

The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry

*Frederick Tung**

Contents

I. Introduction

II. The Bankruptcy Model of Mass Tort Resolution

A. Bankruptcy Reorganization

B. The Mass Tort Debtor

C. An Uneasy Fit

1. Future Claimants' Participation

2. Other Problems

D. Conceptual Bankruptcy Prescription

E. Play in the Joints

III. The Future Claims Representative as Agent

A. Seeking an Agent

1. Underinclusiveness of the FCR Mechanism

2. Appointment of the FCR and the Commitment to Reorganize

B. Reducing Agency Costs

C. The Dominant Role of the Judge

1. What Does the Judge Maximize?

2. Expressing the Judge's Preferences

D. Legal Culture and Group Norms

IV. Tentative Conclusions and Further Inquiries

I. Introduction

Mass torts have become moved center stage in the courts, the academy, and the popular press. The plight of mass tort victims—*asbestos* victims, *Dalkon shield* users, *breast implant* recipients, among others—has become standard fare in the media, and courts and commentators have struggled for several decades attempting to craft just and workable solutions/resolutions of mass tort liabilities. The challenge is to save the business, restructuring its debts, while providing fair treatment to future claimants and achieving a final resolution of their rights against the business.

A "mass tort" problem arises when a company's product has been mass produced and widely distributed before the nature or extent of its harm-generating potential becomes evident. By the time the potential for harm is realized, large numbers of individuals have already been placed at risk through contact or exposure to the product. Many of these at-risk individuals will ultimately will suffer harm from this contact with the product and will look to the manufacturer for redress.¹ The magnitude of the potential liability may cause the manufacturer's demise.

Bankruptcy reorganization has emerged as one legal avenue to for resolving mass tort liability.² The challenge is to save the business, by restructuring its debts,

while providing fair treatment to future tort victims—"future claimants"—and achieving a final resolution of their rights against the business.³ Bankruptcy reorganization results in financial and perhaps economic restructuring of the debtor's business. Parties in interest negotiate over the fate of the business and the distribution of value among claimants.

At the center of this bankruptcy approach to mass tort resolution is the idea of the future claims representative (the "FCR"), a court-appointed agent named to represent then-nameless, faceless future victims of claimed tortious acts already committed by the corporate debtor. The FCR's mandate is to negotiate on behalf of future claimants, asserting their rights as creditors to their pro rata share of value in the reorganized company. This representational device makes possible the crafting of a comprehensive settlement in bankruptcy, one that includes future claimants and disposes of their rights, along with those of other claimants. The FCR device makes possible a sort of constructive participation by future claimants. They claimants, so that they may be bound to any resulting settlement.

While other aspects of the bankruptcy model have been vetted,⁴ this the FCR device has not received the careful scrutiny it deserves. The FCR is in essence an agent without a principal. She is not answerable to her ostensible beneficiaries. Indeed, the absence of the principal is the very circumstance requiring the invention of the device. Given the pressure on bankruptcy claimants to settle, to come to terms so that the debtor may reorganize, standard agency theory might and insights from social psychology may lead us to view the FCR device with some skepticism. One might understandably question whether this mechanism can be expected truly to provide zealous representation for future claimants, who do not choose and cannot monitor their agent. Moreover, their losses are not "vivid" but abstract and prospective,⁵ while the losses of competing claimants are real. While there all agency relationships entail costs.⁶ But the FCR mechanism is particularly problematic insofar as the principals may have enormous individual and collective stakes in the subject of the agency but a complete inability to assure the faithfulness of their agent.

The outcomes in several mass tort bankruptcies have received mixed reviews or worse with respect to future claimants' treatment and their ultimate recoveries.⁷ Assessing outcomes is no doubt a complicated affair, and multiple affair. Multiple plausible explanations exist for both negotiated and litigated decisions outcomes that in retrospect appear to have prejudiced future claimants' interests. This context suggests that an examination of the FCR mechanism is therefore timely.

This Article takes a preliminary step in the investigation. The bankruptcy model of mass tort resolution is still something of a moving target, and the handful of mass tort bankruptcies that have occurred provide only a small data set. In this Article, I sketch the contours of the agency problem. I describe the bankruptcy model, explaining how, where and why the agent might be tempted to shirk. I

raise a cautionary flag, suggesting lines of inquiry, hoping to sharpen the focus on issues of concern.

In Part II, I describe the bankruptcy model of mass tort resolution and the FCR's central role. In Part III, I provide an agency critique of the FCR mechanism. I identify influences that might distract the FCR from the goal of maximizing future claimants' recoveries in bankruptcy. In Part IV, I suggest further avenues of inquiry and conclude.

II. The Bankruptcy Model of Mass Tort Resolution

Conceptually, the bankruptcy model for approach to resolution of mass torts is conceptually no different from bankruptcy reorganization in other contexts. It comports with the general model of bankruptcy reorganization. Creditors negotiate with the debtor over the remaking of the firm, with a confirmed plan detailing the firm. A court-approved plan of reorganization details the structure of the reorganized entity and each creditor's share in the value of that entity. However, the contingent nature of future claimants' rights, their temporal dispersion, and inability to represent themselves make the standard bankruptcy model an uneasy fit. Future claimants cannot participate directly in the multilateral negotiation central to the Chapter 11 process. They cannot strategize and bluster in the hope of attaining a larger share of the fixed pie. They cannot claim their distributions upon plan confirmation, as do other creditors. To address these discontinuities, creative lawyers and judges devised mechanisms to allow the mass tort problem to be massaged into the bankruptcy mold.

However, the fit is not perfect. The mechanisms that enable future claimants' nominal participation in Chapter 11 have a fair bit of play in them. Whether that play works to the benefit or detriment of future claimants depends critically on the quality and zealotry of their representation. This Part describes the bankruptcy model, its mechanisms for inclusion of future claims, and the FCR's critical role.

A. *Bankruptcy Reorganization*

In bankruptcy reorganization, negotiation among the debtor and its creditors decides the fate of the business and the division of value among claimants. The product that emerges from this negotiation is a plan of reorganization, the blueprint for the debtor's restructuring. The plan adjusts the rights and obligations among the debtor and its creditors and equity holders. It may specify reduction of the interest rate or extension of the maturity of certain debt obligations. It may call for payment of some debts at a discount from their prepetition face amount. It may specify reduction of the interest rate or extension of the maturity of certain debt obligations. It may call for satisfaction of other debt obligations with the issuance of new equity by the reorganized entity. The plan may also specify operational changes. For instance, the debtor may be required to

sell unprofitable lines of business or consolidate certain operations. The ultimate goal of this financial and operational restructuring is to assure that the business that emerges from bankruptcy will be economically viable. Upon finding that a proposed plan meets all the requirements of the Bankruptcy Code, a court will confirm the plan, which then binds the debtor and all claimants.⁸

Because of the sheer number of claimants that may be involved in a reorganization and the relative inability of small claimants to participate in a cost-effective manner, unsecured creditors ordinarily negotiate through official representatives in the large cases.⁹ The Bankruptcy Code¹⁰ provides for the appointment of an official committee of Code contains few substantive requirements for any unsecured creditors,¹¹ which ordinarily will comprise the debtor's seven largest unsecured creditors willing to serve.¹² The committee is entitled to retain attorneys and other professionals,¹³ who are compensated—as are the debtor's professionals—from the bankruptcy estate.¹⁴ The Code further contemplates that additional committees may be fashioned, to the extent necessary to assure adequate representation of creditors or equity holders.¹⁵ Official committees and their counsel generally play significant roles in bankruptcy reorganization.

The Bankruptcy Code contains few substantive requirements for any reorganization plan.¹⁶ Instead, it provides a framework for multilateral bargaining. Negotiation over the division of value among claimants occurs, however, in the shadow of two fundamental distributional norms: absolute priority and equal treatment. Under the rule of absolute priority, a class of unsecured claims or interests is not entitled to any bankruptcy distribution unless and until each senior class either consents or is paid in full.¹⁷ The rule of equal treatment requires that similarly situated creditors receive equality of treatment: "Equality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property."¹⁸ These distributional norms, however, provide only the starting point for negotiation. The parties are free to—and generally do—agree to diverge from these norms. What any party ultimately receives in under a plan reorganization depends to a great extent on its negotiating skill and its ability to use its leverage under the Chapter 11 framework.

Creditor leverage in negotiation derives in large measure from creditor consent requirements for plan confirmation.¹⁹ Creditors vote by class. Their claims are classified under the plan, with only "substantially similar" claims allowed in the same class.²⁰ Classes whose rights are impaired under the plan are entitled to vote.²¹ Ordinarily, all impaired classes must approve a plan in order for it to be confirmed.²² If an impaired class of unsecured creditors disapproves a plan, then the plan may be confirmed

only if no class junior to that objecting class receives any distribution in bankruptcy.²³ In other words, creditor classes are entitled to insist on absolute priority in the bankruptcy distribution.

While this substantive rule of absolute priority tends to favor senior creditors, other aspects of the negotiation framework favor junior claimants. The debtor's management typically controls the negotiating agenda, since it initially enjoys "exclusivity"—the exclusive privilege of proposing a plan to the court.²⁴ In large public company reorganizations, the debtor will ordinarily also retain exclusivity for the duration of the case.²⁵ Because the debtor's management typically aligns with equity holders or junior creditors,²⁶ management will often use its agenda control to favor junior claimants, attempting to extract value from senior classes in favor of junior classes. Senior classes can either hold out—insisting on a better proposal from the debtor—or attempt to wrest control of the case from the debtor while threatening—or actually attempting—to have the debtor's exclusivity terminated in order to propose their own plans.²⁷ Or they may move for the debtor's liquidation or dismissal of the case.²⁸

The doomsday scenario for all parties—assuming there is going concern surplus—occurs when deadlock over the division of the surplus value results in the demise of the business and the debtor's piecemeal liquidation. This possibility of mutually assured destruction always lurks in the background, and collective avoidance of this worst case scenario is a primary goal of reorganization.²⁹ But the splitting of the fixed—and perhaps shrinking—pie depends to a great extent on each party's negotiating leverage, which turns in no small part on that party's willingness to threaten and perhaps force a piecemeal liquidation if its demands are not met.³⁰ As Professors Elizabeth Warren and Jay Westbrook have so aptly noted: "We can think of a Chapter 11 negotiation as taking place in a conference room with the debtor sitting in the window threatening to jump . . . while the creditors threaten to push."³¹

As a practical matter, reorganization of large firms is typically consensual. All impaired classes ultimately vote in favor of a plan proposed by the debtor.³² Senior classes agree to forego strict absolute priority, giving up value to junior claimants in order to achieve consensus.³³

This result, however, typically does not occur without significant skirmishing among the debtor and creditor factions.

B. The Mass Tort Debtor

Unlike most firms in bankruptcy, the mass tort debtor does not necessarily suffer current cash flow problems. It may be able to meet its current expenses.³⁴ However, it has a different problem.

Modern manufacturing and distribution enable widespread sale and use of a product long before its harm-generating potential becomes evident to the public.³⁵ The harm involved may also have a "long tail"—that is, the harm may not manifest for years or even decades after sale of the product to end users. The latency period for asbestos-related disease, for example, may run as long as forty years.³⁶ And the liability will not all mature at once, but progressively over time. In addition, the severity of the individual harms that ultimately manifest will vary depending on individual circumstances. While it is impossible to pinpoint how much time or how much liability, it becomes clear at a certain point that the aggregate liability will eventually will be staggering, and the manufacturer's survival is will be in doubt. This staggering liability, along with the sheer number of future victims and the temporal dispersion and varying severity of their future harms, are the hallmarks of the mass tort case.³⁷ These features make difficult the structuring of any final resolution of this future claims liability.

