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Toxic Torts and Chapter 11 Reorganization:The Problem of Future Claims

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I. INTRODUCTION

Recently, the toxic tort phenomenon has emerged as a vital concern to manufacturers, employers, and consumers as Agent Orange,[1] DES,[2] Dalkon Shield,[3] and asbestos[4] victims have litigated

1. "Agent Orange," a defoliant that the United States military used in Vietnam, allegedly contained tetrachlorodibenzo-p-dioxin, which is a highly toxic substance. Vietnam veterans and their families allege that this substance has caused cancer, genetic damage, and early death. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983).

2. DES is the abbreviation for diethylstilbestrol, a synthetic hormone administered to prevent miscarriage. Doctors subsequently discovered that women exposed to the drug *in utero* tended to develop cancer. Eli Lilly, the drug's developer, has faced numerous lawsuits because of this problem. *See, e.g.*, Glater v. Eli Lilly & Co., 744 F.2d 213 (1st Cir. 1984); Mathis v. Eli Lilly and Co., 719 F.2d 134 (6th Cir. 1983).

3. The Dalkon Shield, an intrauterine device (IUD), allegedly has caused uterine in-

toxic tort claims.[5] Toxic torts are unique because any number of victims may be exposed to a toxic substance from which they may contract a disease as far as twenty years in the future.[6] Toxic tort claims typically involve large sums of money and an inestimable number of plaintiffs.[7] The potential for tremendous, financially crippling, liability for these injuries has prompted some asbestos companies[8] to file for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978.[9]

A keystone of the American bankruptcy system is the discharge of debt.[10] Tort claimants qualify as creditors under the

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fections, septicemia, endometriosis, septic abortions, and other serious gynecological problems in women who used the device. These problems have prompted many lawsuits against A. H. Robins, one of the principal producers of the Dalkon Shield. *See, e.g.*, Setter v. A. H. Robins, Co., 748 F.2d 1328 (8th Cir. 1984); Gardiner v. A. H. Robins Co., 747 F.2d 1180 (8th Cir. 1984); Kontoulas v. A. H. Robins Co., 745 F.2d 312 (4th Cir. 1984); Mann v. A. H. Robins Co., 741 F.2d 79 (5th Cir. 1984); Sellers v. A. H. Robins Co., 715 F.2d 1559 (11th Cir. 1983); Hansen v. A. H. Robins Co., 715 F.2d 1265 (7th Cir. 1983); Philpott v. A. H. Robins Co., 710 F.2d 1422 (9th Cir. 1983); Blaha v. A. H. Robins and Co., 708 F.2d 238 (6th Cir. 1983). A. H. Robins recently has filed for reorganization under Chapter 11. Alexander, *Robins Runs for Shelter*, TIME, Sept. 2, 1985, at 32.

4. "Asbestos" refers to a class of fire-resistant minerals. Exposure to asbestos can cause asbestosis, a lung disease similar to emphysema, mesothelioma, chest cancer, and lung cancer. Kelly, *Manville's Bold Maneuver*, TIME, Sept. 6, 1982, at 17. Johns-Manville, the largest producer of asbestos, has faced many claims from asbestos victims. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975).

5. *See generally* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983).

6. *See* Note, *Who Will Compensate the Victims of Asbestos-Related Diseases?: Manville's Chapter 11 Fuels the Fire*, 14 ENVTL. L. 465, 466 (1984) [hereinafter cited as Note, *Who Will Compensate*]; Special Project, *supra* note 5, at 641 n.390.

7. According to one source, over a quarter of a million people may die of asbestos-related diseases in the next several decades. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 847 (1984).

8. Amatex Industries, Unarco Industries, and Johns-Manville Corporation have filed Chapter 11 petitions. *See* Comment, *Product Liability Claims in the Bankruptcy Courts After the 1984 Amendments: Four Standards to Limit "Related to" Jurisdiction*, 17 U.C.D. L. REV. 1247, 1248 n.7 (1984).

9. 11 U.S.C. §§ 1101-1174 (1982), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (to be codified Supp. 1984). *See* Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability?*, 56 TEMPLE L.Q. 539, 543 (1983).

10. *See* Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982). The bankrupt will emerge with a fresh start after the court discharges his debt. *See* Hughes, *Code Exemptions: Far-Reaching Achievement*, 28 DEPAUL L. REV. 1025, 1043 (1979) (discussing debtor's fresh start as a major goal of bankruptcy).

Bankruptcy Act,[11] and tort claims, therefore, are subject to discharge. Unlike commercial creditors, however, who voluntarily undertake risks when extending credit, the tort victim does not voluntarily submit to creditor status. The tort victim whose claim a court has discharged in bankruptcy, nonetheless, will receive no compensation. Under a reorganization, however, the bankrupt may continue to operate so that it can pay certain creditors.[12] If tort victims can participate in the Chapter 11 reorganization process, the reorganization plan may afford them some compensation.[13]

Toxic tort victims who already have filed claims against a corporation undergoing reorganization typically participate in the formulation of a reorganization plan through committees that represent the plaintiffs' interests.[14] In contrast, future claimants, who have not yet contracted a disease as a result of their exposure to toxic matter, do not participate in the reorganization process. Unlike the tort victims who already have filed claims, the terms of the reorganization plan do not bind future claimants.[15] Thus, under the typical plan, Tort Victim *A* will receive whatever the plan provides for her class of creditors. Tort Victim *B*, a future claimant, may press her suit when it accrues and enforce the entire judgment. If her claim is one of many future claims, however, she may never recover because the substantial liability may force the corporation to liquidate. In the alternative, Tort Victim *B*'s claim may trigger another Chapter 11 reorganization, in which case the court will treat Victim *B*'s claim like Victim *A*'s claim.[16] Courts, therefore, may treat differently two plaintiffs whose injuries arose from the same source, depending on when the defendant corporation undergoes reorganization. The only difference between the two claims is that one injury manifested itself sooner than the other.

Recently, defendant debtors have sought to circumscribe their potential protracted and unlimited liability by attempting to per-

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11. 11 U.S.C. § 101(9) (1982) (defining creditor as an entity with a claim against the estate).

12. Note, *Relief from Tort Liability Through Reorganization*, 131 U. PA. L. REV. 1227, 1232 (1983) [hereinafter cited as Note, *Relief from Tort Liability*].

13. *See* 11 U.S.C. §§ 1102-1103, 1123, 1126, 1129 (1982) (discussing the role of creditors' committees in the formulation of a reorganization plan).

14. 11 U.S.C. §§ 1102 (1982); *see In re* UNR Indus., Inc., 29 Bankr. 741, 743 (N.D. Ill. 1983) (The court appointed a committee of plaintiffs from pending asbestos cases against defendant-debtor.).

15. *See* 11 U.S.C. § 1141(a) (1982). This section provides that the reorganization plan is binding on creditors. *Id*; *see infra* note 18. Thus, unless the court considers future claimants to be creditors within the meaning of the Code, the plan is not binding on them.

16. In the second reorganization, Courts would consider Victim *B* to be a creditor.

suade bankruptcy courts to appoint representatives for these future claimants.[17] These representatives would represent the future plaintiffs' interests during the reorganization process, and, if the court considers future claimants to be creditors, the court could bind them to the reorganization plan.[18] The question of whether to appoint a representative for future claimants raises three principal issues: (1) whether a future claimant is a "creditor" or a "party in interest" under the Bankruptcy Code; (2) whether a bankruptcy court's equitable powers enable the court to consider future claimants' interests; and (3) whether binding future claimants to a reorganization plan violates due process requirements. Three courts have considered the question of whether to appoint a representative for future claimants[19] and have reached different results for different reasons.[20]

The purpose of this Recent Development is to analyze these decisions and propose a solution that will benefit debtors and creditors, including future claimants. Part II discusses three issues: (1) the definitions of "creditor" and "party in interest"; (2) the scope of a bankruptcy court's equitable powers; and (3) due process requirements. Part II also considers the analogy between representation in class action suits and representation in reorganization proceedings. Part III examines three recent decisions that address the question of whether to appoint a representative for future claimants in a reorganization proceeding. Part IV analyzes these decisions in light of the policies underlying the Bankruptcy Code, tort law, and due process requirements. Part IV also considers the potential precedential ramifications of these rulings. Part V stresses the need for uniformity in bankruptcy law and contends that appointing representatives for future toxic tort claimants in bank-

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17. *Compare In re* UNR Indus., Inc., 29 Bankr. 741 (N.D. Ill. 1983) (refusing to appoint a representative) *with In re* Johns-Manville Corp., 36 Bankr. 743 (Bankr. S.D.N.Y. 1984) (permitting the appointment of a representative).

