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THE FUTURES PROBLEM

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INTRODUCTION

Perhaps the most difficult problem in addressing mass torts is that of future claimants. "Futures" are those who do not now have claims, because injury has not been sufficiently manifested, but who may well have claims in the future. The Supreme Court's decisions in Amchem1 and Ortiz2 appear to have foredoomed any procedural mechanism by which to resolve future claims. This, in turn, will leave defendants in mass tort cases with greatly reduced incentives to participate in mass settlement. That implication makes the possibility of reforms in substantive law perhaps more attractive. In addition, these decisions invite further questions about the validity of class suit injunctions that were adumbrated in Martin v. Wilks.3

I. "FUTURES" IN MASS TORTS

As has often been noted, there are mass torts, and there are mass torts.4 On one end are airplane crashes involving large passenger jets,

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1 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (holding, inter alia, that a class of plaintiffs certified solely for settlement of current and future asbestos-related claims did not meet Rule 23 requirements).
2 Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2307 (1999) (holding, inter alia, that a class certification similar to that in Amchem was impermissible).
3 490 U.S. 755, 761 (1989) (holding that an absentee from a class suit settlement was not bound by the decree); see Douglas Laycock, Due Process of Law in Trilateral Disputes, 78 IOWA L. REV. 1011, 1012 (1993) (discussing Martin v. Wilks in the context of "trilateral disputes—disputes in which there are at least three distinct interests involved"); George M. Strickler, Jr., Martin v. Wilks, 64 TUL. L. REV. 1557, 1606 (1990) (analyzing the case and criticizing the current Supreme Court majority's wishes "to discourage litigation like the Title VII class action that led to Martin v. Wilks").
4 See, e.g., Paul D. Rheingold, Mass Tort Cases, TRIAL, Sept. 1989, at 50 (distinguishing between single-situs disasters, such as airplane crashes and building collapses, and multi-situs disasters, such as toxic torts).
in which there are hundreds of victims in a single traumatic misfortune, typically all of whom are killed. On the other end are "toxic torts," such as injuries from asbestos, drugs, or prosthetic devices, where over a period of time an injurious product affects—at least, the product is alleged to have affected—some victims with apparently serious effects, some with moderate effects, and others with little or no discernible effects. The two categories shade into each other but generally can be distinguished.

Substantially similar to the airplane crash cases, in terms of the legal problems presented, are railroad and bus accidents, passenger vessel sinkings, and food poisoning from a single batch of contaminated victual. Ordinarily in these situations, each of the injured people can be definitely identified, subject to verification from passenger lists or fairly good circumstantial evidence such as specific purchase of food. The number of victims in such cases is also usually definite and rarely exceeds a few hundred. The basis of liability as regards the victims is often fairly clear, although there may be difficult legal and factual issues in allocating responsibility among defendants. Where the victims have suffered death, as in air crashes, the damage claims will be economic loss, perhaps loss of companionship, perhaps brief pain and suffering, but not medical expenses or long term pain and suffering. Thus, in these mass torts most, if not all, of the elements of obligation to the victims usually will be ascertainable at an early stage.

Toxic torts, such as the asbestos claims and claims of harmful drugs, present much more difficult evidentiary and administrative problems. Toxic torts by definition involve a biological interaction between the allegedly injurious substance and the victim. Most toxic torts involve human victims, but there can be animal victims (poisonous feed, as in the British "mad cow" case) or plant victims. Biological interactions, whether involving humans or animals or vegetation, typically are very complex. This is particularly true where exposures are relatively small or intermittent. Moreover, manifestation of injury

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5 This characteristic brings to mind a mordant joke that goes around the trial bar. Question: What should the bus driver do first when there is an accident? Answer: Close the doors.

6 See Richard Rhodes, Mad Cows and Americans, WASH. POST, Mar. 9, 1997 (Magazine), at 13 (describing the genesis of mad cow disease which afflicts both human and animal victims).

7 See John D. MacKinnon, Florida Journal: Growers File New Suits on Benlate, WALL ST. J., Nov. 3, 1999, at F1 (describing the protracted litigation over a fungicide manufactured by Dupont that was alleged to have been "contaminated with a class of ultratoxic herbicides" that caused widespread crop damage).
may be long delayed from the time of exposure, sometimes for weeks or months, sometimes—as in the case of asbestos—for years. In some of these cases, correlation is readily established and sometimes so is the physical etiology. Proof of causation often is not very definite, however, and in many situations is a matter of gradation. In some instances the proof of causation is based on probabilistic analysis and is subject to more or less intense disputation. In some cases it may be "obvious" that a causal relation is involved. In others there is a boundary beyond which injury is speculative or de minimis, although that point may be clear only in theory and difficult or impossible to establish in fact.