But without some comprehensive resolution, the firm faces a slow death, as future liabilities mature over time, punctuated by the firm's operational collapse.³⁸ As the cloud of future liability becomes darker and darker, financing becomes more and more difficult to obtain. Doubts about the continuing viability of the business grow. Customers and suppliers defect. Financing becomes be more and more difficult to obtain. The business gradually grinds to a halt.³⁹

Rather than wait for this slow death to overtake the business, the firm actively seeks a global solution to the overhanging future liabilities. Bankruptcy is an attractive option, provided that future claimants' rights may be adjudicated in bankruptcy. Asbestos, Dalkon shields, and silicone breast implants⁴⁰—among others—have generated long-tail tort liability sufficient to force their manufacturers into bankruptcy.

C. *An Uneasy Fit*

Future claims in mass tort cases present conceptual and practical problems for the bankruptcy process. Conceptually, future claims are meant to be treated just like other unsecured claims against the debtor in bankruptcy.⁴¹ They are meant to receive some distribution in bankruptcy in final settlement of their rights against the reorganizing firm. However, future claims do not easily fit into the multiparty bargaining regime for corporate reorganization.

I. Future Claimants' Participation

The first and most critical problem is the inability of future claimants to participate and protect their interests in the bankruptcy proceeding. Because their injuries have not manifested by the time of bankruptcy, future claimants may be impossible to identify or even describe except in general terms.⁴² Some may not even have been born at the time of the bankruptcy filing. Even identified, many may not come forward to participate in a proceeding whose potential effect on them is remote. It may be difficult to convince a potential future tort victim to invest resources today in a proceeding that will affect her, if ever, only years into the future.

Whether any type of notice would be meaningful in this situation is questionable.⁴³ If only a remote possibility of future injury exists for any given individual, then even personal notice of the bankruptcy may not be sufficient to satisfy constitutional due process requirements. The Supreme Court has noted in the class action context:

Many persons . . . 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. . . . [W]e recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.⁴⁴

As a practical matter, then, the future claimant may have had no opportunity to assert her rights in bankruptcy. Foreclosing the rights of a creditor under these circumstances would raise serious due process concerns.

Providing due process—including adequate representation—for future claimants, however, may be critical to all parties with a stake in reorganization. From future claimants' perspective, as with other creditors, their rights and opportunities for recovery may be affected by the proceeding. In addition, future claimants as a group also have a special interest in the long-term viability of the business. Given the staggering amount of aggregate future claims liability that drives the debtor into bankruptcy, future claimants will likely be the dominant creditor group—at least in terms of their share of the debtor's overall liabilities. They may therefore be entitled to the lion's share of value in the reorganized debtor. They

may have a legitimate claim to majority ownership of the reorganized firm.⁴⁵ Future claimants as a group will therefore be vitally interested in the viability of the reorganized entity. They will be concerned that the operational and financial restructuring meant to occur in bankruptcy will be successful.

Other parties in interest also have a stake in assuring that due process is accorded to future claimants. A failure of due process would preclude the bankruptcy from affecting future claimants' legal rights. That of course would frustrate the primary purpose of the bankruptcy filing—to achieve a comprehensive and final settlement of all future claims liability.

2. *Other Problems*

Even assuming that due process protections for future claimants could be engineered, future claims raise other problems for bankruptcy reorganization. Future claims liability is by definition contingent. Its temporal dispersion makes its aggregate amount difficult to quantify in advance. Therefore, it is difficult to determine what future claimants' proportionate share of the reorganized debtor's value should be. Even if this aggregate figure could reliably be determined, the subsequent delivery of individual compensation presents problems. How can individual bankruptcy distributions be made to unknowns whose respective who will suffer injuries that will individually manifest for decades into the future? How will each future claim be liquidated when it matures? Once liquidated, where shall the future claimant—now injured—turn to collect her promised compensation?

D. *Conceptual Bankruptcy Prescription*

By fits and starts, lawyers and courts improvised solutions to these issues as they arose. Today, we can speak of a "traditional" approach.⁴⁶ To borrow Peter Schuck's phrase, an "institutional evolution" has occurred in the bankruptcy model of mass tort management.⁴⁷ To enable future claimants to participate in the plan negotiation process and other aspects of the bankruptcy proceeding, a special legal representative for future claimants—the FCR—is appointed.⁴⁸ Complex estimation proceedings are conducted in order to value future claims, thereby fixing the manufacturer's aggregate liability and ascertaining future claimants' collective share of value in the reorganized debtor.⁴⁹ That share of value is paid to future claimants in trust. A trust is created to hold and husband the assets set aside for future claimants.⁵⁰ A claims resolution facility is structured to streamline claims liquidation and disburse payments as future claims mature.⁵¹ A "channeling injunction" enjoins future claimants from

pursuing the reorganized debtor or any successor to the debtor's business or assets. Future claims are instead channeled to the designated payment trust, and the going concern is insulated from postbankruptcy suit by future claimants.⁵²

These improvisations received limited after-the-fact approval by Congress in 1994 with its adoption of the so-called Manville Amendments to the Bankruptcy Code,⁵³ named after the case that pioneered the basic structure of the traditional approach. With the Manville Amendments, Congress affirmed the practice of enjoining future claimants' pursuit of the reorganized debtor or certain third parties after plan confirmation, provided that certain provisions had been made for future claimants in the case—for example, appointment of a FCR⁵⁴ and establishment of a payment trust.⁵⁵ This Congressional blessing was specifically limited to asbestos cases.⁵⁶

More recently, the National Bankruptcy Review Commission has recommended legislation adopting a similar approach, which would apply not only to asbestos cases but would be available in all mass future claims liability situations.⁵⁷

E. Play in the Joints

This now-traditional approach to mass tort reorganization seems both elegant and straightforward conceptually. Ingenious devices are employed to bring future claimants into the bankruptcy process, enabling vindication of their rights as creditors while saving the business for the benefit of all parties in interest. Hidden in the details, however, are numerous issues affecting the fortunes of future claimants and others. There is play in the joints of this mass tort reorganization process. Whether future claimants or other competing claimants benefit from that play Quite of bit of slack lies buried in the system. How much of that slack gets taken up for the benefit or detriment of future claimants or other parties will depend in large partmeasure on the negotiating skills of their respective agents.

For instance, the process of estimating aggregate future claims liability is critical to determining the entitlement of future claimants—and other creditors—to their pro rata share of the value of the reorganized debtor. This process is basically a battle among competing experts, turning largely on statistical analysis based on various assumptions. If the assumptions are wrong, future claimants may suffer.⁵⁸ The Manville Trust ran out of assets after less than two years in operation and had to be restructured over six years of litigation.⁵⁹ Originally intended to pay all future claimants in full,⁶⁰ the restructured trust will pay only pro rata amounts, with an initial pro rata payment of 10%.⁶¹ During the course of Manville's bankruptcy, the estimated total number of claims was revised upward several times. By

the time of plan confirmation, the funding of the trust was based on an assumption of 100,000 claims at a present value of \$25,000 each.⁶² However, "[c]ircumstances quickly outstripped projections concerning the number of claims, the rate at which they were filed and their average value."⁶³

Given the uneasy mix of science and law, the range of expert estimates presented during the claim estimation process may be fairly broad. In *A.H. Robins*, five experts gave estimates of aggregate unliquidated Dalkon Shield claims liability ranging from \$800 million to \$7 billion,⁶⁴ a difference of 875% between the low and high estimates.

Now, the claim estimation mechanism in bankruptcy is not unique to mass tort cases. Bankruptcy courts resort to claim estimation whenever the ordinary course liquidation of a contingent or unliquidated claim would unduly delay administration of the case.⁶⁵ However, several aspects of mass tort cases make estimation especially tricky. Given the potential magnitude of the liability, the outcome may determine the proportionate shares of ownership of the reorganized debtor.⁶⁶ In addition, the number of individual claims and their temporal dispersion make estimation fairly speculative. In the face of these daunting factors, the court in *Dow Corning* basically refused to take on the task or even to establish estimation procedures.⁶⁷ Instead, the court left the entire fair distribution issue for the parties to negotiate.⁶⁸ Given this context, zealous representation and expert advice therefore seem imperative on all sides in order to assure that estimation—whether court-conducted or informally negotiated—does not work to the prejudice of particular claimants.⁶⁹

The structuring of a payment mechanism—a claims resolution facility and payment trust—is also no easy matter.⁷⁰ Different structures may tend to favor some interests over others. For example, at one point in the *Robins* bankruptcy, it was proposed that any money left in the Dalkon Shield claimants' trust after all claims had been paid would revert to reorganized *Robins*.⁷¹ That arrangement, of course, would have given the company incentive to push for a claim resolution structure and administration that would minimize payments to tort victims.⁷²

Some structures may favor early maturing future claims over later maturing ones or vice versa. There may be pressure to "lowball" early claims in order to preserve enough assets to pay later claims. While distributing assets fairly among future claimants is certainly a laudable goal, worthy end, there may be other motivations at work as well. For example, if the claim estimation process in a given case were controversial and the court's ultimate estimate of aggregate mass tort liability debatable, parties in interest or the court might care about legitimating the outcome

after the fact. One way to do that is to make sure the trust still has assets on the day the last future claim has been paid off.⁷³ If this happens, then arguably the court's estimate was "correct" and the bankruptcy process was fair to future claimants. This scenario is not merely hypothetical. The *A.H. Robins* court specifically retained postconfirmation jurisdiction to supervise the Dalkon Shield Claimants' Trust in order to "assure the accuracy of the Court's estimate."⁷⁴

Because of the play in the joints of the traditional model for mass tort bankruptcy, the FCR's role is critical. The quality and zeal of her representation determine the likelihood and amount of future claimants' recoveries. As important, because of the aggregate amount of claims she represents, she wields a heavy club. Given the dollar value of their claims in the mass tort context, future claimants are likely to be a major—and perhaps dominant—creditor group.⁷⁵ The FCR is potentially a major voice in the reorganization process, with potential leverage either to assure future claimants' future compensation or to scuttle a deal not to her liking. This critical role requires a careful look at the terms of the FCR's agency.

III. The Future Claims Representative as Agent

The FCR device enables future claimants to participate in mass tort reorganization, asserting their rights as creditors through their representative. Bankruptcy's binding effect on future claimants depends on this constructive participation. However, severe agency problems exist with the FCR mechanism. The fundamental—and unavoidable—problem is that the purported principals play no part in choosing or monitoring their agent or even in deciding whether to retain one at all. Instead, other parties in interest—the debtor and other creditors—initiate the process, and the judge decides whether and whom to appoint,⁷⁶ as well as the terms of the agency. All these actors have interests that will conflict with those of future claimants.

Ultimately, the FCR mechanism may not assure zealous representation of future claimants' interests. The appointment process, judicial oversight of the FCR, and group pressure may discourage a FCR's zealous pursuit of future claimants' interests. The FCR has principals only as a conceptual matter. The terms and quality of the FCR's representation are not subject to oversight by her ostensible "clients." A significant potential exists, therefore, for divergence between the respective interests of principal and agent.

