A Model State Mass Tort Settlement Statute

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I. INTRODUCTION

Global mass tort settlements are an endangered species. The recent passage of the Class Action Fairness Act relegates to posterity the state class action settlement that is national in scope.[1] The *Amchem*[2] and *Ortiz*[3] cases make federal mass tort settlements difficult, and the "Fen-Phen" experience suggests that they may be impractical as well.[4] The recent decisions of *In re Combustion Engineering, Inc.*[5] and *In re Congoleum Corp.*[6] do not bode well for prepackaged bankruptcy mass tort settlements.

Notwithstanding these impediments, there is still a significant demand for procedural vehicles for resolving personal injury mass torts. The American Law Institute has commenced a project on aggregate litigation that contains provisions devoted to nonclass aggregate settlements.[7] The Class Action Fairness Act, itself, was

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1. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.) (providing greatly expanded federal diversity jurisdiction over class actions).

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

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

4. *See In re* Diet Drugs Prods. Liab. Litig., Nos. 1203, 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (involving claims regarding the health effects of "Fen-Phen").

5. 391 F.3d 190 (3d Cir. 2004).

6. 426 F.3d 675 (3d Cir. 2005).

7. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.15 (Need for Special Treatment of Non-Class Aggregate Settlements); § 3.16 (Definition of a Non-Class Aggregate Settlement); § 3.17 (Circumstances Required for Aggregate

amended to exclude the settlement of nonclass action cases involving personal injuries.[8]

The suggestion here is that a new state statute, modeled after a combination of Rule 23 of the *Federal Rules of Civil Procedure*[9] and § 524(g) of the Bankruptcy Code,[10] has significant merit for filling the current vacuum in mass tort settlement devices. It would then be possible to settle a personal injury mass tort on a statewide basis without recourse to a class action. There would be finality, if only state by state.

II. THE MASS TORT SETTLEMENT LANDSCAPE

During the formative era of mass torts, cases were settled individually. Each plaintiff's lawyer evaluated a lawsuit and made a settlement demand on a defendant or defendants. When there were multiple defendants, the plaintiff would either settle individually or with the entire group.

Once it became obvious that plaintiffs' counsel represented multiple clients in the same mass tort, each side would attempt to leverage their bargaining power by settling groups of cases. If a plaintiff's counsel had a particularly strong case set for trial, that counsel would typically attempt to settle a group of cases at the same time. If a court set multiple cases for trial, there would be an attempt to settle all of them. Defendants would try to use the total dollar amount in a given settlement to bargain for lowering the average value of each case.

As the backlog of cases awaiting trial became a problem for trial judges, there were various procedural devices used to expedite settlement.[11] Because relatively few mass tort cases are actually tried, the judicial focus became settlement.[12] If a court viewed the defendants as impediments to settlement, it would not be unusual for a court to set large numbers of cases for trial at the same time, even

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Settlements To Be Binding); § 3.18 (Limited Judicial Review for Non-Class Aggregate Settlements); § 3.19 (Alternative Mechanism of Petitioning the Court if an Aggregate Settlement Is Not Feasible) (Discussion Draft, Apr. 21, 2006).

8. H.R. REP. NO. 109-7, at 2 (2005).

9. FED. R. CIV. P. 23(b).

10. 11 U.S.C. § 524(g) (2000).

11. *See* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1752-53 (2002).

12. *See generally* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1991); RONALD J. BACIGAL, THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY (1990).

empanelling multiple juries for a single trial.[13] Oftentimes these efforts resulted in large settlements.[14]

The most extreme procedural devices used by courts included class actions[15] and large consolidations.[16] In one instance, the court invoked an extrapolation theory, trying representative cases and extrapolating the results to the entire docket.[17] Other courts consolidated thousands of cases for trial at the same time.[18] Needless to say, these efforts promoted major settlements, at least from most of the defendants.

When it became apparent that there was the potential for a future stream of plaintiffs, counsel often negotiated case flow agreements. These settlements contemplated resolving future cases at given amounts over a given time frame.[19] So, for example, a defendant would agree to settle a predetermined number of cases at predetermined prices on an annual basis.[20]

III. GLOBAL SETTLEMENTS

As history suggests, both plaintiffs and defendants find settlement preferable to trial.[21] A mathematical analysis of the net benefits reveals that in most instances achieving a global settlement is rational.[22] There are, however, few options available for this purpose. On the one hand, counsel for plaintiffs would prefer to generate settlement funds for all pending and future cases thus lowering costs of capital, opportunity, and transactions. At the same time, defendants typically prefer to reduce the financial uncertainty associated with a mass tort because of its impact on stock prices, stock options, investment opportunities, and continuity. If it is possible to reach agreement on overall price, the mass tort can be bifurcated into an

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13. *See* McGovern, *supra* note 11, at 1746.