Claims in this second category of cases typically involve problems of "futures." As noted above, a "futures" claim is one where a claimant cannot presently prove a causal connection between an injury and a supposed source of injury, but nevertheless suspects or fears that he or she is suffering injury that has its origin in the suspect source. The lack of present proof means that the claimant generally cannot properly bring present suit. Bringing suit, even without good proof of causation, of course would open the way to discovery of evidence from the defendants. Discovery may generate proof of causation, perhaps through statistical analysis based on proof that there have been similar cases that permit the inference of causation. Discovery, however, is not guaranteed to produce positive results. Moreover, serious legal risks are entailed in bringing a premature claim: the defendant may push the case to trial, opening the possibility that eventual judgment may be adverse and in any event reducing the settlement value of the claim. A claim brought prematurely may well be adjudicated on a ba-

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8 The tobacco cases can be considered in this category. See, e.g., Blue Cross & Blue Shield, Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 575 (1999) ("Plaintiffs may well be able to establish, by means of experts and scientific and statistically based evidence, what proportion of the medical care was provided to treat the effects of tobacco use."). On the other hand, statistical analysis may require an inference of no causation, as in the report concerning the breast implant claims. See Milo Geyelin & Laurie McGinley, Panel Concludes There Is No Connection Between Implants and Major Diseases, WALL ST. J., June 22, 1999, at B15 (noting that a panel of experts found "insufficient evidence to conclusively link the devices to any major systemic diseases, such as cancer or connective-tissue disorders").

9 The Supreme Court's decision in Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993), signifies that a plaintiff must have reasonably good proof, statistical or otherwise, to get beyond a motion for summary judgment or directed verdict. See Kimberly H. Hrabosky, Kumho Tire v. Carmichael: Stretching Daubert Beyond Recognition, 8 GEO. MASON L. REV. 203, 204 (1999) (discussing the new standard created by Kumho Tire, which expands Daubert's holding to include nonscientific expert testimony).
sis that results in res judicata, precluding later assertion at a subsequent stage when proof of causation is available.

In terms of available proof, and hence as a legal basis for suit and a practical basis in settlement value, a futures claim therefore is a premature claim.

II. CASES WITH NO "FUTURES" AND MEDICAL MONITORING

As indicated above, some mass torts do not involve futures claims, or at least none that create serious legal issues. All air crash victims usually are dead and ordinarily can be identified as a basis for wrongful death claims. Victims of other kinds of collisions—trains, buses, etc.—usually can be counted, and a measurement of their damages is no more difficult than in other personal injury cases. Some toxic torts—the Thalidomide victims come to mind—also involve victims whose identity and magnitude of injury is clear more or less immediately. The food poisoning cases typically involve a similarly confined number of victims, with immediate causal consequences confined to immediate injury or to mild injuries that are legally worth little more than nuisance value or commercial good-will reparation.

These kinds of mass torts may involve large and complicated litigation, but they are not "mass torts" for purposes of present discussion. A large and complicated litigation may involve only a few claimants who attempt to establish the question of liability, a determination of compensatory damages and perhaps a determination of punitive damages against the defendant or defendants. There can be difficult and sometimes ugly questions of which of the claimants should go first, of how the risks of outcome should be distributed among claimants, and problems of allocation of burden and gain concerning claimants litigation costs and attorneys' fees. These questions, however, typically are resolved by negotiation or, failing that, by a preliminary adjudication by the judge.

10 Thalidomide was the drug administered to pregnant women to control morning sickness which, however, resulted in terrible deformation of the baby. See, e.g., Anita Bernstein, Formed by Thalidomide: Mass Torts As a False Cure for Toxic Exposure, 97 COLUM. L. REV. 2153, 2154 (1997) (reviewing the Thalidomide disaster).

11 For example, the Jack-in-the-Box food poisoning settlements. See, e.g., Jack in the Box's Parent Firm Settles Suit for 1.3 Million, ORANGE COUNTY REG. (Cal.), Feb. 17, 1994, at C2 (noting settlement of "several dozen" cases with about 20 additional lawsuits pending).

12 See Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 506-07 (1994) ("While the attorney representing a large number of clients might,
The large and complicated issues in these cases often can arise from litigation among defendants to determine obligation and share of liability. Illustrative of these situations are airplane crash cases where liability to the victims is assumed but there is dispute among the air carrier, plane manufacturer, and others as to specific cause and fault. These too are what might be called big tort cases, but not “mass torts.” That is, they involve several parties, complex issues, and large stakes. But that is true of many types of modern litigation, including various kinds of financial and commercial litigation. They lack, however, the distinguishing feature of mass torts, which is the existence of a large number of victims whose injuries are various, including some victims who have very serious injuries and some whose injuries may be exiguous or practically nil.