This Part first describes standard agency problems with the FCR device. It then describes an institutional context that may inhibit the FCR's zealous advocacy for future claimants. In particular, the influence of the judge, the other lawyers involved in the mass tort case, appointment process, judicial oversight of the FCR, and the culture of consensual reorganization may

causetogether discourage a FCR's zealous pursuit of the FCR to compromise future claimants' interests.

A. *Seeking an Agent*

Before establishing a principal-agent arrangement, the principal must first decide whether to rely on an agent at all. An agent's interests will never perfectly coincide with those of her principal. The agent will always have some incentive either to shirk or to pursue her own interests instead of those of her principal. Despite this inevitable divergence of interests, relying on agents still makes sense in many contexts.⁷⁷ A principal will rely on retain an agent as long as the costs of doing so are less than the costs to the principal of acting on her own behalf. These latter costs include the principal's opportunity costs and the costs of developing any specialized skill or expertise she may need to accomplish her end. For example, a client may seek out legal representation even knowing that no attorney will advocate her position as zealously as she herself would herself would. It will typically be cheaper for the client to buy the lawyer's expertise—even discounted for the imperfections of the agency—than for the client to develop the skill set necessary to represent herself effectively.⁷⁸

Future claimants, of course, typically have little choice in this regard. They do not initiate appointment of a FCR. They may not even know of their stake in the bankruptcy. Even with full information concerning her risk of future harm and the possibility that the bankruptcy proceeding will affect her rights, a future claimant may rationally choose not to participate, either personally or through an agent. She runs only a *risk* of future harm, while the costs of her participation would be a certainty.⁷⁹ The expected value of participating would likely be negative.⁸⁰

The Unfortunately, the appointment of the FCR will typically occur at the instigation *not* of any ostensible principal, but at the behest of the debtor and other represented parties. Their purpose is to improve their own returns in bankruptcy by arranging a comprehensive settlement of future claims liability. This suggests the result-oriented nature of the FCR mechanism. It *is* a device to protect the rights represent the interests of future claimants, but not in all bankruptcies, and not even in all mass tort bankruptcies, but only in those cases in which *other* parties have an interest in securing representation for future claimants. The FCR's agency is an atypical one in this respect. Not only is she *not* selected by her ostensible principals, but the principals do not seek out the agency relationship. The principals have no say in the retention of the agent at all. Instead, appointment occurs at the behest of parties that *are already* represented in the case.⁸¹

This prompts several observations.

1. *Underinclusiveness of the FCR Mechanism*

As a group, future claimants are generally better off having their rights recognized and settled in bankruptcy. Absent a comprehensive settlement, the business would likely fail eventually,⁸² and future claimants with late-maturing claims would have no avenue of recovery when their respective claims matured.⁸³ In this respect, the FCR mechanism benefits the group of future claimants by overcoming a collective action problem among them,⁸⁴ much like the class action mechanism.⁸⁵

However, because future claimants cannot ordinarily initiate appointment of a FCR, they must rely on other parties to do it. And those other parties will have interests opposed to those of future claimants. The impetus to recognizing and settling future claimants' rights is not simply some abstract desire to do justice or treat future tort victims fairly. Instead, it derives from the recognition by other parties in interest that they have something to gain from resolving future claims liability in bankruptcy, and that appointment of a FCR is necessary to that end. In particular, parties decide that a reorganization of the business will maximize returns to them, provided future claims liability can be resolved.⁸⁶ And the parties conclude that only with representation may future claimants' rights be affected in bankruptcy.

Presumably in many cases whereIf the debtor's business were to be liquidated instead, there would typically be no incentive for other parties in interest to include future claims in the bankruptcy distribution, and therefore no incentive to provide for their representation. In these cases, no FCR is appointed, and future claims arewill be ignored in the bankruptcy. But if future claimants are truly creditors with rights cognizable in bankruptcy, then they deserve equal treatment with other unsecured creditors, whether the debtor is liquidating or reorganizing.⁸⁷ Representation may be critical to assuring equal treatment. But future claimants will not always be represented.

In *Locks v. U.S. Trustee*,⁸⁸ Gene Locks, a lawyer for asbestos claimants, attempted to have himself appointed as the FCR, a move opposed by the debtor and creditors' committee. The committee represented prepetition asbestos claimants—those whose disease had already manifested.⁸⁹ The debtor was liquidating, and, since there would be no business left to save from overhanging future claims liability, the court was unwilling to recognize future

claimants as creditors, citing among other reasons the administrative costs of maintaining a facility to pay future claims and the minimal dividend they would receive. Future claims received no distribution.⁹⁰

In the *Piper Aircraft* case, future claimants were lucky. An FCR was appointed at the behest of a prospective acquirer of the debtor's business.⁹¹ The debtor and creditors' committee had agreed that the business should be sold, but it seemed unlikely that a buyer could be found unless future products liabilities of the extant fleet were resolved in the bankruptcy and successor liability risks eliminated. Formal representation of future claimants would be necessary to bind them to any plan.⁹² Later in the case, however, the debtor and committee decided that a buyer *could* be found without addressing future claims liability.⁹³ But by that point, the FCR had already been appointed, and there was no way to get rid of him! Future claimants would have to be accounted for in the bankruptcy distribution.⁹⁴

Even in reorganization, the judge may refuse to appoint an FCR. In *Dow Corning*, for example, the future claimants were women with allegedly defective breast implants manufactured by the debtor. Alan B. Morrison, a noted public interest lawyer, tried to get himself appointed as their FCR. His application was opposed by the official tort claimants' committee, which officially represented all women with defective implants, regardless of whether they had manifested health problems.⁹⁵ The judge rejected the application.⁹⁶ The judge agreed with the tort claimants' committee that all claimants were capable of coming forward and representing their own interests, despite the fact that some potential claimants had not manifested any injury from the implants.⁹⁷

As an institution for the representation and protection of future claimants, the FCR device is underinclusive. Its use suggests not so much a concern for otherwise unrepresented claimants, but instead a need to provide due process cover in order to bind future claimants to a reorganization plan.

2. *Appointment of the FCR and the Commitment to Reorganize*

Once application has been made for appointment of the FCR, then it is up to the judge to decide whether to appoint. Presumably, the judge will favor appointment if she agrees with the assessments of the moving parties concerning the promise of reorganization and, to that end, the necessity of resolving future claims liability.⁹⁸

A consequence of this initial screening process by parties in interest and the court is that they have all become invested in the prospect of a successful reorganization. The decision to appoint an FCR is an important milestone in committing to reorganization.⁹⁹ The court and parties in interest effectively commit to the view that the debtor's business should be saved, and that future claimants are entitled to a share of value in the reorganized entity. And tThese commitments are more or less irrevocable. The FCR's appointment implicitly recognizes future claimants' rights in the case, and once appointed, the FCR cannot be decommissioned. The court and parties in interest commit to including future claims in the bankruptcy distribution, as well to the complex—and expensive—mechanisms necessary for estimation, liquidation and payment of those future claims. All of this overhead, along with the costs of having an FCR at all, might be difficult to justify if no going concern surplus were in the offing—that is, if the debtor's business were ultimately liquidated.¹⁰⁰

This escalating commitment to reorganize affects the entire course and conduct of the bankruptcy case. While a successful reorganization is certainly a desirable outcome, *how* that outcome is achieved also matters. This commitment to reorganize affects the judge, the FCR, and other parties in interest in ways that may be inimical to future claimants' interests. While all parties stand to benefit from a successful reorganization, future claimants' inability to select or monitor their agent disadvantages them in terms of the ultimate division of value in reorganization.

With the power to decide whether and whom to appoint, the judge will wish to select a "safe" FCR, one who subscribes to the common goal of reorganization. The FCR, the judge, and other parties in interest will understand this role for the FCR, and their respective expectations of the FCR's conduct will be affected accordingly. The FCR's latitude to champion future claimants' cause may be circumscribed. She is not negotiating on a clean slate, as she would be if her appointment did not depend on this collective precommitment to reorganization.

The FCR may face pressure to compromise future claimants' interests in subtle ways. Bankruptcy reorganization facilitates collective action among claimants in order to preserve the debtor's going concern surplus, and the legal culture in large corporate reorganization is one that ultimately values consensual resolution. However, the division of the going concern surplus among claimants depends to a great extent on claimants' relative ability to bluster and threaten to defect.¹⁰¹ The FCR may be singularly

handicapped in this poker game. Of all the bargaining agents, the FCR has the widest discretion to settle and the least credible threat to defect. The late House Speaker Sam Rayburn would advise new members of Congress, "To get along, go along." The context of large firm reorganization may give incentive for the FCR to do just that.

In the next section, I discuss future claimants' inability to monitor their representative. I then discuss other influences that may be brought to bear on the FCR in reorganization—namely, the influences of the judge and other parties in interest.

B. *Reducing Agency Costs*

Getting beyond the screening process for appointment of the FCR, a wholly separate set of issues arise in those cases in which an FCR is ultimately appointed. The agency costs of the FCR arrangement may be quite high.

A principal may ordinarily reduce agency costs by affecting her agent's incentives, rewarding behavior consistent with the principal's interests and penalizing deviations. A principal may monitor performance of her agent, intervening directly to penalize shirking or other undesirable behavior. The principal and agent may also decide in advance that specific benchmarks will be used to assess an agent's performance *ex post*, with rewards or penalties depending on such benchmarks. Player contracts in professional sports, for example, routinely contain bonus contingencies for exceptional performance based on objective measures.¹⁰²

In lawyer-client relationships, unfortunately, clients often lack the expertise to assess the quality of a lawyer's advocacy or work product, or even to question the lawyer's bills.¹⁰³ Monitoring may therefore not be effective, and specifying objective *ex post* benchmarks for evaluation may be infeasible. In the case of future claimants, they have all these disabilities as clients and more. Even if they had the expertise to monitor or evaluate their agent, they do not choose their agent or negotiate the fee arrangement or participate at all.¹⁰⁴ Therefore, they can neither set incentives *ex ante* nor monitor *ex post*.¹⁰⁵ They have no way to assure the faithfulness of their agent.

Moreover, the quality of the FCR's representation of future claimants will realistically *never* be subjected to scrutiny by the ostensible principals. Not only are the principals absent, but they are amorphous and scattered. Many may not even discover their stake in the reorganization until decades after its conclusion. Given the complexity of the mass tort reorganization process and the lapse of time between the closing of the

case and the maturing of many of the future claims, it is unlikely that any particular future claimant would have sufficient incentive to review—let alone challenge—the FCR’s performance.¹⁰⁶

Since future claimants are disabled from influencing the FCR’s agency, in the way that typical principals would, that leaves open the question of what other influences operate on the FCR and how they affect her representation of future claimants. Given the absence of monitoring by the FCR’s ostensible principals during the case and the FCR’s virtual insulation from retrospective scrutiny, these other influences deserve careful consideration.

C. *The Dominant Role of the Judge*

Because future claimants are unavailable to decide whether to retain an agent for themselves, select an agent, or arrange the terms of any agency, those tasks fall to the judge. Once the judge has decided to appoint, it is up to her to select the FCR and decide the terms of the appointment. Typically, the U.S. Trustee recommends an individual, whom the court approves after notice and hearing.¹⁰⁹ While the judge may not necessarily perform the initial screening, she has the final say over the FCR’s appointment as well as the terms of that appointment.¹⁰⁸ She defines the FCR’s powers and duties. In addition, the judge’s control over the purse—that is, the judge’s power over professional fees¹⁰⁹—and over the FCR’s retention of professionals¹¹⁰ may have a significant effect on the FCR’s ability to serve as the zealous advocate.