18. 11 U.S.C. § 1141(a) (1982). This section provides in pertinent part:

> Except as provided . . . the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor [*sic*], whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Id.

19. *In re* Johns-Manville Corp., 36 Bankr. 743 (Bankr. S.D.N.Y. 1984); *In re* UNR Indus., 29 Bankr. 741 (N.D. Ill. 1983); *In re* Amatex Corp., 30 Bankr. 309 (Bankr. E.D. Pa. 1983), *rev'd*, 755 F.2d 1034 (3d Cir. 1985).

20. *See infra* notes 100-68 and accompanying text.

ruptcy reorganization proceedings and binding the future claimants to the reorganization plan strikes the best balance among the competing concerns in this modern dilemna.

II. Legal Background

A. *Tort Claims Under The Bankruptcy Act*

In a Chapter 11 proceeding the debtor must submit a reorganization plan within 120 days after filing the bankruptcy petition.[21] Once the debtor files the petition, the court will appoint a committee of unsecured creditors and may appoint additional creditors' committees at the request of a party in interest.[22] These committees participate in the formulation of the reorganization plan[23] and may collect and file rejections or approvals of the plan.[24] The court then will confirm the plan if it meets certain statutory conditions.[25] Once the plan is confirmed, it binds all creditors and the debtor.[26] Unless the plan provides otherwise, the court discharges the debtor's prepetition debts.[27] The debtor then continues to operate in business and pay certain creditors according to the plan.[28]

The Bankruptcy Code determines whom the reorganization plan affects. The Code defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."[29] Accordingly, to qualify as

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21. 11 U.S.C. § 1121(b) (1982).
22. *Id.* § 1102(a)(2).
23. *Id.* § 1103(c)(3).
24. *Id.*
25. *Id.* § 1129(a). This section provides:

> (a) The court shall confirm a plan only if all of the following conditions are met:
> (1) The plan complies with the applicable provisions of this title.
> (2) The proponent of the plan complies with the applicable provisions of this title.
> (3) The plan has been proposed in good faith and not by any means forbidden by law.
> . . . .
> (8) With respect to each class of claims of interests—
> (A) such class has accepted the plan; or
> (B) such class is not impaired under the plan. . . .
> . . . .
> (11) Confirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Id.

26. *Id.* § 1141(a).
27. *Id.* § 1141(d)(1)(A).
28. *Id.* § 123.
29. *Id.* § 101(q)(A).

a "creditor," a party first must demonstrate that it has a "claim" cognizable in bankruptcy. The former Bankruptcy Act[30] required that tort claims must be "provable" to be recognized in bankruptcy.[31] The new Bankruptcy Code,[32] however, broadened the definition of a "claim." The present Code does not require that a claim must be "provable." Instead, section 101(4) defines "claim" as a "right to payment," regardless of whether that right is fixed, contingent, or provable.[33] The legislative history indicates that Congress intended the term "claim" to encompass "all legal obligations of the debtor, no matter how remote or contingent."[34]

Second, to qualify as a creditor, a party must prove that its claim arose "at the time of or before the order for relief concerning the debtor."[35] Absent any overriding federal provision, courts rely

30. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *amended by* Act of June 22, 1938, ch. 575, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151, 326 (1982).

31. *Id.* at § 63a(7), 11 U.S.C. § 103(a)(7) (repealed 1978) (permitting proof and allowing damages for negligence if suit instituted prior to petition). Tort cases decided under the former Act paid strict attention to this statutory language. The dispute in *In re* Gladding Corp., 20 Bankr. 566 (Bankr. D. Mass. 1982), for instance, concerned a creditor who had purchased a vehicle from the dehtor and then sold the vehicle to a third party. *Id.* The third party brought a tort action against the creditor, who sought to implead the debtor. *Id.* The debtor had filed a Chapter XI petition prior to the second sale and maintained that the petition had discharged this claim. *Id.* at 567. The court, however, held that "a mere possibility of a claim of unknown origin, in an unknown amount, and which only might arise, if at all, at some unknown time" is incapable of proof and therefore not cognizable in bankruptcy. *Id.* at 568.

32. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1979) (codified as amended in scattered sections of U.S.C.).

33. 11 U.S.C. 101(4)(A) (1982). This section defines "claim" as 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 . . . ." *Id.*

34. S. REP. No. 989, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5788, 5808. The legislative history of this provision further indicates: "By this broadest possible definition of the term throughout the title 11 . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be dealt with in the bankruptcy case. It permits the broadest relief possible in the bankruptcy court." *Id. But see* Note, *Relief From Tort Liability, supra* note 12, at 1228 (arguing that Congress did not foresee tort liability as a potential cause of bankruptey when Congress redrafted the Code). Courts that have interpreted the new Code have recognized the broadening effect of the amendment. *See, e.g., In re* La Bonte, 13 Bankr. 887 (Bankr. D. Kan. 1981) (holding that a debtor's guarantor on a note was a "creditor" with a "claim"); *In re* Thomas, 12 Bankr. 432 (Bankr. S.D. Iowa 1981) (holding that an assignee of support payments was a "creditor").

35. *See supra* text accompanying note 29. One court has asserted that Congress intended that the term "claim" encompass only contractual obligations, not tort obligations. *See In re* UNR Indus. Inc., 29 Bankr. 741, 745 (N.D. Ill. 1983). The great weight of authority, however, makes no such distinction. *See generally* Countryman, *The Use of State Law*

on state law to determine whether a claim is valid at the time the debtor files its petition.[36] In a case concerning future claimants, the plaintiffs are likely to be residents of different states. Determining whether these plaintiffs have claims under state law becomes complicated because the accrual of a tort claim differs from state to state.[37] The scope of a bankruptcy court's equitable power, therefore, may determine whether a future tort claim is a "claim" cognizable in bankruptcy.

Finally, in addition to "creditors" with cognizable "claims," anyone who qualifies as a "party in interest" may appear in a Chapter 11 proceeding.[38] The Bankruptcy Code does not define the term "party in interest" precisely, but the Code does indicate that Congress did not intend for the list of parties in interest in section 1109(b) to be exclusive.[39] Courts generally have agreed that they should construe the term "party in interest" broadly to permit affected parties to appear and assert their interests.[40] Within this broad construct, courts must determine on a case by case basis whether a party has a sufficient interest to mandate representation.[41]

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in Bankruptcy Cases, 47 N.Y.U. L. REV. 407, 411 & n.24 (1972) (under the former Bankruptcy Act tort claims are not provable unless reduced to judgment).

36. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946); *see also In re* Spanish Trails Lanes, Inc., 16 Bankr. 304, 306 (Bankr. D. Ariz. 1981) (stating that bankruptcy court must rely on state law to determine whether a claim exists). *But see* cases cited *infra* notes 52-58 and accompanying text (discussing cases in which bankruptcy courts recognized claims regardless of their status under state law).

37. For example, a claim for a disease with a long latency period accrues at different times under different state laws. In some states a claim accrues when the disease invades the victim's body. In other states a claim accrues when the plaintiff knows or should have known of the disease. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 115-16 (D.C. Cir. 1982).

38. *See* 11 U.S.C. § 1109(b) (1982). This section provides in pertinent part: "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." *Id.*

39. *See id.* § 102(3) (1982) (stating that the terms "includes" and "including" are not limiting); *see also* 5 COLLIER ON BANKRUPTCY, *supra* note 39, ¶ 1109.02, at 1109-24 (15th ed. 1984).