A subcategory of “futures” cases are those involved in medical monitoring. Medical monitoring is a procedure in which a set of possible victims is given periodic examinations to determine whether and when they manifest symptoms that are believed to result from a specified source. Those who eventually reveal no injury are dropped from the group, usually with some payment for their trouble. Those who eventually reveal the suspect symptoms become eligible as claimants, either in conventional tort suit or through some stipulated compensation system. Typically, the cost of the monitoring is imposed on the defendant. Medical monitoring is a useful device in various situations. Indeed, in some situations a defendant may willingly join in requesting medical monitoring, in the hope and expectation that the results will eliminate its liability or reduce it to definite proportions.

A decree requiring medical monitoring, however, has two prerequisites. First, there must be sufficient proof of a causal connection between the defendant’s activity and the injury. The strength of that proof could vary from something like “reasonable suspicion” to “probable cause” to proof sufficient to establish liability in favor of some of the persons in the victim group. Of course, a target defen-

\[\text{See Bill Charles Wells, The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury, } 18\text{ WM. & MARY J. ENVTL. L. 285, 294-95 (1994) (outlining the theory behind and early development of the medical monitoring concept). For a case in which medical monitoring was ordered, see Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 822 (Cal. 1993).}\]

\[\text{See Potter, 863 P.2d at 824 (rejecting requirement that occurrence of disease be “reasonably certain” and holding that the tests themselves must be reasonable in light of the increase in risk); Ayers v. Jackson Township, 525 A.2d 287, 312 (N.J. 1987) (find-}
dant could stipulate to medical monitoring upon a lesser showing, or no showing at all, where the target considers the positive advantages of its liability being excluded or mitigated. Conversely, it is not sufficient for court-ordered medical monitoring that there be merely suspicion or fear of the ascribed cause. The second prerequisite is that the set of claimants be definitely ascertained. To be given the examinations, the population in question must be identified, either immediately by name or by definite category through which they can be sought out, for example, people living within X radius of Three Mile Island.

A medical monitoring procedure thus is appropriate for a group that consists of people who are presently identifiable as having been exposed, even though it is uncertain whether some or any of them will eventually manifest the feared malady. In this respect the monitored group is similar to a set of present claimants in respects critical to administration of mass torts justice: specific persons with an exposure that is or appears plausibly to be causally related to a specific potentially liable actor.

III. A "Bankruptcy" Solution?

The legal problems posed by a set of "futures" in the administration of medical monitoring damages appropriate where such monitoring is "reasonable and necessary" in light of several factors, including "the relative increase in the chance of onset of disease" and upholding medical monitoring even if the risk of disease was just "slightly higher than the national average"); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (requiring proof that the exposure complained of increased the "risk of the anticipated harm significantly over the plaintiff's risk prior to exposure").

See Potter, 863 P.2d at 825 (noting "substantial evidentiary burdens" on a plaintiff seeking medical monitoring damages).

One could establish a sample of a population for medical modeling. Unless the boundaries of the population were specified, however, the evidence yielded from the sample would be indeterminate.

On medical monitoring after the Three Mile Island nuclear facility matter, see Amy B. Blumenberg, Note, Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation, 43 HASTINGS L.J. 661, 703-04 (1992) (describing monitoring for plaintiffs living within a 25-mile radius of the facility).

The solution in Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980), does not help. The Sindell court imposed "market share" liability on a set of product manufacturers. But the liability was in favor of consumers with manifestations causally related to the product and against defendants, all of whom manufactured essentially the same product. See Andrew R. Klein, Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation, 68 TUL. L. REV. 883, 886-88 (1994) (arguing "that the extension of market share liability principles to blood products litigation is illogical").
tion of mass torts justice are the converse of those presented in a case suitable for medical monitoring. This is because a futures claimant is one who cannot be specifically identified as being causally related to a specific potentially liable actor. Stated in epistemological terms, a "futures" therefore is a hypothetical person. A hypothetical person cannot have real legal rights or be owed real legal obligations. By the same token, a hypothetical person cannot be the subject of a binding determination except through the concept of an in rem proceeding. It has therefore been suggested that bankruptcy, a classic form of in rem proceeding, may be a feasible means of dealing with futures claims.

