's problems should be solved by the bankruptcy court.

FOOTNOTES:

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[1] *See* John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Actions, 95 Colum. L. Rev. 1343, 1346 (1995) (commenting on plaintiff's position vis−a−vis courts and attorneys in mass tort context).Back To Text

[2] *See* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2253 (1997) (noting hundreds of thousands of law suits involved 13 to 21 million workers exposed to asbestos over past 40 to 50 years). *See generally* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618 n.2 (3d Cir. 1996) (citing commentary).Back To Text

[3] 117 S. Ct. 2231 (1997).Back To Text

[4] *See* Fed. R. Civ. P. 23; Amchem, 117 S. Ct. at 2245−46 (describing characteristics of class actions for which Federal Rules provide).Back To Text

[5] *See* Amchem, 117 S. Ct. at 2250−51.

> Many persons in the exposure−only category . . . may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Id. at 2252.Back To Text

[6] *See* id. at 2252. Indeed, the Commission Report concludes that bankruptcy *is* preferable to class actions, because of the scrutiny of fee arrangements, the absolute priority rule, and other claimant protection rules. *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 334−41 (1997) [hereinafter Commission Report]; *see also* John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1383 (1995) (discussing class action certification); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business left by the* Manville Amendments, 69 Am. Bankr. L.J. 493, 490 (1995) (explaining jurisdictional advantage of bankruptcy over class action mechanism).Back To Text

[7] *See* 11 U.S.C. § 524(g) (1994) (stating "asbestos amendments" apply exclusively to demands for payment on account of asbestos injuries); *see also* Linda J. Rusch, Unintended Consequences of Unthinking Tinkering: The 1994 Amendments and the Chapter 11 Process, 69 Am. Bankr. L.J. 349, 389 (1995) (discussing limited scope of these amendments and potential repercussions). Back To Text

[8] *See* Commission Report, supra note 6, at 315.

> The bankruptcy system offers a structured system to manage multiple liabilities and has provided a forum for companies with massive liabilities to attempt to do so. At least 15 asbestos manufacturers, including UNR, Amatex, Johns−Manville, National Gypsum, Eagle−Picher, Celotex, and Raytech, have organized or liquidated in attempts to address massive numbers of known and unknown asbestos claimants using Chapter 11 of the Bankruptcy Code.

Id.

See generally In re Eagle−Picher Indus., 203 B.R. 256, 262 (S.D. Ohio 1996) (noting trust adequacy with respect to future claims); Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, 108 Stat. 4106 (providing explicit legislative guidance to ensure equitable treatment of mass future asbestos claimants in bankruptcy).Back To Text

[9] *See* 140 Cong. Rec. H10752−01, H10765 (daily ed. Oct. 4, 1994).

> The [Judiciary] Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas.

Id. Back To Text

[10] *See, e.g.,* Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, § 111(b), 108 Stat. 4106, 4117 (1994) (uncodified) (noting asbestos amendments do not affect court's power to deal with other mass claims); Eagle−Picher, 203 B.R. at 267 (permitting inclusion of lead personal injury claims in trust in addition to asbestos claims and establishing trust for property damage claims as well).Back To Text

[11] *See* H.R. Rep. No. 103−835 (1994); *see also* Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business left by the* Manville Amendments, 69 Am. Bankr. L.J. 493, 495 (1995) (noting uncertainty of law contributed to failure of Manville reorganization).Back To Text

[12] It should be noted that, although this article is limited to the discussion of mass torts, the Commission's proposals are not limited to torts, and are intended to cover mass contract liabilities, as well. *See* Commission Report, supra note 6, at 327.Back To Text

[13] *See* 11 U.S.C. § 101(5) (1994).Back To Text

[14] *See* Commission Report, supra note 6, at 331−32.

> The use of mass future claims representatives has become readily accepted in the reorganization context under present law, yet nothing in the Code expressly requires representation for mass future claimants or gives any guidance on the parameters of appointing such representatives . . . [T]he Commission considered this representation an absolute necessity and a fundamental prerequisite to the discharge of mass future claims. A legal representative is essential to represent the interests of classes of holders who were not identified individually during the bankruptcy proceedings.

