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RESOLUTION OF MASS TORT CLAIMS IN THE BANKRUPTCY SYSTEM

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Resolution of Mass Tort Claims in the Bankruptcy System

Douglas G. Smith*

This Article addresses the resolution of mass tort claims in bankruptcy, with a particular emphasis on one important mechanism available under the Bankruptcy Code, § 157(b). Section 157(b) allows the district court presiding over a bankruptcy case to centralize all related claims for resolution within the bankruptcy proceedings. This is a particularly important procedural tool given the necessity of a centralized resolution of mass tort claims — one that has been increasingly utilized to resolve such claims on a global basis.

The Article discusses the essential aspects of mass tort litigation in the United States, the potential mechanisms for addressing mass tort liability as well as their shortcomings, the tools available within the bankruptcy system for resolution of mass tort claims, and the ability of bankruptcy courts to centralize all related claims for resolution in a single forum through litigation of common threshold issues of liability. The Article concludes that the bankruptcy system may succeed in efficiently and fairly resolving mass tort claims where other mechanisms have failed.

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INTRODUCTION

Mass tort litigation in the United States has expanded rapidly in the last few decades. As a result, there has been a substantial increase in the number of companies seeking refuge from such claims under the bankruptcy laws. Bankruptcy provides a unique forum for resolution of mass tort liability. The centralization inherent in bankruptcy proceedings as well as the tools available for rationally addressing claims under the Bankruptcy Code (“Code”) provide an important mechanism for resolving mass tort claims.

More significantly, however, as mass tort litigation increases, it is inevitable that the bankruptcy system will be forced to address such claims. As companies are deluged with thousands of claims spread throughout the country, they are often forced to resort to the bankruptcy laws to resolve them. Indeed, it is exactly when claims become so significant that they force businesses to seek relief under the Code that the tools available for resolving such claims within the bankruptcy system are most needed.

This Article addresses the resolution of mass tort claims in bankruptcy with a particular emphasis on § 157(b) of the Code. Section 157(b) allows the district court presiding over a bankruptcy case to centralize all related claims for resolution within the bankruptcy proceedings. This is a particularly important procedural tool given the necessity of a centralized resolution of mass tort claims — one that has been increasingly utilized to resolve such claims on a global basis.

Part I of this Article discusses the essential aspects of mass tort litigation in the United States. Such litigation is characterized by numerous claims that are widely dispersed and an ever-expanding group of potential defendants. Many of these characteristics have made mass tort litigation particularly difficult to resolve.

Part II addresses the potential mechanisms for addressing mass tort liability as well as their shortcomings. Case-by-case litigation, class action procedures, and legislative and administrative procedures have all proved ineffective in addressing mass tort claims. Litigation of mass tort cases on an individual basis is not feasible given the large volume of potential claims. The Supreme Court has cast significant doubt on the use of class action procedures in the context of mass tort claims in decisions such as *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.* And, while there have been many legislative and administrative proposals for addressing mass tort claims, they have not

been enacted, leaving bankruptcy as one of the only options available to companies facing such litigation.

Part III discusses the tools available within the bankruptcy system for resolution of mass tort claims. Through the claims objection process, the court may resolve whole categories of claims, eliminating those claims that have no valid legal basis so that limited funds are distributed equitably among all claimants. Significantly, the Federal Rules of Civil Procedure and Evidence, including the stringent requirements of Rule 702 and *Daubert*, apply in determining whether submitted claims will receive compensation. Thus, not only may claims be disallowed where they fail to meet the required elements, but claims may also be scrutinized to ensure that they are based on sound and reliable scientific evidence. This is particularly critical given the recent evolution of mass tort litigation, where courts have recognized that claims for exposure to substances such as asbestos and silica are increasingly being submitted based on dubious or even manufactured scientific and medical evidence.

Finally, Part IV focuses on the ability of bankruptcy courts to centralize all related claims for resolution in a single forum and resolve common threshold issues of liability. Section 157(b) allows the district court presiding over bankruptcy proceedings to transfer and assert jurisdiction over all claims “related to” the underlying bankruptcy. This statutory authorization provides a mechanism for transferring all related claims to a single forum for uniform, consistent, and efficient resolution. Thus, the Code provides an avenue to achieve what is so often lacking in the civil litigation system: uniformity and efficiency in the resolution of mass tort claims. In sum, the bankruptcy system may succeed where other mechanisms have failed.

I. FUNDAMENTAL CHARACTERISTICS OF MASS TORT LITIGATION

Mass tort litigation in the United States has been described by both courts¹ and commentators² as being in a state of “crisis.” Litigation

¹ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (noting that there is “an asbestos-litigation crisis”); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618 (3d Cir. 1996) (“This case arises against the background of an asbestos litigation crisis.”).

² See, e.g., Alan N. Resnick, *Bankruptcy As a Vehicle For Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2045 (2000) (“A difficult challenge facing the American judicial system is providing for the fair and efficient resolution of litigation arising from mass tort liability.”); Steven L. Schultz, *In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged — A*

regarding the health effects of asbestos, for example, has been cited as illustrative of how mass tort litigation has spun out of control.³ The “avalanche of litigation”⁴ has been characterized again and again as a “serious problem,”⁵ a “dilemma,”⁶ and a “disaster.”⁷ However, courts have been either unwilling or unable to address this significant problem. Many factors have contributed to the intractable nature of mass tort litigation.

A. *Numerous and Dispersed Claims*

Mass tort litigation is characterized by multiple, dispersed claims. From breast implants to silica claims, the courts are inundated with waves of claims that are often difficult to manage, much less to resolve. In the asbestos context, for example, claims have continued to increase, despite the fact that asbestos use ceased long ago. As the Supreme Court has recognized, the tort system is besieged by an “elephantine mass of asbestos cases” that “defies customary judicial administration.”⁸

Proposal for the Use of Federal Common Law in Mass Tort Class Actions, 58 BROOK. L. REV. 553, 554 (1992) (“It has become increasingly apparent in the last few years that the asbestos crisis facing the judicial system in the United States has reached epidemic proportions.”).

³ Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2017 (1999) (“No mass tort litigation . . . has received more intense criticism than the litigation concerning exposure to asbestos.”); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541, 541 (1992) (“Most commentators agree that tort litigation today is a highly unsatisfactory system for resolving claims arising out of workers’ exposure to asbestos.”); Schultz, *supra* note 2, at 590 (“The traditional tort system, in connection with asbestos litigation, has been marked by high transaction costs, excessive delays in providing compensation to injured plaintiffs, unequal recoveries among identically injured victims, litigious parties and a judicial system clogged by an avalanche of cases.”).

⁴ *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986).

⁵ *In re Asbestos Litig.*, 829 F.2d 1233, 1235 (3d Cir. 1987).

⁶ *Jenkins*, 782 F.2d at 470.

⁷ *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. 213 (1999) (statement of William N. Eskridge, Jr., Professor, Yale Law School); REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2 (1991) [hereinafter JUDICIAL CONFERENCE REPORT]; see also Schuck, *supra* note 3, at 541 (“Most commentators agree that tort litigation today is a highly unsatisfactory system for resolving claims arising out of workers’ exposure to asbestos.”).

⁸ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); see also JUDICIAL CONFERENCE REPORT, *supra* note 7, at 7 (“The tide of asbestos personal injury and wrongful death litigation in federal and state courts in the 1970s and 1980s continues

Before 1980, plaintiffs had filed approximately 950 asbestos cases in the federal district courts.⁹ By 1985, 37,000 cases had been filed, a fourfold increase in the filing rate over the preceding five-year period.¹⁰ During the 1990s, claims continued to grow at the rate of approximately 40,000 per year.¹¹ As a result, hundreds of thousands of claims have flooded the judicial system. As of 2002, approximately 730,000 individuals had filed asbestos claims with the number of claims increasing “sharply” in the past few years.¹²

The sheer number of asbestos cases has distorted the traditional process for resolving tort claims.¹³ Unrelenting docket pressure has resulted in attempts to aggregate claims to resolve them on a collective basis. However, aggregation can generate additional cases by lowering transaction costs associated with filing new claims.¹⁴ Thus, attempts to manage the problem have only made things worse.

Many of these claims lack any merit. The data show that there has been a significant spike in claims that is simply inexplicable given the underlying trends in disease.¹⁵ The Manville Trust, for example,

to rise unabated and has not begun to crest.”).

⁹ TERENCE DUNGWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURTS* 36 (1988).

¹⁰ DEBORAH R. HENSLEY, *ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW* 3 (1991); see also *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 263 (E.D. Pa. 1994) (“Although by this time state and federal courts were already burdened by many asbestos claims, amazingly 1986 saw the rate of filing of new asbestos suits quadruple.”).

¹¹ *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. 160 (1999) (statement of Paul Verkuil, Dean, Cardozo School of Law) (“[L]awsuits continue to arrive at a rate of over 40,000 per year, and over 200,000 cases are now pending.”).

¹² See RAND INSTITUTE, *ASBESTOS LITIGATION*, at xxiv (2005) (observing that “[a]nnual claims against major defendants have increased sharply over [the] 1990s” and that “defendants who were receiving 10,000 to 20,000 claims per year in the early 1990s were receiving three to five times as many claims per year by the year 2000”).

¹³ REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (1999) [hereinafter *ADVISORY COMMITTEE REPORT*].

¹⁴ Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997); see also *ADVISORY COMMITTEE REPORT*, *supra* note 13, at 16 (observing that aggregation generates additional cases); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1826-27 (1992) (“The more successful courts became in devising ways to more quickly and assuredly compensate the meritorious, the larger the number of unmeritorious claims that were able to enter the system.”).

¹⁵ See RAND INSTITUTE, *supra* note 12, at xx (concluding that “the unanticipated increases in claims filings in recent years are more likely to be a result of changes in claiming behavior than differences between projected and actual rates of asbestos-

which was established to pay out claims brought against the Johns-Manville Company, has experienced a significant influx of claims. The Manville Trust received 55,077 new claims in 2000, a 94% increase over the 28,416 claims received in 1999.¹⁶

The problem was so severe that the court presiding over the Manville bankruptcy and the establishment of the trust revised the claims resolution process, so that the “amount [paid] pro rata on claims” was “reduced from 10 percent to 5 percent of the original value.”¹⁷ In support of its decision, the court cited the continuing increase in the number of claims as well as the possibility that “there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries.”¹⁸

Other trusts set up to pay out asbestos-related claims have also experienced a dramatic increase in claims. By the Fall of 2000, claims against the UNR Trust had jumped so quickly that it was forced to lower its payout on asserted claims from 12.9% to 7.8%. The Trust cited a 33% rise in claims from the previous year and noted that the forecast of new claims after the year 2000 had nearly doubled from 1998 projections.¹⁹

The increase in claims is at odds with the scientific evidence, which predicts a decrease in the number of claims given that widespread use of asbestos ceased long ago.²⁰ Indeed, while the number of claims filed against asbestos defendants experienced a dramatic upward spike, the incidence of actual malignant disease decreased. The increase in claims may be attributed to an influx of thousands of nonmalignant claims of dubious merit.²¹ As one commentator has observed, “[i]n

related illness”).

¹⁶ Table, *Number of Claims by Year Received and Industry*, in David Austern Mealey's Presentation (July 2, 2001); see also Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1436 (2004) (observing that Manville Trust was “rapidly depleted . . . when the number of claimants and size of claims greatly exceeded expectations”).

¹⁷ Order at 2, *In re Johns-Manville Corp.*, Nos. B 11656 (BRL) to 82 B 11676 (BRL) (E.D.N.Y. Nov. 7, 2001).

¹⁸ *Id.*

¹⁹ See, e.g., Letter from David E. Maxam, Dir. of Operations, UNR Asbestos-Disease Claims Trust, to Claimant's Counsel 1 (Nov. 17, 2000) (on file with UC Davis Law Review).

²⁰ See Brickman, *supra* note 14, at 1834.

²¹ See RAND INSTITUTE, *supra* note 12, at xxiv (“The fraction of claims that asserted nonmalignant conditions began to grow in the early 1990s, rising to more than 90 percent of annual claims in the late 1990s and early 2000s.”); *id.* at 73 (“Claims for nonmalignant injuries grew sharply through the late 1990s and early 2000s. Almost

recent years, caseloads have burgeoned — not because of an increase in the numbers of the seriously ill — but rather because of the enormous incentives for plaintiffs to enter the lottery and the far more enormous incentives for plaintiffs' lawyers to obtain ever increasing numbers of claimants.”²²

Consequently, many current claimants are not, and will never be, sick.²³ Nonetheless, such unimpaired claimants often receive compensation, depleting resources that would otherwise be available to compensate legitimate claims. As Justice Breyer has observed, “[u]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though individual litigants will never become impaired.”²⁴

Mass screening programs have facilitated the filing of huge numbers of claims by those who are unimpaired.²⁵ As Judge Weinstein observed when presiding over the Johns-Manville bankruptcy, some plaintiffs' attorneys “have filed all of their cases without regard to the extent of injury.”²⁶ Working in conjunction with unions, plaintiffs' attorneys have “arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without

all the growth in the asbestos case load can be attributed to the growth in the number of these claims, which include claims from people with little or no current functional impairment.”). There is wide variability among different jurisdictions in the mix of malignant versus nonmalignant claims, indicating that the influx of claims is not driven by disease, but rather the ability of the plaintiffs' bar to bring unimpaired claims in pro-plaintiff jurisdictions. See MICHAEL E. ANGELINA & JONATHAN L. BIGGS, TILLINGHAST-TOWERS PERRIN, ASBESTOS CLAIMS: IS THIS THE BEGINNING OR THE END? 10 (May 30, 2001) (on file with author).

²² Brickman, *supra* note 14, at 1834.

²³ See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 384 (1993) (“Tens of thousands of [asbestos] claims have been made, many successfully, by individuals who are understandably worried about their exposure to asbestos but who are not now and *never will be afflicted* with disease.”).

²⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (Breyer, J., concurring in part and dissenting in part).

²⁵ Schuck, *supra* note 3, at 564 (observing that “probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs' lawyers who engage in aggressive claim-solicitation campaigns”).

²⁶ *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 748 (E.D.N.Y. 1991); see also *Eagle-Picher Indus. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) (noting that “many of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed”).

manifestations of disease”²⁷ These procedures have resulted in thousands of claims that are of dubious merit.