It is familiar that an in rem proceeding poses the legal issue as follows: All persons who have or might have an interest in X must come forth, within a specified time, or forever thereafter be precluded. As the term "in rem" suggests, however, the concept of an in rem proceeding depends upon there being some thing that has value or is of interest in terms that can be stated as a legal right. An in rem proceeding therefore can be predicated upon a specific item of property—the traditional Blackacre—or on a bag of gold or on a bank account. By stretching the concept, an in rem proceeding can be predicated upon a legal relationship between specific people, hence the idea that divorce proceedings address a "status" that has existence and location separate from the parties to the marriage. In the bankruptcy concept, where an obligor, or potential obligor, has fewer assets than liabilities, the obligor's entire estate can be treated as an article of property and made the subject of an in rem proceeding. This last conception is of course the essence of bankruptcy procedure.

The concept of an obligor's estate being an article of property, however, upon which the procedure in bankruptcy depends, unavoidably entails the financial predicate that the assets of the obligor are less than the liabilities. Measuring assets is not so difficult. Measuring liabilities is not insuperably difficult if there is definite information as to the number of claimants and as to the size of their claims. But

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19 See RESTATEMENT (SECOND) OF JUDGMENTS § 6 cmt. a (1982) (questioning whether the traditional distinction between in rem and quasi in rem proceedings is useful for any purpose).

20 See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) ("Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.'" (citation omitted)).

21 See Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877) (discussing divorce as addressing a status).
measuring liabilities with any degree of accuracy is impossible if it is
unknown, for example, whether there are 10 claimants or 1000, or
perhaps 10,000, and unknown whether the average size of the claims
is $100 or $10,000 or $1 million.22

In my opinion the recent report of the Bankruptcy Commission
did not come to terms with this problem.23 The Report suggests that
estimation of the magnitude of liability in mass torts can be a basis for
bankruptcy proceedings to resolve future claims arising from opera-
tions of the debtor.24 The Report, however, does not explore the basis
on which such an estimate could be made, other than by wild guess or
back-of-the-envelope calculation.25 One of the key factors in any such
calculation is the number of victims; the other is the magnitude of the
injuries suffered by each victim. Yet in the typical toxic tort case,
there is dispute between claimants and defendants as to who was in-
jured and in what degree, how many claimants there may be, and how
many claimants have real injuries versus how many only nuisance
value claims.

If reliable estimates can be made in these dimensions, i.e., the
number of claimants and the average size of a claim, of course bank-
ruptcy could handle the problem. But so could ordinary civil proce-
dures. All the identified claimants could be brought in through the
mechanism of the class suit, or a bill of peace (essentially a suit against
a defendant class), or simple multiple joinder of claimants. All de-
fendants can similarly be brought in.26 On the other hand, if reliable

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22 The range of liability, within the limits supposed in the text, is $1000 (10 x $100)
to $10 billion (10,000 x $1,000,000). The liabilities in the asbestos cases and tobacco
settlements run into many billions and those in the breast implant proposed settle-
ments into the low billions.

23 See 1 NATIONAL BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY
YEARS 315-50 (1997) [hereinafter BANKRUPTCY REPORT].

24 See id. at 341-45.

25 Compare id. at 343 (explaining the omission of a prescribed method of estimation
as a deliberate choice that preserves "flexibility" for the court and parties), with Edith
H. Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Re-
form?, 76 TEX. L. REV. 1695, 1696 (1998) (urging "caution before bankruptcy courts
enter deeper into the mass tort litigation fray").

26 Bankruptcy has peculiar advantages regarding personal jurisdiction and subject-
matter jurisdiction. Regarding personal jurisdiction, bankruptcy process runs
throughout the country, indeed perhaps throughout the world. See FED. R. BANKR. P
7004(d) (authorizing nationwide service of process); Harold S. Burman, Harmonization
of International Bankruptcy Law: A United States Perspective, 64 FORDHAM L. REV. 2543,
2553 (1996) (noting that § 304 of the Bankruptcy Code has been construed to give
bankruptcy courts "jurisdiction to issue orders affecting the debtor's estate wherever
located"). The federal bankruptcy court has jurisdiction without regard to citizenship
of the parties or the presence of any federal substantive claims. See 28 U.S.C.
estimates of liability cannot be made, then the financial predicate for bankruptcy simply does not exist. When this occurs it is simply impossible to determine whether the obligor’s liabilities exceed its assets—and hence whether there is a condition fairly to be described as bankruptcy.

Of course, one could pretend that the liabilities exceed the assets if it is established that there is some degree of risk that this may be so. But there are legal limits to such manipulation. There are also practical limits, since subjecting a business to bankruptcy governance can seriously interfere with its ability to manage operations normally. Also, since bankruptcy is a basis of jurisdiction specified in the Constitution, there are constitutional limits to the legal fictions that may be employed to justify bankruptcy intervention.