40. *See In re* Cash Currency Exch., Inc., 37 Bankr. 617, 628 n.10 (N.D. Ill. 1984); *In re* Citizen's Loan & Thrift Co., 7 Bankr. 88, 90 (Bankr. N.D. Iowa 1980); *see also* 5 COLLIER ON BANKRUPTCY, *supra* note 39, ¶ 1109.02.

41. *In re* Penn-Dixie Indus., Inc., 9 Bankr. 941, 943 n.7 (Bankr. S.D.N.Y. 1981); *see, e.g., In re* Cash Currency Exch., Inc., 37 Bankr. 617, 628 n.10 (N.D. Ill. 1984) (allowing state director of financial institutions to intervene as party in interest on behalf of the state); *In re* Citizen's Loan & Thrift Co., 7 Bankr. 88, 90 (N.D. Iowa 1980) (allowing a representative for the state as a party in interest because the state had an interest in supervising industrial loan companies).

B. Scope of the Equitable Power of the Bankruptcy Court

Through the Bankruptcy Code, Congress prescribed the outer limits[42] of a bankruptcy court's equitable authority.[43] Within these bounds, bankruptcy courts have broad equitable powers. The United States Supreme Court asserted in *Pepper v. Litton*[44] that a bankruptcy court may use its equitable powers to enter any judgment that the bankruptcy court believes necessary to enforce the provisions of the Code.[45]

In Chapter 11 proceedings, bankruptcy courts have exercised their equitable powers by balancing the need for prompt determination of a reorganization plan against individuals' rights. In *Katchen v. Landy*,[46] for example, the Supreme Court denied the petitioner a jury trial because the petitioner presented his claim in a bankruptcy context.[47] The Court emphasized the need for summary adjudication of claims relating to the estate of a bankrupt.[48] Even though the petitioner asserted a legal claim, the Court held that the petitioner had no right to a jury trial because a bankruptcy case is an equity proceeding.[49] Similarly, the United States Court of Appeals for the Sixth Circuit denied a request for a jury trial in a Chapter 11 proceeding because the court found that the interest in prompt determination of a reorganization plan, which affected all parties, outweighed the individual's interest in a jury trial.[50]

Bankruptcy courts also have used their equitable powers to

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42. 28 U.S.C. § 1481 (1982) ("A bankruptcy court shall have the powers of a court of equity . . . .").

43. 1 COLLIER ON BANKRUPTCY, *supra* note 39, at ¶ 3.01(b)[ii] (exercise of equitable power subject to provisions of title 11).

44. 308 U.S. 295 (1939).

45. *Id.* at 304. The Court repeatedly emphasized the broad equitable powers that bankruptcy courts have exercised in many contexts. *Id.*

46. 382 U.S. 323 (1966).

47. *Id.* at 336-37.

48. *Id.* at 339.

49. *Id.* at 336-37.

50. *In re* Michigan Brewing Co., 24 F. Supp. 430, 431 (W.D. Mich. 1938), *aff'd*, 101 F.2d 1007 (6th Cir. 1939). The court asserted:

> [I]t is the view of the court that the rights of which petitioner will be deprived by being required to present his claims in the bankruptcy court are not substantial when compared with the rights . . . [of] all parties in interest to have prompt submission and determination of a plan of reorganization.

Id. Other courts also have emphasized the need for prompt reorganization and have used the court's equitable power to deny a jury trial. *See, e.g., In re* Rude, 101 F. 805 (D. Ky. 1900) (right to have jury rule on attorney's fees is a matter of discretion); *In re* Christensen, 101 F. 243 (N.D. Iowa 1900) (chancery methods used to investigate claim against bankrupt).

determine whether a claim is cognizable in bankruptcy. In *In re Spanish Trails Lines*[51] a bankruptcy court relied on its equitable authority to recognize a contract claim that the parties could not enforce in state court.[52] The court asserted that Congress had given bankruptcy courts the power to look beyond applicable state law to effect the purposes of the Bankruptcy Code.[53] The court maintained that "[s]ubstantial right and justice rather than technical form control."[54] Looking to the circumstances surrounding the claim, the court found that the claimant had enriched the debtor and thus had a valid claim for purposes of a bankruptcy proceeding.[55] Similarly, the court in *In re Leeds Homes, Inc.*[56] used its equitable power to allow a corporation to enforce a claim in bankruptcy even though the state had not authorized the corporation to conduct business.[57] These cases[58] clearly indicate that a bankruptcy court can use its equitable powers to recognize the existence of claims for bankruptcy purposes regardless of the status of the claims under state law.

C. Due Process Requirements

The constitutional requirement of notice is one of a court's primary concerns with appointing a representative for future claimants.[59] *Mullane v. Central Hanover Bank & Trust Co.*[60] is the

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51. 16 Bankr. 304 (Bankr. D. Ariz. 1981).

52. *Id.* at 307-08. A state statute rendered the contract unenforceable. *Id.*; *see* ARIZ. REV. STAT. ANN. § 32-1151 (Supp. 1984).

53. 16 Bankr. at 307. The court stated, "To effectuate the purpose of the Bankruptcy Code in successfully rehabilitating distressed debtors while at the same time treating creditors in a fair and equitable manner, bankruptcy courts must broaden their vision to include not only applicable state law, but the circumstances surrounding the claims in question." *Id.*

54. *Id.* (citation omitted).

55. *Id.* at 308.

56. 222 F. Supp. 20 (E.D. Tenn. 1963).

57. *Id.* at 20.

58. *See also* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946). The case concerned the validity of a covenant to pay interest to mortgage bondholders. The Court held that, because residents of many different states were parties to the contract, the bankruptcy court should not apply the law of the state in which the bankruptcy court sits. *Id.* at 162. Rather, the court must "enforce the Bankruptcy Act . . . in accordance with authority granted by Congress to determine . . . what claims shall be allowed under equitable principles." *Id.* at 162-63. The Court also noted that the validity of a claim under state law was irrelevant because the Court would still have to decide whether allowing the claim would be consistent with the policies of the Bankruptcy Act. *Id.* at 162.

59. *See* Note, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 160-61, 162-63 (1982) (stating that while bankruptcy proceedings are subject to the due process requirements of notice and a hearing, courts handling contingent claims should balance the competing concerns of expediency and notice on

leading case concerning the notice requirement of the due process clause. In *Mullane* the Supreme Court considered the adequacy of notice by publication to beneficiaries of a common trust fund in an accounting action. The bank had appointed a guardian for all absent persons, known or unknown, who might have had an interest in the income of the trust fund.[61] The Court adopted a balancing approach to determine whether publication provided adequate notice to the absent beneficiaries.[62] The Court balanced the state's interest in bringing the trust claims to a final settlement against the individual interest in notification. The Court noted that it could not justify placing "impractical" or "impossible" burdens on the state.[63] The Court, nevertheless, required notice to be "reasonably calculated . . . to apprise interest parties of the pendency of the action and afford them an opportunity to present their objections."[64] The Court, therefore, found notice by publication inadequate as a means of informing beneficiaries whom the state could notify personally.[65]

The Court noted that when circumstances prevent individual notice, the Court will approve the form of notice selected if it is at least as likely to accomplish its goal as other forms of notice.[66] In the case of missing or unknown persons, the Court determined that an indirect or even futile form of notice would satisfy due process.[67] Concerning the beneficiaries whose interests were future or conjectural, the Court recognized that the difficulties and costs of notifying these persons placed an unreasonable burden on the state. The Court, therefore, held that notice by publication to future or conjectural beneficiaries satisfied due process.[68]

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a case-by-case basis).