14. *See, e.g.*, STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 25-26 (2003), *available at* http://www.rand.org/pubs/documented_briefings/DB397/DB397.pdf.

15. *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995).

16. *See* McGovern, *supra* note 11, at 1746.

17. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 659-65 (E.D. Tex. 1990).

18. *See* Deborah R. Hensler, *A Brief History of Asbestos Litigation*, 38 CONN. L. REV. (forthcoming 2006); *see also* KEVIN LEAHY, ASBESTOS EXPOSURE AND THE LAW (forthcoming 2006).

19. *See* Hensler, *supra* note 18; *see also* LEAHY, *supra* note 18.

20. *See* Hensler, *supra* note 18.

21. *See* Francis E. McGovern, *A Proposed Settlement Rule for Mass Torts*, 71 UMKC L. REV. (forthcoming 2006).

22. *See id.*

overall determination of the value of liability and damages, leaving for another day the allocation of those damages to individual plaintiffs through a claims-resolution facility.[23] The prerequisite, however, is that plaintiffs be bound by the settlement.

IV. MASS TORT CLASS ACTION SETTLEMENTS

The history of class action settlements in mass torts is not a happy one. The notes of the Advisory Committee on the *Federal Rules of Civil Procedure* to Rule 23 provide:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[24]

The pressure of one mass tort after another, and the asbestos litigation in particular, led trial courts to certify mass tort class actions, only to have their opinions rejected by courts of appeals.[25] Finally, there were several breakthroughs in Dalkon Shield, DDT, asbestos, and others.[26] The United States Supreme Court changed direction in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*[27] In *Amchem*, the Court stressed that the "dominant concern" is "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives."[28] This concern manifested itself in both the Rule 23(b)(3) predominance requirement and the Rule 23(a)(4) adequacy of representation standard, both of which mandated reversal.[29] The Court did not require a settlement class to be certified as a trial class but did impose heightened scrutiny

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23. *See* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1380 (2005).

24. FED. R. CIV. P. 23 advisory committee's note (1966 Amendment, Subdivision (b)(3)).

25. *See generally* ADVISORY COMMITTEE ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (Feb. 15, 1999).

26. *Id.*

27. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

28. *Amchem*, 521 U.S. at 621.

29. *Id.* at 622, 625.

"to protect absentees by blocking unwarranted or overbroad class definitions."[30]

Like *Amchem*, the *Ortiz* opinion did not address justiciability, Rules Enabling Act, Seventh Amendment, due process of notice, or *in personam* jurisdiction issues. The Court rejected the settlement because of a lack of proof of a limited fund, disparate treatment of class and nonclass members, and noncompliance with Rule 23(a) prerequisites.[31] The Court stressed the inadequacies of the process in light of the incentives of class counsel and the Rule 23(a) standards for representation and also the variety of potential conflicts and disparities among class members arising out of previous settlements, exposure rates, disease progression, litigation status, and other facts.[32] "[T]he settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b)."[33]

One of the most innovative attempts to reach a class action settlement in a mass tort occurred in the Fen-Phen litigation, *In re Diet Drugs Products Liability Litigation*. The Fen-Phen mass tort began in 1996 with the FDA approval of Redux, a new diet drug.[34] It was sold by Wyeth along with a related drug, Pondimen, as part of the Fen-Phen (dexfenfluramine and phentermine) diet medication.[35] In 1997, there were reports of heart valve disease associated with the use of Fen-Phen, and Wyeth withdrew the drugs from the marketplace.[36] Plaintiffs' counsel alleged that there were over 600,000 plaintiffs.[37] By 1999, there were over 18,000 filed cases and a jury verdict of $23,000,000 in one case.[38] Wyeth agreed to a Rule 23(b)(3) settlement of $2.5 billion in a compensatory trust and $1 billion for medical monitoring.[39] The class action settlement had a triple opt-out procedure designed to comply with the *Amchem* opinion.[40] The compensatory damages trust had three trustees who delegated to a