There is a further practical problem when “futures” are involved, a problem that Francis McGovern has called “elasticity.” Professor McGovern noted that in the breast implant litigation, when settlement was proposed on the basis of a multi-billion dollar tender by the defendants, the number of claimants dramatically escalated from hundreds to thousands. This demonstrates the problem of uncertainty in estimating the magnitude of claims involved in mass torts involving futures. “Elasticity” could therefore be considered a euphemism for indeterminacy.

A bankruptcy solution also poses difficulties of a technical variety. There is the initial question of a jury trial. Unless the bankruptcy court has proper “bankruptcy” jurisdiction, sole adjudication of the claims before the bankruptcy judge involves a deprivation of the right to jury trial under the Seventh Amendment of the Constitution.

§ 157(c)(2) (1994) (providing federal bankruptcy courts with jurisdiction over core and related proceedings).

In my opinion there is no basis for reliable estimates in the kinds of mass torts for which bankruptcy procedure has been tendered as a solution. Here I rely on a very thoughtful paper by Candice Toll, submitted in a seminar given by Judge Anthony Scirica and myself in 1998 at the University of Pennsylvania Law School. See Candice Moore Toll, Bankruptcy and Mass Torts: The Proper Venue (1998) (unpublished manuscript, on file with the University of Pennsylvania Law Review).

See FED. R. BANKR. P. 1008 (stating that “all petitions, lists, schedules, statements and amendments thereto shall be verified”).

See U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to create “uniform Laws on the subject of Bankruptcies throughout the United States”).

The sudden appearance of new claimants parallels the need for the bus driver to close the bus’s doors after an accident. See supra note 5.

See Langenkamp v. Culp, 498 U.S. 42, 45 (1990) (“If a party does not submit a claim against the bankruptcy estate . . . the preference defendant is entitled to a jury trial.”).
additional constitutional problem of a bankruptcy court’s subject matter jurisdiction arises if the enterprise is not insolvent in any real sense. The public convenience of an orderly claims procedure is not the equivalent of practical necessity in dividing limited assets among creditors whose claims exceed the debtor’s estate. Neither does the concept of “reorganization,” as used in Chapter 11, seem to be an adequate basis for establishing a federal claims adjustment administration.

But the problems for “futures” are deeper than simply whether class suit procedure is adaptable to deal with them or whether a proceeding could properly be characterized as a bankruptcy reorganization. Nor is the inability of our legal system to deal with hypothetical claimants merely a concomitant of protecting the right to jury trial, or having an adversary system, or the limitations of federal jurisdiction. Essentially the same problem would be posed by any administrative agency procedure that could be imagined.

The basic problem is this: if individual claims cannot be specified in terms of the identity of claimants and the factual basis of their claims, then there is simply no basis for “adjudication” of unknown claims on the part of unknown claimants.

IV. THE TRAGEDY OF THE ASBESTOS FUTURES

It seems to me this was the essential problem that confronted the Supreme Court in the Amchem and Ortiz cases. How can hypothetical claimants have their potential claims conclusively adjudicated in a present proceeding?

In neither Amchem nor Ortiz was the proceeding predicated on the insolvency of the obligor and hence based on an accepted concept of in rem jurisdiction. The Court in Ortiz was particularly critical of the lower court’s characterization of the proceeding as one involving a “limited fund” under Rule 23(b)(1)(b). The concept of “limited fund” in Rule 23 has historical origin in the in rem concept and is essentially the equivalent of the bankruptcy concept. Thus, Ortiz not

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52 In my view, the Ortiz case presented a different problem in that the case could have been treated as a controversy over a “limited fund” as that term is used in Federal Rule 23. There was a real issue whether the assets of the obligor, Fibreboard Corp., exceeded its liability to the present and future claimants.
53 See Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 2317 (1999) (stating that the lower court erred “since there was no adequate demonstration of the second element required for limited fund treatment”).
54 See Geoffrey C. Hazard, Jr. et al., An Historical Analysis of the Binding Effect of Class
only directly disapproves the use of Rule 23 for "futures," but also suggests that a bankruptcy solution would stand on equally dubious footing.

In both *Amchem* and *Ortiz* there was a subsidiary problem of whether the lawyers purporting to represent the "futures" had a conflict of interest under prevailing ethical standards because those lawyers also represented the present claimants. This translated into a concern, perhaps justified, that the claimants’ lawyers had negotiated settlements overly generous for their present clients but too penurious for the futures.