60. 339 U.S. 306 (1950).
61. *Id.* at 310.
62. *Id.* at 314.
63. *Id.* at 313-14.
64. *Id.* at 314.
65. *Id.* at 318-19.
66. *Id.* at 315.
67. *Id.* at 317.
68. *Id.* at 318. The Court stated:

> Nor do we consider it unreasonable for the State te dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [*sic*] of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose

A number of courts following the Supreme Court's decision in *Mullane* have applied a balancing test in bankruptcy proceedings.[69] In *City of New York v. New York, New Haven & Hartford Railroad Co.*,[70] for example, the Supreme Court held tbat notice by publication was inadequate to inform a lien creditor of a bankruptcy proceeding because the debtor could have notified the creditor by mail. The Court insisted that even creditors who are aware of a reorganization have a right to "reasonable notice" before a bankruptcy court can bar their claims.[71] In *In re DCA Development Corp.*,[72] however, the United States Court of Appeals for the First Circuit, after applying the *Mullane* balancing test, found that the interest in a final and efficient resolution of claims is particularly strong in bankruptcy proceedings.[73] The court, therefore, concluded that in this case informal or constructive notice satisfied due process.[74]

Notably, the majority of cases to apply the *Mullane* balancing test in bankruptcy proceedings have concerned notice requirements to ascertainable parties.[75] In *In re GAC Corp.*[76] the United States Court of Appeals for the Eleventh Circuit considered the due process requirements for notice to *unascertainable* parties. In this instance, the bankruptcy court sought to notify all purchasers of the bankrupt corporation's debentures of a class action filed on their behalf so that the purchasers could file proofs of claims, as required by the Code.[77] The court held that publication in fifty-

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> interests in the common fund are so remote as to be ephemeral; and we have no doubt tbat such impracticable and extended searches are not required in the name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Id. at 317-18.

69. *See* Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505, 1509 (1975).

70. 344 U.S. 293 (1953).

71. *Id.* at 297.

72. 489 F.2d 43 (1st Cir. 1973).

73. *Id.* at 46. The court noted that delay can allow tbe debtor's assets to diminish with no corresponding benefit to the creditors. *Id.* (citation omitted).

74. *Id.* at 47. The court cited several previous cases in which courts found that informal or constructive notice satisfied due process in bankruptcy proceedings. *Id.* (citing Ferguson v. Bucks County Farms, Inc., 280 F.2d 739 (3d Cir. 1960); Harris v. Capehart-Farnsworth Corp., 207 F.2d 512, 517 (8th Cir. 1953) (further citations omitted)).

75. *See, e.g.*, cases cited *supra* notes 70-74.

76. 681 F.2d 1295 (11th Cir. 1982).

77. *See* 11 U.S.C. § 501 (1982) (describing the procedure for filing a proof of claim).

three leading newspapers satisfied the notice requirement of the due process clause because personal notice would have been overly burdensome and the purchasers' claims were speculative.[78]

D. Analogy: The Class Action Standard of Notice

Recently, courts have found that an examination of the notice requirement in class actions is helpful in determining the proper notice requirement for reorganization proceedings.[79] Although injured parties typically do not bring toxic tort claims as class actions,[80] a future claimants' representative in a reorganization proceeding could seek certification for a class action. Furthermore, a representative for future claimants in a bankruptcy reorganization would be in an analogous position to a class representative in a class action suit.[81]

Notice in a class action gives the class members an opportunity to opt out or to participate in the litigation.[82] For the court to certify a 23(b)(3) class,[83] the representatives must give the best practicable notice under the circumstances to the members of the

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See generally Note, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153 (1982) (arguing that the use of class actions would provide a viable method of estimating contingent claims for the purpose of fulfilling the Code's procedural requirements).

78. 681 F.2d at 1300. One commentator has asserted that *In re DCA* and *In re GAC* together stand for the proposition that a bankruptcy court exercises an important role in balancing the need for individual notice against the need to resolve the case. The court, therefore, has discretion in mandating the form of notice to inform creditors of the proceeding. *See* Note, *Manville: Good Faith Re-organization or "Insulated" Bankruptcy*, 12 HOFSTRA L. REV. 121, 148-49 (1983) [hereinafter cited as Note, *Manville*].

79. *See, e.g., In re* UNR Indus., Inc., 29 Bankr. 741, 746-48 (N.D. Ill. 1983); *In re* REA Express, Inc., 10 Bankr. 812, 814 (Bankr. S.D.N.Y. 1981).

80. *See, e.g., In re* Northern Dist. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir.) (denying class certification for toxic tort victims), *cert. denied*, 459 U.S. 1171 (1982); Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) (denying class certification for DES victims).

81. *See infra* text accompanying notes 200-03.

82. Note, *Jurisdiction and Notice in Class Actions: "Playing Fair" With National Classes*, 132 U. PA. L. REV. 1487, 1504 (1984).

83. FED. R. CIV. P. 23(b)(3). This provision reads in pertinent part:

> An action may be maintained as a class action if the prerequisitcs of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominatc over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .

Id.

class.[84] Rule 23(c)(2) requires personal notice to all members whom the representative can identify through reasonable effort.[85] In *Eisen v. Carlisle & Jacquelin*[86] the Court strictly applied the language of Rule 23. The plaintiff in *Eisen* contended that individual notice to over two million members was cost-prohibitive, particularly because each individual had only minimal interest in the outcome of the case.[87] The Court rejected this argument and intimated that the *Mullane* balancing test was irrelevant because Rule 23 exclusively governed the notice issue.[88]

Parties in mass tort actions face the same notice issues. In *Payton v. Abbott Labs*[89] the plaintiff class consisted of a defined group of women whom the defendant allegedly had exposed to DES *in utero*. The court reasoned that notice by publication would deprive future plaintiffs of the opportunity to opt out of the action, thus unjustly prohibiting them from seeking compensation.[90] The court in *In re "Agent Orange" Product Liability Litigation*,[91] however, certified a 23(b)(3) class of toxic tort plaintiffs.[92] The court found that the notice requirement was not a prohibitive barrier because the rules require only "the best notice practicable under the circumstances."[93] The court suggested that the best notice might include notification through the news media.[94]

Parties may be able to avoid the notice issue in a 23(b)(1)(B) class action[95] because the stringent notice requirement of 23(c)(2)

84. FED. R. CIV. P. 23(c)(2). This section provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through *reasonable effort*." *Id.* (emphasis added).

85. *Id.*

86. 417 U.S. 156 (1974).

87. *Id.* at 175-76. The Court held that individual notice was not discretionary and thus could not he waived. For a criticism of this view, see Note, *Jurisdiction and Notice in Class Actions*, *supra* note 82, at 1507-08 (asserting that when a minimal interest is at stake, a court should relax notice requirements accordingly).

88. 417 U.S. at 177. ("[Q]uite apart from what due process may require, the command of Rule 23 is clearly to the contrary.").

89. 83 F.R.D. 382 (D. Mass. 1979).

90. *Id.* at 393. The court was concerned with the high stakes associated with the victims' chance of developing cancer. *Id.*

91. 506 F. Supp. 762 (E.D.N.Y. 1980).

92. The class included all persons whom the Army allegedly had exposed to Agent Orange and various members of their families. *Id.* at 787.

93. *See supra* note 84 and accompanying text.

94. 506 F. Supp. at 791.

95. FED. R. CIV. P. 23(b)(1)(B) states:

> An action may be maintained as a class action if . . . (1) the prosecution of separate actions by or against individual members of the class would create a risk of

does not apply.[96] In *In re Northern District "Dalkon Shield" IUD Products Liability Litigation*,[97] however, the court declined to certify a mass toxic tort class as a 23(b)(1)(B) class.[98] The *Agent Orange* court also refused to certify the class under 23(b)(1)(B) because the court found no evidence that the claims would bankrupt the defendant.[99]

III. Recent Development

A. In re UNR Industries, Inc.

In *In re UNR Industries, Inc.*[100] the involvement of the debtor corporation in over 17,000 asbestos-related lawsuits prompted the corporation and its subsidiaries to file for reorganization under Chapter 11.[101] The court appointed two creditors' committees to participate in the reorganization plan: a committee of suppliers and lenders and a committee of asbestos plaintiffs.[102] The debtor then requested that the court appoint a representative for unknown asbestos plaintiffs because neither of the two creditors' committees represented these claimants' interests.[103] The debtor contended that although the Code does not expressly authorize a court to appoint a representative for unknown claimants, a bankruptcy court has the equitable power to grant the appointment to fulfill the intent of the Code.[104] Specifically, the debtor argued that future tort claims fit within the class of claims dischargeable under

. . . .