30. *Id.* at 620.
31. *Ortiz*, 527 U.S. at 848.
32. *Id.* at 862-65.
33. *Id.* at 863-64.
34. Robert Lenzner & Michael Maiello, *The $22 Billion Gold Rush*, FORBES, Apr. 10, 2006, at 86, 89.
35. *Id.* at 87.
36. *Id.*
37. *Id.*
38. *Id.* at 89.
39. *In re* Diet Drugs Prods. Liab. Litig., Nos. 1203, 99-20593 (E.D. Pa. Nov. 18, 1999) (nationwide class action settlement agreement with American Home Products Corp.) (as amended), *available at* http://www.settlementdietdrugs.com (follow "Settlement Documents" hyperlink).
40. *Id.* at 55-63.

claims processing firm the task of evaluating the claims and placing them on a grid with values from $500 to $1,485,000.[41] The medical monitoring trust had one trustee and provided funds for claimants who had no current harm to be tested for potential future damages.[42] The three opt-outs were: (1) to not participate in the class action settlement at all;[43] (2) to exit to the tort system if the trust payment was not acceptable, but without an opportunity to collect punitive damages;[44] and (3) to exit to the tort system in the event of future harm, but without the right to collect punitive damages.[45]

When five of the original opt-out plaintiffs in Mississippi received $30 million apiece in a jury trial, the opt-out rates increased by almost 10% of the original class.[46] There was a subsequent settlement in 2000 of $8.5 billion for the opt-out cases.[47] Additional charges were taken by Wyeth from 2002 to 2005 of almost $8 billion for additional litigation and trust funding.[48] The total potential cost to Wyeth has become $22 billion.[49]

Most analysts of mass torts had projected a $2 - $4 billion cost to Wyeth.[50] Two major factors in the substantially increased cost related to the structure of the settlement mandated in part by *Amchem* and *Ortiz*. The triple opt-out allowed plaintiffs to pursue their claims in the tort system both immediately and long after the settlement was reached if they were not content with the amount of money offered by the Fen-Phen trust. Thus, the number of plaintiffs to be paid in the tort system greatly exceeded the earlier projections.[51] Normally, there is only a single opportunity to opt out and the defendant has the right to reject the global settlement if the number of opt-outs exceeds their expectations. The fundamental rationale of the class action settlement—finality at a predictable cost—can be achieved by the defendant making its decision after the plaintiffs have made theirs.

Another reason for the increased cost relates to the operation of the compensatory damage trust. "[I]n some instances the doctors and auditors administering the settlement were misinterpreting 'mild'

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41. *Id.* at 38.
42. *Id.* at 32-36.
43. *Id.* at 55.
44. *Id.* at 56.
45. *Id.* at 58.
46. *See* Lenzner & Maiello, *supra* note 34, at 90.
47. *Id.* at 90-91.
48. *Id.* at 89.
49. *Id.* at 87.
50. *Id.* at 89.
51. *See id.* at 90.

heart-valve damage as 'moderate' and incorrectly classifying moderate cases as 'severe.'"[52] Given the increased expectations of the plaintiffs, there was both an increase in propensity to make a claim and an inducement to fraud. This led Wyeth to investigate the claims and a resulting decision by the court overseeing the settlement to require 100% inspections of all claims.[53]

One effect of this effort to comply with the *Amchem* and *Ortiz* requirements resulted in an amount estimated to be over $22 billion in payments by Wyeth.[54] Most observers of mass torts doubt that any other defendant will use a similar settlement approach. The class action device is no longer viewed as a welcome vehicle for global settlements.

V. MASS TORT BANKRUPTCY SETTLEMENTS

The traditional bankruptcy approach to resolving a mass tort has followed a predictable path. Once a defendant files for bankruptcy there are readily recognizable parties, procedures, issues, and information. Bargaining in accordance with this standard model has generally resulted in a predictable range of outcomes. The main deterrent is the bankruptcy itself with its associated transaction and opportunity costs. This type of global settlement is typically viewed as a last resort.[55]

A more promising alternative has been the prepackaged bankruptcy which allows a defendant to obtain the requisite number of creditor votes prior to filing for bankruptcy. Once a defendant receives fifty percent of the votes by number in each class of creditors and two-thirds of the votes by value for each class, it can file for bankruptcy and a preapproved plan of reorganization at the same time.[56] The capital markets can see the outcome of the bankruptcy when it is filed, thereby reducing both transaction and opportunity costs.