Id.Back To Text

[15] *See* 11 U.S.C. § 502 (1994). Although it does not prescribe a particular method, section 502(c)(1) of the Code authorizes estimation of claims for purposes of allowance for contingent or unliquidated claims, "the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." Id. *See also* 28 U.S.C. § 157(b)(2)(B) (1994) (providing district court shall order that personal injury tort and wrongful death claims be tried in district court where bankruptcy case is pending or district court in district where claim arose).Back To Text

[16] *See* Commission Report, supra note 6, at 345−46 (noting 1994 asbestos amendments specifically provided for channeling injunctions in limited instance of future asbestos demands). Back To Text

[17] *See* 11 U.S.C. § 363 (authorizing trustee or debtor in possession to sell property free and clear of interests in such property).Back To Text

[18] *See* Commission Report, supra note 6, at 316−17. Back To Text

[19] *See* id. at 322−23.Back To Text

[20] *See, e.g.,* Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (stating "it is apparent that Congress desired a broad definition of a 'claim'"); United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1003 (2d Cir. 1991) (noting "Congress unquestionably expected this definition to have wide scope."); In re Johns−Manville Corp., 36 B.R. 727, 754−56 n.6 (Bankr. S.D.N.Y. 1984) (stating "[i]n enacting the Bankruptcy Code, Congress specifically intended to afford the broadest possible scope to the definition of 'claim' so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors"), *aff'd,* 52 B.R. 940 (S.D.N.Y. 1985); *see also* Kenneth N. Klee & Frank A. Merola, Ignoring Congressional Intent: Eight Years of Judicial Legislation, 62 Am. Bankr. L.J. 1, 28 (1988) (discussing legislative intent to define claim as broad as possible).Back To Text

[21] 11 U.S.C. § 101(5) (1994).Back To Text

[22] *See* H.R. Rep. No. 95−595, *reprinted in,* 1978 U.S.C.C.A.N. 5963, 5965 (emphasis added). Back To Text

[23] *See* In re Amatex Corp., 755 F.2d 1034, 1035 (3d Cir. 1985) (granting appointment of representative for future claimant irrespective of whether future claims were "claims" within meaning of statute); In re UNR Indus., 46 B.R. 671, 674 (N.D. Ill. 1985) (noting dispute as to whether claimants under statute should not bar legal representative appointment). Even in the widely−cited *Johns−Manville* case, the treatment of future claims was not predicated on a finding that future claims were actually "claims." *See* Johns−Manville, 36 B.R. at 747.Back To Text

[24] Tests employed to determine whether a potential liability is a claim include the "conduct" test," *see, e.g.,* Grady v. A.H. Robins Co., 839 F.2d 198, 199 (4th Cir. 1988) (noting claims arise based on time when acts giving rise to alleged liability were performed); "preconfirmation relationship test," *see e.g.,* Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.), 58 F.3d 1573, 1577 (11th Cir. 1995) (recognizing claim requires prepetition breach and preconfirmation contact, privity, or other relationship between debtor and creditor); the "prepetition relationship test," *see e.g.,* Chateaugay, 944 F.2d at 1004 (recognizing claim requires prepetition act or omission and prepetition contact privity or other relationship); the "fair contemplation test," *see, e.g.,* California Dep't of Health Services v. Jensen (In re Jensen), 995 F.2d 925, 930−31 (9th Cir. 1993) (noting prepetition relationship not enough; claim must have been within fair contemplation of parties prior to bankruptcy petition); and the "accrued state law claim test," *see e.g.,* In re M. Frenville Co., 744 F.2d 332, 337 (3d Cir. 1984) (stating claim not cognizable in bankruptcy if not yet cognizable under state law). *Back To Text*

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

[26] *See, e.g.,* A.H. Robins, 839 F.2d at 199 (discussing test); s*ee also* Waterman S.S. Corp. v. Aguiar, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992), vacated on other grounds, 157 B.R. 220 (S.D.N.Y. 1993) (same).Back To Text

[27] Arguably, the Commission's definition would overrule the holding of In re Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla. 1994), aff'd, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub nom.*, Epstein v. Official Comm. of Unsecured

Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995). In *Piper*, future claims from preconfirmation defectively−built Piper aircraft were estimated to be $100 million. The Bankruptcy Court appointed Professor Epstein as a representative of the future claimants. The Bankruptcy Court's order defined "future claimants" 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." *See* Piper, 162 B.R. at 621 n. 1.