The issue addressed initially in *Amchem* and the central focus in *Ortiz*, however, was whether, as a matter of constitutional due process, a judgment could conclusively determine claims of the futures. The Court could well be uneasy with the proposition that a futures claimant could be bound by a judgment where neither his identity nor the existence or magnitude of his injuries have yet been established. There were two potential arguments in response to this challenge. One was that the formula for settlement of the future claims had been reasonably calibrated to similar claims of the present claimants. In other words, one could say that the schedule for the futures thus was fair in fact. The other contention was that the lower court’s finding that the settlement was “reasonable” was a sufficient proxy on behalf of the future claimants. Neither of these contentions, however, satis-


55 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (“In significant respects, the interests of those within the class are not aligned. Most saliently, for 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.”); *Ortiz*, 119 S. Ct. at 2319-20 (discussing the need for the division of present and future claims into subclasses to “eliminate conflicting interests of counsel”).


57 It might be noted that the findings of “reasonableness” by the trial courts in both *Amchem* and *Ortiz* were functionally the same as the finding of reasonableness in an estimate of futures liability contemplated in the Bankruptcy Commission’s recommendation. See supra text accompanying note 24. If a judicial finding of reasonableness is not a sufficient proxy for an approval by a claimant in a class suit such as *Amchem* or *Ortiz*, it is difficult to see how a bankruptcy court’s estimate of future liability could withstand similar due process challenges. The force of this point is the greater when one recalls that *Ortiz* was framed as a “limited fund” case, i.e., one where the available assets were exceeded by the anticipated liabilities.
fied the Supreme Court.

The tragedy of the futures in Amchem and Ortiz is pedestrian but stark. Since the Supreme Court disapproved the settlements, the parties have simply proceeded with ad hoc settlements generally based on the formulas that previously were incorporated in the now-invalidated trial court decrees. The settlements usually occur in batches managed by a small set of asbestos claimant lawyers, who have engagements based on individual contingent fee contracts. New claimants continue to appear, often as a result of medical examinations and x-rays funded by the various labor unions in cooperation with plaintiffs' lawyers. The "futures" thereby become present claimants and enter into contingent fee agreements that typically provide the standard one-third fee (although some provide for 40%). The attorneys' fee provision under Amchem's invalidated court decree was 25%. If an asbestos claimant, speaking through plaintiffs' counsel, does not want to settle on the basis of formulas such as those proposed in Amchem and Ortiz, the claimant is theoretically free to proceed to trial. However, the right to bring an asbestos case to trial is subject to significant impediments. The asbestos cases in the federal courts have all been remanded to the Eastern District of Pennsylvania, where most of them have been put on de facto permanent standby while the transferee court conducts what amounts to a "centralized, mandatory alternative dispute resolution system for ad hoc resolution of the highly individualized claims of asbestos personal injury victims." These cases are not being tried in Philadelphia, nor are they being remanded to the other districts from which they originated. Hence, they must settle at a discount reflecting the fact that their cases cannot be brought to trial. The cases in various state courts are subject to various civil calendar delays in many parts of the country. They are also subject to

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39 Shannon P. Duffy, 3rd Circuit Rejects Attempt To Remand Asbestos Cases, LEGAL INTELLIGENCER, Apr. 13, 2000, at 1 (quoting the lead counsel for three groups of plaintiffs seeking a writ of mandamus to order the JPML to remand their cases).
40 See In re Joann Patenaude, No. 99-1540, 2000 WL 369789, at *1-4 (3d Cir. Apr. 11, 2000) (describing the seven-year history of an unsuccessful attempt by several groups of asbestos plaintiffs to have their cases remanded to their respective transferor courts). The district court in the Eastern District of Pennsylvania has remanded cases only when the claimant was "seriously ill or dying and all avenues of settlement were exhausted," but even then "has a practice . . . of severing and retaining jurisdiction over punitive damage claims." Id. at *3 & n.3 (internal quotation omitted). The conditions this policy imposes on plaintiffs desiring to have their claims brought to trial are onerous to say the least.
the usual risk of a low verdict or a defense verdict, because not all claimants win "big," if they win at all. These claimants also must pay their lawyers at contingent fee rates. Most of the cases settle on this basis.

Defendants are usually willing to negotiate settlements based on the formulae in the now-invalid settlement agreements. The defendants, however, are rational actors. If settlement fails they put up stiff defenses in order to maintain downward pressure on settlement values. The resulting cost structure for administering these claims probably approximates the structure prior to the attempted settlements in Amchem and Ortiz. According to the RAND Institute, the cost structure in litigated cases comprised two-thirds transaction costs—primarily fees for lawyers on both sides—and one-third claimant compensation.41 The widows may not be weeping but neither are they dancing in the streets.42

V. A Future for Class Suits?

The Supreme Court's decision in Ortiz therefore seems to doom any use of Rule 23 to resolve futures claims in mass torts injury cases. But the pathway in the Court's analysis also raises serious questions about other uses of Rule 23. Specifically, the analysis raises questions that could also embarrass injunction class suits, such as the kinds of decrees commonly employed in race and gender discrimination cases. The basis of such embarrassment can be briefly described as follows.