By contrast, other official appointments in bankruptcy are made by the U.S. Trustee. In particular, the U.S. Trustee appoints the creditors’ committee in Chapter 11¹¹¹, and the committee and debtor choose their own attorneys and other professionals.¹¹² This role for the U.S. Trustee was created expressly for the purpose of removing the judge from the administrative aspects of bankruptcy cases. Prior to the inception of the U.S. Trustee program, judicial involvement with appointments and supervision of appointees led to (i) appointees either feeling or appearing beholden to judges,¹¹³ and (ii) judges developing feelings of personal responsibility for the success or failure of their cases.¹¹⁴ Analogous dangers may exist with judges’ involvement in the FCR appointment process. Unlike members of creditors’ committees or their professionals, the FCR is beholden to the judge for her appointment.¹¹⁵ And the judge may also feel some proprietary interest in "her" FCR and the conduct of the case.

Judicial control of the FCR is not an entirely objectionable practice, given that the FCR, with no principal monitoring her actions, would otherwise

be unconstrained. But this practice of judicial supervision necessarily requires us to consider the judge's incentives.

1. What Does the Judge Maximize?

Where does the judge's self-interest lie? Even posing this question might have seemed heretical in the not-too-distant past:

"[C]riticizing judges for self-interested behavior . . . is considered by many to be as profane as accusing the Pope of a lecherous eye, a charge well-nigh outside the bounds of civilized discourse."¹¹⁶

Recent scholarship, however, has focused attention on judges as utility maximizers, not necessarily immune to the pursuit of self-interest.¹¹⁷

What does the judge seek to maximize in the mass tort case?¹¹⁸ To answer this query, it is important to understand the relative novelty of a mass tort case on any bankruptcy judge's docket. It will undoubtedly involve a large company. Outside of the Southern District of New York and the District of Delaware, "megabankruptcies" are not common affairs.¹¹⁹ A mass tort filing is likely to be one of the largest—if not *the* largest—and most widely followed bankruptcy case over which the judge has ever presided. Especially given the mass harm involved, the case is likely to attract significant public scrutiny.

Given the public and professional attention focused on the case, the judge will have a reputational stake in the conduct and outcome of the case. A well-managed case with a good outcome will maximize the judge's prestige and reputation. Therefore, the judge will wish to appear competent—intelligent, an efficient case manager. A perception of fairness may also be important. In terms of outcome, the judge's best hope is that the debtor successfully reorganize, and that it do so on a consensual basis—that is, all impaired classes vote in favor of the plan.¹²⁰ A "successful" outcome is one that saves the company. Many employees will keep their jobs. The local community preserves its tax base. Existing customer and supplier relationships with the debtor continue. Going concern value is preserved. And future claimants are promised compensation for their future injuries.

In the mass tort context, saving the going concern may be especially beneficial in terms of reputational enhancement. The cases are complex. The legal and logistical issues are daunting. Moreover, having agreed to appoint the FCR in the first place, the judge—as well as the parties in interest—have already escalated their commitment to reorganization.¹²¹

2. *Expressing the Judge's Preferences*

How does the judge's preference for reorganization affect the FCR mechanism? Certainly, the process of appointing an FCR and defining the terms of the appointment allow the judge an opportunity to express her preferences. A judge—and certainly parties in interest—might be less interested in finding a person to provide zealous representation for future claimants than one who understands the paramount goal of reorganization. The ideal candidate may be one who will provide "adequate" representation, understanding and subscribing to the ultimate aim of reorganizing the debtor.¹²²

In *Robins*, for instance, the court agreed to the appointment of a FCR, but the judge chose a surprisingly junior person for the task, given the size of the case and the caliber and experience of the other lawyers involved.¹²³ Stanley Joynes, the appointee, was a young lawyer who apparently had no significant bankruptcy experience at the time of his appointment.¹²⁴ The court also refused Mr. Joynes' request to retain a bankruptcy expert in the case. Joynes' proposed expert, Professor Vern Countryman of Harvard, was willing to work for a remarkably low hourly rate. The sum total of Professor Countryman's fees in the case would not likely have exceeded \$50,000, a pittance compared to the fees paid to the lawyers and other professionals retained by the debtor and official committees in the case.¹²⁵ The court was apparently concerned with duplication of effort and unnecessary expense!¹²⁶

Appointment of an FCR, then, does not typically constitute a blank check for the agent to fight the good fight on behalf of the principal. In *UNR*, the court initially refused a request to appoint an FCR.¹²⁷ On appeal, the Seventh Circuit dismissed, finding that the judge's order was not a final order and therefore not ripe for appeal.¹²⁸ Judge Posner did suggest, however, that future claims might properly be handled in bankruptcy.¹²⁹ Upon a subsequent motion to reconsider, the bankruptcy court agreed to the appointment, ordering that the FCR's "primary task" would be "to advise putative asbestos disease victims of the pendency of and their interest in these bankruptcy proceedings."¹³⁰ In addition, the FCR "may also be heard" with respect to any plan of reorganization and any motion to convert the case. However, the FCR was required to seek leave of the court to become involved in any other litigation.¹³¹ In subsequent litigation, the court expressed the view that defining the scope of the FCR's powers and duties was a matter of administration, as to which the court had final decision-making authority. "This Court can alter or amend [the

FCR's] powers and responsibilities as circumstances might dictate."¹³²

In addition to sticks, judges have carrots at their disposal with respect to managing the FCR. In *Johns-Manville*, the first of the mass tort bankruptcy cases, the judge ultimately awarded the FCR a 100% premium over and above his fee for his billed hours.¹³³ From future claimants' perspective, however, the representation was hardly ideal. The FCR, rather than a single-minded advocate for future claimants interests, played instead the "honest broker" among represented constituencies. While he successfully brokered a consensual plan of reorganization in an enormously complex case—presumably justifying his 100% bonus in the judge's eyes—future claimants fared quite badly in the resulting deal.¹³⁴

Given this sort of judicial management, the FCR in the course of her representation of future claimants must necessarily consider not only what is best for future claimants, but also what the judge wants. These two sets of interests may not always coincide.

In addition to the judge's control over the selection of the FCR and the terms of her agency, the judge has significant influence over other aspects of the case that directly affect future claimants and the prospects for reorganization. An estimation proceeding, for instance, fixes the aggregate amount of future claims liability. By fixing this number, the judge effectively sets an important negotiating parameter. She decides how much future claimants are "owed," and therefore resolves future claimants' maximum entitlement under the plan. A small number may be better than a big number in terms of facilitating reorganization,¹³⁵ since a high estimate of future claims liability shrinks all other slices of the reorganization pie. Competing claimants' recoveries must necessarily be reduced, the larger the share of value that belongs to future claimants. However, creditors staring at quantifiable out-of-pocket losses may be less willing to take a "haircut"—a recovery discounted from the face amount of their debt—than a FCR, whose clients' losses are not vivid.¹³⁶ Indeed, the losses have not yet occurred. They are prospective and somewhat conjectural. This is not to suggest that a judge *would* consciously skew an estimate in order to preserve value for current claimants. But the mere potential for this may dampen the FCR's enthusiasm for a fight.¹³⁷

The judge's preference for reorganization, then, combined with her control of the terms of the FCR's appointment and the case itself, may curb the FCR's enthusiasm for zealous advocacy for future claimants' interests. No direct order need be given by the judge.

The FCR may simply find it easier to go along. While there may be countervailing considerations that give the FCR incentive to take on the judge or other creditor groups,¹³⁸ the fear of client reprisal is not an issue. The FCR has no client calling.

D. Legal Culture and Group Norms

The judge is not the only influence affecting the FCR. The mass tort case is a species of "megabankruptcy," and megabankruptcy has its own culture. The FCR must operate within this culture, which values consensual reorganization. In particular, lawyers in the large cases understand that consensual reorganization is the responsible approach, and that they may have to forego strict enforcement of their clients' legal entitlements in order to achieve consensus. In this culture, the FCR may be peculiarly vulnerable to group pressure to compromise her clients' interests.

The lawyers and other professionals who regularly appear as the key players in the reorganization of large, publicly held companies form a fairly small community.¹³⁹ Members of this group can expect to be repeat players in the large cases. As such, they have some incentive to cooperate with each other.¹⁴⁰ As with any culture, this group has shared understandings—norms about how cases are conducted and disputes resolved.¹⁴¹

Lynn LoPucki and Bill Whitford have noted the high incidence of consensual plans in the large reorganizations—all impaired classes ultimately approved the plan—and that distribution of value under such plans almost invariably deviates from the absolute priority rule. In their sample of cases, although debtors were clearly insolvent—and therefore equity holders had no legal entitlement to *any* bankruptcy distribution—senior classes nevertheless ultimately gave up value to equity holders.¹⁴²

Lawyers interviewed asserted that consensual plans were the norm because of the expense and delay of litigating nonconsensual "cram down" plans. And the distributions to equity were the "price of peace."¹⁴³ LoPucki and Whitford found, however, that the avoidance of litigation costs could not explain the size of the distributions to equity, which were worth significantly more than potential litigation costs.¹⁴⁴ Cram down was not necessarily undesirable from an economic standpoint. But it was "just not done."

Although these cases were spread throughout the United States, most of the lawyers who played key roles in them were members of the same legal community. They could expect to be involved in future cases with their current adversaries and were to various degrees dependent on those

adversaries for professional respect and advancement. They were not entirely free to ignore the conventional wisdom that consensual plans were the responsible, appropriate means for accomplishing reorganization and that despite the absolute priority rule, everyone at the bargaining table was entitled to a share.¹⁴⁵

Social norms require that everyone at the bargaining table receive a share, legal entitlements notwithstanding. In the large cases, lawyers expect ultimately to settle. Moreover, they willingly compromise their clients' legal entitlements when no clear legal or economic justification exists. If lawyers with "real" clients will compromise in obeisance to group norms, how much worse off will future claimants be with the FCR? From which classes will the value come that is necessary to achieve consensus in the mass tort bankruptcy? The most ready source is the class of future claims, which are the most abstract and conceptual of legal entitlements. The dollar amount of claims is a statistical and scientific construct. Moreover, the clients themselves are somewhat abstract, at least at the time of the bankruptcy.¹⁴⁶

The division of value among claimants occurs over multiple negotiations in the case. The fight over estimation, the design of the claims resolution facility, and valuation of the consideration to be placed in trust for future claimants, for example, all are issues that will affect the ultimate bankruptcy distribution. Sometimes confrontation beats cooperation in terms of serving the client's best interest. Any lawyer unwilling to push, or unable to mount a credible threat that it *will* push, is disadvantaged in the negotiation.

The FCR may be peculiarly disadvantaged in her ability to bluster. Given the group norm toward consensus—the "responsible" approach—the FCR might be more readily ostracized by the group for disruptive hold-up behavior than would other lawyers. All other players have clients to whom they answer. Any recalcitrance on their part might be understandable. No such countervailing consideration is available to the FCR. All bargaining agents in Chapter 11 enjoy some degree of independence from their constituents.¹⁴⁷ None, however, is quite so free as the FCR.

Given the small community of lawyers involved in the large cases, the FCR will have some stake in maintaining good standing with the group. Professional reputation and opportunities for future work in the megacases may turn to some extent on other group members' opinion of the quality of the FCR's representation.