(B) adjudications with respect to individual memhers of the class which would as a practical matter be dispositive of the interests of the other members not parties to tbe adjudications or substantially impair or impede their ability to protect their interests

. . . .

Id.

96. *In re* N. Dist. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1193 (N.D. Cal. 1981). Under Rule 23(c)(2), the notice requirement only applies to a 23(b)(3) class.

97. 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

98. *Id.* at 851. The court asserted that it could not certify a class under 23(b)(1)(B) unless separate actions would "inescapably . . . alter the substance of the rights of others having similar claims." *Id.* (citations omitted). The court then refused to certify a 23(b)(1)(B) class action in this case because the "detrimental effect of separate [actions] is not clearly inescapable." *Id.*

99. 506 F. Supp. at 789.

100. 29 Bankr. 741 (N.D. Ill. 1983).

101. *Id.* at 743.

102. *Id.*

103. *Id.*

104. *Id.* at 744.

Chapter 11[105] and that future claimants are creditors within the meaning of the Code.[106]

The bankruptcy court rejected the debtor's arguments and refused to appoint a representative for future claimants. First, the court asserted that the claims referred to under Chapter 11 dealt with contract obligations, not tort liability.[107] Second, the court maintained that future plaintiffs had no claims under the Code because their claims did not arise at the proper time.[108] The court insisted that tort claims do not arise until the plaintiff suffers injury. Putative claimants who have not yet suffered injury thus have no claims cognizable in bankruptcy.[109]

The court then addressed the practical problems of appointing a representative for putative claimants. Noting that most courts have denied class certification in mass tort actions,[110] the court refused to appoint a representative for future claimants because adequate representation, which is impossible to achieve in a class action, would be no more practicable in the present context.[111] The court next considered the problem of notifying future claimants. The court required personal notice for a judgment to bind injured parties.[112] The court concluded that personal notice was impossible because of the variety of ways in which asbestos-related injuries can arise.[113] Finally, the court maintained that it had no power to decide the claims of future plaintiffs.[114] The court recognized that its holding may deprive future claimants of a remedy, but the court asserted that Congress must find a solution to this problem.[115]

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105. *Id.* at 744-45; *see supra* note 33 and accompanying text (defining claim).

106. 29 Bankr. at 745; *see supra* notes 29, 35 and accompanying text (defining creditor).

107. 29 Bankr. at 745.

108. *Id.*

109. *Id.*

110. *Id.* at 746.

111. *Id.* at 747 (maintaining that if no individual could represent present ashestosis sufferers adequately in a consolidated case, then one representative could not represent adequately future claimants' interests in a single proceeding).

112. *Id.* The court cited Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) (discussed in text accompanying notes 88-89) and Greene v. Lindsey, 456 U.S. 444 (1982) (holding eviction notice on tenant's door not sufficient to satisfy due process).

113. 29 Bankr. at 747. For example, shipyard workers, school children, and members of asbestos workers' families all have received some exposure to asbestos. The severity of their injuries varies with the degree of exposure. *Id.*

114. *Id.* at 748. The court found that the statute does not provide for resolution of future claims. *Id.*

115. *Id.*

The United States Circuit Court of Appeals for the Seventh Circuit dismissed the debtor's appeal.[116] Writing for the court, Judge Posner discussed whether a bankruptcy court's equitable powers would enable the court to provide for future plaintiffs.[117] Posner found that putative plaintiffs may be better off if a court were to appoint a representative for future plaintiffs. He conceded, however, that providing for innumerable unidentified plaintiffs would be "a quixotic undertaking far beyond the realistic boundaries of judicial competence."[118] Posner reiterated the district court's plea for a legislative solution to the problem.[119]

B. In re Amatex Corporation

The debtor in *In re Amatex Corp. (Amatex I)*[120] asked the court to appoint a guardian *ad litem* to represent the interests of future asbestos claimants. The court refused to appoint a guardian because the court found that a reorganization plan cannot affect future claims.[121] The court reached this conclusion after carefully examining the Chapter 11 provisions that address the nature of claims and interests subject to a reorganization plan.[122] The sections that describe a plan's contents[123] and confirmation[124] both emphasize "claims" and "interests."[125] The section that addresses

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116. *In re* UNR Indus., Inc., 725 F.2d 1111 (7th Cir. 1984). The court dismissed the appeal on the grounds that the district court's order, which denied appointment, was not an appealable order. *Id.* at 1120-21.

117. *Id.* at 1119-20.

118. *Id.* at 1120.

119. *Id.*

120. 30 Bankr. 309 (Bankr. E.D. Pa. 1983).

121. *Id.* at 315. The court did not address the issue of notice requirements. Furthermore, the court dismissed the debtor's argument concerning a bankruptcy court's equitable powers in one conclusory sentence. *Id.* at 315-16. By adhering to a strict construction of the statutory language, however, the court implied that it had only narrow equitable capabilities. *See infra* text accompanying note 179.

122. *Id.* at 311-15. The court noted that the reorganization plan can affect only claims and interests. *Id.*

123. *See* 11 U.S.C. § 1123 (1982). This section provides that a plan shall:

> (1) designate . . . classes of claims . . . and classes of interests; (2) specify any class of claims or interests that is not impaired under the plan; (3) specify the treatment of any class of claims or interests that is impaired under the plan; (4) provide the same treatment for each claim or interest or a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest . . . .

Id.

124. *See id.* § 1129 (describing prerequisites for confirmation of a plan).

125. 30 Bankr. at 312-13 (noting that these provisions refer to claims and interests rather than creditors).

a confirmed plan's effect specifically states that confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation."[126]

The court proceeded to examine the legislative history of certain Code definitions. Specifically, the court examined the definition of "creditor," which the Code defines as a "holder of prepetition claims against the debtor."[127] According to the court, a reorganization plan may not affect future claimants because Congress intended that a plan affect only prepetition claims.[128] The court concluded that, because future plaintiffs' injuries have not become manifest, these plaintiffs do not hold claims within the meaning of the Bankruptcy Code.[129] Confirmation of a plan, therefore, would not discharge these future claims,[130] and the court would serve no purpose by appointing a guardian to represent interests that the Bankruptcy Code does not recognize.[131]

On appeal (*Amatex II*), the United States Court of Appeals for the Third Circuit reversed the district court order and used a "party in interest" rationale to justify appointing a representative for future claimants.[132] The court specifically noted that it need not determine whether future claimants were "creditors" with "claims" because the court could appoint a representative for future claimants as "parties in interest."[133] Citing the broad judicial construction of the term "party in interest,"[134] the court found that the reorganization proceeding sufficiently affected future claimants to warrant including them within the process.[135] The court noted that future claimants have different interests than other creditors, and that if the court denied future claimants representation, current claimants would receive a greater portion of a limited fund.[136] For these reasons, the Third Circuit appointed a representative to protect future claimants' interests.[137]

126. *See* 11 U.S.C. § 1141(d)(1)(A) (1982).

127. 30 Bankr. at 314 (quoting 11 U.S.C. § 101(9) (1982)).

128. 30 Bankr. at 315.

129. *Id.* In making this distinction, the court relied on the discovery principle embodied in many states' statutes of limitations. *See id.*

130. *Id.* ("[T]he Code provides that a debtor is only discharged from debts which arose prior to the confirmation of the plan.").

131. *Id.* at 316.

132. 755 F.2d 1034, 1042 (3d Cir. 1985).

133. *Id.* at 1041.

134. *Id.* at 1042 (discussing cases cited *supra* note 41).

135. 755 F.2d at 1042.

136. *Id.* at 1043.