Ultimately, *Piper* refused to recognize future claims, holding that some prepetition contact between the debtor and the future tort claimants was necessary. *Piper* has been criticized as wrongly decided, because it reads the words "contingent" and "unmatured" out of the definition of claim in section 105(5) of the Bankruptcy Code. *See* Michelle M. Morgan, *The Denial of Future Tort Claims in In re Piper Aircraft: Will the Court's Quick Fix Solution Keep the Debtor Flying High or Bring it Crashing Down?*, 27 Loy. U. Chi. L.J. 27, 33−34 (1995). An interesting hypothetical in Chateaugay, 944 F.2d at 1003 (2d Cir. 1991), questioned whether there was a "claim" on behalf of 10 people who would be killed when they drive across a bridge that will fall some day in the future. However, the *Piper* situation differs from the bridge hypothetical, where the accident happens by chance. In *Piper*, the debtor was already facing substantial prepetition litigation arising from defective products. *See* Piper, 162 B.R. at 619.Back To Text

[28] *See* Commission Report, supra note 6, at 326.Back To Text

[29] *See* id.Back To Text

[30] *See* id. at 316.Back To Text

[31] *See* id. at 326.Back To Text

[32] In re Dow Corning Corp., 211 B.R. 545 (Bankr. E.D. Mich. 1997).Back To Text

[33] *See* id. at 554. The court recognized that since this was the first mass tort bankruptcy case where liability was disputed by a debtor, there was a lack of precedent in bankruptcy and non−bankruptcy mass tort cases to find a solution to the estimation problems facing the court. *See* id.Back To Text

[34] Originally the Judicial Panel on Multidistrict Litigation consolidated pending tort claimants, federal court matters for administration and coordination of pretrial activity pursuant to 28 U.S.C. § 1407. See Dow Corning, 211 B.R. at 551 (citing *In re* Silicon Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098 (Jud. Pan. Mult. Lit. 1992)). After a settlement for pending claims was proposed, more that 15,000 class members chose to opt out of the proposed settlement so to pursue individual trials. *See* Dow Corning, 211 B.R. at 552 (citing *In re* Dow Corning Corp., 187 B.R. 919, 922 (Bankr. E.D. Mich. 1995)). Therefore, Dow Corning Corporation's proposed solution to the courts mass tort claim estimation and procedure problems included a provision that would reserve the corporation's right to hold a single common−issue causation trial. Dow Corning, 211 B.R. at 555.Back To Text

[35] Bankruptcy courts exist to marshal assets and make awards justified by non−bankruptcy entitlements. *See* In re American Reserve Corp., 840 F.2d 487, 492 (7th Cir. 1988) (discussing proposition). Under 28 U.S.C. § 157(b)(5), the district court that has a pending bankruptcy case shall order the pending claim to be tried in the district court in which the bankruptcy case is pending, or in the district court situated in the district where the claim arose. *See* 28 U.S.C. § 157(b)(5) (1994). A district judge is much better qualified to preside over a complex products liability trial than a bankruptcy judge lacking any comparable experience. *See* Dow Corning, 211 B.R. at 561. Back To Text

[36] Products liability and mass toxic torts typically involve injuries to hundreds of thousands of people, over a period of time, through multiple events, over a geographically dispersed area. Few would disagree with the conclusion that mass tort cases have proved difficult to resolve efficiently and fairly. *See* Deborah R. Hansler and Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio−Legal Analysis, 59 Brook. L. Rev. 961, 1030−31 (1993).

Long delays can be expected. *See* Cimino v. Raymark Indus., 751 F. Supp. 649, 652 (E.D. Texas 1990); *see also* Edward F. Sherman, Aggregate Dispostion of Related Cases: The Policy Issues, 10 Rev. Litig. 231, 238−39 (1991) (observing court congestion caused by mass tort liability resolution).Back To Text

[37] *See* Commission Report, supra note 6, at 321. The scope of the asbestos provisions enacted in 1994 is limited to chapter 11 debtors. *See* id. (citing 11 U.S.C. § 524(g)(I)(A) (1994)). However, the National Bankruptcy Review Commission stated that "mass future claimants of debtor liquidating in Chapter 7 also should be entitled to equal priority with present claimants." Id.Back To Text

[38] The bankruptcy court's goal in chapter 7 liquidation is the prompt closure and distribution of the debtor's estate. *See* Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 389 (1993); Beth Anee Harrill, Note and Comment, Equitable Standards of Excusable Neglect: A Critical Analysis of Pioneer Investment Services Co v. Brunswick Associates Limited Partnership, 11 Bankr. Dev. J. 181, 205−07 (1995) (discussing goals of "prompt closure and distribution") .