[L]awyers . . . had an incentive to be concerned not only with the welfare of their clients but also with their relationships to each other. Lawyers who act unconventionally in a particular case may find it difficult to negotiate

effectively in future cases with the other lawyers. Moreover, the other lawyers are likely to form and express opinions about the quality of the lawyer's representation, and these opinions may influence whether the lawyer obtains future clients. . . . Social norms typically are enforced by ostracizing violators and these norms are no exception.¹⁴⁸

Obstructionist tactics that violate group norms may lead to accusations that the FCR was a "crazy" or "troublemaker."¹⁴⁹ Lawyers with "real" clients succumb to the pressure of the group norms. For the FCR, subscribing to the group norms is likely costless.

IV. Tentative Conclusions and Further Inquiries

The FCR device ought to be viewed with a degree of skepticism. The result-oriented nature of the FCR mechanism, the influence of the judge, and the legal culture of the megabankruptcy—coupled with the absence of principals to monitor the FCR's behavior—together give cause for concern.

Have future claimants gotten good deals or raw deals in the mass tort bankruptcies to date? Assessment of outcomes is not a straightforward task. First, given the relative handful of cases, broad generalizations would be ill-advised; only tentative assessments are appropriate. Second, there is the problem of ascertaining the appropriate baseline for comparison. The evolution of the traditional bankruptcy approach has occurred in the face of significant legal uncertainty. While courts have upheld the various elements of the traditional approach, some uncertainty still exists concerning (a) future claimants' status as creditors in bankruptcy, (b) bankruptcy courts' power to estimate future claims liability for distribution purposes, (c) bankruptcy's ability to bind future claimants to the terms of a confirmed plan and courts' power to enjoin future lawsuits against the reorganized debtor or its successors.¹⁵⁰ Therefore, future claimants' entitlement in bankruptcy has not always been clear. This is a separate problem from the issues of effective representation raised by the FCR mechanism, but one that has also affected future claimants' treatment in bankruptcy.

The mass tort problem may well-nigh be intractable for courts and lawyers, who have been left to craft prospective solutions—providing compensation systems for harms that have not yet occurred—only because of legislative inaction. One might credibly assert that saving the debtor and providing some compensation to future tort victims at all should be considered a victory.

Moreover, the FCR mechanism may be the best of a whole host of imperfect alternatives.¹⁵¹ Given an appropriate benchmark, empirical research may show that the FCR mechanism has worked well on the whole. Despite the absence of principals, other influences may exist that serve as adequate substitutes for actual monitoring of the agent. Public scrutiny of future claimants' fortunes in these highly visible cases might provide a substitute for active monitoring of the FCR

by real principals. However, given the complexity of the proceedings—both legal and scientific—public assessment of outcomes might be difficult. Assessment of the performance of particular individuals would be even more problematic.¹⁵²

Reputational concerns may exist that cause the interests of the FCR to align with those of future claimants in maximizing recoveries to the latter. Or perhaps norms of professional integrity and responsibility operate to constrain shirking or self-interested behavior by the FCR. The prospect of *repeat* business as a FCR is probably not very promising, given the rarity of mass tort filings. Moreover, given judges' incentives, an overly aggressive FCR from an earlier mass tort case may not be an attractive candidate for a subsequent appointment. On the other hand, competent and faithful representation of future claimants might plausibly facilitate a reputation for professionalism and integrity, qualities that would be useful in landing other representations. Stanley Joynes, for example, the young and inexperienced lawyer picked to represent the *Robins* future claimants, served future claimants "admirably."¹⁵³ He was later retained by the official physicians' committee in the *Dow Corning* case.¹⁵⁴

To the extent external influences exist to align the interests of FCRs with future claimants, these influences need explaining. If they do not currently exist, then perhaps they could be manufactured. Perhaps a compensation arrangement for the FCR could be designed to encourage her attention to future claimants' ultimate recoveries. That is, the FCR could be explicitly reconceptualized as an entrepreneur—as well as an agent—and given some financial stake in maximizing future claimants' recoveries.¹⁵⁵ This approach would require, among other things, a bankruptcy judge willing to turn the FCR loose to advocate for her clients. Or, given that the Chapter 11 culture creates pressure to compromise future claimants' interests, perhaps influences from outside this culture could be imported. A federal agency with a strong consumer protection culture—the Federal Trade Commission, for example—could be enlisted to participate in reorganizations involving mass tort claims.¹⁵⁶

In any event, a "traditional" approach to mass tort bankruptcy has emerged. It is high time that the FCR mechanism, a central feature of this bankruptcy model, receive careful consideration. This Article sketches some of the major issues, with the hope and expectation of further scholarly and professional attention to the subject.

* Professor of Law, University of San Francisco School of Law. A.B. 1983, Cornell University; J.D. 1987, Harvard University. Many thanks to David Epstein for invaluable conversation and critique of an earlier draft of this paper. Thanks also to Judge Sam Bufford for his thoughtful comments during the symposium. I am also indebted to numerous colleagues at the University of San Francisco School of Law, who participated in a faculty workshop and commented on earlier drafts. The usual disclaimer applies.

1. Other parties as well—distributors, insurance companies, successor companies—will also be named as defendants.
2. The other is the settlement class action. *See* Roger Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343 (1995).
3. Future claims are those potential future products liabilities that exist but have not matured by the conclusion of the bankruptcy case. The debtor-manufacturer's liability-creating conduct occurred prebankruptcy, but any harmful consequence has yet to appear.
4. On estimating future claims, *see* David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy,* 32 Wake Forest L. Rev. 1119 (1997) (critiquing various approaches used by bankruptcy courts and advocating statistical methods). On the design of claims resolution facilities, *see* Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts,* 53 Law & Contemp. Probs. No. 4 (1990), which discusses claims resolution facilities designed in class actions as well as in bankruptcy. On discharging future claimants, *see* Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy,* 44 S.C. L. Rev. 745 (1993) (concluding that discharge is constitutionally permissible); G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge,"* 84 Iowa L. Rev. 753 (1999) (finding that discharge of future claims is impermissible with respect to third party non-debtors).
5. *See* Mark J. Roe, *Bankruptcy and Mass Tort,* 84 Colum. L. Rev. 846, 855 (1984) (noting society's willingness to spend more on current identifiable victims and less on future statistical victims despite expert consensus that dollars are better spent on latter); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy,* 104 Yale L.J. 367, 383 (1994) (noting in the mass tort context that "[p]resent claimants have powerful psychological advantages over future claimants in their battle to maximize their share of the debtor's estate. Present claimants in mass tort bankruptcies are identifiable persons with urgent medical and financial needs, while future claimants are only statistical probabilities."). *See generally* Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 43-62 (1980) (finding that cognitive processes tend to lead us to overemphasize information which is most concrete and "vivid"); Shelley E. Taylor & Suzanne C. Thompson, *Stalking the Elusive "Vividness" Effect,* 89 Psychol. Rev. 155 (1982) (questioning evidence supporting vividness effect, but proposing salience-vividness effect to explain differential impact of vivid information under conditions of information competition).
6. Moreover, experience to date suggests that the bankruptcy approach is superior to the settlement class action as currently devised. *See* Coffee, *Class Wars,* *supra* [2](#)note , at 1457 (finding bankruptcy reorganization superior to class action for resolving mass torts while protecting interests of future claimants); 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, 488 (1995) (asserting that bankruptcy court is the "best forum" for mass tort future claims cases). *But see* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?,* 76 Tex. L. Rev. 1695 (1998) (criticizing National Bankruptcy Review Commission proposal, and bankruptcy approach generally, questioning whether bankruptcy approach is truly improvement over class action approach).
7. The Manville Trust, for example, ran out of funds less than two years after its inception and had to be restructured with dramatically diminished expectations for compensating future claimants. *See infra* note [59](#) and accompanying text. Describing the FCR's role in *Manville*, one commentator has noted:

The [FCR] adopted the role of shuttle diplomat, selling his proposed plan to the various parties separately. He apparently saw his role not as the intransigent defender of future claimants, but as the honest broker among constituencies. That the [FCR] adopted the role of broker was not an accident, as the [FCR] was the only claimant representative

whose constituency was entirely unable to monitor his performance. In truth, he was as he behaved, less a representative than a go-between among representatives. . . . Liberated from any concrete constituency, the [FCR] brokered a deal that gave [present] tort claimants 80% of the firm's value, and equity holders the remaining 20%. . . . The ultimate result, whatever the [FCR's] intentions may have been, was a division of the debtor's value between present claimants and equity holders that left future claimants almost entirely unprovided for, as the protections of future claimants in the plan proved completely ineffective.

Smith, *supra* note [5](#), at 390-91 (citations omitted).

With respect to claims resolution in *A.H. Robins*, compare Francis E. McGovern, *Foreword, Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 *Law & Contemp. Probs.* 1, 7 (1990) (noting some dissatisfaction with Dalkon Shield Trust) with Georgene M Vairo, *Essay: The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *Fordham L. Rev.* 617 (1992) (defending Trust).

8. For a complete discussion of the plan negotiation process, see Frederick Tung, *Confirmation and Claims Trading*, 90 *Nw. U. L. Rev.* 1684, 1689-99 (1996).

9. In smaller cases, there may be few creditors willing to serve on committees.

10. 11 U.S.C. §§ 101-1330 (1994 & Supp. IV 1998). The Bankruptcy Code may be referred to herein as the "Code." Unless otherwise indicated, all subsequent statutory references are to the Bankruptcy Code.

11. *Id.* § 1102(a).

12. *Id.* § 1103(b)(1).

13. *Id.* § 1103(a).

14. *Id.* §§ 328, 330(a).

15. *Id.* § 1102(a)(2).

16. The only strict substantive limitation concerning creditor distributions under a plan is that each creditor must receive as much as it would have received in liquidation. See 11 U.S.C. § 1129(a)(7) (1994).

17. *Id.* § 1129(b)(2)(B). See also Tung, *supra* note [8](#), at 1692-93 (explaining rule of absolute priority).

18. *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 58 (1990).

19. See 11 U.S.C. §§ 1126(c), 1129(a)(8) (1994). Secured creditors have additional leverage as well. They may insist on adequate protection of their security interests or—failing that—seek relief from stay in order to repossess their collateral. *Id.* § 362(d)(1).

20. *Id.* § 1122(a). All creditors in the same class are entitled to identical treatment under the plan. *Id.* § 1123(a)(4).

21. Unimpaired classes are deemed to have accepted the plan. *Id.* §§ 1126(f), 1129(a)(8). A class accepts the plan if, of the claims voting, a majority in number of claims in the class approves, and that majority holds at least two-thirds in dollar amount of claims in the class. *Id.* § 1126(c).

22. *Id.* § 1129(a)(8).

23. *Id.* § 1129(b)(2)(B)(ii). This is the Chapter 11 "cram down." *See generally* Kenneth N. Klee, *All You Ever Wanted to Know About Cramdown Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133 (1979). Confirmation could also occur over the objection of an impaired class if that class were paid in full under the plan. *See* 11 U.S.C. § 1129(b)(2)(B)(i) (1994). That option is rarely available in practice.

24. *Id.* § 1121(b) (describing initial 120-day exclusivity period). *See generally* Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 Va. L. Rev. 561 (1977).

25. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. Pa. L. Rev. 669, 693 (1993) (noting that a large, publicly held debtor almost always enjoys exclusivity for duration of case).

26. *See* Tung, *supra* note 8, at 1694 & n.52.

27. *See* 11 U.S.C. § 1121(c) (1994).

28. *Id.* §§ 1121, 1112.

29. "The premise of a business reorganization is that assets that are used for production in the industry for which they are designed are more valuable than those same assets sold for scrap." H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977) [hereinafter, House Report].