B. *Forum Shopping*

Moreover, the claims have gravitated toward certain jurisdictions that plaintiffs believe are more favorable.²⁸ As a result, the bulk of the litigation has occurred in a handful of jurisdictions.²⁹ Indeed, the lengths to which the plaintiffs’ bar has gone in shopping for favorable forums in the asbestos context have been extreme, prompting certain states to take some action to attempt to correct the problem. Nonetheless, there remains a gross disparity among jurisdictions as to plaintiffs’ ability to successfully pursue mass tort claims, with certain jurisdictions being far more likely to result in large verdicts than others.³⁰ As a result, extensive and widespread forum shopping continues.

C. *An Ever-Expanding Roster of Potential Defendants*

Another important characteristic of mass tort litigation is the expansion in the number of potential defendants. Plaintiffs routinely attempt to bring as many “deep pockets” into the litigation as possible. As a result, the litigation tends to expand despite the resolution of claims, as new claims are filed against an expanding roster of defendants. Moreover, in more mature mass torts, as companies are forced into bankruptcy, plaintiffs assert more tenuous claims against remaining parties who are peripheral to the litigation. Thus, even the

²⁷ *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 748.

²⁸ Brickman, *supra* note 14, at 1827 n.34 (“Forum shopping is widespread in asbestos litigation.”); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 664 (1989) (“Part of the reason for the clogged East Texas trial docket was that jury verdicts in personal injury cases in East Texas are generally high, particularly in asbestos cases.”).

²⁹ RAND INSTITUTE, *supra* note 12, at 61; *see id.* at 63 (“Sharp changes in filing patterns over time more likely reflect changes in parties’ strategies in relationship to changes in the (perceived) attractiveness (or lack thereof) of state substantive legal doctrine or procedural rules, judicial case management practices, and attitudes of judges and juries toward asbestos plaintiffs and defendants, than changes in the epidemiology of asbestos disease.”).

³⁰ *See, e.g.*, Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1747 (2002) (“[T]here has been a gross disparity in jury verdicts among the states, usually with the largest verdicts coming from the same counties that allow large mass filings.”).

elimination of potential defendants does not necessarily halt the expansion of the litigation.

In the asbestos context, for example, the major manufacturers have long since entered bankruptcy.³¹ Beginning in the 1980s, companies that manufactured asbestos-containing materials such as Johns-Manville and Raybestos were forced into Chapter 11 bankruptcy after being deluged with waves of asbestos-related claims. Since that time, the net of liability has expanded dramatically as the plaintiffs' bar seeks to hold companies who may have had only an attenuated connection to asbestos-containing products liable for these claims.³² In fact, there is evidence that such bankruptcies have accelerated claim filings and demands against nonbankrupt defendants.³³ "[A]s one defendant has followed another into Chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants."³⁴

Because the overall liability that plaintiffs seek to impose remains the same, these companies soon find themselves unable to survive outside of Chapter 11. Thus, as the companies that remain begin to dwindle and the connections of the remaining companies to the underlying products become more remote, the theories of liability that are pursued become less tenable. Indeed, the litigation has become so

³¹ See 1 REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 315 (1997) [hereinafter BANKRUPTCY COMMISSION REPORT] (observing that numerous asbestos manufacturers have entered Chapter 11 bankruptcy).

³² *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 747 (observing that "peripheral defendants are becoming ensnared in the litigation"); RAND INSTITUTE, *supra* note 12, at 48 ("As filings surged, many of the asbestos product manufacturers that plaintiff attorneys had traditionally targeted as lead defendants filed for bankruptcy. Plaintiff attorneys sought out new defendants and pressed defendants whom they had heretofore treated as peripheral to the litigation for more money."); A.M. Best, *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, INS. J., May 21, 2001, at 4 ("Anecdotal evidence suggests that peripheral defendants (those that either produced or used asbestos in small quantities within their products) are being sued for increasing sums as the resources available from large, more traditional defendants become exhausted.").

³³ A.M. Best, *supra* note 32, at 3 ("A key driver of th[e] explosion [in new asbestos claims] is the acceleration of bankruptcy filings by major asbestos producers seeking relief from rapidly escalating asbestos claims. As increasing numbers of producers opt for federal bankruptcy protection, remaining defendants are targeted to shoulder larger shares of asbestos costs.").

³⁴ RAND INSTITUTE, *ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE* 25 (2001); see also *id.* at 33 ("[P]laintiff attorneys told us that they are asking non-bankrupt defendants to pay more money on claims filed against them than previously negotiated.").

widespread that over 8400 companies now face some form of asbestos liability.³⁵ As a result, as of a few years ago, “nontraditional defendants” accounted for more than 60% of asbestos litigation expenditures.³⁶

Not only does the connection between the defendant and the offending product become more attenuated as mass tort litigation matures, but the range of products that are implicated may expand and the corresponding scientific evidence supporting such claims may become more attenuated. In the asbestos context, for example, the initial claims involved asbestos insulation, which was associated with a much greater risk of exposure than other asbestos products. Current litigation has expanded to involve asbestos gaskets, flooring materials, and brake friction products that contain limited amounts of asbestos.³⁷ Plaintiffs continue to bring claims based on exposure to such products despite sound epidemiological evidence indicating a lack of any associated risk.³⁸

One might conclude that there must be some legal stopping point and that the law’s prohibition on bringing remote claims would prevent plaintiffs from pursuing litigation against such entities. However, the mere fact that such claims are asserted — often in the tens of thousands — leaves many companies with no practical alternative but to capitulate or seek relief under the Code. In the mass tort context, unlike other areas, the sheer volume of claims constitutes significant leverage that often overrides both the law and societally efficient outcomes.

Moreover, it is often difficult to correctly ascertain and constrain any individual entity’s liability. For example, commentators have observed that as companies enter the bankruptcy system the extent to

³⁵ See RAND INSTITUTE, *supra* note 12, at xxv.

³⁶ RAND INSTITUTE, *supra* note 34, at 10; see also RAND INSTITUTE, *supra* note 12, at 94.

³⁷ See ANGELINA & BIGGS, *supra* note 21, at 17 (listing products).

³⁸ See, e.g., H.J. Raithel et al., *Health Hazards From Fine Asbestos Dust*, 61 OCCUPATIONAL ENVTL. HEALTH 527, 527 (1989) (“[I]t can be assumed that certain fields of work are or were exposed to such a small extent or not at all that a risk of asbestosis which is relevant in terms of occupational medicine is no longer to be assumed or was not to be assumed. This applies above all to certain work in the frictional coating (brake lining) and asbestos paper industry.”); Otto Wong, *Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence*, 34 REG. TOXICOLOGY & PHARMACOLOGY 170, 170 (2001) (“An application of Hill’s causation criteria to epidemiologic data of malignant mesothelioma among auto mechanics clearly demonstrates that auto mechanics do not have an increased risk of malignant mesothelioma as a result of exposure to asbestos fibers from brake linings and clutch facings.”).

which claimants assert exposure to the now-bankrupt companies' products dramatically drops, while claimants' assertions of exposure to remaining entities' products markedly increase.³⁹ In sum, it is often difficult to prevent the assertion of claims of exposure that are dubious at best. Moreover, there are not adequate mechanisms for ensuring that claimants do not, in effect, obtain multiple recoveries by moving from company to company, extracting settlements for their claimed exposure from multiple entities, which far exceed any legitimate liability.⁴⁰

D. *New Avenues of Liability*

A related phenomenon is the expansion of the range of products and substances that are the subject of the litigation, even where the scientific basis for such claims is less than sound. A prime example is the recent silica litigation. As the claims asserted in asbestos litigation have become increasingly attenuated and the number of companies available to satisfy such claims has shrunk, the plaintiffs' bar has actively sought out new avenues of liability. One manifestation of this aggressive search has been the recent expansion of litigation based on claims of adverse health effects due to exposure to silica. Indeed, thousands of plaintiffs in the silica litigation have asserted claims against silica defendants for the same injuries they previously attributed to asbestos exposure.⁴¹

The experience in the silica litigation has been similar to that in the asbestos context. It has been marked by the filing of large numbers of claims, often based on dubious scientific and medical evidence.⁴² As asbestos claims have become more difficult to pursue, silica claims have become an attractive alternative. This phenomenon has been

³⁹ See, e.g., Lester Brickman, *The Asbestos Claim Management Act of 1991*, 13 CARDOZO L. REV. 1891, 1917 n.13 (1992) (noting "shift" in roster of companies identified by plaintiffs as sources of exposure after companies enter bankruptcy).

⁴⁰ See RAND INSTITUTE, *supra* note 12, at 70 (observing that claimants sometimes "filed a suit naming several defendants and then, at a later date, added defendants or filed a claim with a trust or against other defendants").

⁴¹ See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 603 (S.D. Tex. 2005) (noting significant overlap in claims despite fact that "many pulmonologists, pathologists and B-readers go their entire careers without encountering a single patient with both silicosis and asbestosis").

⁴² See *id.* at 629 (observing that "unreliability of the B-reads performed for this MDL is matched by evidence of unreliability of B-reads in asbestos litigation"); *id.* at 634 ("[T]he failure of the challenged doctors to observe the same standards for 'legal diagnosis' as they do for a 'medical diagnosis' renders their diagnoses in this litigation inadmissible under Rule 702.").

amply documented in a recent opinion issued by Judge Janis Graham Jack of the U.S. District Court for the Southern District of Texas, who is presiding over the federal multidistrict silica litigation. As Judge Jack observed, “[i]n the majority of cases, . . . diagnoses [of disease] are more the creation of lawyers than of doctors.”⁴³ Accordingly, while the defendants and products have changed, the same dynamics are at work.

E. Lack of Coordination Among Claimants’ Counsel

Another characteristic of modern mass tort litigation is the lack of coordination among the plaintiffs’ bar. Plaintiffs’ counsel often have adverse interests that bring even more pressure on defendants who have to deal with multiple factions representing these varied interests. Most obviously, all plaintiffs’ counsel have an interest in receiving compensation for their own clients as soon as possible.⁴⁴ Given the limited pool of resources available to compensate claimants and the fact that the civil litigation system often causes rapid depletion of those scarce resources, all plaintiffs’ counsel have inherently conflicting interests.

There may also be conflicts arising from the types of claims that are being asserted. For example, in the asbestos context, there has been a split within the plaintiffs’ bar between counsel representing clients who suffer predominantly from malignant disease and those who claim that they have various nonmalignant conditions.⁴⁵ Malignant claimants have more serious conditions, but are fewer in number. Their interests clash with those of nonmalignant claimants who represent the bulk of the asserted claims and who thereby can exercise significant leverage against defendants, but whose claims are demonstrably less serious.

Finally, there may be tactical and strategic differences in the way different lawyers approach the litigation. Plaintiffs’ counsel often have

⁴³ *Id.* at 635.

⁴⁴ McGovern, *supra* note 30, at 1750 (observing that “[t]he lack of cooperation among plaintiffs . . . has led to a ‘field of dreams’ phenomenon wherein increasingly disparate and large numbers of current plaintiffs seek to maximize their compensation from current assets”).

⁴⁵ *Id.* at 1748-49 (“Because the plaintiffs’ bar is not uniform in its representation of clients with the same asbestos diseases, there has been increasing disagreement as to the appropriateness of the allocation of the limited resources in bankruptcies and their resulting trusts.”).

distinct styles and different discovery and trial strategies.⁴⁶ As a result, resolution of claims through negotiation often becomes impossible.

F. Common Threshold Issues of Liability

Another defining characteristic of mass tort claims is that they often involve threshold issues of liability, including threshold issues regarding the reliability of the scientific evidence proffered in support of such claims. Many standard questions must be resolved in litigating mass tort claims: Are particular substances or products capable of causing certain diseases? Are certain threshold doses or exposures necessary to demonstrate causation? What type of medical evidence is sufficient to support a claim? Thus, while mass tort litigation is characterized by vast numbers of claims with many individual differences, there are commonalities among claims, the resolution of which may dispose of all or certain categories of claims, thereby narrowing the scope of the litigation.

In the asbestos litigation, for example, there are often threshold scientific issues regarding the types of claims that may be supported. Courts are called upon to assess the health effects of asbestos incorporated in different kinds of products with different potentials for release of asbestos fibers and accompanying exposure. They are also called upon to assess the effects of different kinds of asbestos and whether they are equally capable of causing certain kinds of diseases. All of these questions involve an assessment of the reliability of the scientific evidence submitted in support of such claims.

There are also issues regarding the medical evidence that is sufficient to establish a legitimate and valid claim. For example, courts have observed medical screeners' propensity "to depart from accepted medical standards by diagnosing asbestos-related 'injuries' that fail to meet minimum diagnostic criteria set by the American Thoracic Society of the American Medical Association."⁴⁷ Application

⁴⁶ See FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 33.24, at 317 (3d ed. 1995).

⁴⁷ See Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 252-53 (2000). The "authoritative consensus view" articulated by the American Thoracic Society is that an ILO reading of 1/1 or higher is required to diagnose asbestosis. Am. Thoracic Soc., *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 AM. REV. RESPIRATORY DISEASE 363, 366 (1986); see also *Eagle Picher Indus. v. Liberty Mut. Ins. Co.*, 829 F.2d 227, 236 n.14 (1st Cir. 1987) (observing that "a reading of 1/0 is too uncertain to be used to diagnose a particular case"); *Raymark Indus., Inc. v. Stempel*, No. 88-1014-K, 1990 WL 72588, at

of accepted criteria within the medical profession would go a long way toward weeding out those claims that have no merit and should not receive compensation. This issue has become more significant in recent years as courts have become increasingly aware of the adverse effect of mass screenings on the quality of claims that are being asserted.

II. THE FAILURE OF TRADITIONAL MECHANISMS TO EFFECTIVELY RESOLVE MASS TORT CLAIMS

Given these inherent characteristics of mass tort litigation, traditional mechanisms for resolving such claims have often failed. In the asbestos context, for example, courts have been grappling with the problem for decades. In 1990, Chief Justice Rehnquist appointed a distinguished panel of judges to serve on a Judicial Conference Committee charged with examining the growing asbestos litigation problem. After extensive study, the Committee reported in 1991 that the “situation has reached critical dimensions and is getting worse.” Characterizing the state of asbestos litigation as “a disaster of major proportions to both the victims and the producers of asbestos products,” the Committee concluded that the courts were “ill-equipped” to address the mass of claims in an effective manner.⁴⁸ Since then, the asbestos litigation problem has degenerated even further.