The goal of chapter 7 liquidation is to marshal the debtor's assets as quickly as possible and to liquidate such assets and distribute the proceeds of liquidation to the debtor's creditors. *See* Susan J. Stabile, *Protecting Retiree Medical Benefits in* Bankruptcy: The Scope of Section 1114 of the Bankruptcy, 14 Cardozo L. Rev. 1911, 1957 (1993). In contrast, the goal of chapter reorganization is the continuation of the debtor's business as a going concern and as a surviving entity capable of continuing to provide benefits. *See* id.Back To Text

[39] *See* Locks v. United States Trustee, 157 B.R. 89, 95−96 (W.D. Pa. 1993) (noting goals of liquidation did not necessitate appointment of legal representative). Where a debtor is liquidated, future claims should be borne by the public as a whole in such fashion as may be determined by the legislature. Judge William T. Bodoh and Michelle M. Morgan, Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create a New Class of Priority Claimants, 4 Am. Bankr. Inst. L. Rev. 325, 359 n.204 (1996). *See also* David Gray Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by* Running Covenants, Products Liability, and Toxic Waste Cleanup, 50 Law & Contemp. Probs. 119, 123−31, 145−49 (1987) (discussing servitude imposed on property by application of successor liability in bankruptcy context).Back To Text

[40] *See* Commission Report, supra note 6, at 327.Back To Text

[41] *See* id. (discussing future claims).Back To Text

[42] 11 U.S.C. § 524(g)(2)(B)(ii)(II) (1994). Back To Text

[43] In *Manville,* the bankruptcy court estimated less than 100,000 future claims. In re Johns−Manville Corp., 36 B.R. 743, 746 (Bankr. S.D.N.Y. 1984). This number was a gross under−estimation. Later estimates showed in excess of 200,000 future claims. *See* Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the* Manville Amendments, 69 Am. Bankr. L.J. 487 n. 40 (1995); *see also* Thomas B. Smith, A Capital Markets Approach to Mass Tort Bankruptcy, 104 Yale L.J. 367, 383 (1994) (recognizing bankruptcy courts under estimation and under valuation of future mass tort claimants).Back To Text

[44] *See* Commission Report, supra note 6, at 322−29 (discussing limitation of "mass future claim").Back To Text

[45] *See* id. at 322−323 (stating proposed text of statute).Back To Text

[46] In questions of statutory construction, the court looks first to the plain meaning of the statutory language, then to other extrinsic aids such as legislative history. *See* Johns−Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed. Cir. 1988). The starting point in every case involving construction of a statute is the language itself. *See* Watt v. Alaska, 451 U.S. 259, 265 (1981). The assumption is that the ordinary meaning of that language accurately expresses the legislative purpose. *See* Park N' Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). Back To Text

[47] *See* Commission Report, supra note 6, at 329−330.Back To Text

[48] *See* Ralph R. Mabey & Jamie A. Gavrin, *Constitutional Limitations on the Discharge of Future Claims in* Bankruptcy, 44 S.C. L. Rev. 745 (1993) (observing chapter 11 reorganization serves to organize consensual settlement and administer compensation to mass tort claimants); *see also* In re Amatex Corp., 755 F.2d 1034, 1042, 1044 (3d Cir. 1985) (remanding to lower court to appoint legal representative because future claimants are significantly affected by reorganization); In re Forty−Eight Insulations, Inc., 58 B.R. 476, 477−478 (Bankr. N.D. Ill. 1986) (appointing legal representative in chapter 11 liquidation case although future claimants did not have claim against debtor); In re UNR Indus., 46 B.R. 671, 675 (Bankr. N.D. Ill. 1985) (holding future claimants qualify as parties in interest entitled to legal representation); Nicholas A. Franke, *The Code and the Constitution: Fifth Amendment Limits on the Debtor's Discharge in Bankruptcy*, 17 Pepp. L.R. 853, 868−870 (1990) (assuming potential due process problems with respect to unknown claimants); Gregory A. Bibler, *The Status of Unaccrued Tort Claims in* Chapter 11 Bankruptcy Proceedings, 61 Am. Bankr. L.J. 145, 170−171 (1987) (arguing future claimants can never receive constitutionally adequate notice thus never receive it in chapter 11 bankruptcy discharge of their claim).Back To Text

[49] 117 S. Ct. 2231, 2252 (1997) ("Many persons in the exposure−only category . . . may not even know of their exposure or realize the extent of harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight need to decide, intelligently, whether to stay in or opt out."). In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court recognized that it may be impracticable to give actual notice to parties with future or contingent interests. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).Back To Text