The most recent mass tort prepackaged bankruptcies have been found in the world of asbestos. There is a unique, additional provision in the bankruptcy code that applies only to asbestos debtors: § 524(g).[57] The shadow created by the risk of future asbestos liability

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52. *Id.* at 89-90.
53. *Id.* at 90.
54. *See id.* at 89.
55. *See* S. ELIZABETH GIBSON, JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 1 (2005).
56. 11 U.S.C. § 1126(c) (2000).
57. *Id.* § 524(g).

had reduced the equity valuation of the reorganized asbestos debtors because there was always the risk that any fund created during the bankruptcy to compensate asbestos claims might run out of money and seek additional money from the reconstituted debtor.[58] These debtors successfully requested Congress to pass legislation to eliminate that risk.[59]

Section 524(g) provides that if:

> (a) a trust is created which assumes the present and future asbestos personal injury and/or property damage liabilities of the debtor; and
> (b) the trust is funded in whole or in part by securities of the debtor and obligations of the debtor to make future payments, including dividends; and
> (c) the trust will own, or by exercise of rights granted under the plan will be entitled to own a majority of the voting stock of the debtor, parent, or subsidiary, if specified contingencies occur; and
> (d) the trust will pay the present and future asbestos claims against the debtor; and
> (e) the present and future claims will all be valued and paid in substantially the same manner; and
> (f) the plan is approved by at least 75% of all asbestos claimants who vote; and
> (g) a futures representative is appointed;
> then the planned discharge provisions can include an injunction issued by the district court barring the following claims:
> (a) for the debtor's asbestos torts against the reorganized debtor; and
> (b) against third-parties who were past and present affiliates of the debtor, officers or directors of the debtor or a related party, insurers of the debtor, lenders to a purchaser of the debtor who have provided or agreed to provide benefits to the trust in amounts that make such protection fair and equitable.[60]

In addition, any enforcement or construction of the injunction must be done by the same district court.[61]

The protections of § 524(g) are greatly valued by the capital markets and have become a prerequisite for a successful asbestos bankruptcy. One effect of this development has been to give asbestos

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58. *See* Francis E. McGovern, *Asbestos Legislation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 241 (2004).

59. *See id.*

60. 11 U.S.C. § 524(g)(4)(a)(i)(I)-(IV); *see also id.* § 524(g)(4)(b)(i).

61. *Id.* § 524(g)(2)(A).

personal injury claimants, as a group, and a large number of claimants with less serious injuries in particular, a de facto veto over any plan of reorganization. This veto power is reinforced by the applicability of state substantive law to the personal injury claims. This phenomenal increase in tort claimants' bargaining power has altered the traditional negotiation process, and adjusting to the new reality has been extremely difficult for some of the other involved creditors.

The assets devoted to asbestos claimants are typically placed in a trust with an accompanying claims resolution facility designed to evaluate each asbestos personal injury or property damage claim and pay them accordingly. The precise trust distribution plan, which assigns values to categories of claims, can also be controversial, particularly regarding the relative allocations of assets between malignancies and non-malignancies, foreign and domestic claims, and personal injury and property damage claims.[62]

The most recent appellate review of a prepackaged bankruptcy is found in the United States Court of Appeals for the Third Circuit's opinion *In re Combustion Engineering, Inc.*[63] In 2002, Combustion Engineering filed a prepack in order to resolve its asbestos liability.[64] It contributed fifty percent of its assets to a settlement trust for a partial payment to current plaintiffs.[65] The unpaid portion of those settlements was reserved for payment in a bankruptcy trust.[66] The plan of reorganization also provided for a § 524(g) injunction that channeled the residual payments for current plaintiffs and future asbestos claims to the bankruptcy trust.[67] The plan of reorganization won the requisite support from the current claimants and the futures representative.[68] The bankruptcy trust also benefited from substantial contributions from two other nondebtor companies who shared the same parent and who sought the same § 524(g) protective injunction.[69]

The issues on appeal dealt with whether nondebtors can benefit from injunctive relief that channels future asbestos claims into a bankruptcy trust; whether current claimants who have a remaining portion of their settlement are conflicted in their vote on the plan of

62. McGovern, *supra* note 58, at 241-42.
63. 391 F.3d 190 (3d Cir. 2004).
64. *Id.* at 201.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 201-02.
69. *Id.* at 201.