30. Roger Fischer and Bill Ury refer to this consideration as "BATNA," the best alternative to a negotiated agreement. *See* Roger Fisher, William L. Ury, and Bruce Patton, *Getting to Yes* (1992).

31. Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors* 477 (3d ed. 1996).

32. *See* Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. Pa. L. Rev. 125, 138 (1990).

33. *Id.* at 178. Deviations from strict absolute priority, however, are generally small in percentage terms. *See id.*

34. Johns-Manville, for example, was profitable when it filed for bankruptcy, and its financial picture actually improved during the first few years of bankruptcy. *See* The Journal Record, Aug. 3, 1985.

35. In some cases, the harm-generating potential was known to the manufacturer long before it became apparent to the public. *See* Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) (claiming that executives of Johns-Manville and other asbestos producers actively suppressed evidence of harmful effects of exposure); Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 1-22 (1991) (chronicling A.H. Robins' history of ignoring safety research showing dangers associated with use of Dalkon Shield); Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 Cornell L. Rev. 773, 823-24 (1997) (describing concealment of adverse safety testing results in marketing of breast implants and tobacco, as well as asbestos and Dalkon Shield).

36. *See* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 Harvard J. on Legis. 383, 387-88 (1993). In addition to toxic torts, products liability may also give rise to long-tail mass tort problems. A product may remain in circulation for quite some time, for example, before causing harm. At the time of the Piper Aircraft bankruptcy, an estimated 95,000 Piper planes were still in existence worldwide, and the average age of a Piper aircraft still flying was 24 years. Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code with Respect to the First Amended Joint Chapter 11 Plan

of Reorganization of the Debtor, the Official Committee of Unsecured Creditors of Piper Aircraft Corporation, Newco Pac, Inc., Teledyne Indus., Inc. and Dimeling, Schreiber and Park, dated May 19, 1995 (*In re Piper Aircraft Corp.*) (No. 91-31884-BKC-RAM) at 12-13 [hereinafter Piper Disclosure Statement]. *See also* *In re RegO Co.*, 623 A.2d 92, 100 (Del. Ch. 1992) (noting actuarial forecasts that future claims involving industrial valve products would arise for 20 to 30 years following dissolution); *Polius v. Clark Equip.*, 802 F.2d 75 (3d Cir. 1986) (involving 1983 accident with machine manufactured in 1969); *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106 (Pa. 1981) (involving 1972 accident with machine manufactured in 1957); Mark R. Sarlitto, Note, *Recognizing Products Liability Claims at Dissolution: The Compatibility of Corporate and Tort Law Principles*, 87 Colum. L. Rev. 1048 (1987):

Insurance industry statistics. . . suggest that only thirty percent of expected general liability claims (which include products liability) are reported three years after the initial policy year and only sixty percent are reported after the eighth year. Not until thirteen years after the initial policy year are seventy-five percent of the losses known to the insurer. The balance of these losses develop over the next two decades.

Id. at 1052 (citing Reinsurance Ass'n of America, Loss Development Study: 1985 Edition 5 (1985)).

37. While a factory explosion that injures many could also reasonably be described as a "mass" tort, that situation does not present the same difficulties involving contingent liabilities as the asbestos cases or other future claims cases. My focus in this Article is on these latter types of cases, and I use the term "mass tort" in that sense.

38. *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 856-62 (1984) [hereinafter Roe, *Mass Tort*] (describing slow process of operational collapse for company beset by mass future tort liabilities which inhibit its access to capital markets).

39. In addition, upon the debtor's collapse, the only possible source of future compensation to future claimants disappears. As the *UNR* court described:

The debtors allege what will occur if the court denies their Application [for appointment of a FCR]: The 17,000 claims which already have been brought will be followed by between 30,000 and 120,000 more over the next forty years. No lenders will extend credit to companies burdened by litigation costs exceeding \$1 million per month, with exposure to damages in the incalculable millions of dollars. If the putative claims cannot be dealt with in a reorganization, the debtors will have no choice but to liquidate. Whatever hope the putative claimants have to a future recovery would vanish, because by the time their diseases are discovered, there will be no company left with any assets to satisfy a judgment.

In re UNR Indus., Inc., 29 B.R. 741, 743-44 (N.D. Ill. 1983). Theoretically, even in a liquidation, value could be set aside to compensate future claimants. However, this almost never happens, since no represented party has any interest in paying future claims if the debtor is liquidating. *See infra* Part III.A.1.

40. Several general aviation aircraft manufacturers have also filed for bankruptcy. *See* *Fairchild Aircraft Inc. v. Cambell* (*In re Fairchild Aircraft Corp.*), 184 B.R. 910 (Bankr. W.D. Tx. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tx. 1998); *Epstein v. Official Committee of Unsecured Creditors* (*In re Piper Aircraft Corp.*), 58 F.3d 1573 (11th Cir. 1995). Whether tort liability was the precipitating cause of their demise is unclear. However, blaming tort liability, these companies succeeded in obtaining passage of the General Aviation Revitalization Act of 1994, 49 U.S.C. § 40,101 (1994), a statute of repose that prohibits certain products liability suits against manufacturers for accidents involving aircraft more than 18 years old. *See* Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 Case W. Res. L. Rev. 435, 471 nn.142 & 143 (1999) [hereinafter, Tung, *Future Claims*] (describing statute). However, at least in the bankruptcy of Piper Aircraft, poor management was apparently at least as

significant a cause of the company's demise as its contingent tort liability. *See* Piper Disclosure Statement, *supra* note 36, at 11-12 (describing "devastating consequences" of key business decisions of prepetition management).

41. Courts have struggled over the preliminary question whether future claimants qualify as "creditors" holding "claims" that may be addressed in bankruptcy. *See* Tung, *Future Claims*, *supra* note 40, at 466. Commentators, however, generally agree that future claims may be included as bankruptcy "claims" and dealt with in bankruptcy, *id.* at 457 n.86, and it seems unlikely that a bankruptcy court would refuse to treat future claims in bankruptcy if other parties felt it necessary to saving the business.

42. With products liability, the universe of future victims may be impossible to capture except in general terms. For example, the universe of potential future victims of plane crashes includes not only owners—whose identities will change over time in any event—but also potential passengers and innocents with no relation whatsoever to the owner of the plane. No one can identify in advance the house upon which the plane will ultimately crash or the occupants of the house at the time.

With some toxic torts, it might be easier to identify all potential future victims. Users of Dalkon Shields or breast implants, for example, could be identified through medical records. This would not apply, of course, for a toxic substance like asbestos that does not require medical insertion into the human body.

43. In the context of mass tort settlement class actions, Susan Koniak contrasts "unknown" future claimants—those who would realize they were future claimants if they received notice, but cannot be given notice because they are unidentified—with unknowing future claimants—those for whom receipt of notice would not be useful because they had not manifested any injury and might not realize they had been exposed.

[H]ow does one provide notice and the opportunity to opt out to the unknowing? It cannot be done, if notice means apprising those people that an action is pending that affects them. By definition, unknowing persons have not manifested any injury and may be unsure whether they have been exposed to the product. Therefore, those class members cannot *know* in any meaningful sense that they are members of the class.

See Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1086-87 (1995).

44. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997). *See also* Sobol, *supra* note 35, at 107-15 (describing debate over whether notice to future claimants concerning claims bar date in bankruptcy could ever be adequate, given that future claimant in perfect health at time of notice would likely fail to appreciate its significance and would not likely file proof of claim).

45. For instance, the Manville Trust, set up to manage assets for payment to asbestos claimants of Johns-Manville, initially received 80% of the equity of the reorganized debtor and \$869 million in cash and receivables. *See* *Findley v. Falise (In re Joint Eastern & Southern Dists. Asbestos Litig.)*, 878 F. Supp. 473, 484 (E. & S.D.N.Y. 1995), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996), *on remand*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996). Even that turned out to be insufficient. *Id.*

46. *See In re Dow Corning Corp.*, 211 B.R. 545, 600 (Bankr. E.D. Mich. 1997) (describing "traditional" model and noting its failures).

47. *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 944 (1995). "The evolutionist emphasis draws attention to, and treats in a more consistent fashion, three distinct but related features of mass torts litigation: (1) incremental system-building, (2) common-law process, and (3) selection by judges and other policymakers among competing institutional designs." *Id.*

48. *See, e.g., In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (appointing representative for asbestos-exposed future claimants, who are parties in interest); *In re Amatek Corp.*, 755 F.2d 1034 (3d Cir. 1985) (same). Some courts, however, refused to appoint FCRs. *See infra* Part III.A.1.

49. *See, e.g., In re Eagle-Picher Indus., Inc.*, 189 B.R. 681 (Bankr. S.D. Ohio 1995) (estimating both prepetition and future asbestos claims for distribution purposes). *See also* *Dow Corning*, 211 B.R. 545 (discussing merits of competing estimation proposals). In *Dow Corning*, the court refused to adopt an estimation process from among those presented by the parties, suggesting instead that the parties reach a consensual resolution. *Id.*

While the Code specifically contemplates court estimation of contingent or unliquidated claims, estimation is specifically authorized only for purposes of allowance, see 11 U.S.C. § 502(c) (1994), and voting. *See* Fed. R. Bankr. P. 3018(a) (court may temporarily allow claim "in an amount which the court deems proper" for voting purposes). Claim allowance determines which claims may validly participate in the case. Only claims that are "allowed" are entitled to vote on the terms of reorganization, see 11 U.S.C. § 1126, and receive distributions. *Id.* § 726.

Estimation for purposes of distribution is not specifically authorized in the Code or the Bankruptcy Rules. The National Bankruptcy Review Commission has recommended statutory amendments clarifying that courts may estimate claims for purposes of distribution in mass future claims cases. *See* 1 Report of the National Bankruptcy Review Commission 341 (1997) [hereinafter NBRC Report].

50. *See, e.g., In re Joint Eastern & Southern Dist. Asbestos Litig. (In re Johns-Manville)*, 982 F.2d 721 (2d Cir. 1992) (describing plight of Manville Trust), *modified*, 993 F.3d 7 (2d Cir. 1993). *See generally* *Roe, Mass Tort*, *supra* note 38, at 864 (describing payment devices to manage uncertainty regarding aggregate claims liability).

51. In *Piper*, the claim resolution process included mandatory pre-trial mediation, as well as a binding arbitration alternative to litigation. *See* *Piper Disclosure Statement*, *supra* note 36, at 138-39. In *Robins*, the Claims Resolution Facility offers several different claim processing options, ranging from a "short form," which pays the electing claimant a nominal amount upon a minimal showing of Dalkon Shield use and injury, to a fairly elaborate settlement process involving in-depth review of the claim, including the electing claimant's medical records. Should the process fail to produce a settlement, the claimant may resort to binding arbitration or trial. *See* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, March 28, 1988 (*In re A.H. Robins Co.*) (No. 85-01307-R), at CRF 1-9. *See generally* Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 Law & Contemp. Probs. 113 (1990) (comparing differing features and objectives of several claims resolution facilities).

52. *See, e.g., In re Johns-Manville Corp.*, 68 B.R. 618, 625 (Bankr. S.D.N.Y. 1986) (holding that bankruptcy court has equitable power to issue channeling injunction), *aff'd sub nom.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988) (enjoining suit against successor corporation, among others), *aff'd sub nom.*, *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989); *Piper Disclosure Statement*, *supra* note 36, at 112 (describing channeling injunction). *Piper* involved an asset sale. Manville was internally reorganized, and the channeling injunction was used to insulate the reorganized debtor and others from suit by future claimants. *Johns-Manville*, 68 B.R. at 624. In *Robins*, the debtor was merged into another entity as part of the plan. That surviving entity and others were the beneficiaries of the channeling injunction. *A.H. Robins*, 88 B.R. at 751.

53. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). *See generally* *Mabey & Zisser*, *supra* note 6.

54. *See* 11 U.S.C. § 524(g)(4)(B)(i) (1994).

55. *Id.* § 524(g)(2)(B)(i).

56. *Id.* § 524(g)(2)(B)(i)(I).

57. See NBRC Report, *supra* note [49](#), at 315-50. Unlike the Manville Amendments, the NBRC Report does not insist on the use of a trust device to hold assets on behalf of future claimants. It opts instead for more flexibility, noting for example that insurance may provide a superior method of assuring compensation. *Id.* at 346-47.

58. See *In re Dow Corning Corp.*, 211 B.R. 545, 602 (discussing difficulties of accurately estimating mass tort liability). See generally Salsburg & Williams, *supra* note [4](#).

59. See *Findley v. Falise (In re Joint Eastern & Southern Dists. Asbestos Litig.)*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996), *on remand*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996).

60. See *Findley*, 878 F. Supp at 484.

61. *Id.* at 493.

62. See *Findley v. Blinken (In re Joint Eastern & Southern Dists. Asbestos Litig.)*, 129 B.R. 710, 755 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified* 993 F.2d 7 (2d Cir. 1993). It was further assumed that the timing of required claim payments would roughly coincide with the timing of the trust's cash inflows. See *Findley*, 129 B.R. at 755.

63. *Id.*

64. See *Menard-Sanford v. Mabey (In re A. H. Robins, Co.)*, 880 F.2d 694, 699 (4th Cir. 1989), *cert. denied.*, 493 U.S. 959 (1989).

65. See 11 U.S.C. § 502(c)(1) (1994).

66. Or at least the estimation will set the baseline from which negotiation over distributions begins. See *supra* note [18](#) and accompanying text.

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

68. *Id.* at 602 ("It is our fervent hope that the parties achieve a fair distribution through settlement or mutual agreement upon a process for resolving the case.").

69. See generally Sobol, *supra* note [35](#), at 165-97 (describing complex wrangling among multiple parties concerning conduct of estimation process).

70. See generally Peterson, *supra* note [51](#) (comparing differing features and objectives of several claims resolution facilities).

71. See Sobol, *supra* note [35](#), at 155.

72. *Id.*

73. Of course, only in hindsight may that "last day" be determined.

74. *In re A.H. Robins Co., Inc.*, 88 B.R. 742, 752 (E.D. Va. 1988). *See also* Sobol, *supra* note [35](#), at 287 (describing judge's control of Dalkon Shield Claimants' Trust).

75. *See supra* note [45](#) and accompanying text.

76. As to the actual selection of the FCR, the judge typically acts on a nomination by the U.S. Trustee. *See infra* notes [107-08](#) and accompanying text.

77. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).

78. Even if the client had the necessary skills to represent herself, she might have difficulty making dispassionate judgments given her self-interest in the matter. She would risk being the proverbial "fool for a client."

79. There may be some situations in which a future claimant's perceived interest in the bankruptcy might be immediate enough that she could reasonably be expected to act in her own behalf—either by retaining her own lawyer or appearing pro se. *See infra* note [97](#) and accompanying text.

80. *See supra* Part II.C.1.

81. Similar issues may arise when a court appoints a guardian to represent an infant or incompetent person. *See* Fed. R. Civ. P. 17(c). However, the FCR device may be unique in terms of the sheer number of principals to be represented who are unable to oversee their agent, and the principals' enormous aggregate stake in the proceeding.

82. If the business could survive without comprehensive settlement of future claims, then perhaps future claimants would be better off being left out. Each future claimant would then be free to sue the reorganized debtor for a full recovery when her claim matured, instead of being relegated to the pro rata recovery that might result from a bankruptcy settlement. *See generally* Tung, *Future Claims*, *supra* note [40](#), at 472.

83. This suggests that serious conflicts may exist among mass tort future claimants inter se. Early maturing claimants may wish to be excluded from any collective settlement, leaving them free to pursue the reorganized debtor.

84. Even if the problem of identifying future claimants can be overcome, *see supra* note [80](#) and accompanying text, the costs of individual participation might discourage future claimants from becoming involved. *See supra* note [80](#) and accompanying text.

85. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 8 (1991) (noting that the class action is "a tool for overcoming the free-rider and other collective action problems that impair any attempt to organize a large number of discrete individuals into any common project").

86. For a detailed analysis of creditors' calculus with respect to asset disposition alternatives, *see* Tung, *supra* note [40](#), at 473.

87. *See* NBRC Report, *supra* note [49](#), at 321 ("[M]ass future claimants of a debtor liquidating in Chapter 7 . . . should be entitled to equal priority with present claimants."). True, some future claimants might be better off left out of bankruptcy. But many will be made worse off, in large measure because the decision whether or not they should be included is not randomly made. This decision is made by those with interests in direct conflict with the interests of future claimants. *See generally* Tung, *Future Claims*, *supra* note [49](#), at 458 (describing alternative outcomes for future claimants when their rights are ignored in bankruptcy).

88. 157 B.R. 89 (W.D. Pa. 1993).

89. *Id.* at 90.

90. *Id.* at 99. Locks also happened to be a member of the creditors' committee. *Id.* at 90. For that reason, the court found that Mr. Locks was not the proper party to bring the motion, since he had an inherent conflict. His fiduciary duty to the committee and the class of claimants it represented disqualified Mr. Locks from advocating on behalf of future claimants, whose interests were adverse to those of current claimants. *Id.* at 93.

One court *was* willing to appoint a FCR despite the fact that the debtor was liquidating. *See In re Forty-Eight Insulations, Inc.*, 58 B.R. 476 (Bankr. N.D. Ill. 1986). "[I]t would be highly inequitable to distribute the liquidated assets of the debtor to the currently known plaintiffs to the detriment of the potential claimants merely because the potential claimants have not yet manifested an injury." *Id.* at 477. That liquidation, however, was unusual insofar as it was planned to be a "slow" liquidation over a 10-year period. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1297 (7th Cir. 1997).

91. The prospective purchaser, Pilatus Aircraft Limited, had signed a letter of intent with the debtor. The letter of intent included a requirement that the debtor seek appointment of a future claims representative so that future claims could be paid off and disposed of. *In re Piper Aircraft Corp.*, 162 B.R. 619, 621 (Bankr. S.D. Fla. 1994), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd as modified*, 58 F.3d 1573 (11th Cir. 1995).

92. *See Piper*, 162 B.R. at 622 n.3.

93. That is, an acquirer would be willing to purchase the business and assume the risk of post-bankruptcy successor liability suits as future claims matured.

94. When the FCR, Professor David Epstein, filed a proof of claim attempting to define a broad class of future claimants and setting the aggregate amount of their claims at \$100 million, the debtor and committee objected. The judge agreed with the debtor and the committee that Epstein's proposed class was too broad. *See Piper*, 162 B.R. 619. Ultimately, the issue was settled with a little help from Congress. *See Tung, Future Claims*, *supra* note [40](#), at 471.

95. The committee took the position that all implant recipients had already suffered injury by virtue of having received implants, and therefore that they were all current—and not future—claimants. *Id.*

96. *See, e.g.*, Order Dismissing Motion of Alan B. Morrison for Appointment as the Legal Representative of Future Breast Implant Claimants, *In re Dow Corning Corp.*, No. 95-20512 (Bankr. E.D. Mich. Oct 10, 1995), which is discussed in *In re Dow Corning*, 211 B.R. 545, 598 (Bankr. E.D. Mich. 1997).

97. The court differentiated the breast implant controversy from future asbestos disease victims and future airplane crash victims on the ground that all breast implant recipients could self-identify and file their own individual proofs of claim. *Id.*

98. If the judge agrees to make the appointment, she will typically solicit a nomination from the U.S. Trustee, approve a nomination, and define the terms of the appointment. *See infra* Part III.C.

99. Some have suggested that a judicial bias exists toward reorganization generally. *See* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 220-21 (1986) (discussing bias of bankruptcy judges in favor of reorganization); Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. Ill. L. Rev. 1 (discussing Chapter 11 reorganization bias).

100. One foundational concept in social psychology is the phenomenon of escalating commitment. Once a decision maker commits to an idea or a course of action, she has invested in it and will persist with it, even in the face of information that tends to call into question the wisdom of the prior decision. She will reject such information, while paying more attention to information tending to affirm her decision. *See* Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 Acad. Mgmt. Rev. 577 (1981). In the business context, organizational behaviorists have shown that managers will often make investment decisions in a manner that justifies previous choices, irrespective of expected outcomes. Therefore, managers will have a tendency to escalate their commitment to a course of action even if it is not cost-effective. *Id.*

101. *See* LoPucki & Whitford, *supra* note [32](#), at 161 (noting strong correlation between "aggressive representation" and success in garnering legally "undeserved" distributions for equity).

102. *See* Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. Miami Ent. & Sports L. Rev. 165, 189 (1993) (discussing incentive clauses); Martin J. Greenberg, *Drafting of Player Contracts & Clauses*, 4 Marq. Sports L.J. 51, 57 (1993) (same).

103. *See* Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 Iowa L. Rev. 965, 970 (1997) (noting informational asymmetry between lawyer and client concerning quality of lawyering).

104. As with the other lawyers and professionals compensated by the estate, the FCR is generally compensated on an hourly basis.

105. Because at the time of the bankruptcy case, each future claimant's individual stake in the outcome of the case is likely to be quite small, no future claimant has sufficient incentive to monitor the FCR or the proceeding.

106. Susan Koniak and George Cohen propose in the class action context that class counsel be subject to malpractice suit by class members in the same way that clients may sue their lawyers in individualized situations. Koniak and Cohen argue that court approval of class settlements should not insulate class counsel from these suits, which would provide a much-needed deterrent to class counsels' shirking or selling out their clients. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996). In the mass tort bankruptcy context, the disciplining effect of potential suits against the FCR is doubtful for the reasons described in the text.

107. *See In re UNR*, 71 B.R. 467, 477 n.24 (Bankr. N.D. Ill. 1987); *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 261 (Bankr. S.D. Ohio 1996).

108. *See* Piper Disclosure Statement, *supra* note [36](#), at 26 (recounting debtor's motion for appointment of a FCR and court's subsequent order appointing David Epstein to the position). In *Forty-Eight Insulations*, the court left selection of the FCR to the agreement of the U.S. Trustee, the debtor and an official committee representing asbestos-related claimants. Absent agreement, the court would select from among their respective nominees. *See In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986).

109. *See* 11 U.S.C. §§ 328, 330, 331 (1994).

110. *See infra* note [126](#) and accompanying text.

111. *See* 11 U.S.C. § 1102(a)(1) (1994). There is some controversy over whether a judge has the authority to reconstitute an official committee after it has been appointed. *See In re Dow Corning Corp*, 212 B.R. 258 (E.D. Mich. 1997) (describing controversy and ultimately holding that bankruptcy judge did not have authority to remove attorneys from official tort claimants' committee sua sponte). *See also* Kenneth N.

Klee & K. John Shaffer, *Creditors' Committees under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 1032 (1993) (discussing uncertain rules concerning altering of composition of committees).