[50] Where conditions do not reasonably permit actual notice, constructive notice is constitutionally adequate if "the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." Id. at 315. Under *Mullane*, the practical situation in a mass tort bankruptcy case mandates the appointment of a future claims representative in order to provide future claims access to a court hearing. *See* Ralph R. Mabey & Jamie A. Gaurin, *Constitutional Limitations on the Discharge of Future Claims in* Bankruptcy, 44 S.C. L. Rev. 745, 780−781 (1993); *see also* In re Waterman S.S. Corp., 141 B.R. 552, 558 (Bankr. S.D. N.Y. 1992) (stating failure to appoint future claims representative as attempt to write out of code its estimation provision).Back To Text

[51] *See, e.g.*, In re Amatex Corp., 755 F.2d 1034, 1036 (3d Cir. 1985) (approving appointment of future claims representative for future claimants); In re Eagle−Picher Indus., Inc., 203 B.R. 256, 261 (Bankr. S.D. Ohio 1996) (approving appointment of future claims representative); In re Johns−Manville Corp., 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984) (approving appointment of future claims representative because parties in interest status).Back To Text

[52] 11 U.S.C. § 524(g)(4)(B)(i) (1994). Back To Text

[53] *See* supra notes 20−24 and accompanying text.Back To Text

[54] S*ee* Commission Report, supra note 6, at 329−30 (discussing exclusive power of future claims representative to file claim).Back To Text

[55] *See* id. at 341.Back To Text

[56] *Cf.* In re Farley, Inc., 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992) (noting estimation can be used for voting and feasibility); In re Baldwin−United Corp., 57 B.R. 751, 758−59 (S.D. Ohio 1985) (finding estimation establishes cap, not floor, on distribution); In re National Gypsum Co., 139 B.R. 397, 408−409 (Bankr. N.D. Tex. 1992) (finding estimation can be used for voting and claim allowance); In re MacDonald, 128 B.R. 161, 164−65 (Bankr. W.D. Tex. 1991) (allowing estimation for feasibility); In re Poole Funeral Chapel, Inc., 63 B.R. 527, 533 (Bankr. N.D. Ala. 1986) (noting estimation dictates distribution); *see also* In re Eagle−Picher Indus., Inc., 189 B.R. 681, 683 (Bankr. S.D. Ohio 1995) (stating "it is 'contingent or unliquidated' claims, the value of which we are estimating. This is to be distinguished from estimating the value which claimants might take in satisfaction of their claims through some bankruptcy mechanism such as a trust"). The Commission's proposal is not intended to disturb current law governing estimation of contingent or unliquidated claims that are not mass future claims. *See* Commission Report, supra note 6, at 342.Back To Text

[57] *See* 28 U.S.C. § 157(b)(5) (1994) (stating district court shall order that personal injury tort and wrongful death claims be tried in district court where bankruptcy case is pending or in district court in district where claim arose); *see also* Reforming the Bankruptcy Code: National Bankruptcy Conference's Code Review Project 40 (rev. ed. 1997) (noting change to 28 U.S.C. § 157(b) might be necessary if bankruptcy court determinations of distributions to personal injury claimant binding). *See* 28 U.S.C. § 1411 (1994) (nothing in Bankruptcy Code shall affect the right to jury trial for personal injury and wrongful death claims).Back To Text

[58] *See* supra notes 35, 57 and accompanying text.Back To Text

[59] *See* supra notes 35−36, 57 and accompanying text.Back To Text

[60] *See* supra note 43 and accompanying text. *See also* In re Dow Corning Corp., 211 B.R. 545, 601 (Bankr. E.D. Mich. 1997) (discussing problems of underestimation with respect to future claimants); In re Joint E. & S. Dist. Asbestos Litig., 120 B.R. 648, 652 (Bankr. S.D.N.Y. 1990) (providing trust from which future claimants derive compensation which grossly underestimated future claimants, trust received 50% more claims than the highest number of estimated claims); Menard−Saudfford v. Mabey (In re A.H. Robins), 880 F.2d 694, 701 (E.D. Va. 1988) (discussing underestimation of value of Dalkon Shield claims where claimant trust may not be able to pay claims in full); In re Johns − Manville Corp., 36 B.R. 743, 746 (Bankr. S.D.N.Y. 1984) (establishing trust for future claimants which drastically underestimated number of future claims and amount of money needed to cover liability). The Bankruptcy Court estimated less than 100,000 future claims. This number was a gross under−estimation. Later estimates showed in excess of 200,000 future claims. *See* Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the* Manville Amendments, 69 Am. Bankr. L.J. 487 n.40 (1995). *Cf.* In re UNR Indust., Inc., 725 F.2d 1111, 1119 (7th Cir. 1984) (discussing need to design systems to compensate future claimants "who were victims of prepetition tort injuries").Back To Text