reorganization; and whether the treatment of the current and future claimants was sufficiently equivalent under the terms of § 524(g).[70]

The Third Circuit held that the bankruptcy code precludes the use of a channeling injunction to nonderivative third-party asbestos claims against a nondebtor and that the vote of the current claimants and their treatment may have violated the applicable equality provisions for treatment among creditors.[71]

The net effect of this opinion has been to pour cold water on asbestos prepacks. If it is necessary to pay a premium to both current and future claimants, there is less incentive for an asbestos defendant to seek this type of global resolution. At the same time, it would be in the interest of the current claimants to delay bankruptcy filings so that more of a defendant's assets could be paid to them prior to any bankruptcy filing. There is little incentive for either party to reserve benefits for future claimants.

Another major impediment to the use of prepacks in asbestos cases as a result of *Combustion Engineering* relates to the scope of the protection afforded by a channeling injunction. Most corporate organizations are looking for total protection, total peace from future asbestos liability, and are willing to pay a premium to receive it. If the channeling injunction is limited to debtors, the same limitations that exist in a free-fall bankruptcy are present in a prepack.

VI. THE MODEL STATE MASS TORT SETTLEMENT STATUTE

The § 524(g) provisions that apply only to asbestos cases may have the potential for greater applicability. What if the protections and benefits of § 524(g) could be obtained, by any mass tort defendant, without filing for bankruptcy? What if the perceived injustices of § 524(g) could be ameliorated to an acceptable degree? What if § 524(g) could be enacted by a state legislature?

The purpose of this legislative model is to suggest the possibility of providing § 524(g)-type protections to personal injury mass tort defendants in a given state without the necessity that they file for bankruptcy.[72] These protections would be available to entities who negotiate successfully with personal injury plaintiffs from that state to create a court-approved trust that is funded with sufficient assets to pay present and, if necessary, future claimants in full. The statute would

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70. *Id.* at 202.

71. *Id.*

72. The following discussion adapts the analysis in McGovern, *supra* note 58, at 241-42, to *all* mass tort cases in a given state rather than to just asbestos cases.

provide, in effect, a structure for settlement, not litigation, of any mass tort liability for present and future cases. A corporate defendant facing mass tort personal injury litigation would be able to benefit from this proposed legislation without filing for bankruptcy.

The negotiation process between a solvent defendant and personal injury plaintiffs would need to be conducted under court supervision. This court could be a single court of appeals or a court specifically designated for this purpose. Applicable jurisdiction would continue, however, only for a defined period of time and would be contingent upon certain conditions, such as good-faith negotiations, being met.

The court could issue an injunction staying litigation during the duration of the negotiations. The length of the stay would need to be defined, but in no event should the stay be longer than one year. The opportunity for a given defendant to utilize this procedure would be limited to one occasion.

Upon obtaining jurisdiction, the court could appoint a committee of plaintiffs' counsel to negotiate on behalf of the current plaintiffs from the given state.[73] The appointed committee of plaintiffs' counsel and any experts they might need could be compensated from a common-benefit fund created by the defendant entities and awarded by the court regardless of the outcome of the negotiations.

The court could also appoint a futures representative in a manner similar to the appointment of a futures representative in bankruptcy cases.[74] Agreement of the futures representative would be a prerequisite for the defendant to achieve the protections afforded by the legislation. If the defendant has insurance for any portion of its personal injury liabilities, the court can also form a committee to represent those insurers in the negotiations in a manner similar to the manner in which insurers' interests are represented in all major insurance coverage litigation.[75]

The most critical aspects of the negotiations among the defendant, its insurers, the current plaintiffs, and the futures representative would be: (1) the amount and form of resources necessary to fund the trust that would compensate claimants, (2) the criteria required for plaintiffs to recover from the fund, (3) the amount of money each qualifying plaintiff would recover, and (4) the approach used to distribute that fund. The court would need to supervise

73. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.22 (1995).
74. *See* 11 U.S.C. § 524(g)(4)(B)(i) (2000).
75. *See* MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 73, § 20.22.

expeditious discovery designed to obtain adequate information on the following: (1) the relevant litigation and settlement history of the corporate defendant, (2) the financial situation of the defendant, and (3) the details of any available insurance coverage. In the event that experts were needed to deal with financial or litigation issues, they could be hired and paid just as they would be in a multidistrict litigation.