The U.S. Trustee also appoints trustees in Chapter 7 liquidations. *See* 11 U.S.C. § 701 (1994). Creditor election is available for selection of Chapter 7 trustees. *Id.* § 702. However, very often the few dollars at stake for unsecured creditors in a liquidation do not justify their active monitoring of or participation in the case. Because creditors show no interest in electing the trustee, the U.S. Trustee's "interim" appointment ordinarily remains the trustee for the entire Chapter 7 case. *Id.* § 701.

112. *Id.* §§ 327(a), 1103(a). The debtor's lawyers and other professionals must be "disinterested" and must not "hold or represent an interest adverse to the estate." *Id.* § 327(a). Likewise, committee professionals must not represent "any other entity having an adverse interest in connection with the case." *Id.* § 1103(b).

113. House Report, *supra* note [29](#), at 89-91.

114. As the administrator of bankruptcy cases, and the individual responsible for the supervision of the trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. Bankruptcy judges frequently view a case as "my case." The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court, and has caused at least one occasional bankruptcy practitioner to suggest that "the bankruptcy court is the only court I appear in in which the judge is an interested party."

Id. at 90.

115. Moreover, the notice and hearing that precedes the FCR's approval by the court allows other parties in interest to voice objections to the FCR nominee. No other official appointee or professional comes under similar scrutiny by parties adverse to the interests of those meant to be represented.

116. Koniak & Cohen, *supra* note [106](#), at 1126 (describing judicial bias in favor of settlement in class action context).

117. *See, e.g.*, Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993); Koniak & Cohen, *supra* note [106](#).

118. It may be a bankruptcy judge or district court judge or both. Bankruptcy jurisdiction is vested originally with the district courts, *see* 28 U.S.C. § 1334(a), (b) (1994), and the bankruptcy courts are adjuncts of the district courts. *Id.* § 157(a). While most bankruptcy cases are automatically referred to the bankruptcy court for the district in which the case is filed, in several mass tort bankruptcies, a district judge has used the power of referral to craft a sort of power sharing arrangement with the bankruptcy judge, pursuant to which both judges preside over the case. *See* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, March 28, 1988 (*In re* A.H. Robins Co.) (No. 85-01307-R), at 18. Besides the prestige and public attention that comes from presiding over a mass tort bankruptcy, there may be a sound legal reason for the district judge to maintain close involvement with the case. Under the bankruptcy jurisdiction statute, it is unclear whether a bankruptcy court may estimate or liquidate contingent personal injury tort claims for purposes of distribution in bankruptcy. *See* 28 U.S.C. § 157(b)(2)(B) (1994).

I refer in the text to the bankruptcy judge. However, the description applies equally well to a district court judge presiding over a mass tort case.

119. *See* Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 Cornell L. Rev. 967 (1999).

120. See LoPucki & Whitford, *supra* note [32](#) (discussing judges' view favoring consensual reorganization).

121. See *supra* note [100](#) and accompanying text.

122. One might suppose that the best sort of lawyer to provide zealous representation for future claimants would be one with experience representing other tort claimants. A tort plaintiff's lawyer understands how to litigate, value and settle tort claims. If nothing else, the tort plaintiff's lawyer may have some natural affinity for the plight of future tort victims that other sorts of lawyers may lack. Corporate lawyers, by contrast, would seem to have the opposite sympathies, if any, as their clients would ordinarily be *defending* suits brought by tort plaintiffs. However, a partial survey of FCRs actually appointed shows no tort plaintiffs' attorneys in the bunch. Attempts by Gene Locks, a tort plaintiffs' attorney, and Alan B. Morrison, a consumer advocate, to get themselves appointed were rebuffed. See *supra* notes [88,96](#), and accompanying text.

123. See Sobol, *supra* note [35](#), at 110.

124. *Id.*

Joynes was a young lawyer from Richmond who had begun practice three years earlier in partnership with four other young attorneys. He had attended law school at the University of Tulsa and had then served as a law clerk for a federal judge in Oklahoma. When he returned to Richmond in 1982, Joynes had worked for Judge Merhige [the presiding judge in *Robins*] for several months on a volunteer basis as an extra law clerk before he opened his law office. Neither Joynes nor his partners had any significant experience in bankruptcy law.

Id. A comparison of the relative billing rates of the lawyers involved in the case may give some flavor of the imbalance in terms of experience and sophistication in corporate reorganization. While the New York and San Francisco lawyers were charging from \$200 to \$300 per hour, and the other Richmond lawyers charged from \$120 to \$150 per hour, Joynes' rate was "between \$85 and \$95 per hour for out-of-court time and a maximum of \$110 per hour when in court." *Hefty Fees Sought in Robins Bankruptcy*, *Legal Times*, March 24, 1986, at 4.

None of this should be taken to suggest, however, that Mr. Joynes did not acquit himself well in the case. "As it turned out, Joynes admirably represented the interests of future claimants. . . ." Sobol, *supra* note [35](#), at 112. At the time of his appointment, however, this outcome may not have been predictable.

125. See Sobol, *supra* note [35](#)

126. The order denying Joynes' application stated:

It appears to the Court that Joynes and other members of his firm . . . are lawyers, duly qualified and admitted to practice in this Court and have appeared in this case and that sufficient cause has not been demonstrated to justify this Court authorizing additional counsel, and it further appears that said Future Tort Claimants are currently represented by counsel and there may be a substantial likelihood of unnecessary duplication of effort and expense.

Id., quoting Order Denying Employment of Special Bankruptcy Counsel for the Legal Representative of Future Tort Claimants, *In re A.H. Robins Co. Inc.*, No. 85-01307-R (Bankr. E.D. Va. May 12, 1986).

127. See *In re UNR Indus., Inc.*, 29 B.R. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), *mot. to reconsider granted*, *In re UNR Indus., Inc.*, 46 B.R. 671 (Bankr. N.D. Ill. 1985). Among

other things, the court was not convinced that future claimants had rights in bankruptcy. *See* UNR, 29 B.R. at 745.

128. *See* UNR, 725 F.2d at 1117.

129. *Id.* at 1119.

130. UNR, 46 B.R. at 675-76.

131. *Id.* Subject to those limitations, the FCR was authorized to exercise the powers and assume the responsibilities of an official creditors' committee under section 1103 of the Bankruptcy Code. *Id.* at 676.

132. *In re* UNR Indus., Inc., 71 B.R. 467, 479 (Bankr. N.D. Ill. 1987).

133. *See* Rita Henley Jensen, *Judge Turns Up Heat on Asbestos: Did High Fees Bankrupt the Manville Trust?*, Nat'l L.J., July 23, 1990, at 1.

134. *See supra* note [7](#) and accompanying text.

135. In *Piper*, a similar result occurred as a result of the narrowing of the scope of the future claims that qualified as bankruptcy claims. In that case, the debtor's business was to be sold. Once the debtor and creditors' committee decided that the resolution of future claims liability would not be necessary to selling the business, they opposed the FCR's attempt to define a broad class of future claims, and the judge agreed. *See supra* note [94](#) and accompanying text.

136. *See supra* note [94](#) and accompanying text.

137. Richard Nagareda notes similar agency costs in claim estimation for mass tort class action settlements. While future claimants' promised payments may depend on accurate projection of the number of eventual claimants, class counsel get paid the same regardless of any uncertainty in the numbers. *See* Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 953 (1996).

For other general examples of judges' opportunities to express their preference for consensual reorganization, *see* LoPucki & Whitford, *supra* note [32](#), at 157.

138. This issue is discussed *infra* Part 0.

139. In their study of 43 "megabankruptcies," Professors LoPucki and Whitford found that nearly *half* the plum representations—for the debtor or an official committee—were captured by a mere 15 firms. *See* LoPucki & Whitford, *supra* note [32](#), at 156.

140. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 Colum. L. Rev. 509 (1994). Gilson and Mnookin model litigation as a prisoner's dilemma, noting the possible divergence of interest between lawyer and client when the lawyer is playing a repeat game while the client is a one-shot player.

141. In the context of personal bankruptcy practice, Professors Sullivan, Warren, and Westbrook describe conditions leading to the emergence of a lawyer-dominated legal culture:

First, because bankruptcy law is highly technical relative to many areas of law, much of the practice is done by a small subset of attorneys who specialize in bankruptcy. Second, because bankruptcy lawyers tend to be few in number, they are more likely to know

nearly all of the other practitioners. Third, because bankruptcy courts are often separated from other federal courts and are always separated from state courts, bankruptcy lawyers routinely encounter the same adversaries in disputed cases and settlement negotiations and many rarely encounter practitioners in other areas of law. These are ideal circumstances for members of a bankruptcy bar to communicate any special group norms it develops to each other and to newcomers.

Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J. L. & Pub. Pol'y 801, 848 (1994).

142. "[T]he creditors' agreements to the equity distributions . . . were in no significant part the reflection of either real or supposed legal entitlements." See LoPucki & Whitford, *supra* note [32](#), at 144.

143. *Id.*

144. *Id.*

145. *Id.* at 195 (citations omitted). This settlement norm may of course be tempered by opposing reputational concerns. Lawyers will wish to preserve their reputations as zealous advocates, which might be tarnished if cases were always settled and done so very quickly. On the other hand, presettlement wrangling may also be useful in maximizing lawyers' own economic returns, as they are typically paid on an hourly basis.

146. Future claimants . . . are an imagined group, an abstraction, at the time a "futures" settlement is negotiated. We know that a substantial number of people will in the future assert claims against the defendants, but their identity is unknown to the settling parties, the court, and often to themselves. Future claimants are more likely to be exploited because they are never present at the negotiating table, and their interests are hypothetical, indefinite, and uncertain.

Cramton, *supra* note [2](#), at 828.

147. Layers of agency mean that the individuals actually negotiating a deal are relatively far removed from their ultimate clients and not subject to direct monitoring. See LoPucki & Whitford, *supra* note [32](#), at 154-55.

148. LoPucki & Whitford, *supra* note [32](#), at 156 & n.68.

149. *Id.* (describing disapproval of lawyers' obstructionist tactics that violate group norms). In the class action context, Susan Koniak and George Cohen have commented on the incentives of special masters appointed to review class settlements and guardians appointed to protect absent class members. They note these appointees' "own self-interest in cultivating a reputation for not scuttling deals. Anyone who gained that reputation might never work as a class guardian again. The next pair of settling parties would vigorously protest the appointment of such a person and a court would be unlikely to insist in the face of that protest. . . . [G]uardians we have talked to understand their job is to approve the deal that the settling parties have constructed, after suggesting a few minor changes, not to recommend that the settlement be chucked." Koniak & Cohen, *supra* note [106](#), at 1110-11.

150. See NBRC Report, *supra* note [49](#), at 316-17.

151. For a scathing critique of class counsel in *Amchem*, the recent asbestos class action, see Koniak, *supra* note [43](#).

152. *Cf.* Koniak & Cohen, *supra* note [106](#), at 1125 (noting dearth of media or academic scrutiny of class settlements).

153. *See supra* note [124](#).

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

155. This conceptual shift would follow a similar rethinking of the role of the plaintiff's lawyer in the derivative and class action contexts. *See* John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986) (noting prevalence in U.S. of reliance on private enforcement of regulatory measures, and characterizing private attorneys acting in this capacity as "bounty hunters").

156. This approach is not without precedent. Recall that under former Chapter X of the Bankruptcy Act, the Securities and Exchange Commission played a significant role in protecting public investors, scrutinizing reorganization plans and producing advisory reports for the court. *See* Bankruptcy Act § 172, 11 U.S.C. § 572 (repealed 1978).