In the course of holding the lower court judgment invalid as to futures claims in Ortiz, Justice Souter called attention to two procedural interests that were compromised by the use of Rule 23. These observations were vague but are highly suggestive. One observation concerned the right to a jury trial; the other concerned the "right" of an individual to an individual day in court.

As to the right to a jury trial, Justice Souter wrote:

[T]he certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members. We noted in Ross v. Bernhard

41 See JAMES S. KAKALIK ET AL., INSTITUTE FOR CIVIL JUSTICE, VARIATIONS IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xvii (1984) (finding that compensation for plaintiffs averaged 39% of every dollar spent by defendants and insurers in the litigation).

42 See supra note 36 (making use of Koniak's title image).
that since the merger of law and equity in 1938, it has become settled among the lower courts that "class action plaintiffs may obtain a jury trial on any legal issues they present." By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.

If the denial of a jury trial is a reason for invalidating a money settlement in a Rule 23 class suit, it would seem no less a reason for invalidating any class-wide judgment under Rule 23. That is, the objection seems equally applicable to all adjudications leading to what was formerly called an equitable decree. Beginning with a line of decisions commencing over forty years ago in *Beacon Theatres v. Westover*, the Court has held that the right to a jury trial applies in equity suits as well as in "suits at common law." The term "suits at common law" is of course the language of the Seventh Amendment in which the jury trial right is guaranteed. But *Beacon* and its progeny such as *Ross v. Bernhard*, to which Justice Souter expressly referred, had held that the Enabling Act extended the jury trial right to equitable proceedings. *Beacon Theatres* indeed mapped out how the right to a jury trial could be applied in all contested liability issues, even issues that were traditionally equitable. This line of analysis can lead to the conclusion that a jury trial should be available where the issue is, for example, whether prison administration or employment practices have been sufficiently racially discriminatory to justify an injunction against such conduct in the future. If this line of analysis governs Rule 23, no adjudication, and presumably no settlement either, would be permissible if its effect would be to preclude a jury trial for an absent class.

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44 See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) (delineating the right to a jury trial in the adjudication of equitable claims).
46 See Ortiz, 119 S. Ct. at 2314 (citing *Ross v. Bernhard*).
47 See *Beacon Theatres*, 359 U.S. at 508. The opinion notes that:

Under the Federal Rules the same court may try both legal and equitable causes in the same action. Thus any defenses, equitable or legal, Fox may have to charges of antitrust violations can be raised either in its suit for declaratory relief or in answer to Beacon's counterclaim. On proper showing, harassment by threats of other suits ... could be temporarily enjoined pending the outcome of this litigation. Whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict. In this way the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue.

*Id.* (citations omitted).
member.

The Court’s observation concerning an individual’s “right” to an individual day in court is even more far-reaching. In this connection the Court said:

[Mandatory class actions aggregating damage claims implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process, it being our deep-rooted historic tradition that everyone should have his own day in court. Although we have recognized an exception to the general rule... in certain limited circumstances[,]... the burden of justification rests on the exception.

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class.

This language clearly suggests that there is an individual right to a day in court, presumably a fight of constitutional dimension. But if there is such a right, it surely precludes the use of a class suit for any purpose. The very essence of a class suit is that it determines rights of individuals who are not to have their individual day in court. As Professor Chaffee stated many years ago:

However convenient class suits may be, it is obvious that they do not comply with some well-recognized general principles of law. The incongruity which startles us today is the disregard of the requirement that a man ought to have his day in court—his rights and duties should not be adjudicated in his absence. 49

Perhaps Ortiz thus has ended class suits of all kinds, not simply those involving futures claims. Under such a regime, all mass injury proceedings would require notice and a right to opt out as required by Phillips Petroleum Co. v. Shutts for state court class suits. 50 Notice with a right to opt out appears to be, in terms of procedural mechanics and due process theory, essentially multi-party joinder. At least reasonable legal argument to this effect is now open.