Because the ultimate outcome would be negotiated rather than adjudicated, the details of any plan would be subject to bargaining among all the parties. The court would need to have a fairness hearing and make findings that the amount and method of funding were adequate and secure in order for the plan to meet the requirements mandated by the proposed statute. Rather than a single payment in full, the negotiations might lead to an evergreen trust. Alternatively, contributions to the trust could be in the form of debt or stock rather than cash. The key factors would be the adequacy and the reliability of the funding, not the form of the funding.

The most fundamental change from existing jurisprudence would be to provide new guidance for the court's fairness hearing. Rather than the implicit one-by-one, perfect-trial paradigm that seems to underpin current jurisprudence, the statute would provide a "settlement" standard, taking into account the economic realities of a global settlement. Rather than insisting on full litigation value for every claimant, the judge could look to litigation risk, transaction costs, opportunity costs, solvency risks, and any other factors that might impact global settlement negotiations. Bulk discounts would not automatically be deemed inappropriate; recognizing plaintiff opportunity costs would be acceptable. It would be normal for the parties to take advantage of the joint gains potentially available because of reduced transaction costs in a settlement. The statutory standard would be weighed on the side of pragmatism rather than principle.

The applicable court could also maintain continuing oversight to ensure the viability of the fund. In the event of a shortfall, the statute could provide for a prorated reduction in benefits similar to those found in trust funds created in current bankruptcy proceedings. The fund would never be reconstituted because any reopening of the proceedings would defeat the purposes of providing financial certainty to participating defendants. This finality would also provide an incentive to the court to make its findings with substantial certainty.

Part of any judicial supervision could be an annual audit of the fund. The precise management of the fund, however, would be left to the negotiation process because its governance would need to follow the precise nature of the funding mechanism. For instance, the administrative requirements for an evergreen trust would be quite different than for a trust funded with stock. In all cases, there would need to be administration with at least the same level of responsibility as an administrator of an employee benefit plan under the Employee Retirement Income Security Act.[76]

The contents of the trust distribution plan (TDP) would be quite complex. It is debatable how many of these difficult issues should be addressed in the legislation and how many should be left to the negotiation process. For example, most parties would favor the inclusion of the requirement of at least a rough equivalency between current and future claimants in the TDP, but it may not be necessary to have a precise definition of "equivalency." Similarly, most parties would favor an alternative dispute resolution (ADR) mechanism, but it would probably not need to be prescribed in any detail. Certain other potential provisions in the statute would be more controversial. Examples include a provision creating a continuing role for the defendant in TDP oversight and a provision setting the precise nature or composition of a trust advisory committee made up of plaintiffs' counsel or insurance carriers.

The key to any TDP would be the metric that emerged from the marketplace of litigation. The data points from trials and settlements that enable the parties to distinguish between true and false positives can translate into a metric suitable for a TDP. Indeed, it is improbable that a settlement under this proposed statute could be negotiated unless there were some consensus about the characteristics of viable cases and their relative value. Plaintiffs would not agree unless they knew who would recover and how much; a defendant would not agree unless money were being allocated to plaintiffs who would otherwise recover in the litigation system.

The statute would probably mirror § 524(g) in mandating that present and future claims be valued and paid in substantially the same manner.[77] Liquidation values would probably be based on a grid with faster and lower payments for those who present less extensive evidence of physical harm and exposure. There would be, however,

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76. *See* 29 U.S.C. §§ 1001-1461 (2000).
77. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(v).

precisely defined minimum medical and exposure criteria required for any payment. For the more seriously injured and exposed, there would be higher payments and more individualized review. The threshold levels, grid amounts, ratios, and flexibility in payment ranges would probably be left to the negotiations among the parties rather than being specified in a statute. It would be possible, however, to establish certain statutory requirements. For example, the statute might mandate that certain cases be paid before others, that medical monitoring be available for everyone exposed, or, perhaps, that anyone suffering a more severe harm at a later date could return to receive a second payment.

The TDP could be managed by an administrator subject to a variety of safeguards including internal fraud protection, financial and medical audits, and annual oversight by the court. The defendant, plaintiffs' committee, futures representative, and insurers could have at least minimal access to the administrator's records in order to maintain their confidence in the implementation of the TDP.