A. *Case-By-Case Litigation*

The avalanche of mass tort claims relating to asbestos has effectively precluded litigation on a case-by-case basis.⁴⁹ The sheer mass of claims has imposed costs that make such litigation prohibitively expensive. Even when claims are litigated, the outcomes are often arbitrary, inconsistent, and driven by rampant forum shopping. Given these circumstances, case-by-case litigation has proved ineffective.

*7 (D. Kan. May 30, 1990) (“On the ILO scale a reading of 1/0 is only a ‘suspect’ finding of fibrosis, and is not sufficient to diagnose asbestosis.”).

⁴⁸ JUDICIAL CONFERENCE REPORT, *supra* note 7, at 2.

⁴⁹ See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995) (“The number of individual claims currently pending and reasonably anticipated in the future is in some mass tort litigations so large that it is simply not practicable to provide individual trials in the traditional fashion.”).

As the Judicial Conference Report observed: "It is unrealistic to believe that individual trials can provide relief."⁵⁰ This is because "[t]he local trial of an individual asbestos claim takes so long that trying each claim separately would require all the civil trial time for the foreseeable future to the exclusion of all other cases in districts with heavy asbestos dockets."⁵¹ Accordingly, courts have concluded that established litigation procedures are ill equipped to process such a large volume of cases.⁵² Any attempt to resolve such claims on a case-by-case basis would "bankrupt both the state and federal court system."⁵³

In addition, transaction costs associated with individual litigation are unconscionably high. In the asbestos context, it is often noted that approximately sixty cents of every dollar paid by defendants is consumed to pay lawyer and other fees, resulting in transaction costs exceeding claimants' recovery "by nearly two to one."⁵⁴ The imposition of punitive damages exacerbates these problems. As companies are punished multiple times for conduct that ceased long ago, funds available to pay remaining claimants have been depleted.⁵⁵ In essence, recipients of punitive damages awards early in the litigation receive a windfall at the expense of future claimants who may suffer from disease, but will no longer be able to obtain full compensation from companies whose resources have been depleted.⁵⁶

⁵⁰ JUDICIAL CONFERENCE REPORT, *supra* note 7, at 19.

⁵¹ *Id.*

⁵² *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1146 (5th Cir. 1985) (observing that individual adjudication would "delay decision for years if not decades, burden both claimants and manufacturers with massive litigation costs, leave claimants uncertain about the possibilities of eventual recovery and manufacturers unable to determine their financial exposure").

⁵³ JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 141 (1995).

⁵⁴ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 n.1 (1999); *see also id.* at 867 (observing that "of each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 632 (1997) (Breyer, J., concurring in part and dissenting in part) (same); JUDICIAL CONFERENCE REPORT, *supra* note 7, at 3 (observing that "transaction costs exceed the victims' recovery by nearly two to one"); RAND INSTITUTE, *supra* note 12, at xxvi (concluding that claimants' net compensation was "about 42 percent of total spending").

⁵⁵ *See* DEBORAH R. HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 117 (1985).

⁵⁶ JUDICIAL CONFERENCE REPORT, *supra* note 7, at 32 (observing that "multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants").

Finally, when cases proceed to trial, the tort system can produce “lottery-like” outcomes.⁵⁷ In the context of asbestos claims, for example, jury verdicts are unpredictable.⁵⁸ Differences in application of the statute of limitations, rulings regarding apportionment of damages, admissibility of evidence, the availability of punitive damages, and other factors have led to similarly situated plaintiffs receiving widely disparate compensation.⁵⁹ Indeed, examples abound where claimants asserting speculative “future claims” for “unconfirmed” disease have received millions, while others suffering from actual illness have received nothing or have had to wait years before they are compensated.⁶⁰

B. *Class Actions*

Class action mechanisms have also proved ineffective in resolving mass tort claims.⁶¹ In two cases, *Ortiz v. Fibreboard Corp.*⁶² and *Amchem Products, Inc. v. Windsor*,⁶³ the Supreme Court rejected proposals for settlement of asbestos claims within the tort system, articulating principles that made resolution of mass tort claims through class action procedures highly unlikely. The Court has not turned a blind eye to the magnitude of the problem. Nonetheless, it has consistently ruled that there are significant legal barriers to collective resolution of asbestos claims within the tort system.

⁵⁷ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 749 (E.D.N.Y. 1991) (noting “enormous” disparities in results and that “[t]rials are much like a lottery”); Schuck, *supra* note 3, at 560 (noting “strong, persistent pattern of disparate outcomes in similar cases”).

⁵⁸ *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 262 (E.D. Pa. 1994).

⁵⁹ See HENSLER, *supra* note 10, at 6; RAND INSTITUTE, *supra* note 12, at 127 (“Plaintiffs with the same injuries and economic losses receive widely varying amounts, depending on the skills and incentives of the attorneys representing them, the jurisdictions in which their cases are brought and, perhaps, their own ‘attractiveness’ as potential trial witnesses.”).

⁶⁰ See generally Brickman, *supra* note 14, at 1834 (observing that “some claimants who roll the trial dice receive nothing while others, including substantial numbers of the unimpaired, hit the jackpot”).

⁶¹ See JUDICIAL CONFERENCE REPORT, *supra* note 7, at 19 (“[C]ourts of appeals generally have not been amenable to class actions in mass tort cases. One reason for this reluctance has been the view that tort claims require individualized proof of claims.”); Georgene Vairo, *Mass Tort Bankruptcies: The Who, The Why and The How*, 78 BANKR. L.J. 93, 95 (2004) (“The Supreme Court’s decision in *Amchem* and its later decision in *Ortiz* have made it more difficult for companies seeking global peace in resolving a mass tort to use Rule 23 settlement classes.”).

⁶² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

⁶³ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

In *Amchem*, the Supreme Court invalidated an order certifying a settlement class on the grounds that common issues of law or fact did not predominate as required under Rule 23(b)(3) and the named parties would not “adequately protect the interests of the class” as required under Rule 23(a)(4).⁶⁴ Taking a cue from the Advisory Committee’s Note to the 1966 revision of Rule 23(b)(3),⁶⁵ which indicated that the class action device ordinarily was not appropriate for resolution of “mass accident” claims, the Court recognized that consolidation within the tort system is inconsistent with the basic legal requirement of individualized determinations of individual issues.⁶⁶ The Court observed that because the class members were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time, resulting in disabling disease for some plaintiffs and no physical injury for others, the commonality requirement of Rule 23(b)(3) was not satisfied.⁶⁷

Moreover, the Court expressed grave concern about the fairness of the settlement itself because of what it viewed as the serious conflicts of interest of the attorneys representing the class.⁶⁸ As the Court observed, “the interests of those within the . . . class are not aligned.”⁶⁹ “[F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”⁷⁰

The Court reiterated these same principles in *Ortiz*, where it overturned an asbestos class action settlement certified under Rule 23(b)(1)(B). Justice Souter’s opinion for the Court recognized that asbestos “litigation defies customary judicial administration.”⁷¹ Nonetheless, the Court concluded that the drafters of Rule 23 did not intend that parties would use 23(b)(1)(B) mandatory class actions “to aggregate unliquidated tort claims on a limited fund rationale.”⁷² In so ruling, the Court followed the analysis of a number of commentators

⁶⁴ *Id.* at 625-26.

⁶⁵ See FED. R. CIV. P. 23(b)(3) advisory committee’s note (observing that “[a] ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action”).

⁶⁶ *Amchem*, 521 U.S. at 625.

⁶⁷ *Id.* at 609, 624.

⁶⁸ *Id.* at 626.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

⁷² *Id.* at 843.

who had observed that Rule 23(b)(1)(B) was not intended to be utilized in the mass tort context to supplant bankruptcy proceedings.⁷³ Indeed, as the Second Circuit had earlier recognized, use of the class action device to resolve asbestos mass tort liability “would surely lead to further evasion of the Bankruptcy Code as other debtors sought relief in mandatory class actions.”⁷⁴ The Court in *Ortiz* concluded that such efforts implicated grave constitutional issues.⁷⁵

Such concerns led the Court to find that the *Ortiz* class certification was defective. Much as it had in *Amchem*, the Court focused on the “divergent interests of the presently injured and future claimants.”⁷⁶ It observed that plaintiffs’ counsel had an “egregious” conflict because their interest was in “generous immediate payments,” whereas future claimants’ interest lay in “an ample, inflation-protected fund for the future.”⁷⁷ As a result, the Court determined that “the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in [that] case was in any event improper.”⁷⁸ Such rulings have effectively blocked resolution of mass tort claims within the confines of the tort system.

C. *Negotiated Settlements*

Because traditional litigation is not a practical option for resolving many mass tort claims, companies often have no choice but to settle claims on a mass basis.⁷⁹ But the mass settlements have not been

⁷³ See, e.g., Henry Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1164 (1998) (“The ‘framers’ of Rule 23 did not envision the expansive interpretations of the rule that have emerged No draftsmen contemplated that, in mass torts, (b)(1)(B) ‘limited fund’ classes would emerge as the functional equivalent to bankruptcy by embracing ‘funds’ created by the litigation itself.”).

⁷⁴ *In re Joint E. and S. Dist. Asbestos Litig.*, 14 F.3d 726, 732 (2d Cir. 1993).

⁷⁵ *Ortiz*, 527 U.S. at 845.

⁷⁶ *Id.* at 853.

⁷⁷ *Id.* at 853, 856.

⁷⁸ *Id.* at 864.

⁷⁹ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that aggregation exposes defendants to “intense pressure to settle”); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1858 (1997) (observing that “plaintiffs’ attorneys rush to their favorite judges and demand draconian procedures to pressure defendants to make block settlements”); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 521 (1994) (“Often the pressure for block settlements comes from plaintiffs’ attorneys who hope to get something for a large mass of questionable cases.”).

governed by traditional principles of liability, which require stringent proof that a defendant's product actually caused an injury and that a plaintiff has a medically valid disease diagnosis. Rather, the threat of widely dispersed litigation in unfavorable jurisdictions inevitably forces defendants to agree to settlement programs that are not based upon actual liability.

This, in turn, often leads to an expansion of the litigation and its associated problems. Unimpaired claimants may "free ride" on the claims of the truly impaired where the tort system encourages the "parasitic fusion of strong and weak cases."⁸⁰ Moreover, claim volumes inevitably swell given that there is no real restriction on the flow of claims into the system. As claims are settled, room is made for additional claims that may be pursued without any rigorous demonstration of liability or accompanying damages.

D. Legislative and Administrative Solutions

Given these problems with resolving mass tort claims through traditional litigation, it is not surprising that parties have actively pursued legislative and administrative resolutions. Indeed, even the Supreme Court has suggested such alternatives. For example, in *Amchem* the Court noted that "a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."⁸¹ Similarly, in *Ortiz*, the Court concluded that the "elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."⁸²

Such calls for congressional action have gone largely unheeded.⁸³ In 1981 and 1982, Congress considered three different bills to address the asbestos problem by setting up a fund to pay benefits to victims of asbestos-related disease.⁸⁴ In 1983, Congress considered the

⁸⁰ See John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1010 (1995).

⁸¹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1999).

⁸² *Ortiz*, 527 U.S. at 821.

⁸³ See RAND INSTITUTE, *supra* note 12, at 130 ("Since the inception of asbestos litigation in the 1970s, more than 15 bills have been introduced in the U.S. Congress proposing to change the nation's approach to resolving asbestos claims," yet none has been passed); Schultz, *supra* note 2, at 555 (observing that "despite the increasingly desperate situation faced by the courts, Congress has consistently failed to adopt a national response to the [asbestos] crisis").

⁸⁴ Occupational Health Hazards Compensation Act, H.R. 5735, 97th Cong. (1982) ("Miller bill"); Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong.

Occupational Disease Compensation Act, which would have made compensation from a national insurance pool the exclusive remedy for asbestos-related claims brought against employers.⁸⁵ In 1984, Congress considered the Asbestos Workers' Recovery Act, which would have established a compensation fund fed by government and industry to serve as the exclusive remedy for injured workers against their employers and asbestos manufacturers.⁸⁶

Similar efforts continued throughout the 1990s. In 1991, prodded by the Judicial Conference Committee Report urging Congress to consider a legislative resolution to the asbestos litigation crisis,⁸⁷ Congress again convened hearings on the matter, yet took no action.⁸⁸ Then in 1999, recognizing the inequities and inefficiencies of asbestos litigation,⁸⁹ Congress held hearings on the Fairness in Asbestos Compensation Act, which would have created a nationwide administration claims resolution process to compensate asbestos victims.⁹⁰ However, the Act met the same fate as its predecessors and never made it out of Congress.

While legislative efforts continue, to date none has been successful.⁹¹ Moreover, even if at some point Congress passes comprehensive legislation, the decades-long process has proved far from effective in addressing a significant problem plaguing the civil justice system. It is simply not feasible in many cases to employ

(1981) ("Fenwick bill"); Asbestos Health Hazards Compensation Act, S. 1643, 97th Cong. (1981) ("Hart bill").

⁸⁵ Occupational Disease Compensation Act, H.R. 3175, 98th Cong. (Sess. 1983).

⁸⁶ Asbestos Workers' Recovery Act, S. 2708, 98th Cong. (1984).

⁸⁷ See JUDICIAL CONFERENCE REPORT, *supra* note 7, at 3, 27; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) ("As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. . . . To this date, no congressional response has emerged.").

⁸⁸ See generally *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 102d Cong. 1-3 (1992).

⁸⁹ Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. § 2(1), at 1 (1999).

⁹⁰ 145 Cong. Rec. S3457-01, at S3509 (statement of Sen. Ashcroft); see also H.R. 1283, 106th Cong. (1999) (stating that purpose of Act was to "establish legal standards and procedures for the fair, prompt, inexpensive, and efficient resolution of personal injury claims arising out of asbestos exposure").

⁹¹ See Fairness in Asbestos Injury Resolution Act of 2004, S. 2290, 108th Cong. (2004); Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, 108th Cong. (2003); RAND INSTITUTE, *supra* note 12, at xxx-xxxii (discussing pending proposals); Vairo, *supra* note 61, at 129 (observing that it is "doubtful whether a trust fund or other approach will actually emerge from the legislative process").

legislative solutions to resolve mass tort litigation. Given the high stakes involved and the many conflicting political interests, timely agreement over proposed legislative or administrative solutions is often impossible to achieve.