137. *Id.* The court, however, declined to decide "whether future claimants can or

C. In re Johns-Manville Corporation

In *In re Johns-Manville Corp.*[138] the debtor filed for bankruptcy because of the debtor's potentially vast liability for asbestos-related claims.[139] Statistics indicated that the debtor corporation's liability over the next twenty years easily could have amounted to over two billion dollars and could have forced the corporation into liquidation.[140] The court noted that any plan ignoring the interests of future claimants would not serve either the debtor's or the creditors' interests.[141] Moreover, the drain these claims imposed could force the debtor to file for reorganization again and again, and even these filings might not prevent liquidation.[142]

To determine whether a court could appoint a representative for future claimants, the *Manville* court focused on the "party in interest" language of the Bankruptcy Code.[143] The court held that future plaintiffs were "parties in interest" who possessed cognizable interests in the reorganization proceeding.[144] Section 1109(b) states that "[A]ny party in interest . . . may appear and be heard on any issue in a case under this chapter."[145] Although the Code does not define "party in interest," the court adopted a broad definition of the term.[146] Under a broad definition, future claimants would be parties in interest because denying them representation would render the entire plan meaningless.[147] The court found that Congress designed the elastic concept of "party in interest" for just

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should be considered 'creditors' under the Code [or] whether constitutionally adequate notice can be provided to such a class . . . ." *Id.*

138. 36 Bankr. 743 (Bankr. S.D.N.Y. 1984).

139. *See* Note, *Manville*, *supra* note 78, at 122.

140. 36 Bankr. at 746.

141. *Id.*

142. *Id.* (asserting that "[i]t fosters the key aims of Chapter 11 to avoid liquidation at all reasonable costs"); *accord In re* Victory Constr. Co., 9 Bankr. 549, 554 (Bankr. C.D. Cal. 1981) ("Congressional purpose in enacting the statute was to encourage resort to bankruptcy reorganization as a means of avoiding unnecessary or premature liquidation, to relieve distressed corporations and to provide the mechanics for reorganization, and to permit the debtor to restructure the debts and pay creditors while retaining its property." (citations omitted)).

143. 36 Bankr. at 747-57.

144. *Id.* at 745.

145. *Id.* at 747 (quoting 11 U.S.C. § 1109(b) (1982)).

146. *Id.* The court noted that Collier advocated a broad definition of the term "party in interest." *See* 5 COLLIER ON BANKRUPTCY, *supra* note 39, at ¶ 1109.02 [3] (use of word "including" in 1109(b) does not limit party in interest to listed entities).

147. 36 Bankr. at 749 (noting that future claimants would be the central focus of the entire plan).

this kind of situation.[148] The court also found that because exposure to asbestos generates enough of an interest to trigger insurance coverage,[149] exposure should give future plaintiffs sufficient interest to qualify as parties in interest.[150]

In reaching this conclusion, the *Manville* court criticized the *Amatex* and *UNR* opinions. First, the court criticized the *Amatex I* court's determination that future claimants held no claims cognizable in bankruptcy because the claims were not prepetition claims.[151] The *Manville* court noted that "the fixation of a statute of limitations is totally unrelated to the status of future claimants as parties in interest."[152] The policy behind a statute of limitations is to prevent defendants from having to litigate claims that have become stale.[153] Determining whether future plaintiffs are parties in interest, however, requires a court to consider the potential detriment to these parties if the court does not allow representation.[154]

Second, the *Manville* court criticized the Seventh Circuit's interpretation of the term "claim."[155] Citing the legislative history,[156] the *Manville* court accused the *UNR* court of ignoring future claimants and thus defeating the drafters' intention that courts address all of the debtor's obligations in a Chapter 11 proceeding.[157] The *Manville* court also challenged the Seventh Circuit's assertion that state law defines the cognizability of a claim.[158] The *Manville* court declared that this determination would "contravene the Constitutional requirement of uniformity in the laws of bankruptcy."[159] According to the *Manville* court, state laws that place

148. *Id.*

149. *Id.* (citing numerous cases holding that exposure to asbestos triggers insurance coverage).

150. *Id.* at 750 (asserting that plaintiffs who have an insurable interest have sufficient interest in these proceedings to qualify as parties in interest).

151. *See supra* note 128 and accompanying text.

152. 36 Bankr. at 750 n.4.

153. *Id.* at 752. The court also noted that, contrary to what the *Amatex* court asserted, not all states date the tolling of the statute of limitations from the point of injury manifestation. *Id.* at 751-52.

154. *Id.*

155. *Id.* at 754 (criticizing the Seventh Circuit's position that future tort claims are not "claims" for bankruptcy purposes because they are grounded in tort law instead of contract law); *see also supra* text accompanying notes 107-09 (discussing the *UNR* court's interpretation of "claim").

156. 36 Bankr. at 754 n.6.

157. *Id.* at 754.

158. *Id.* at 755 n.6.

159. *Id.*

limitations on federal bankruptcy law must yield to federal legal constructs.[160]

The *Manville* court next turned to the problem of notice, stating that "[t]he court . . . must balance the individual's interest . . . against the overall interest of efficient final resolution of claims."[161] In this case the court found that the logistical problem of notice was not insurmountable.[162] The tremendous publicity given to Manville's bankruptcy filing had already notified many putative claimants.[163] Furthermore, because notice is an "elastic concept," the court could require supplemental mailings or publications if the initial publicity subsequently appeared insufficient.[164] The *Manville* court, therefore, did not find that the notice requirement precluded appointing a representative for future claimants.[165]

Finally, the *Manville* court espoused a broad view of the bankruptcy court's equitable powers, declaring that Congress vested these powers in the courts to enable them to respond to extraordinary cases like the present one.[166] The court noted that previous bankruptcy courts had used their equitable powers to protect the rights of absent persons whom the court's decision would affect.[167] According to the *Manville* court, the statutory authority in section 1109(b) to appoint a representative for future claimants provided an even stronger basis for asserting the court's broad equitable power in this case.[168]

IV. Analysis

A. *Permitting the Appointment of a Representative for Future Claimants*

1. Consistency with Bankruptcy Policy

Appointing a representative for future claimants in cases of potential tort liability promotes the specific goals of Chapter 11.

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160. *Id.*

161. *Id.* at 756 n.6 (quoting *In re* DCA Dev. Corp., 489 F.2d 43, 46 (1st Cir. 1973)).

162. 36 Bankr. at 756 n.6.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 757.

167. 36 Bankr. at 758. The court relied particularly on Gunnell v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1938), in which the Illinois Supreme Court used its equitable discretion to appoint a representative for unborn remaindermen in the absence of statutory authority. 36 Bankr. at 758.

168. 36 Bankr. at 758.

Congress created Chapter 11 reorganizations because of the common belief that preserving a business entity is preferable to liquidating it.[169] The reorganization provisions of the Bankruptcy Code preserve business entities and provide for an efficient disposition of bankrupt entities' assets.[170] This result benefits the debtor, the creditors, and the economy as a whole.[171] Although appointing a representative for future claimants is not mandated in every case,[172] when the debtor does face the potential of future liability, failure to bind future claimants to a reorganization plan could lead to a succession of Chapter 11 filings. This result is clearly inefficient and economically undesirable.[173] Moreover, because toxic torts involve innumerable potential victims and long latency periods prior to discovery, an efficient resolution for the problems facing debtors and other creditors is almost impossible unless the reorganization plan incorporates future claimants' interests.

Apart from promoting the specific goals of Chapter 11, bankruptcy courts uphold the general aims of the entire bankruptcy system by appointing a representative for future claimants. First, the bankruptcy system aspires to treat creditors equally. Equal treatment discourages the creditors from racing to court.[174] Only by binding future claimants to a reorganization plan can courts ensure equal treatment of future plaintiffs.[175] Second, future tort claims threaten debtor rehabilitation, another goal of bankruptcy.[176] Creditors will not do business with an entity that faces substantial future tort liability.[177] Providing for future claims in a reorganization plan, however, would encourage lenders to extend credit to the debtor and thus would promote the debtor's rehabilitation.

Another pervasive principle of bankruptcy is the bankruptcy

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169. *See* Note, *Manville*, *supra* note 78, at 151 (asserting that preservation of ongoing business is important objective of business reorganization).

170. *See id.* (asserting that new Chapter 11 offers more speed, efficiency, and protection for all parties).