Under the proposed statute, payment to a claimant could be treated as a settlement for purposes of calculating contribution and taxes. Any claimants dissatisfied with an offer from the fund could avail themselves of ADR, including arbitration. The statute could provide that, if a case were still not resolved, the claimant could have access to the tort system. The statute could use an adjudication in the state court to liquidate damages but preclude the claimant from receiving damages except under a payment schedule that would render the compensation of the opt-out plaintiff comparable to that of participants in the fund.

The insurance aspects of the proposed statute would probably be among the most controversial and contentious provisions. The intent is to have an even playing field, but the implementation of this intent is challenging. The Third Circuit's *Combustion Engineering* opinion suggests that it may be possible to draft "super-preemptory" and "neutrality" provisions that would not disadvantage insurers.[78]

Most insurers have written their insurance policies based upon assumptions about the tort system. If claims are subject to a less rigorous filter or are processed more quickly under the statute than in normal litigation, there could be dire repercussions for the capitalization of the entire insurance industry. Resolving the total potential liability of an insured at the time the statute applies, and then

78. *See In re* Combustion Engineering, 391 F.3d 190, 217-18 (3d Cir. 2004).

utilizing a claims-resolution facility rather than a court to process claims, creates a potential disadvantage for insurers. An insured that files for bankruptcy, for example, can argue that the entire amount of the insurance coverage is due and payable on the effective date of a plan of reorganization. In addition, as indicated above, the insured has additional bargaining leverage because it can offer the insurer a § 524(g) release if the insurance disputes are resolved prior to the effective date.

How, then, can there be sensible treatment of insurers? First, the statute would not invoke the principles of bankruptcy. Second, the criteria that determine the amount of payments to claimants and the application of those criteria would probably need to be comparable to the existing tort system of litigation and settlement. The TDP cannot constitute precedent regarding the validity of claims, but there would need to be some security for any future insurance funding. Third, the velocity of payments would not be accelerated by virtue of the statutory settlement. The court should attempt to determine, based on history and experience, what the "normal" velocity of the case would be without the statutory acceleration. Fourth, the insurance carriers would not use the typical litigation delays involved in insurance coverage cases to calculate the timing of their contractual obligations. Fifth, any legal decisions regarding insurance contracts or agreements could be made by a judge not overseeing the negotiations. On balance, the goal is to minimize any deviation from the normal payment of insurance proceeds. The court could not approve the protections afforded by the statute in a way that would disadvantage either the insured or the insurer in the total amount to be paid, its availability, or the velocity of the payment.

Each situation would be different, and a statute cannot define with specificity what the guidelines would require in any given setting. A court would need to have wide discretion to decide whether a proposed settlement between the defendant and tort claimants adversely impacts the insurance status quo. This decision by the court would need to be made within the statutory time frame allowed for the completion of a settlement. Thus, the insurers would have a seat at the table to increase their bargaining power in the negotiations, but the insurers would not have the ability to veto a settlement unless the court ruled that the proposed settlement undercut their contractual rights.

Another of the more problematic sections of the proposed statute relates to voting procedures; both the quantum and the qualifications present difficulties. Under § 524(g), at least seventy-five percent of all

the asbestos claimants must vote in favor of the plan of reorganization.[79] Under traditional bankruptcy standards, there must be a positive vote of at least fifty percent in number and two-thirds in value of the members of a class of claimants.[80] The normal bankruptcy approach to the qualifications for voting is to give each entity and each dollar a vote. Each asbestos personal injury claimant has historically been given one vote, and sometimes they have been valued at the same amount. The assumption behind these decisions has been that the process of evaluating each personal injury claim to establish its validity and its value would simply take too long and be too expensive to accomplish prior to a vote. In a normal bankruptcy, the total value of all personal injury claims is estimated first; the time for liquidating claims comes after the effective date and is accomplished by a claims-resolution facility in accordance with the plan of reorganization.

Neither of the bankruptcy models is completely satisfactory because each is based upon the assumptions that there is a financially bankrupt debtor and that it is appropriate to give superior bargaining power to creditors. In the § 524(g)-without-bankruptcy scenario, that assumption is incorrect. The corporate defendant is solvent and has a desire to liquidate and pay its mass tort liabilities in full.