III. RESOLVING MASS TORT CLAIMS IN THE BANKRUPTCY SYSTEM

Given that limited alternatives for resolving mass tort claims are currently available, the bankruptcy system increasingly is being called upon to provide a solution.⁹² Chapter 11 “offers a structured system to manage multiple liabilities and has provided a forum for companies with massive liabilities to attempt to do so.”⁹³ Courts in bankruptcy proceedings may employ procedural mechanisms similar to those employed by nonbankruptcy courts to resolve common issues underlying multiple claims. One of the major advantages of such proceedings is that threshold issues that may be dispositive of whole categories of claims can be addressed in a uniform fashion in a single forum. Such centralized resolution of claims is difficult to achieve in the civil litigation system and has significant benefits for the consistent and efficient disposition of claims.

A. *Evolution of Procedures for Addressing Mass Tort Claims in Chapter 11*

The procedures available for addressing mass tort claims in bankruptcy did not emerge overnight. Rather, over the years, courts presiding over mass tort bankruptcies have evolved (and improved upon) procedures designed to facilitate the resolution of such claims. These procedures include consolidating all claims in one court, precluding collateral litigation in other courts, identifying the universe of existing claims, ensuring appropriate representation of future claimants, establishing a committee of claimants’ counsel, disallowing invalid claims, litigating objections to claim validity, establishing the

⁹² See RAND INSTITUTE, *supra* note 12, at xxvii (reporting that at least 73 firms had filed for bankruptcy through mid-2004); Listokin & Ayotte, *supra* note 16, at 1436 (“Mass tort bankruptcies involving future claimants are increasingly prevalent. Asbestos liability alone has been implicated in the bankruptcy declarations of at least sixty corporations.”); McGovern, *supra* note 30, at 1754 (“Bankruptcy is the only generally recognized legal vehicle that is currently available for imposing finality on a defendant’s asbestos liability.”); Vairo, *supra* note 61, at 95 (“[I]t has become routine for asbestos defendants to use the bankruptcy laws to obtain global peace, and more companies involved in various other mass torts may be likely to do so in the future.”).

⁹³ BANKRUPTCY COMMISSION REPORT, *supra* note 31, at 315.

criteria to be used in settling claims, creating and funding a trust with criteria and procedures for evaluating and paying valid claims, and enjoining claimants from bringing future claims against the debtor or its affiliates while channeling all claims to a post-confirmation trust.

1. *Johns-Manville*

Early mass tort bankruptcies demonstrated the importance of imposing strict criteria in assessing which claims should receive compensation. While the original Johns-Manville plan of reorganization established an important precedent for channeling all claims to a post-confirmation trust, the Manville Trust nonetheless failed because it allowed the uncontrolled return of claims to the tort system. Specifically, the Manville Trust's design allowed all claimants to go back to the tort system to litigate their claims 120 days after they filed a claim against the Trust. Claimants proceeded to litigation en masse, forcing the Trust to litigate on several fronts at once and thereby expend resources that could have been used to compensate claimants.⁹⁴

Judge Weinstein, who intervened during the Manville bankruptcy proceedings and corrected some of the early problems with the Trust, observed that the problems stemmed in part from the influence of certain plaintiffs' attorneys who used their power to manage the Trust to collect large fees for themselves, despite supervising courts' efforts to keep the fees reasonable.⁹⁵ Indeed, Judge Weinstein observed that there "was a frenzied offense by [the] plaintiffs' bar to dispose of claims by the hundreds and thousands at a time and collect fees before the Trust went broke" and that "[t]he hundreds of millions of dollars in fees received by plaintiffs' attorneys made assembling large stables of claimants hugely profitable."⁹⁶ Due to flaws in the plan and high

⁹⁴ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 754-55 (E.D.N.Y. 1991); Frank Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 602-03 (1996) (observing that "[t]he Trust mechanism was poorly designed and highly vulnerable to litigation").

⁹⁵ WEINSTEIN, *supra* note 53, at 106 ("If plaintiffs control the appointment of attorneys, administrators, accountants, and trustees, the entity loses its independence. Such control by those who brought the first major asbestos claims in the Manville bankruptcy is one of the factors that led to the rapid disintegration of the Manville Trust and the need for court intervention to replace management and restructure operations."); Macchiarola, *supra* note 94, at 603 ("The Trust, in essence, was captured and held hostage by the plaintiffs' bar.").

⁹⁶ *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 758.

administrative costs, the Manville claims resolution process had to be drastically overhauled.⁹⁷

2. *A.H. Robins*

In contrast to the early Manville experience, the procedures established in the reorganization of A.H. Robins proved quite successful in resolving claims fairly and efficiently. A.H. Robins faced a wave of actions in state and federal courts around the country. These actions sought damages for injuries allegedly caused by the Dalkon Shield intrauterine device (“IUD”).⁹⁸ Mindful of the Manville history, the *Robins* court approved a plan that offered flexible and easy-to-administer payment options that encouraged the orderly resolution of claims. The Dalkon Shield claimants were permitted to litigate their claims, but not at the expense of those who did not wish to do so.⁹⁹ In order to evaluate asserted claims, the court required claimants to provide information regarding their use of the Dalkon Shield, the alleged injury, and the names of physicians and clinics the claimant visited.¹⁰⁰ The court then established a trust facility to pay claims that met pre-established criteria.

The Dalkon Shield Trust was able to resolve thousands of pending claims quickly by avoiding the costs associated with litigation.¹⁰¹ Of the over 350,000 claims filed, only about 6,600 claimants initially elected arbitration or trial.¹⁰² Thus, the vast majority of claimants found immediate compensation offered by the Trust to be just.¹⁰³ Of the remaining 6,600 claims, only a handful ultimately proceeded to an arbitration hearing or trial. By 1997, fewer than 300 of the claims were in arbitration or litigation, and about half of those claims had been resolved. The Trust was able not only to reduce administrative

⁹⁷ See *In re Johns-Manville Corp.*, 982 F.2d 721, 727 (2d Cir. 1992).

⁹⁸ *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir. 1986).

⁹⁹ See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 *FORDHAM L. REV.* 617, 645-46 (1992).

¹⁰⁰ *In re A.H. Robins Co.*, 862 F.2d 1092, 1093 (4th Cir. 1988).

¹⁰¹ See WEINSTEIN, *supra* note 53, at 280-81 n.88 (“Some trust mechanisms have functioned very well. The Dalkon Shield Claimants Trust has been, on the whole, a success.”); Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 *LOY. L.A. L. REV.* 79, 153 (1997) (concluding that Dalkon Shield Trust’s approach to resolving claims “worked well”).

¹⁰² Vairo, *supra* note 101, at 145.

¹⁰³ *Id.* at 154.

costs, but also to resolve pending tort claims more quickly than anticipated.¹⁰⁴

By 1997 virtually all of the claims had been resolved for far less than the \$2.4 billion fund (as augmented by accumulated interest from investments) approved by the court to cover all tort claims through the post-confirmation trust.¹⁰⁵ In comparison with the Manville Trust, the Dalkon Shield Trust, during the first four years of its operation, processed approximately five times as many claims, paid the full face amount of its settlement offers, and incurred approximately one-tenth the administrative cost per claim.¹⁰⁶ The success of the Dalkon Shield Trust (and the failure of the Manville Trust) demonstrated the importance of avoiding continued mass tort litigation and employing flexible payment options.

3. *Dow Corning*

These lessons were taken to heart in the subsequent Dow Corning reorganization. In 1992, the Food and Drug Administration ordered that silicone gel breast implants be taken off the market due to concern that they may cause connective tissue disease.¹⁰⁷ On the heels of the FDA's action and the attendant publicity, a wave of lawsuits against breast implant manufacturers soon followed. In 1992, more than 3,000 such suits were commenced, including dozens of class actions. Another 15,000 actions were filed in 1993 and 1994.¹⁰⁸ Dow Corning, a manufacturer of silicone breast implants, faced the prospect of defending itself in multiple trials as well as excessive settlement demands from plaintiffs' lawyers attempting to use the leverage from the looming trial dates to extract concessions.¹⁰⁹ Unable to meaningfully litigate the mass of claims in the tort system, Dow Corning sought resolution of the claims through procedures available within the bankruptcy system.

At the outset, Dow Corning objected to the asserted claims on the ground that there was no reliable scientific evidence or expert testimony under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals* to support a finding that silicone gel breast implants

¹⁰⁴ *Id.* at 155.

¹⁰⁵ *Id.* at 126-27.

¹⁰⁶ See Vairo, *supra* note 99, at 655-56.

¹⁰⁷ *In re Dow Corning Corp.*, 211 B.R. 545, 551 (Bankr. E.D. Mich. 1997).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 552-53.

caused disease.¹¹⁰ Accordingly, Dow Corning asked the bankruptcy court to (1) determine whether the claimants' scientific evidence was admissible under *Daubert* and (2) grant its motion for summary judgment, disallowing thousands of pending disease claims for lack of sufficient admissible evidence of causation. The court agreed that it could adjudicate such threshold issues to assess the validity of the claims.¹¹¹ Estimation of any remaining claims would proceed following adjudication of the debtor's liability.¹¹²

While Dow Corning's summary judgment motion on threshold issues of disease causation was pending, the parties negotiated a consensual plan of reorganization. That plan set out criteria for allowable disease claims, provided for efficient and fair compensation mechanisms for those who opted to settle, and further provided that unsettled claims would be subjected to a controlled litigation process that would provide the opportunity for resolution of the same threshold, scientific issues.¹¹³

4. *Babcock & Wilcox*

More recently, procedures similar to those implemented in the *Robins* and *Dow Corning* bankruptcy proceedings were proposed by Babcock & Wilcox in its Chapter 11 bankruptcy. Like many companies, Babcock & Wilcox was forced to seek bankruptcy protection after facing waves of claims for asbestos-related disease allegedly caused by asbestos insulation used in industrial boilers it manufactured. At the debtor's request, the district court first partially withdrew the reference from the bankruptcy court to resolve threshold issues relating to the company's liability concerning various categories of claims.¹¹⁴ The court then set a bar date and crafted a special proof of claim form to be used in setting out the factual basis for the claims.

The court contemplated that it would hear "motions for summary judgment on threshold liability issues," including the appropriate standard of liability, the validity of claims asserted by those who were unimpaired, the validity of claimants' scientific evidence of disease and

¹¹⁰ See *id.* at 554; *In re Dow Corning Corp.*, 215 B.R. 346, 348 (Bankr. E.D. Mich. 1997).

¹¹¹ *In re Dow Corning*, 215 B.R. at 352-53.

¹¹² See *In re Dow Corning*, 211 B.R. at 555.

¹¹³ See generally *In re Dow Corning Corp.*, 244 B.R. 718 (Bankr. E.D. Mich. 1999) (articulating details of reorganization plan).

¹¹⁴ See *In re The Babcock & Wilcox Co.*, No. 00-0558, 2000 WL 422372, at *4 (E.D. La. Apr. 17, 2000).

causation, the appropriate statute of limitations, and other potential defenses.¹¹⁵ Ultimately, as in *Dow Corning*, the parties reached a negotiated plan of reorganization against the backdrop of these proposed claims-handling procedures.

B. *Procedures Available in Chapter 11*

What emerges from the history of these mass tort cases is the development of a set of tools and procedures that may be used inside Chapter 11 to fairly and efficiently resolve mass tort claims. These established procedures exist for identifying and litigating claims in a manner that ensures that only valid claims are paid and more fairly allocates the limited pool of resources available to pay asserted claims.

1. *The Automatic Stay*

One of the most important features of Chapter 11 as a means for resolving mass tort liability is its ability to protect the defendant from collateral litigation.¹¹⁶ The Code provides that all such litigation is automatically stayed upon the debtor's filing of a petition for bankruptcy protection. The automatic stay may also be used to bar continued litigation against related companies.¹¹⁷

The automatic stay serves the dual purpose of (1) giving the debtor a breathing spell from the pressures that precipitated its bankruptcy filing and (2) protecting creditors by promoting the bankruptcy goal of equal treatment.¹¹⁸ The automatic stay is broad in scope¹¹⁹ and "afford[s] the parties and the Court an opportunity to appropriately resolve competing economic interests in an orderly and effective

¹¹⁵ *Id.* at *4-5.

¹¹⁶ Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 435-36 (1999) ("The imposition of the automatic stay under § 362 of the Bankruptcy Code is the most immediate benefit of filing a bankruptcy petition by a debtor who is also a defendant in tort actions. The automatic stay provides an 'enormous benefit,' immediately halting all litigation pending against the debtor and prohibiting the commencement of new litigation."); Vairo, *supra* note 61, at 113 ("The automatic stay plays a critical role in the administration of the bankruptcy laws; it prevents creditors from seeking satisfaction of their claims against the debtor in proceedings outside of bankruptcy.")

¹¹⁷ *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1003 (4th Cir. 1986).

¹¹⁸ *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1182 (5th Cir. 1986).

¹¹⁹ *Tubbs*, 68 F.3d at 691.

way.”¹²⁰ It is designed “to protect debtors from creditors and creditors from each other.”¹²¹ In furtherance of that purpose, the automatic stay makes clear the bankruptcy court’s centralized jurisdiction over the debtor’s assets and “forestall[s] the race to levy upon or make claims against the debtor’s property with possibly inconsistent results.”¹²² The breathing spell provided by the automatic stay affords the bankruptcy court the opportunity to craft efficient procedures for resolving large numbers of claims originally brought in multiple state and federal jurisdictions.

2. Representation of Future Claimants

The bankruptcy system also offers unique advantages for protecting the interests of future claimants and avoiding conflicts among different groups of claimants. It is typical for the bankruptcy court to appoint a representative for future claimants to protect their interests throughout the bankruptcy proceedings.¹²³ Because future claimants have separate representation, their interests are better protected than they might otherwise be in the civil litigation system. Separate representation, for example, avoids the inherent conflicts of interest that infected the class action settlements at issue in *Amchem* and *Ortiz*. Once a representative for future claimants has been appointed, the court may then proceed to identify and ascertain the validity of asserted claims.