171. Note, *Relief from Tort Liability*, *supra* note 12, at 1242.

172. Providing for future claimants in a reorganization plan, however, could be costly, cumbersome, and unnecessary. A rule requiring courts to provide for future claimants in all reorganizations would contravene the underlying policy of Chapter 11, particularly when the debtor did not predicate the filing of its petition on the possibility of future liability.

173. *See* Note, *Manville*, *supra* note 78, at 152.

174. *See id.*

175. See, for example, the hypothetical situation discussed *supra* text accompanying notes 14-16.

176. *See* Roe, *supra* note 7, at 920.

177. 29 Bankr. at 743.

court's authority to act in equity.[178] The *UNR*, *Amatex*, and *Manville* courts each considered the extent of its equitable powers in determining whether to appoint a representative for future claimants. The *UNR* and *Amatex* courts found their equitable powers narrowly constrained by the plain wording of Chapter 11.[179] The *Manville* court, however, chose to interpret this power broadly, reasoning that equity power enables the courts to respond to "extraordinary problems in estate administration."[180] The *Manville* court's finding is consistent with the long line of cases that have construed the Code[181] as granting broad equity powers to bankruptcy courts.[182] Courts should not hesitate to use this power if the provisions of the Code do not preclude the exercise of equitable discretion in a particular case.

The definitions in the Code,[183] the legislative history,[184] and the great weight of judicial authority[185] support a broad definition of "claim" for bankruptcy purposes. The *UNR* and *Amatex* courts ignored this authority and focused narrowly on explicit statutory langnage and state law constraints on the validity of a claim. These courts failed to recognize that bankruptcy courts have the power to consider a claim for bankruptcy purposes regardless of whether it is a legal claim for state law purposes.[186] This unncessarily strict construction of the Bankruptcy Code makes the Code unresponsive to new situations such as future toxic tort claims.

The *Manville* court at least recognized that Congress intended for courts to construe the term "claim" broadly,[187] and the *Manville* court's general approach is more consistent with bankruptcy policy. Unfortunately, the *Manville* court stopped short of ruling that future claimants are "creditors." Instead, the court left future claimants in an uncertain position by basing the court's ruling on the "party in interest" rationale. Neither the *Manville* court's opinion nor the Bankruptcy Code indicates exactly what

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178. *See supra* text accompanying notes 42-58.

179. 29 Bankr. at 746; 30 Bankr. at 315-16.

180. 36 Bankr. at 758 ("[W]here circumstances warrant, courts readily use their equitable powers to protect the substantive rights of persons similarly situated who are not before the court.").

181. *See supra* note 42 and accompanying text.

182. *See* cases discussed *supra* text accompanying notes 44-58.

183. *See supra* notes 29-36 and accompanying text.

184. *See supra* note 34 and accompanying text.

185. *See supra* notes 31-37.

186. *See supra* notes 37, 51-58 and accompanying text.

187. 36 Bankr. at 754 n.6 (noting that Congress intended that a court, in a Chapter 11 proceeding, consider all a debtor's obligations).

"party in interest" status entails.[188] Presumably, if the court did not consider these claimants to be "creditors," the court could not bind the claimants to the reorganization plan.[189] The court may have allowed the future claimants to participate through representatives in formulating the reorganization plan, but left the future claimants free to press individual claims against the debtor if the plan later becomes unsatisfactory. This result would contravene the goals of bankruptcy. To best serve the goals of reorganization in bankruptcy, courts should use their broad equitable powers to rule that future claims are cognizable in bankruptcy and that future claimants are creditors.

2. Consistency with Tort Law Policy

Incorporating future claimants' interests in a reorganization plan is consistent with the basic principles of tort law, namely compensation and risk allocation. Although Congress, when it redrafted the Code, did not foresee tort liability as a potential cause of bankruptcy,[190] reorganization can accommodate tort law policies as well as bankruptcy goals. In a typical mass tort action the debtor corporation, if forced to liquidate, cannot compensate all of the victims.[191] Reorganization, however, provides a vehicle whereby the debtor can continue to operate and compensate victims.[192] Furthermore, if the reorganization plan includes the interests of future claimants, the court can distribute the debtor's compensation pool more equitably among the class of victims as a whole.[193] Reorganization that incorporates future claimants' interests, therefore, serves the first goal of tort law—compensation.

Appointing a representative for future claimants also can serve another basic goal of tort law—risk allocation. Recent toxic tort suits[194] have alerted creditors to the possible liability facing their debtors. Creditors are in a position to exert economic pressure on

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188. The court in *In re* Citizen's Loan & Thrift Co., 7 Bankr. 88 (Bankr. N.D. Iowa 1980), stated that parties in interest have the "same rights as if they were . . . intervenors." *Id.* at 90. This statement, however, does not shed any light on the issue of a party in interest's rights and duties under a reorganization plan.

189. *See supra* note 26 and accompanying text.

190. *See* Note, *Relief from Tort Liability, supra* note 12, at 1228.

191. *See* Note, *Jurisdiction and Notice in Class Actions, supra* note 82, at 1241.

192. *See In re* UNR Indus., Inc., 29 Bankr. 741, 748 (N.D. Ill. 1983) (Because the court refused to appoint a representative for future claimants, "claimants may wind up with judgments against corporations left with only one asset: a corporate charter.").

193. Note, *Who Will Compensate, supra* note 6, at 489.

194. *See supra* notes 1-4.

debtors to take precautions against accidents and to procure adequate insurance.[195] Debtors can pass these costs along to consumers.[196] A reorganization plan that provides for future claimants will enable the debtor to pass on costs more efficiently because the plan will account for compensation for all claimants.

3. Consistency with Constitutional Principles

The constitutional problems that the appointment of a representative for future claimants pose are significant but not insurmountable.[197] The *Mullane* standard of notice requires a court to balance the interests in bringing all claims to final settlement against the interest of claimants in notification. This balancing test is particularly appropriate in planning a Chapter 11 reorganization. Many courts have noted that the interest in an efficient resolution of claims is critical in bankruptcy proceedings, "where delay can often result in diminution of corporate assets with no corresponding benefits to creditors."[198] Given the paramount importance to all interested parties of final resolution in a bankruptcy case, a court should not unduly burden the debtor and threaten the plan's success by requiring personal notice to all future claimants. The *Manville* court's conclusion that publication notice would suffice is consistent with the holding in *Mullane* that publication notice was adequate for the unknown beneficiaries. The *Agent Orange* opinion also supports the *Manville* court's position that notice through the news media may provide the "best notice practicable under the circumstances" for some claimants.[199]

Furthermore, judicial treatment of the notice requirement in class actions concerning mass tort claimants does not present an insurmountable constitutional obstacle. The *Agent Orange* court certified a class of toxic tort plaintiffs as a 23(b)(3) class action.[200] This certification vitiates the *UNR* court's argument that bankruptcy courts should not appoint a representative for future claim-

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195. *See* Note, *Jurisdiction and Notice in Class Actions, supra* note 82, at 1241.

196. *Id.*

197. Professor Countryman has suggested that specific circumstances could justify a relaxation of due process. *See* Wall St. J., Mar. 16, 1983, § 2, at 33, col. 5.

198. *In re* DCA Dev. Corp., 489 F.2d 43, 46 (1st Cir. 1973); *see also* cases cited *supra* notes 46-50 and accompanying text.

199. *Agent Orange*, 506 F. Supp. 762, 791; *see also Manville*, 36 Bankr. 743, 756 n.6. The *Agent Orange* ruling is more consistent with the language of 23(c)(2), *see supra* note 84, than the *Eisen* ruling, which commentators have criticized for heing unnecessarily restrictive. *See* Note, *Jurisdiction and Notice in Class Actions, supra* note 82, at 1507-08.

200. *See supra* note 92 and accompanying text.

ants because parties cannot bring mass tort claims as class actions.[201] In addition, the *Agent Orange* court based its refusal to certify a 23(b)(1)(B) class on the absence of any indication that the claims would bankrupt the defendant.[202] The court's reasoning suggests that a 23(b)(1)(B) class action[203] may be appropriate in cases in which the mass toxic tort defendant is undergoing reorganization in bankruptcy.