The Seventh Amendment to the U.S. Constitution provides for each individual to have a right to trial by jury and that trial needs to meet the due process protections of the Constitution.[81] Non-agreeing plaintiffs could not be bound under the Bankruptcy Code. There would, however, be natural forces to lead plaintiffs to agree to the settlement structure. Outliers would be subject to the normal inclination to reach resolution. There could also be sufficient agreement or waiver of rights to make the settlement binding.[82]

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79. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

80. *Id.* § 1126(c).

81. U.S. CONST. amend. VII.

82. *See* AM. LAW INST., *supra* note 7, § 3.17 (Circumstances Required for Aggregate Settlements To Be Binding). This section provides:

> (a) Under the aggregate settlement rule, a lawyer who represents two or more clients may not settle the claims of those clients on an aggregate basis unless each client gives informed consent, in writing, after reviewing the settlements of all other persons subject to the aggregate settlement.
>
> (b) A claimant is not entitled to collaterally attack a non-class aggregate settlement if, after informed consent and after reviewing the individual settlements of all affected claimants, the claimant agrees to the terms of the settlement and is compensated accordingly.
>
> (c) An individual claimant may, after consultation with counsel, affirmatively agree to be bound by a non-class aggregate settlement without prior knowledge of and consent to the terms of other claimants' settlements by

There could also be an opt-out provision for a limited number of plaintiffs. That number would need to be acceptable to the defendant in order for the defendant to be responsible for paying any additional money. Otherwise the exit to the tort system described in connection with the TDP could provide the necessary relief for dissenting plaintiffs.

Both the quantum and qualification issues for voting would need to be resolved in the statute. Leaving these issues to the court would not provide the level of predictability necessary to negotiate under the act; these issues are simply too critical to be left open. One way to promote the negotiation process could be to establish a threshold for the right to vote; this threshold could be similar to the threshold which must be met to receive payment under some of the existing bankruptcy trusts. For example, a predefined medical report, based upon a medical examination, and an acceptable affidavit or other proof could be required in order for a claimant to vote. Again, the consensus metric that emerged from the marketplace of litigation would form the basis for the filtering process. Those who qualify to vote should also qualify for payment, even if that payment is in the nature of a lower, expedited amount under the TDP.

Another alternative would be to eliminate the need for a vote altogether by expanding the court's role to include authority over the issues that might have been resolved by negotiation. If a court were to give preclusive effect to those issues and to find that current and future plaintiffs will be paid equivalently and in full, then the court could effectively order all plaintiffs to participate in the statutorily designed compensation system.

Finally, the form and scope of an injunction or other relief terminating the defendant's personal injury liability can be provided in the statute. The statute would need to define what entities could be covered by the permanent injunction and their required levels of

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agreeing to accept an aggregate settlement as part of a known collective representation.

(d) The affirmative waiver may be consented to by a litigant as part of counsel's retainer agreement or at any other point during the course of the litigation.

(e) A waiver is valid only if it is given in writing after the claimant has been adequately informed by counsel of the consequences of agreeing to the waiver.

(f) Waivers executed pursuant to this Section are valid only if the total value of the claims is greater than $5,000,000 and the total numbers of claimants involved in the settlement is at least 40.

Id.

contribution. Parent companies, financial entities, insurers, and others similarly situated could be covered by the injunction, but their participation would be based upon contributions similar to those required under § 524(g). The court would provide the form of the injunction and the parties would negotiate the identity of the entities to be covered, subject to the court's approval.

VII. CONCLUSION

The states provide perfect opportunities to experiment with innovative approaches to resolving mass torts. The current federal approaches have not met with universal acclaim. The concept here is to take advantage of the assets of the litigation system with its paradigm of perfect, one-on-one trials to establish a marketplace for the characteristics and values of an alleged tort. This marketplace would be governed by judicial rationality rather than counsels' strategic maneuverings in order to provide rapid and defensible data points for distinguishing among claims. Once the parties felt comfortable in being able to distinguish between true and false positives, they would then be in a position to negotiate a metric that embodied a consensus for paying claims.

The parties could then use a new state statute to shift from a trial to a settlement paradigm. This statute would allow the parties to negotiate a global resolution based upon negotiation criteria, rather than trial outcome criteria. They would take into account the marginal value of money, the time value of money, the rationale for volume discounts, the cost of foregone opportunities, and other related factors that are inherent in any global transaction. The parties would vote and a court would hold a fairness hearing before the proposed settlement would be binding on the plaintiffs. The thrust of the proposal is to move the global settlement scenario into a legislative format rather than a judicial one.