3. Objections to the Validity of Claims and Summary Judgment Proceedings

The Code provides efficient mechanisms for identifying the universe of asserted claims and determining which claims are valid and should receive a portion of the debtor’s limited resources. Under the Code, creditors (including mass tort claimants) must file proofs of claim.¹²⁴ The debtor is then afforded the opportunity to make objections to any

¹²⁰ Taylor v. Slick, 178 F.3d 698, 702 (3d Cir. 1999).

¹²¹ *In re Walker*, 51 F.3d 562, 566 (5th Cir. 1995).

¹²² *Holland Am. Ins. v. Roy*, 777 F.2d 992, 995 (5th Cir. 1985).

¹²³ See Listokin & Ayotte, *supra* note 16, at 1443 (“Bankruptcy courts have frequently appointed legal representatives to represent classes of future claimants in mass tort cases.”). In the asbestos context, under 11 U.S.C. § 524(g)(4)(B)(i) (2000), Congress requires the appointment of a legal representative “for the purpose of protecting the rights of persons that might subsequently assert [future] demands.” *Id.*

¹²⁴ See 11 U.S.C. § 501 (2000).

asserted claims.¹²⁵ This includes omnibus objections to entire categories of claims based on common issues cutting across claims.¹²⁶

Under the Bankruptcy Rules, the claimant bears the burden of proof to establish a valid claim.¹²⁷ A claimant must first assert facts sufficient to establish a legal basis for the claim.¹²⁸ Where there is any dispute concerning the validity of a claim, the court, after giving notice and holding a hearing, shall ascertain the amount of such a claim.¹²⁹ However, the court may not allow any claim that is “unenforceable against the debtor and property of the debtor, under any agreement or applicable law.”¹³⁰

The Code authorizes bankruptcy courts to set a bar date by which claimants must file their proofs of claim.¹³¹ The bar date serves the important purpose of “enabl[ing] a debtor and his creditors to know, reasonably promptly, what parties are making claims against the estate and in what general amounts.”¹³² In addition, it provides “finality” regarding the universe of asserted claims.¹³³ The debtor may then make objections to the validity of the claims, which will ultimately be resolved by the bankruptcy court.

In order to resolve the validity of asserted claims, the debtor may submit motions for summary judgment to litigate threshold issues that apply to all or some subset of the asserted claims. In the *Babcock & Wilcox* Chapter 11, for example, the district court presiding over the bankruptcy proceedings withdrew the reference from the bankruptcy court to determine the validity of asbestos claims asserted against the debtor.¹³⁴ Similarly, in the *Dow Corning* Chapter 11, which was

¹²⁵ *Id.* § 502(a).

¹²⁶ See, e.g., *In re Int'l Wireless Commc'ns Holdings, Inc.*, 257 B.R. 739, 742 (Bankr. D. Del. 2001) (approving omnibus objection); *In re Marvel Entm't Group, Inc.*, 254 B.R. 817, 820 (D. Del. 2000) (same); *Bartel v. Bar Harbor Airways, Inc.*, 196 B.R. 268, 270 (S.D.N.Y. 1996) (granting debtor's omnibus objection).

¹²⁷ *In re Fidelity Holding Co.*, 837 F.2d 696, 698 (5th Cir. 1988).

¹²⁸ *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 49-50 (Bankr. D. Del. 2001).

¹²⁹ 11 U.S.C. § 502(b).

¹³⁰ *Id.* § 502(b)(1).

¹³¹ See *In re Dow Corning Corp.*, No. 97-1177, 1998 WL 180594, at *1 (6th Cir. 1998) (bar date established for breast implant claims); *In re The Babcock & Wilcox Co.*, No. 00-10992, 2000 WL 1511175, at *1 (E.D. La. Oct. 6, 2000) (bar date established for asbestos bodily injury claims).

¹³² *In re Kolstad*, 928 F.2d 171, 173 (5th Cir. 1991).

¹³³ See *Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 17 (1st Cir. 1997); see also *In re Eagle-Picher Indus., Inc.*, 137 B.R. 679, 681 (Bankr. S.D. Ohio 1992) (observing that in mass tort bankruptcies, bar date is essential to “the process of arriving at a value of the claims of [the tort claimant] class”).

¹³⁴ *In re The Babcock & Wilcox Co.*, No. Civ. A 00-0558, 2000 WL 422372, at *4

precipitated by the filing of thousands of claims asserting that silicone breast implants caused a range of adverse health conditions, the bankruptcy court acknowledged that summary judgment procedures could be used “to weed out those claims which do not present a genuine issue of material fact, and for which the debtor is entitled to judgment as a matter of law.”¹³⁵

One of the issues frequently raised regarding mass tort claims is the reliability of the scientific evidence supporting such claims.¹³⁶ Under Bankruptcy Rule 9017, the Federal Rules of Evidence, including Rule 702 and the stringent requirements under *Daubert*,¹³⁷ apply to all claims asserted in bankruptcy proceedings.¹³⁸ Absent reliable scientific evidence demonstrating causation, summary judgment is warranted. The stringent judicial “gatekeeping” that is required under these rules mandates that courts weed out unsupported claims.¹³⁹ Under Rule 702, claimants must establish by a preponderance of the evidence that they meet the relevant admissibility requirements.¹⁴⁰ The party sponsoring such evidence must demonstrate to the court that its evidence is admissible under the stringent gatekeeping requirements of Rule 702. The court must make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.”¹⁴¹ Expert

(E.D. La. Apr. 17, 2000).

¹³⁵ *In re Dow Corning Corp.*, 215 B.R. 346, 360 (Bankr. E.D. Mich. 1997).

¹³⁶ *In re Babcock & Wilcox*, 2000 WL 422372, at *4 (withdrawing reference to determine “the validity of claims based on unreliable scientific evidence of disease and/or causation”).

¹³⁷ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588-89 (1993).

¹³⁸ FED. R. BANKR. P. 9017; see also *In re Husting Land & Dev., Inc.*, 255 B.R. 772, 780-81 (Bankr. D. Utah 2000) (excluding expert evidence under Rule 702); *In re Dow Corning Corp.*, 237 B.R. 364, 369-72 (Bankr. E.D. Mich. 1999) (same).

¹³⁹ See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996) (observing that if such scrutiny were applied, “even a mass tort like asbestos could be managed . . . in a way that avoids judicial meltdown”); see also FED. R. EVID. 702 advisory committee’s note (observing that rule “affirms the trial court’s role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony”); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138, 147 (1999) (noting that “gatekeeping” requirement “applies to all expert testimony”); *Daubert*, 509 U.S. at 589.

¹⁴⁰ FED. R. EVID. 702 advisory committee’s note.

¹⁴¹ *Daubert*, 509 U.S. at 592-93. The Supreme Court provided a non-exclusive list of factors to assist trial courts in undertaking their obligation to prevent “subjective belief” and “unsupported speculation” in the guise of expert testimony, including: (1) whether the expert’s technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review; (3) the known or potential rate of

opinion evidence must be rejected where there is an “analytical gap” between the data and the expert opinion being offered.¹⁴²

In order to survive judicial scrutiny under *Daubert* in the context of toxic torts, claimants must provide reliable scientific evidence demonstrating that exposure to a toxin is linked to disease. Evidence linking a specific exposure to disease is inadmissible unless there is “an established scientific connection between exposure and illness,” including “information on the level of exposure necessary for a person to sustain . . . injuries.”¹⁴³ “Scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs’ burden in a toxic tort case.”¹⁴⁴

Thus, quantification of exposure and risk are essential, and epidemiological evidence is required to demonstrate general causation in a reliable way.¹⁴⁵ Claims may be rejected, for example, where there is insufficient epidemiological evidence establishing that a particular exposure is associated with a relative risk above 2.0.¹⁴⁶ Similarly, courts have rejected claims where the exposures fall below prophylactic levels set by government regulators. These courts have

error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *See id.* at 593-94, 598-600.

¹⁴² *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

¹⁴³ *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998).

¹⁴⁴ *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996).

¹⁴⁵ *See, e.g., Renaud v. Martin Marietta Corp.*, 972 F.2d 304, 307 (10th Cir. 1992) (holding that plaintiffs’ causation evidence “was not sufficiently reliable, being drawn from tests on non-human subjects without confirmatory epidemiological data”); *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 315 (5th Cir. 1989) (noting that theories of toxic causation “unconfirmed by epidemiologic proof cannot form the basis for causation in a court of law”).

¹⁴⁶ Courts generally require that epidemiological studies show a doubling of the risk of disease — a relative risk of 2.0 at a 95% confidence level — when determining whether the evidence of causation is sufficiently reliable. *See, e.g., Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1315 n.16 (11th Cir. 1999) (“The threshold for concluding that an agent more likely than not caused a disease is 2.0.”); *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1321 (9th Cir. 1995) (“For an epidemiological study to show causation under a preponderance standard, ‘the relative risk of [the disease] arising from the epidemiological data . . . will, at a minimum, have to exceed 2.’”); *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 959 n.23 (3d Cir. 1990) (“In no case . . . can evidence suffice to establish a causal link if it does not include at least reasonable estimates of exposure levels and durations, and data that reasonably indicate a relative risk greater than 2.”); *FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* 384 (2d ed. 2000) (observing that “[a] substantial number of courts in a variety of toxic substances cases have accepted this reasoning”).

explained that “agencies’ threshold of proof is reasonably lower than that appropriate in tort law, which ‘traditionally make[s] more particularized inquiries into cause and effect’ and requires a plaintiff to prove ‘that it is more likely than not that another individual has caused him or her harm.’”¹⁴⁷

Moreover, claimants must demonstrate exposure to the debtor’s product, as opposed to some other source.¹⁴⁸ In the asbestos context, for example, “a plaintiff ‘must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant’s product.’”¹⁴⁹ This issue has become particularly significant in the context of asbestos claims given allegations of widespread fraud regarding product identification. There has been a dramatic shift in the roster of defendants responsible for plaintiffs’ exposure: as defendants enter bankruptcy, they are less and less likely to be named by plaintiffs as the source of their asbestos exposure.¹⁵⁰ Requiring stringent proof of exposure to a particular defendant’s product eliminates the possibility of the debtor paying invalid claims.

Proceedings may also be undertaken to determine the medical criteria that will be required to establish a valid claim. In addition to presenting reliable scientific evidence to establish general and specific causation, a claimant must present sufficiently reliable evidence to establish that the claimant actually has the disease claimed. This has been an area of intense litigation in the asbestos context, for example, where defendants assert that thousands of claims are being filed based on unreliable, if not fraudulent, medical documentation.¹⁵¹

In making these determinations, the court may appoint scientific experts pursuant to Federal Rule of Evidence 706, if necessary, to aid

¹⁴⁷ *Allen*, 102 F.3d at 198 (observing that an agency’s purpose is to “suggest or make prophylactic rules governing human exposure . . . in order to reduce public exposure to harmful substances” (quoting *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996))); *see also* *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 470-71 (5th Cir. 1985) (showing in studies that fiber count for defendant’s product was below “threshold limit defined by OSHA,” and accordingly, record did not contain “sufficient evidence” that plaintiffs’ “limited exposure . . . to the relatively small number of fibers emitted by this cloth under the most unfavorable conditions could be a producing cause of his injuries”).

¹⁴⁸ PROSSER & KEETON ON TORTS § 103, at 713 (5th ed. 1984).

¹⁴⁹ *Harris v. Owens-Corning Fiberglas Corp.*, 102 F.3d 1429, 1432 (7th Cir. 1996).

¹⁵⁰ *See* *Brickman*, *supra* note 39, at 1917 n.13 (observing that whereas “prebankruptcy testimony in Philadelphia Navy Yard Cases put Manville’s share of product use as high as 80%, postbankruptcy testimony had Manville exposure accounting for a quarter or less of the volume of asbestos-containing materials encountered by plaintiffs”).

¹⁵¹ *See* *Schwartz & Lorber*, *supra* note 47, at 252-54.

the court in its gatekeeping role and ensure that only reliable evidence is admitted.¹⁵² Justice Breyer, for example, has observed that in cases involving complicated scientific or technical issues, “a judge could better fulfill this gatekeeper function if he or she had help from scientists.”¹⁵³ Accordingly, he recommended that “[j]udges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts.”¹⁵⁴ Such independent experts can play a critical role in advising the court and informing the decision-making process. Where, as in the context of bankruptcy proceedings, numerous claims have been centralized in a single forum, such an appointment may make even more sense. The cost associated with the appointment may be spread over numerous claims, and the experts will have the ability to consider the full range of claims and associated issues, leading to added efficiencies.

There are many other issues that may be addressed through summary judgment proceedings. For example, there are often significant defenses such as the statute of limitations that can be litigated through summary judgment proceedings, thereby eliminating certain categories of claims. Similarly, the court may resolve whether it will allow claimants to seek punitive damages. Disallowance of punitive damages is standard practice in mass tort bankruptcies because allowing punitive damages “would prevent the fair and equitable treatment” of claims and “would frustrate the fair distribution of . . . assets.”¹⁵⁵

¹⁵² See, e.g., *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1404-05 (D. Or. 1996) (appointing panel of independent experts to provide opinion on medical evidence supporting causation); *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1552-53 (D. Colo. 1990) (appointing independent expert to assess testing methods used by plaintiffs' expert to support opinion on PCB contamination); see also Karen Butler Reisinger, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 IND. L. REV. 225, 225-26 (1998).

¹⁵³ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997).

¹⁵⁴ *Id.* at 149-50.

¹⁵⁵ *In re Celotex Corp.*, 204 B.R. 586, 613 (Bankr. M.D. Fla. 1996); see also *In re A.H. Robins Co.*, 89 B.R. 555, 562 (E.D. Va. 1988) (“The presence of a ‘wild card’ in the form of punitive damages would constitute the death knell of any feasible reorganization plan.”); *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986) (“To allow recovery of punitive damages . . . would be to risk the depletion of Trust assets to the benefit of known victims at the expense 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, 505 (1995) (observing that “courts overseeing mass tort related bankruptcies generally either subordinate punitive damages to general unsecured claims or disallow them entirely”).

In order to collect the information necessary to facilitate these procedures, it is not unusual for courts to require claimants to submit detailed proofs of claim that lay out the information required to establish a claim in the face of the defenses the debtor is likely to assert.¹⁵⁶ For example, the court-approved form may require the submission of information necessary to document the claimant's medical diagnosis, including the date of first diagnosis, and the medical records relating to the diagnosis, all of which are necessary to establish claims of disease causation. Similarly, court-approved forms may require the submission of information relating to alternative causes of a claimant's disease, such as other sources of exposure or pre-existing conditions. Claim forms may also involve the submission of information necessary to document the claimant's exposure to a particular product or material that is alleged to cause disease. Finally, the claim form may require information necessary to determine whether the claims are barred by the doctrine of res judicata, such as whether the claimant has filed any prior lawsuits relating to the exposure or workers' compensation claims.