[61] *See* Commission Report, *supra* note 6, at 342 (discussing estimation). Back To Text

[62] *See id.* at 343. *See, e.g.,* In re National Gypsum Co., 118 F.3d 1056, 1059 (5th Cir. 1997) (explaining settlement trust became sole shareholder of reorganized National Gypsum); *see also* 26 U.S.C. § 468(B) (1994) (allowing trust fund settlement). *Cf.* In re Eagle−Picker Indus., Inc., 203 B.R. 256, 280 (S.D. Ohio 1996) (funding trust with 100% of Tax Refund Notes and common stock); In re Baldwin−United Corp., 79 B.R. 321, 334 (S.D. Ohio) (using cash payments through liquidated trust); In re Piece Goods Shops Co., L.P., 188 B.R. 778, 789 (M.D. N.C. 1995) (discussing proposed reorganization plan).Back To Text

[63] *See* Commission Report, supra note 6, at 343.Back To Text

[64] *See* id. at 345 (discussing trust adjustments).Back To Text

[65] *See* 11 U.S.C. § 524(g)(1)(B)(ii)(II); *see also* In re Dow Corning Corp., 211 B.R. 545, 601 (Bankr. E.D. Mich. 1997) (acknowledging difficulty in ascertaining aggregate value of future claims); Herbert B. Newberg & Alba Conte, Newburg on Class Actions 20.07 at 6 (3d. ed. 1992) (discussing special problems that arise with resolution of contingent future claims); Peter Charles Choharis, A Comprehensive Market Strategy For Tort Reform, 12 Yale J. on Reg. 435, 518 (1995) (demonstrating estimates of tort liability are very imprecise in bankruptcy context); Gregory Bibler, *The Status of Unaccrued Tort Claims in* Chapter 11 Bankruptcy Proceedings, 61 Am. Bankr. L.J. 145, 181−182 (1987) (criticizing practice of bankruptcy court estimating debtor's liability for purposes of approving reorganization plan effectively limiting recovery prospects of future claimants); Michael B. Sobo, Bending the Law: The Story of the Dalkon Shield Bankruptcy 178 −97 (1991) (reviewing problems with tort liability estimation procedure followed by *Dalkon Shield* court).Back To Text

[66] *See* Commission Report, supra note 6, at 342−43; s*ee also* Dow Corning, 211 B.R. at 596 (stating bankruptcy cannot effect right of individual to jury trial with regard to personal injury or wrongful death claims); In re Standard Insulation, Inc. 138 B.R. 947, 951 (Bankr. W.D. Missouri 1992) (same); Apex Oil Co. v. Stinnes Interail, Inc. (In re Apex Oil), 107 B.R. 189, 193 (Bankr. E.D. Mo. 1989) ("The duty to estimate is not mandatory until the court determines that liquidation of the claim outside the bankruptcy court would unduly delay the bankruptcy proceeding");

In re Poole Funeral Chapel, Inc. 63 B.R. 527, 531 (Bankr. N.D. Ala. 1986) (discussing undue delay in administration of estate by court's estimation of all claims for purposes of confirming plan under chapter 11 or 13).Back To Text

[67] *See, e.g.,* In re National Gypsum Co., 118 F.3d 1056, 1059 (5th Cir.) (discussing settlement trust became sole shareholder of reorganized National Gypsum); Dow Corning, 211 B.R. at 556 (establishing plan for trust from which future claimants can recover); c*f.* Unarco Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 282−83 (N.D. Ill. 1990) (stating that appeal from an order of bankruptcy court approving trust agreement is not moot despite trustee's argument that they have taken too many actions which cannot be undone); *see also* William L. Norton, Jr., Norton Bankruptcy Law & Practice, 6A Norton Bankr. Law & Prac. 2D § 154:19 (discussing recent case in which bankruptcy court considered protection of debtor on behalf of reorganized entity against post confirmation litigant of mass tort claims).Back To Text

[68] *See* supra note 29. Back To Text

[69] *See, e.g.,* Menard−Sanford v. Mabey (In re A.H. Robins), 880 F.2d 694, 701 (4th Cir. 1989) (referring to doctrine of marshaling); MacArthur Co. v. Johns−Manville (In re Johns−Manville Corp.), 837 F.2d 89, 93 (2d Cir. 1988) (stating that injunction was proper to channel claims to settlement fund); Unarco Bloomington Factory Workers v. UNR Indus., Inc., 124 B.R. 268, 277 (N.D. Ill. 1990) (approving channeling injunction). Back To Text