VI. A “SUBSTANTIVE” SOLUTION

Many serious discussions concerning mass torts have usually con-

43 Ortiz, 119 S. Ct. at 2314-15 (citations and internal quotations omitted).
49 ZECHARIAH CHAFFEE, JR., SOME PROBLEMS OF EQUITY 203 (1950).
50 See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding, in the context of state court class suits, that “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class”).
cluded that there should be some kind of legislative solution. Amchem and Ortiz may have closed all other avenues of relief. Obviously, such a solution would have to come from Congress because mass torts, virtually by definition, are not confined to a single state jurisdiction. However, there are notorious perils involved in obtaining from Congress coherent legislation addressing a complicated and controversial problem. It seems highly improbable that Congress could bring itself to address a specific mass tort, for example, asbestos or the breast implant situation. By the time a mass tort has become recognized as such, the interest alignments would have hardened to produce the usual legislative deadlocks we have learned to endure. The industries are powerful enough to block solutions that claimants might regard as fair and just, and the plaintiff’s bar has become influential enough to block many solutions that industry would be willing to accept. Hence, it is a reasonably safe prediction that no legislative solutions will be forthcoming for mass torts from specific product categories, at least in the foreseeable future. This includes bankruptcy “solutions.”

Perhaps the Supreme Court will come to appreciate that no legislative solution is likely to be forthcoming, that bankruptcy is no an-

51 See Ortiz, 119 S. Ct. at 2323, 2324 (Rehnquist, C.J., concurring) (opining that the asbestos situation “cries out for a legislative solution”).

52 The hotel fire cases are perhaps an exception. See PAUL D. RHEINGOLD, MASS TORT LITIGATION § 1.3 (1996) (noting that the hotel fire cases are prominent examples of “single situs cases”). Even these cases can be considered as arising in interstate commerce because the guests include people from out of state and, in the modern configuration of these cases, claims are asserted against all kinds of suppliers to the hotels—manufacturers of rugs, for example, as well as smoke alarms. See Dennis E. Curtis, Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar, 66 S. CAL. L. REV. 985, 1003 & n.72 (1993) (listing possible plaintiffs in hotel fire cases and citing such a case).

55 The only industry-specific mass torts legislative resolution of which I am aware is the brown lung statute for coal miners, sponsored by Senator Robert Byrd. The circumstances under which that legislation was adopted seem unique, including the unique position of Senator Byrd at the time. In any event the legislation is hardly a model. See ERNEST GELLHORN, THE “BLACK LUNG” ACT: AN ANALYSIS OF LEGAL ISSUES RAISED UNDER THE BENEFIT PROGRAM CREATED BY THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 (AS AMENDED) 4-6 (1981) (discussing various interpretive problems that have arisen under the original bill and subsequent amendments).

I do not believe that the innovations of 11 U.S.C. § 524(g) and (h) provide a persuasive counterexample. Although Congress thereby created that statutory authority for channeling injunctions in asbestos litigation in the Chapter 11 context, it did so by merely ratifying, in numbing detail, the precise structure of an existing court-ordered injunction. See BANKRUPTCY REPORT, supra note 23, at 320-22. Not only did this avoid any real engagement of legislative process or expertise, the specificity of the provision means that it gives little help to courts facing asbestos litigation if that approved trust structure proves infeasible, and no help to courts facing non-asbestos claims.
swer, and that settlements for futures in the mode of Amchem and Ortiz are anomalous in terms of strict due process, but that the ordinary procedure of civil litigation involves very high transaction costs to claimants. Perhaps the Court could also recognize that ordinary procedure involves comparable anomalies in due process. After all, the Court's own decisions resolve important rights of thousands of people who have never been in court at all.54

Be that as it may, in the mode of entering where angels fear to tread, I tender a conception of a "substantive" solution to mass torts problems. It is a federal statute that would provide essentially as follows:

1. The statute would cover distributors of products or services attended by some risk of causing multiple personal injuries. This would include, for example, automobiles, drugs, prosthetic devices, transportation services, hotels, liability for slip and fall and for intruder-caused injuries, and so on.

2. The statute would provide an elective procedure rather than a compulsory one. That is, a potential target of claims of this kind could register its good or service with a federal agency, such as the Commerce Department, as a "limited strict liability" product or service. If the good or service were thus registered, the statutory provisions apply; otherwise the ordinary law of torts and commercial liability would apply.

3. The distributor of such a registered product or service would be subject to liability without proof of fault for all injuries in which the product or service is the substantial cause. (Various formulations of the proximity of cause can be envisioned—a "substantial" cause or "legal" cause, for example.) The distributor of the product or service would have to establish financial responsibility for the prospective liability (through insurance, for example).

4. The measure of recovery would be based on the workers' compensation formula in the state where the claimant resides or, for nonresidents, the District of Columbia's formula. The recovery could be a multiple of that measure, for example, 150%
of the formula's allowance for lost wages. Special provision could be made for the unemployed, for example.

The only alternative to this proposal is to soldier on with the present law of torts and procedure. In the immediate future, the status quo is unlikely to change.