Utilizing court-approved proof of claim forms is an efficient means of collecting such information, as opposed to engaging in lengthy individualized discovery. Once the information is collected, applying the court's rulings on summary judgment becomes a simple administrative matter. The court's determinations may simply be applied to individual claims based on the information each claimant submitted in the proof of claim form.

4. Rule 42 Common Issue Litigation

Should the court deny any of the motions for summary judgment, any remaining issues may be adjudicated using Rule 42 common issue trials. Through Bankruptcy Rule 7042, Federal Rule of Civil Procedure 42 specifically applies in adversary proceedings under Chapter 11. Rule 42(a) "confers upon a district court broad power, whether at the request of a party or upon its own initiative, to consolidate causes for trial as may facilitate the administration of

¹⁵⁶ Such questionnaires are sometimes used to streamline litigation outside the context of bankruptcy proceedings as well. See *In re Diet Drugs Phentermine, Fenfluramine, Dexfenfluramine Prods. Liab. Litig.*, No. 98-20070, 1999 WL 387322, at *1 (E.D. Pa. May 19, 1999) (utilizing claim forms to "minimize time consuming and expensive exchanges of discovery"); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. 98-20070, 1997 WL 704702, at *4 (E.D. Pa. Aug. 22, 1997) (noting use of "questionnaire that requested, among other things, pertinent medical, employment, and worker's compensation information").

justice.”¹⁵⁷ The “broad grant of authority” found in Rule 42 “has been applied liberally” to avoid unnecessary costs or delay by resolving common issues in unified proceedings.¹⁵⁸ In particular, courts addressing mass tort claims have suggested this procedure as a means of resolving threshold issues common to asserted claims both inside and outside of Chapter 11.¹⁵⁹

5. Estimation of Remaining Claims

After the court has resolved threshold issues concerning the validity of the asserted claims, the value of any remaining claims can be estimated.¹⁶⁰ Under the Code, the debtor is ensured of a “complete discharge” of its debts so that it will not be subject to “lingering claims ‘riding through’ the bankruptcy.”¹⁶¹ Consistent with these principles, estimation sets a fixed outer limit on the amount to be provided for contingent tort claims.¹⁶²

Estimation is not a substitute for litigation of the validity of asserted claims. A debtor has both a constitutional and statutory right to litigate defenses to asserted claims. Under the Code, the court may not allow any claim that is “unenforceable against the debtor.”¹⁶³ With respect to

¹⁵⁷ *Ellerman Lines, Ltd. v. Atl. & Gulf Stevedores, Inc.*, 339 F.2d 673, 675 (3d Cir. 1964).

¹⁵⁸ *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006, 1013 (5th Cir. 1977).

¹⁵⁹ *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997) (observing that “exercising its discretion under Federal Rule of Civil Procedure 42(b),” district court ordered consolidated trial on “issues of exposure, causation, medical monitoring, and property damages,” which served “the interests of judicial economy”); *In re Bendectin Litig.*, 857 F.2d 290, 317 (6th Cir. 1988) (“Many courts have . . . permitted separate issue trials when the issue first tried would be dispositive of the litigation [A]ll claims depended upon the answer to a single question. Does Bendectin, taken in therapeutic doses cause birth defects?”); *In re Dow Corning Corp.*, 211 B.R. 545, 583 (Bankr. E.D. Mich. 1997) (holding that consolidation of breast implant tort claims for generic causation trial was appropriate to resolve “a threshold issue which, depending on its resolution, could obviate the need for further proceedings”).

¹⁶⁰ 11 U.S.C. § 502(c)(1) (1994); *see also In re Dow Corning Corp.*, No. 95-20512, 1995 WL 495978, at *3 (Bankr. E.D. Mich. Aug. 9, 1995).

¹⁶¹ *In re Baldwin-United Corp.*, 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985).

¹⁶² *See id.*; *see also* 11 U.S.C. § 1129 (2000); *In re A.H. Robins Co.*, 880 F.2d 709, 720 n.13 (4th Cir. 1989) (describing necessity of setting outer limit on debtor’s liability).

¹⁶³ 11 U.S.C. § 502(b)(1) (2000); *see also In re G.I. Indus., Inc.*, 204 F.3d 1276, 1281 (9th Cir. 2000) (“[A] claim cannot be allowed [under § 502(b)(1)] if it is unenforceable under nonbankruptcy law.”); *In re Sanford*, 979 F.2d 1511, 1513 (11th

personal injury tort and wrongful death claims, § 157(b)(5) directs that such claims “shall be tried in the district court” where such claim is pending or in the district court presiding over the bankruptcy proceedings.¹⁶⁴ Moreover, the Code makes clear that “[t]he estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses.”¹⁶⁵ The Code specifically bars recovery for claims that are not enforceable and mandates that any plan of reorganization must be “fair and equitable”¹⁶⁶ and that no class of claimants “be paid more than it is owed.”¹⁶⁷

More generally, courts have recognized that “[i]f parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them.” This “deprivation of property without due process of law cannot be countenanced in our constitutional system.”¹⁶⁸ Thus, the Code provides an orderly set of procedures for first assessing the validity of asserted claims and then, to the extent claims remain, estimating their value to set a fixed outer limit on the debtor’s potential liability.

6. Discharge and Channeling Injunction

The Code also contains procedures to ensure the finality of any resolution of disputed claims reached during the bankruptcy proceedings. Bankruptcy courts may enter injunctions discharging all claims against the debtor¹⁶⁹ and channeling any future claims to a post-confirmation trust.¹⁷⁰ In so doing, bankruptcy courts may bring

Cir. 1992) (“[A] claim against the bankruptcy estate will not be allowed in a bankruptcy proceeding if the same claim would not be enforceable against the debtor outside of bankruptcy.”).

¹⁶⁴ 28 U.S.C. § 157(b)(5) (2000).

¹⁶⁵ 11 U.S.C. § 558 (2000).

¹⁶⁶ 11 U.S.C. § 1129 (2000).

¹⁶⁷ 7 COLLIER ON BANKRUPTCY § 1129.04[4][a], at 1129-90 (15th ed. 2001).

¹⁶⁸ Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B., 28 F.3d 376, 394 (3d Cir. 1994).

¹⁶⁹ See 11 U.S.C. § 1141(a) (2000).

¹⁷⁰ See 11 U.S.C. § 105 (2000); see also Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1717 (1998) (observing that “the authority to grant channeling injunctions is sine qua non to fashioning a bankruptcy solution to mass future claims cases” but that “[c]autious is

finality and global peace to companies facing mass tort claims. While bankruptcy courts have fashioned such remedies using their inherent statutory authority, Congress too has recognized the value of such mechanisms. Congress has enacted legislation that specifically codifies the channeling injunction for asbestos-related liabilities under certain circumstances.¹⁷¹ Nonetheless, bankruptcy courts retain broad inherent authority to craft such remedies in dealing with a wide variety of mass tort claims, rendering bankruptcy a particularly effective way of resolving such claims.

In sum, bankruptcy courts are uniquely equipped to efficiently address the large numbers of claims that are characteristic of mass tort litigation. Bankruptcy courts have developed streamlined procedures both in the context of mass tort claims and otherwise for collecting the information necessary to assess the validity of claims and to promptly and efficiently resolve such claims in a consistent manner. Moreover, these procedures are characterized by a great deal of flexibility. Where appropriate, claims may be addressed on a group basis; nonetheless, the bankruptcy system also allows a high degree of individualized treatment of claims where necessary.

IV. SECTION 157(B) AND THE ABILITY TO ADDRESS MASS TORT CLAIMS ON A GLOBAL BASIS

One of the most significant aspects of the Code is its ability to consolidate related claims for resolution in a single proceeding in a single forum. Under 28 U.S.C. § 157(b)(5), the district court presiding over a bankruptcy case has the power to transfer to itself all claims “relating to” the bankruptcy proceedings.¹⁷² This broad statutory authority complements the ultimate goal in mass tort litigation — to obtain “a single, uniform, fair, and efficient resolution of all claims growing out of a set of [related] events.”¹⁷³ The use of this mechanism has been effectively employed in mass tort bankruptcies such as *Dow Corning* and *A.H. Robins*, and is one of the key advantages of resolving mass tort litigation within the bankruptcy system.¹⁷⁴

appropriate” in exercising this “extraordinary” power).

¹⁷¹ See 11 U.S.C. § 524(g)(2)(B)(i)(I) (2000).

¹⁷² 28 U.S.C. § 157(b)(5) (2000).

¹⁷³ Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 947 (1998).

¹⁷⁴ See Mabey & Zisser, *supra* note 155, at 506 (arguing that Bankruptcy Court “provide[s] the best framework for treating present and future victims of the same

A. *The Bankruptcy Courts' Broad Jurisdiction over "Related" Claims Under § 1334(b)*

Bankruptcy courts have broad authority under 28 U.S.C. § 1334(b) to exercise jurisdiction over all claims "related to" the bankruptcy proceedings.¹⁷⁵ As the Supreme Court explained in *Celotex Corp. v. Edwards*, this includes any litigation whose outcome "could conceivably have any effect on the estate being administered in the bankruptcy."¹⁷⁶ As a number of courts have recognized, "[a] key word in this test is *conceivable*. Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankrupt estate.'"¹⁷⁷ In sum, "the reach of 'related to' jurisdiction is very broad."¹⁷⁸

The congressional intent behind § 1334(b) was "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate."¹⁷⁹ Indeed, "[t]he emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave . . . no

faulty product equitably and economically"); Resnick, *supra* note 2, at 2092 ("The automatic stay and nationwide bankruptcy jurisdiction are procedural attributes that facilitate bringing all mass tort litigation against the debtor into one court."); Vairo, *supra* note 61, at 125 ("[I]t is plain that the filing of bankruptcy, together with the broad reach of the 'related to' jurisdictional provision and the transfer power, provides a very potent tool for aggregation and global resolution in connection with Chapter 11 reorganization.").

¹⁷⁵ See 28 U.S.C. § 1334(b) (2000); Rice & Davis, *supra* note 116, at 435 ("Bankruptcy courts have broad jurisdiction to determine all matters that touch on debtors' estates The Bankruptcy Code provides the tort defendant debtor with powerful tools by which it may bring codefendants under the same protection of the automatic stay."); Vairo, *supra* note 61, at 98 ("Because of its jurisdictional reach, bankruptcy provides an important vehicle to resolve mass tort liabilities.").

¹⁷⁶ 514 U.S. 300, 308 n.5 (1995) (citing *In re Pacor, Inc.*, 743 F.2d 984, 994 (3d Cir. 1984)); see also *In re Dow Corning Corp.*, 86 F.3d 482, 489-90 (6th Cir. 1996) (same); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986) (same).

¹⁷⁷ *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991).

¹⁷⁸ *Belcufine v. Aloe*, 112 F.3d 633, 636 (3d Cir. 1997); see also *In re Celotex Corp.*, 124 F.3d 619, 625-26 (4th Cir. 1997); *In re Dow Corning*, 86 F.3d at 489, 495, 497 (noting that § 1334(b) gives federal courts "broad jurisdiction in bankruptcy cases" given "expansive definition" of related claims); *Robinson v. Mich. Consol. Gas Co.*, 918 F.2d 579, 583 (6th Cir. 1990) (stating that federal courts have "uniformly adopted an expansive definition of a related proceeding under section 1334(b)").

¹⁷⁹ *Celotex*, 514 U.S. at 308.

doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases.”¹⁸⁰ Courts have applied this broad grant of jurisdiction in a variety of situations.

Mass tort claims may be related to bankruptcy proceedings where, for example, (1) there is a common issue amenable to dispositive resolution that affects the debtor’s liability; (2) claims asserted against other entities are derivative of the debtor’s liability because, for example, the source of the liability is a product supplied by the debtor; (3) other entities have potential claims for contribution or indemnification against the debtor; or (4) where the sheer volume and dispersion of claims outside of bankruptcy relating to the same issues presented in the bankruptcy proceedings inevitably will add to both the scope and uncertainty of the debtor’s own liability, warranting resolution in a single, consolidated proceeding. Each of these rationales provides an independent ground for exercising jurisdiction. Indeed, courts have repeatedly recognized that mass tort claims constitute a prototypical example of the kind of claims that fall within bankruptcy courts’ broad related to jurisdiction.¹⁸¹

1. Contribution and Indemnification

One of the most obvious situations in which related to jurisdiction has been exercised is where there is litigation against nondebtors who may assert claims for contribution or indemnification against the debtor.¹⁸² Such claims may have a direct financial impact on the

¹⁸⁰ *In re Salem Mortgage Corp.*, 783 F.2d 626, 633-34 (6th Cir. 1986); *see also Robinson*, 918 F.2d at 583 (stating federal courts “have uniformly adopted an expansive definition of a related proceeding under section 1334(b)”; 1 NORTON’S BANKRUPTCY LAW & PRACTICE § 4:44 (2d ed. 2001) (“The concept of related proceedings is broad.”).

¹⁸¹ *See, e.g., In re Dow Corning*, 86 F.3d at 489, 497; 7 COLLIER ON BANKRUPTCY, *supra* note 167, § 3.04[c][ii][B] (observing that courts such as Sixth Circuit in *Dow Corning* had concluded that “mass tort litigation brought by personal injury claimants” against nondebtors was related to Chapter 11 proceedings); NORTON’S BANKRUPTCY LAW & PRACTICE, *supra* note 180, § 4:44 (observing that courts in cases such as *Dow Corning* had ruled that they had “related to’ jurisdiction over the actions brought against a host of manufacturers who were co-defendants with the debtor in a large number of personal injury actions”).