[70] *See* A.H. Robins, 880 F.2d at 700 (channeling future claims to a specific *res* as proper exercise of the district court's power); Dow Corning, 211 B.R. at 279 (providing future claimants with compensation from either settlement trust or litigation trust); Findley v. Blinker (In re Joint E. and S. Dist. Asbestos Litig.), 129 B.R. 710, 754−62 (E & S.D.N.Y. 1991) (establishing trust to deal with Dalkon Shield future claimants); Unarco Bloomington Factory Workers, 124 B.R. at 279 (discussing channeling of funds to a limited fund); In re Johns−Manville Corp., 68 B.R. 618, 628−629 (Bankr. S.D.N.Y. 1986) (providing present and future asbestos related claims would be paid from trust). Back To Text

[71] *See* Commission Report, supra note 6, at 346; *see also* MacArthur Co. v. Johns−Manville (In re Johns−Manville), 837 F.2d 89, 91 (2d Cir. 1988) (noting channeling claimants away from insurance company and toward insurance proceeds was essential to reorganization and thus feel within bankruptcy court's equitable powers), Unarco Bloomington Factory, 124 B.R. at 277 (approving channeling injunction that also enjoined workers from pursuing claims against settling insurers because section 105 permitted court to protect property of estate and claims against insurers already settled). *Cf.* In re Forty−Eight Insulations, Inc., 149 B.R. 860, 864 (N.D. Ill. 1992) (disallowing channeling injunction that also entailed release of settling insurers from parent corporation claims); Reforming the Bankruptcy Code: National Bankruptcy Conference's Code Review Project, 40−41 (rev. ed., 1997) (noting channeling injunctions can be used to bring insurance proceeds to estate).Back To Text

[72] *See* Commission Report, supra note 6, at 346. *See, e.g.,* In re Johns−Manville Corp., 68 B.R. 618, 624 (Bankr. S.D.N.Y.) (issuing injunction channeling all asbestos−related claims and obligations away from reorganized entity toward newly created trust funds for resolution); In re Celotex Corp. & Carey Canada Inc., 204 B.R. 586, 624 (Bankr. M.D. Fla. 1996) (involving rights of entities with asbestos claims and assertion of such claims solely against specified trust); In re Drexel Burnham Lambert Group Inc., 138 B.R. 723, 754 (Bankr. S.D.N.Y. 1992) (using channeling injunction to satisfy claims arising from Drexel activities and business through use of pooled contingent assets and funds).Back To Text

[73] *See* Commission Report, *supra* note 6, at 346−347. Section 524(5)(1)(B) provides that an injunction maybe issued under subparagraph (A) to "entities taking legal action for the purpose of directly and indirectly collecting, recovering or receiving payments or recovery with respect to any claim or demand that, under a plan of reorganization is to be repaid in whole or in part by a trust described in paragraph (2) (B) (1), except such legal action as are expressly allowed by the injunction, confirmation order, or the plan of reorganization." 11 U.S.C. § 524(5)(1)(B) (1994).Back To Text

[74] *See, e.g.,* Feld v. Zale Corp., 62 F.3d 746, 760−761 (5th Cir. 1995) (holding federal courts have jurisdiction to issue and enforce channeling injunctions, even though to do so would involve a future matter without jurisdiction).

Furthermore, these channeling injunctions are inherently equitable. *See* Texas v. Florida, 306 U.S. 398, 405−406 (1939); *see also* In re Manford Inc., 97 F.3d 449, 445 (11th Cir. 1996) (noting bankruptcy court may issue injunction barring nonsettling defendants from asserting contribution actions against settling defendants pursuant to section 105 where injunction would be consistent with public policy favoring settlements); Thomas A. Smith, A Capital Market Approach To Mass Tort Bankruptcy, 104 Yale L.J. 367, 375 (1994) (addressing practical revision in Bankruptcy law allowing future claims to be addressed in mass tort bankruptcy trusts).Back To Text

[75] 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).Back To Text

[76] *See* Commission Report, supra note 6, at 321. It should be noted that the Commission contemplates the repeal of section 524(g). *See* id. at 347.Back To Text