Finally, appointing a representative for future claimants best serves the general principles of due process by giving these claimants their day in court. Binding future claimants to the reorganization plan would further protect their interests because a corporation could be forced to liquidate if a court allowed future claimants to assert their claims after the reorganization. Without allowing representation in the reorganization proceeding, a court may be denying future claimants any remedy at all.[204] Binding future claimants to the reorganization plan, therefore, is more consistent with the notion that due process should protect claimants' interests.[205] The *Amatex II* and *Manville* courts at least allowed representation in reorganization, but these courts failed to provide further protection by ensuring that the plan would bind the future claimants.

B. *The Dangers of Precedent*

The *Amatex I* and *UNR* courts explored the dangers of permitting the appointment of a representative for future claimants. A decision to appoint representatives for future claimants may force courts to provide for future claims even when a court has no reason to suspect that such claims will arise. The broad reading of the term "claim" coupled with the *Amatex II* and *Manville* courts' liberal construction of "party in interest" signifies that the *Amatex I* and *UNR* Courts' warnings may be well taken.[206] A rule that

201. *See supra* note 110-11 and accompanying text.

202. *See supra* note 99 and accompanying text.

203. *See supra* note 96 and accompanying text.

204. *See* 29 Bankr. at 748; 30 Bankr. at 316 (admitting possibility that claimants will not receive compensation).

205. *See* Note, *Jurisdiction and Notice in Class Actions, supra* note 82, at 1497. The approach of the *UNR* court would subvert the purposes of due process. *See supra* notes 112-15 and accompanying text. The *Amatex II* and *Manville* courts at least allowed representation in reorganization, but these courts failed to provide for further protection by ensuring that courts bind the future claimants to the plan. *See supra* text accompanying notes 188-89.

206. The *Manville* court found that anyone who had been exposed to asbestos quali-

completely prohibits appointing a representative for future claimants, nonetheless, would be unwise. A holding that future claimants are creditors within the meaning of the Code would bind them to the terms of the plan whether they are represented or not.[207] Thus, future claimants will be cut off from litigating their claims in cases in which no one anticipates future claims. To avoid this disastrous result, courts could appoint representatives for future claimants as a matter of course. When future claims clearly threaten the plan, the representative would protect those interests. When future claims pose little or no threat to the plan, the representative would draft a contingency clause requiring that the plan be reformulated if future claims begin to accumulate.

Legislative action can alleviate the problem of compensating future toxic tort claimants.[208] In fact, several authorities have ad-

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fied as a "party in interest." *See supra* notes 148-50 and accompanying text. Exposure, however, may not necessarily lead to an actual injury or disease upon which to base a claim.

207. *See* 11 U.S.C. § 1141(a) (1982).

208. Congress could provide a legislative solution to the toxic tort prohlem patterned after the program for environmental cleanup costs—the "Superfund." The Comprehensive Environmental Responses, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. 9601-57 (1982)), created the Superfund, which is essentially industry financed, to provide finances for cleaning up hazardous waste sites. 42 U.S.C. § 9631 (1982). This fund consists of taxes collected from crude oil and chemical companies, amounts recovered on behalf of the fund, *see id.* § 9607, and penalties assessed under the Act. *Id.* § 9607(c)(1) (1982). The Superfund, in effect, taxes hazardous waste producers and forces them to bear the brunt of the expense of bazardous waste cleanup. CERCLA further provides for a strict liability standard and a corresponding liahility limitation. *Id.* § 9607(c)(1) (1982). Thus, a plaintiff may not receive as great a recovery as a conventional tort suit would allow, but the plaintiff is more likely to obtain some recovery becanse the burden of proof is easier to meet.

A legislative solution similar to the Superfund would be appropriate in the toxic tort context for several reasons. *See* Grad, *Injuries from Exposure to Hazardous Waste: Can the Victim Recover?*, 2 J. PRODS. L. 133 (1983) (noting that the Superfund Study Group concluded that existing tort law and compensation systems cannot adequately handle the toxic tort problem); *see also* Barsky, *Abandoning Federal Sovereign Immunity: Public Compensation for Victims of Latently Defective Therapeutic Drugs*, 2 J. PRODS. L. 20, 54 (1983) (advocating a "superfund" system for compensation under the Federal Tort Claims Act). First, such a program would provide for uniform treatment of tort plaintiffs by imposing a single standard of proof and a single statute of limitations. By simplifying the recovery process, the program would eliminate the large transaction costs that result from using the tort system. For example, varying theories currently exist regarding the accrual of a cause of action in ashestosis cases. Some jurisdictions date the accrual of a cause of action from the date of exposure to the substance, others date the accrual from the date of discovery of adverse symptoms, and still others date the accrual from the date that the plaintiff discovers that the injury was probably the result of exposure to the substance. *See* Special Project, *supra* note 5, at 641-51. By imposing a single statute of limitations, a Superfund-type program would ensure equal treatment of all toxic tort victims. Similarly, imposing a strict liability standard would eliminate the disparity between cases brought under negligence or breach of warranty theories and cases brought under strict liability. For a discussion of the

vocated congressional action as the only solution to the toxic tort problem.[209] A congressional committee has proposed legislation to deal with the asbestos situation,[210] but Congress has yet to act on the subject. Although a legislative solution to the toxic tort problem would be desirable, today's victims need compensation now. Courts can provide for these victims in the bankruptcy context and should act appropriately when given the opportunity to do so.

V. Conclusion

The judicial system clearly needs a legislative solution to the problem of future claimants in toxic tort litigation. Until such legislation is forthcoming, however, courts must show enough flexibility to cope with the changing circumstances brought by scientific advances. Unfortunately, the *UNR*, *Amatex*, and *Manville* courts' inconsistent treatment of future claims in Chapter 11 reorganizations does a disservice to both bankruptcy and tort law. The status of future plaintiffs will depend on where defendant debtors file their Chapter 11 petitions. Moreover, the courts have failed to uphold the constitutional mandate of uniformity in bankruptcy law.[211]

The *UNR* court's decision not to appoint a representative for future claimants does not pose the precedential danger that the *Amatex II* and *Manville* results present, but this safe approach may shut off future claimants' recoveries entirely, or leave the debtor vulnerable to protracted and unlimited liability. The *Amatex II* and *Manville* courts' decisions to appoint a representative for future claimants at least presented an opportunity to provide for future claimants' interests. Unfortunately, because the

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problems of applying different theories of recovery in asbestos cases, see Special Project, *supra* note 5, at 592-607.

Second, the fund would provide a source from which toxic tort victims could recover damages for their injuries. Admittedly, the fund would probably be insufficient to allow full recovery for all plaintiffs and may contain a limited liability provision similar to that in CERCLA. Plaintiffs' recoveries would, nonetheless, be much greater than any recoveries plaintiffs could expect from a bankrupt corporation. Third, because the fund would provide for plaintiffs' recoveries, the threat of toxic tort claims would not send otherwise viable corporations into bankruptcy. Last, the program would ensure that the culpable parties essentially bear the costs of compensating toxic tort victims. For these reasons, a Superfund-type program offers a workable solution to the toxic tort problem.

209. *See, e.g.*, Roe, *supra* note 7.

210. *See, e.g.*, *Asbestos Health Hazards Compensation Act of 1980: Hearings on S. 2847 Before the Committee on Labor and Human Resources*, 96th Cong., 2d Sess. 169 (1980).

211. U.S. Const. art. I, § 8, cl. 4.

Amatex II and *Manville* courts were not willing to hold that future claimants were creditors under the Bankruptcy Code, appointing a representative for these claimants left them in an uncertain position and may have created more problems than the appointment solved. The best approach is for bankruptcy courts to exercise their equitable power to bring future plaintiffs' claims within the broad definition intended in the Code, thereby giving future plaintiffs the rights and the responsibilities of creditors in the reorganization. This approach best accommodates the competing concerns of the debtor, prior claimants, future claimants, and the economy as a whole.

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