¹⁸² *See In re Celotex Corp.*, 124 F.3d at 626 (contribution action); *Belcufine*, 112 F.3d at 636 (“[C]ontractual indemnity claims can have an effect on a bankruptcy estate and thus provide a basis for the exercise of ‘related to’ jurisdiction.”); *In re Dow Corning*, 86 F.3d at 494 (finding jurisdiction exists given potential contribution and indemnification claims); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1143 (6th Cir. 1991) (indemnification); *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 624 (9th Cir. 1989) (holding that “related to” jurisdiction existed where debtor’s guarantor “would

debtor, given that a judgment against such entities will have to be satisfied out of the debtor's limited funds. Accordingly, courts have concluded that "[t]he potential for [the debtor's] being held liable to the nondebtors in claims for contribution and indemnification" supports bankruptcy jurisdiction.¹⁸³ Jurisdiction exists even where such claims ultimately may not affect the debtor.¹⁸⁴ The test "does not require certain or likely alteration of the debtor's rights, liabilities, options or freedom of action," but rather "[t]he possibility of such alteration or impact is sufficient to confer jurisdiction."¹⁸⁵

For example, in the *Dow Corning* Chapter 11 proceedings, potential claims for contribution or indemnification that had not yet materialized were sufficient to establish the requisite jurisdictional connection. The court reasoned that "[t]he potential for the debtor's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy."¹⁸⁶ As the court observed, under the

likely" make claim against debtor's officers' stock, which "could conceivably affect the administration of [the debtor's] plan"); *In re Wood*, 825 F.2d 90, 94 (5th Cir. 1987) (finding "related to" jurisdiction against nondebtor where debtor "may bear" all, part, or none of judgment); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986) (jurisdiction exists given potential indemnity); *In re Salem Mortgage*, 783 F.2d at 634 (finding "related to" jurisdiction established where nondebtors "may have an action against the debtors such as breach of the assignment agreement").

¹⁸³ *In re Dow Corning*, 86 F.3d at 494.

¹⁸⁴ *In re Wolverine Radio*, 930 F.2d at 1143.

¹⁸⁵ *In re Celotex Corp.*, 124 F.3d at 626. The Third Circuit in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), inexplicably stated that jurisdiction may not exist where there are only potential claims, rather than actually filed claims. See *id.* at 382 (suggesting that conceivable effects test is not satisfied where "intervention of yet another lawsuit" is required to have effect on bankruptcy estate). Not only is this statement inconsistent with established Supreme Court precedent in *Celotex* and established Third Circuit law, but the court did not even have jurisdiction to address this issue as it acknowledged in its opinion; its statements therefore constitute mere dicta. See *id.* at 384 (acknowledging that court "remain[s] a step away from reaching the merits of whether the District Court has 'related to' jurisdiction" given that its "appellate jurisdiction is at issue"); see also *In re Farmland Indus., Inc.*, 296 B.R. 793, 807-08 (B.A.P. 8th Cir. 2003) (discussing advisory nature of *Federal-Mogul* opinion). The author represented the manufacturers seeking to transfer the claims in the *Federal-Mogul* case.

¹⁸⁶ *In re Dow Corning*, 86 F.3d at 491, 494 (emphasis added); see also *Kocher v. Dow Chem. Co.*, 132 F.3d 1225, 1230-31 (8th Cir. 1997) (holding that "potential indemnification claims" were sufficient to establish jurisdiction); *In re GSF Corp.*, 938 F.2d 1467, 1475-76 (1st Cir. 1991) (potential claim sufficient); *In re Gen. Carriers Corp.*, 258 B.R. 181, 189 (B.A.P. 9th Cir. 2001) (citing *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995) ("A 'related to' proceeding may be related to the bankruptcy because of its potential effect."); 7 COLLIER ON BANKRUPTCY, *supra* note

governing test, “[a]n action is ‘related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.’”¹⁸⁷ Thus, “it is not necessary for the [plaintiffs] first to prevail on their claims against . . . nondebtors” before such “civil actions pending against the nondebtors may be viewed as conceivably impacting” the bankruptcy proceedings.¹⁸⁸

2. Claims “Directly Attributable to” the Debtor

Another category of related claims consists of those that are “directly attributable to the debtor.”¹⁸⁹ A claim is directly attributable to the debtor, for example, where there is “such identity between the debtor and the third-party defendant . . . that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.”¹⁹⁰ In the mass tort context, this test is applicable where claims against a third party are based on a product that was manufactured by the debtor.

For example, in *A.H. Robins*, the district court stayed litigation against certain nondebtors and entered an order transferring claims relating to the Dalkon Shield IUD for centralized resolution within the bankruptcy proceedings. The court held that “pursuant to Section 1334(b), all actions based upon personal injury or wrongful death claims arising from the use of the Dalkon Shield were proceedings ‘related to’ [A.H. Robins’s] Chapter 11 case.”¹⁹¹ In upholding the district court’s ruling, the Fourth Circuit indicated that an important factor justifying the exercise of jurisdiction was the “identity between

168, § 3.01[4][c], at 3-28 (“‘Automatic’ liability of the estate is not the *sine qua non* for related-to jurisdiction; all that is necessary is that there could ‘conceivably’ be some effect upon the estate as a consequence of the litigation in question.”).

¹⁸⁷ *In re Dow Corning*, 86 F.3d at 489 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

¹⁸⁸ *Id.* at 494.

¹⁸⁹ *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999, 1004 (4th Cir. 1986); *see also* *McCartney v. Integra Nat’l Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997) (citing *A.H. Robins*, 788 F.2d at 999) (ordering stay where there was “such identity between the debtor and the third-party defendant”); *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 862 (6th Cir. 1992) (enjoining litigation against company officers that was “inextricably intertwined” with claims against debtor); *In re Johns-Manville Corp.*, 26 B.R. 420, 426 (Bankr. S.D.N.Y. 1983) (noting suits against officers and employees were “in reality derivative of identical claims brought against Manville”).

¹⁹⁰ *McCartney*, 106 F.3d at 510 (citing *A.H. Robins*, 788 F.2d at 999).

¹⁹¹ *See In re Dow Corning*, 86 F.3d at 493 (describing *A.H. Robins* ruling).

the debtor and the third-party defendant,” which existed where the nondebtor’s liability was directly attributable to the debtor.¹⁹²

Similarly, in the *Dow Corning* Chapter 11 proceedings, the court concluded that the “nature of the claims” against the nondebtor defendants satisfied the jurisdictional requirements under § 1334 given that “[t]housands of suits asserted against Dow Corning include claims against the nondebtors” and “the various nondebtor defendants are closely related with regard to the pending implant litigation.”¹⁹³ Specifically, the court observed that the jurisdictional prerequisites were met because there were “claims against the nondebtors as manufacturers and claims against Dow Corning as the supplier of silicone materials to the nondebtors.”¹⁹⁴ This common element in the claims against the debtor and the nondebtors presented the requisite “nexus between the ‘related’ civil proceeding and the title 11 case.”¹⁹⁵

3. Claims that Will Have an “Effect” on the Administration of the Bankruptcy Estate

A third rationale for the exercise of jurisdiction involves claims that will have a significant effect on the administration of the bankruptcy proceedings.¹⁹⁶ This basis for exercising bankruptcy jurisdiction finds support in the Supreme Court’s decision in *Celotex*, in which the Court observed that proceedings related to a bankruptcy case include actions between third parties that will affect the bankruptcy estate.¹⁹⁷ This rationale is particularly relevant in the context of mass torts,

¹⁹² *A.H. Robins*, 788 F.2d at 999, 1004.

¹⁹³ *In re Dow Corning*, 86 F.3d at 493.

¹⁹⁴ *Id.* at 493 n.11.

¹⁹⁵ *Id.* at 489 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); see also *Arnold v. Garlock, Inc.*, 278 F.3d 426, 440 (5th Cir. 2001) (observing that co-defendants in *Dow Corning* were “closely involved in using the same material, originating with the debtor, to make the same, singular product . . .”).

¹⁹⁶ See *Celotex Corp. v. Edwards*, 514 U.S. 300, 310 (1995) (exercising jurisdiction is warranted where there may be “a direct and substantial adverse effect on [the debtor’s] ability to undergo a successful reorganization”); *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 204 (3d Cir. 1999) (noting that jurisdiction exists over litigation between nondebtors where “resolution of this dispute conceivably would have impacted upon the debtor’s options” in crafting plan of reorganization); *McCartney v. Integra Nat’l Bank N.*, 106 F.3d 506, 510 (3d Cir. 1997) (“Courts have . . . extended the stay to nondebtor third parties where stay protection is essential to the debtor’s efforts of reorganization.”).

¹⁹⁷ *Celotex*, 514 U.S. at 308 n.5; see also *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (observing that proceeding “need not necessarily be against the debtor or against debtor’s property” to satisfy requirements for “related to” jurisdiction).

where by virtue of the multitude of potentially related claims, the litigation by definition will significantly affect the debtor's ability to successfully reorganize.

In *Dow Corning*, for example, the court concluded that, given the sheer magnitude and dispersed nature of the claims involved, exercise of jurisdiction was critical. As the court observed, “[a] single possible claim for indemnification or contribution does not represent the same kind of threat to a debtor’s reorganization plan as that posed by the thousands of potential indemnification claims at issue here.”¹⁹⁸ In ruling that the related claims should be resolved within the bankruptcy proceedings, the court reasoned that the claims “whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning’s ability to resolve its liabilities and proceed with reorganization.”¹⁹⁹

The court in the *A.H. Robins* Chapter 11 proceedings offered similar reasoning. Following the “accepted definition” of related to proceedings, the court noted that in a Chapter 11 case involving thousands of personal injury tort claims, the “single focal point” is “the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and nonpreferential resolution of the [tort] claims.”²⁰⁰ As the court observed, however, in determining the feasibility of a plan of reorganization, “[n]o progress along estimating these contingent claims . . . can be made until *all* Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized.”²⁰¹ Accordingly, the court ruled that jurisdiction should be exercised to achieve a successful reorganization and that such an exercise of jurisdiction was beneficial to all parties’ interests.²⁰²

¹⁹⁸ *In re Dow Corning*, 86 F.3d at 494; see also 1 NORTON’S BANKRUPTCY LAW & PRACTICE, *supra* note 180, § 4:44 (“While the court in *Dow Corning* was influenced by the existence of thousands of lawsuits in non-bankruptcy forums nationwide, its analysis was keyed to the language of the leading decision in *Pacor* and the Supreme Court’s recent approval of the *Pacor* standard in *Celotex Corp. v. Edwards*.”).

¹⁹⁹ *In re Dow Corning*, 86 F.3d at 494.

²⁰⁰ *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986).

²⁰¹ *Id.* at 1014 (emphasis added).

²⁰² *Id.*

4. Claims that Involve “Piecemeal” Litigation

Perhaps one of the most significant reasons for exercising bankruptcy jurisdiction over mass tort claims is to avoid piecemeal litigation in widely dispersed forums. The fact that mass tort litigation by definition involves numerous individual claims that are often pursued simultaneously in various state and federal courts means that the litigation will inevitably adversely impact ongoing bankruptcy proceedings involving a debtor that has some connection to, or interest in, the asserted claims.

As the court in *A.H. Robins* observed, it is the need to centralize litigation that is felt particularly acutely in the mass tort context. The failure to achieve such centralization will inevitably lead to “inconsistent judgments.”²⁰³ In contrast, exercising bankruptcy jurisdiction over such claims “further[s] the prompt, fair, and complete resolution of all claims ‘related to’ bankruptcy proceedings, and harmonize[s] Section 1334(b)’s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate.”²⁰⁴

B. Transfer of Related Claims Under § 157(b)

In exercising its broad jurisdiction under § 1334, the district court presiding over the bankruptcy proceedings may, pursuant to 28 U.S.C. § 157(b)(5), transfer any related claim or cause of action for resolution within the bankruptcy proceedings.²⁰⁵ In this manner, the court may exercise jurisdiction over all related claims in order to centralize the litigation in a single forum.

Congress enacted § 157(b)(5) to prevent adjudication of various parts of a bankruptcy case in multiple forums.²⁰⁶ The purpose behind § 157(b)(5) was to make it possible for a single court “to oversee the many claims and proceedings that might arise in or affect” an ongoing

²⁰³ *Id.* at 1008.

²⁰⁴ *In re Dow Corning*, 86 F.3d at 497.

²⁰⁵ Section 157(b)(5) provides in relevant part: “The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.” While § 157 specifically references tort claims, other claims may be centralized within the bankruptcy proceedings as well by seeking transfer from the district court in which the claims are currently pending to the bankruptcy court, which may exercise jurisdiction of all related claims pursuant to § 1334. *See* 28 U.S.C. § 1404 (2000).

²⁰⁶ *See In re Dow Corning*, 86 F.3d at 496 (quoting *A.H. Robins*, 788 F.2d at 1011).

reorganization.²⁰⁷ Congress specifically intended to enhance the court's ability to centralize adjudication of the bankruptcy case.²⁰⁸

As Congress recognized in enacting § 157(b)(5), centralized adjudication allows consideration of all interests and harmonization of all claimants' interests.²⁰⁹ Moreover, “[c]entralization of claims increases the debtor’s odds of developing a reasonable plan of reorganization that will ‘work a rehabilitation of the debtor and at the same time assure fair and nonpreferential resolution of the [asserted] claims.’”²¹⁰ In this manner, § 157(b)(5) facilitates a “prompt, fair and complete resolution of all claims ‘related to’ bankruptcy proceedings.”²¹¹

1. Claims Against Nondebtors

Bankruptcy courts have used this broad grant of authority to centralize the resolution of related mass tort claims. Section 157(b)(5) allows the courts to address the unique problems associated with voluminous and dispersed litigation. The thousands of claims brought in multiple state and federal jurisdictions against not only the debtor, but also related parties, may all be channeled for resolution in a central forum.²¹² In the process, it allows bankruptcy tools to be applied to resolve mass tort claims facing entire industries.

In *Dow Corning*, for example, the court transferred thousands of claims against nondebtor breast implant manufacturers to resolve the threshold scientific issue of whether silicone breast implants cause disease through a “consolidated trial on the issue of causation.”²¹³ The court concluded that it was essential to Dow Corning’s Chapter 11 reorganization that related cases against other breast implant manufacturers be consolidated to resolve this threshold issue and

²⁰⁷ *Calumet Nat’l Bank v. Levine*, 179 B.R. 117, 121 (N.D. Ind. 1995).

²⁰⁸ *In re Pan Am Corp.*, 16 F.3d 513, 516 (2d Cir. 1994).

²⁰⁹ *In re Dow Corning*, 86 F.3d at 496-97 (quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1014 (4th Cir. 1986)) (internal quotation marks omitted).