[77] Id.Back To Text

[78] *See* Polius v. Clark Equip. Co., 802 F.2d 75, 77 (3d Cir. 1986) (stating it is a "well−settled rule of corporate law [that] where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts of the transferor") (citing 15 W. Fletcher, Cyclopedia of the Law of Private Corporations § 7122 (Perm Ed. 1983)); In re Fairchild Aircraft Corp., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995) (noting general rule of corporate law has always been that transfer of assets from one company to another does not pass debts or liabilities of the seller, including liability for torts or products liability); s*ee also* Upholsterer's Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1325 (7th Cir. 1995) ("[T]he general common law rule, designed to minimize the fluidity of corporate assets is that 'a corporation that merely purchases for cash the assets of another corporation does not assume the seller corporation's liabilities'") (quoting Travis v. Harris Corp., 565 F.2d 443, 446 (7th Cir. 1977).Back To Text

[79] *See* Louisiana−Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (explaining four exceptions of successor liability); Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir. 1988) (same); Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980) (same); Sylvester Brothers Development Co. v. Burlington N. R.R., 772 F. Supp 443, 447 (D. Minn. 1990) (same).Back To Text

[80] *See, e.g.,* In re White Motor Credit Corp., 75 B.R. 944, 950 (Bankr. N.D. Ohio 1987) (discussing negative effects of imposing successor liability in context of corporate reorganization, forcing debtors to accept less on sales of corporate assets to compensate for liability); Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.), 19 B.R. 323, 325 (Bankr. W.D. Wash. 1982) (expressing concern that imposition of successor liability claims on those who purchase from debtor would have negative chilling effects on such sales); Forde v. Kee−Lox Manufacturing Co., Inc., 437 F. Supp. 631, 633 (W.D.N.Y. 1977) (setting out policies against successor liability following bankruptcy sales, successor liability theory would disrupt priority scheme established by Bankruptcy Code, allowing negative impact on trustee's ability to sell assets of estate at fair prices); s*ee* also David G. Epstein, *Bankruptcy Abrogation of State Law on Successor Liability for Defective* Products, 520 *Legal* Questions, 752 PLI/Comm 515 (1997) (discussing whether allowing successor liability claims to survive bankruptcy will produce inequality among creditors); Nathan F. Coco, *An Examination of Successor Liability in* Post Bankruptcy Context, 22 J. Corp. L. 345, 354 (1997) (discussing whether allowing successor liability claims to survive bankruptcy will produce inequality among creditors); David I. Cisar, Von Bressen, Purtell, & Roper S.C., Successor Liability and Asset Sales Under the Bankruptcy Code, 15 Am. Bankr. Inst. J. 32, 32 (1996) (discussing whether allowing successor liability claims to survive bankruptcy will produce inequality among creditors); Hon. William T. Bodoh & Michelle M. Morgan, Inequality Among Creditors: The Unconditioned Use of Successor Liability to Create a New Class of Priority Claimants, 4 Am. Bankr. Inst. L. Rev. 325, 328−29 (1996) (demonstrating increasing use of successor liability doctrine to hold purchaser of debtor's assets liable for prepetition claims against debtor jeopardizes balance undermining fundamental premise of federal bankruptcy law); J. Maxwell Tucker, The Clash of Successor Liability Principles, Reorganization Law, And the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants, 12 Bankr. Dev. J. 1 (1995) (discussing whether allowing successor liability claims to survive bankruptcy will produce inequality among creditors); Michael H. Reed, Successor Liability and Bankruptcy Sales, 51 Bus. Law 653, 654 (1996) (same).Back To Text

[81] *See* Commission Report, supra note 6, at 349.Back To Text

[82] *See* id. at 348.Back To Text

[83] *See* 11 U.S.C. § 524(g) (1994).Back To Text

[84] *See* id. § 524(g)(2)(B)(ii)(IV)(bb). Back To Text

[85] *See* Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2−3, 27−35 (March 1991) (noting reform will require "federal legislation creating a national asbestos dispute−resolution scheme"); s*ee also* Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices 2 (Northwestern Press, 1995). Mr. Weinstein noted: "We need seriously to readdress the problems of mass toxic tort litigation. Improvements are possible. Litigation involving large numbers of plaintiffs, such as Agent Orange, Dalkon Shield, heart valves, atomic weapons pollution sites, Benediction, repetitive task syndromes (particularly carpal tunnel problems), breast implants, and the like, require us to treat a wide variety of problems−jurisdictional, scientific, substantive and administrative, as well as philosophical and ethical−differently from the way we have met them in the traditional one−plaintiff one−defendant case." *See* id.Back To Text