²¹⁰ *Id.* at 496 (quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986)).

²¹¹ *Id.* at 497.

²¹² *See, e.g.*, *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1013-14 (4th Cir. 1986) (*Dalkon Shield IUD tort claims*); *In re Dow Corning*, 86 F.3d at 490 (*breast implant tort claims*).

²¹³ *In re Dow Corning*, 86 F.3d at 487; *see also id.* at 497 (“agree[ing] with the Fourth Circuit that Section 157(b)(5) should be read to allow a district court to fix venue for cases pending against nondebtor defendants which are ‘related to’ a debtor’s bankruptcy proceedings pursuant to Section 1334(b)”).

thereby “increase[] the debtor’s odds of developing a reasonable plan of reorganization” and “assure fair and nonpreferential resolution of . . . claims.”²¹⁴ Utilizing § 157(b)(5), the court sought “to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible.”²¹⁵ In directing that all related claims should be litigated in a single forum, the court took into consideration “the judicial system’s interest in allocating its limited resources effectively and efficiently.”²¹⁶

Similarly, an overwhelming number of Dalkon Shield cases confronted A.H. Robins.²¹⁷ While many of the cases listed A.H. Robins as the sole defendant, more than half named other defendants.²¹⁸ The district court presiding over the bankruptcy proceedings held that suits claiming personal injury or wrongful death arising from the use of the Dalkon Shield would be transferred for resolution within the ongoing bankruptcy proceeding.²¹⁹ As a result, claims against a wide variety of third parties were subject to transfer, including claims against doctors who had implanted the Dalkon Shield device; clinics, hospitals, and other health care providers that provided the device; and medical product suppliers that distributed the device (in addition to A.H. Robins’s officers, employees and insurers).²²⁰ The appellate court affirmed the transfer ruling, observing that “the power of the district court in this case to fix venue for all the pending . . . tort cases . . . is stated in unmistakable terms in section 157(b)(5).”²²¹

In the process, the appellate court noted the significant benefits of § 157 transfer in the mass tort context. First, the court observed that § 157(b)(5) transfer prevents inefficient collateral litigation that may undermine the successful reorganization of the debtor. In particular, allowing such litigation to proceed raised the specter of “inconsistent judgments.”²²² Second, the court noted that the expense of separate

²¹⁴ *Id.* at 496 (quoting *A.H. Robins*, 788 F.2d at 1011).

²¹⁵ *Id.* at 487.

²¹⁶ *Id.*

²¹⁷ *Id.* at 493.

²¹⁸ *Id.* at 496.

²¹⁹ *Id.* at 493.

²²⁰ See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1566 n.33 (2000) (noting that in *A.H. Robins*, “the Fourth Circuit . . . held that there was ‘related to’ jurisdiction over claims against doctors”); Vairo, *supra* note 99, at 629 (“[D]efendants included . . . doctors and hospitals accused of medical malpractice associated with the use of the Dalkon Shield.”).

²²¹ *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1010-11 (4th Cir. 1986).

²²² *Id.* at 1008.

trials would be avoided if “all Dalkon shield claims and suits [were] centralized before a single forum where all interests [could] . . . be harmonized.”²²³ Thus, as the court recognized, § 157(b) provides a unique tool for resolving mass tort liability.

2. Transfer from State Court

Another advantage of the § 157 mechanism is that claims may be transferred not only from other federal courts, but also directly from state court. While it is possible to remove claims from state courts pursuant to 28 U.S.C. § 1452 before moving to transfer under § 157 (and this may be advisable in some circumstances to further administrative convenience), removal is not necessary.²²⁴ Rather, claims may be transferred to the bankruptcy proceedings directly utilizing § 157(b)(5).

Section 157(b)(5)'s plain language allows district courts to transfer cases directly from state court.²²⁵ This aspect of § 157(b)(5) is highly advantageous given that mass torts may generate thousands of claims filed primarily in state courts located throughout the country. Having to remove all such claims to federal court before seeking transfer may in some circumstances be advisable, but nonetheless may also entail significant time and expense. Section 157(b)(5) makes this unnecessary by authorizing the district court presiding over the bankruptcy proceedings to transfer claims located throughout the country for resolution in a single proceeding.

C. *The Abstention Doctrines and § 157(b)*

The same principles giving rise to the courts' broad jurisdiction to transfer claims pursuant to § 157 similarly render abstention in favor of ongoing state court proceedings inappropriate. Section 1334(c) contains certain mandatory and permissive abstention provisions that

²²³ *Id.* at 1013-14.

²²⁴ Where cases are removed to federal courts, the court may issue a provisional transfer order “to preserve the status quo while the court weigh[s] the merits of [the transfer] motion.” *In re Dow Corning Corp.*, No. 95-20512, 1995 WL 495978, at *2 (Bankr. E.D. Mich. Aug. 9, 1995). The *Dow Corning* court, for example, recognized that such a provisional order was appropriate given that “[a]lthough most or all of the implant lawsuits had been removed to federal court, in many instances the implant plaintiffs had filed, or were expected to file, a motion for remand to state court.” *Id.*

²²⁵ *In re Pan Am. Corp.*, 16 F.3d 513, 516 (2d Cir. 1994); *see also* *Calumet Nat'l Bank v. Levine*, 179 B.R. 117, 122 n.7 (N.D. Ind. 1995) (“Section 157(b)(5) bestows upon the district court authority to transfer actions pending in state court.”).

may apply in determining whether courts should exercise their broad authority to assert jurisdiction over all claims related to a bankruptcy proceeding. As a threshold matter, however, it is not clear that mandatory or permissive abstention is ever permissible when considering transfer under § 157. The plain language of the statute indicates that personal injury tort claims “shall be tried” in one of two federal jurisdictions determined by the court presiding over the bankruptcy proceedings.²²⁶ This language suggests the courts have no discretion to abstain in favor of state court adjudication of such claims when considering § 157 transfer. Indeed, even those courts that have concluded that permissive abstention may be applicable under some circumstances have also acknowledged that §§ 157(b)(5) and 1334(c)(1) apparently conflict.²²⁷

In addition to this general statutory language, there is more specific language that makes clear that the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2) are inapplicable to personal injury tort claims. Section 157(b)(4) provides that “[n]on-core proceedings under section 157(b)(2)(B) . . . shall not be subject to mandatory abstention provisions of section 1334(c)(2).”²²⁸ Noncore proceedings under § 157(b)(2)(B), in turn, include “the liquidation or estimation of contingent or unliquidated personal injury tort claims or wrongful death claims against the estate.” Thus, the plain language of § 157(b)(4) makes clear that personal injury claims are not subject to mandatory abstention under § 1334(c)(2) — a conclusion that has received widespread affirmation.²²⁹ As the court succinctly stated in *A.H. Robins*, “[m]andatory abstention under section 1334(c)(2) is not applicable to personal injury claims.”²³⁰

Similar statutory concerns suggest that permissive abstention pursuant to § 1334(c)(1) is also inappropriate. Section 157(b)(5) makes plain that personal injury tort claims “shall be tried” in one of two federal jurisdictions — “the district court in which the

²²⁶ 28 U.S.C. § 157(b)(5) (2000); *see also In re Schepps Food Stores, Inc.*, 169 B.R. 374, 378 n.5 (Bankr. S.D. Tex. 1994) (“Section 157(b)(5) is a mandatory provision that favors centralization of related bankruptcy litigation.”).

²²⁷ *In re White Motor Credit Corp.*, 761 F.2d 270, 273 (6th Cir. 1985).

²²⁸ 28 U.S.C. § 157(b)(4).

²²⁹ *See, e.g., In re Pan Am. Corp.*, 950 F.2d, 839, 844-45 (2d Cir. 1991) (mandatory abstention inapplicable); *In re Salem Mortgage Co.*, 791 F.2d 496, 635 (6th Cir. 1986) (same); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1010 n.14 (4th Cir. 1986) (same); *In re White Motor Credit Corp.*, 761 F.2d at 272 (same); NORTON’S BANKRUPTCY LAW & PRACTICE, *supra* note 180, § 8:8 (“§ 157(b)(4) renders mandatory abstention inapplicable to personal injury tort and wrongful death actions.”).

²³⁰ *A.H. Robins*, 788 F.2d at 1010 n.14.

bankruptcy case is pending, or in the district court in the district in which the claim arose.”²³¹ This mandatory language leaves no room for state court adjudication of claims that fall within the scope of the statute.

Moreover, the structure of the statutory scheme and the legislative history make clear that even if courts have some leeway to permissively abstain pursuant to § 1334(c)(1), “[t]ransfer should be the rule, abstention the exception.”²³² Indeed, courts have observed that even if the statutory language did not suffice to prohibit abstention in cases under § 157, “the district court, if it elects to abstain and have the claim liquidated in state court, may be contravening the legislative history.”²³³

Finally, policy considerations in mass tort cases also favor transfer over abstention. As the *Dow Corning* court emphasized, transfer is warranted in such circumstances given the “judicial system’s interest in allocating its limited resources effectively and efficiently.”²³⁴ Abstention defeats this interest by leaving related claims to be resolved in disparate judicial fora.

While these concerns are particularly acute in the context of § 157 transfer, courts have observed more generally that the abstention doctrines are narrowly construed in the bankruptcy context and that “abstention must be granted sparingly.”²³⁵ The inquiry is “not whether there is a substantial reason to exercise federal jurisdiction, but whether there are ‘exceptional circumstances’ that justify surrendering that jurisdiction.”²³⁶ “As a general rule, abstention is inapposite in the context of a removed action in a bankruptcy case

²³¹ 28 U.S.C. § 157(b)(5).

²³² *In re Pan Am. Corp.*, 950 F.2d at 845.

²³³ 7 COLLIER ON BANKRUPTCY, *supra* note 167, § 3.01[3][b], at 3-82; *see also* NORTON’S BANKRUPTCY LAW & PRACTICE, *supra* note 180, § 8:8, at n.91 (“[A]bstain[ing] pursuant to the discretionary abstention provision might contravene the legislative history and intent of 157(b)(4).”).

²³⁴ *In re Dow Corning Corp.*, 86 F.3d 482, 487 (6th Cir. 1996); *see also In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1013 (Bankr. M.D. Fla. 1990) (“Litigating the identical issues in a variety of other forums would properly create a chaotic situation by producing inconsistent litigations.”).

²³⁵ *In re Nationwide Roofing & Sheet Metal, Inc.*, 130 B.R. 768, 781 (Bankr. S.D. Ohio 1991); *see also In re B.S. Livingston & Co.*, 186 B.R. 841, 861 (D.N.J. 1995) (“[D]iscretionary abstention should be exercised cautiously and sparingly.”).

²³⁶ *In re Albion Disposal, Inc.*, 217 B.R. 394, 411 (W.D.N.Y. 1997) (citing *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983)).

[and] . . . [a]bstention is not a favored doctrine in the federal system in any event.²³⁷

These principles flow from the fact that the bankruptcy system was designed to provide a centralized resolution of claims in a single federal court. The bankruptcy courts routinely address and resolve claims over which the state courts would otherwise have jurisdiction. To allow state courts to continue to exercise jurisdiction over pending claims involving the debtor would defeat the bankruptcy court's ability to resolve claims uniformly and fairly and to efficiently and effectively craft a feasible plan of reorganization.²³⁸

D. Global Resolution

Finally, transfer of all related claims using § 157 has the benefit of offering finality not only to the debtor, but also to other third parties. Once the claims are transferred to the bankruptcy proceeding, a global resolution of all claims can be reached and all parties discharged from further liability. In the *A.H. Robins* Chapter 11 proceedings, for example, not only were claims against the debtor that was responsible for manufacturing the Dalkon Shield subject to discharge, but also claims against doctors, hospitals, and distributors of the Dalkon Shield who had also been sued.²³⁹ Accordingly, § 157(b)(5) may be used not only to efficiently adjudicate claims, but also to provide finality for all affected parties once the court renders its decision.

²³⁷ *In re Fairchild Aircraft Corp.*, No. 90-50257C, 1990 WL 119650, at *1-2 (Bankr. W.D. Tex. June 18, 1990).

²³⁸ See generally *In re Hillsborough Holdings*, 123 B.R. at 1013 (refusing to abstain with respect to litigation of corporate veil-piercing issues because to do so "would have a certain disastrous effect on [the] entire reorganization process").

²³⁹ See *In re A.H. Robins Co.*, 131 B.R. 292, 302 (E.D. Va. 1991) ("Confirmation of this plan will likewise bar your right to obtain any recovery against other third parties such as doctors, clinics, hospitals, other health care providers, and distributors of the Dalkon Shield."); see also *In re Dow Corning Corp.*, 280 F.3d 648, 656 (6th Cir. 2002) (affirming nondebtor discharge); *In re A.H. Robins Co.*, 880 F.2d 694, 700-02 (4th Cir. 1989) (same); Vairo, *supra* note 101, at 128 ("[T]he Plan itself not only discharged the debtor, A.H. Robins, but it also provided for permanent injunctions which had the effect of releasing . . . doctors or health care providers who otherwise could have been sued for malpractice for any Dalkon Shield claims."). *But cf. In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234-35, 237 n.50 (3d Cir. 2005) (overturning discharge of nondebtor entities under § 105 where debtor was discharged under § 524(g), and nondebtors did not meet requirements of § 524(g), but reaffirming that § 105(a) may be used to discharge nondebtors in other contexts).

CONCLUSION

Mass tort litigation often presents intractable problems for the civil litigation system. The sheer volume of claims and the ability to forum shop serve to defeat the rational and efficient resolution of such claims. The tools available under the Code present a practical solution to these problems. The bankruptcy system affords an opportunity for centralized resolution of all related claims in a single proceeding in which those claims that have merit may be equitably compensated, while those that do not may be disallowed.

Once claims are centralized and consolidated utilizing procedural mechanisms such as § 157(b), traditional litigation tools such as application of the requirements ensuring the reliability of scientific evidence under Rule 702 and summary judgment procedures to address common issues of liability and damages may be employed to separate those claims that have merit from those that do not. Because the proceedings occur in a single forum where all interested parties are represented, they ensure uniformity and equality in treatment that is sorely lacking outside of Chapter 11. As mass tort litigation expands to new products and defendants, it is likely that courts will increasingly be called upon to employ these tools to efficiently and equitably resolve such litigation.