

COMMENTARY

BACK TO THE FUTURES: PRIVATIZING FUTURE CLAIMS RESOLUTION

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INTRODUCTION

Professor Geoffrey Hazard has accurately captured the “Futures Problem.” Not only has he succinctly stated the problem, but he also has hit the perfect pitch of pessimism entailed in this subject. It is abundantly clear that neither the judicial system nor the legislature will ever solve the problems of mass tort litigation until we find a way to resolve the futures problem.¹

Professor Hazard has usefully distilled several conclusions from his knowledge of mass tort litigation, settlements, legislation, and rulemaking efforts. First, not all mass tort cases are alike.² Second, only latent-injury mass torts involve the futures problem.³ Third, medical monitoring is only a partial, and not especially efficacious, means for dealing with future claimants.⁴ Fourth, substantive, procedural, and technical difficulties limit the effectiveness of proposed bankruptcy solutions.⁵ Fifth, Congress is an immovable object paralyzed by interest-group gridlock and is therefore incapable of legislating to resolve the futures problem.⁶ Sixth, in light of the

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¹ The problem of future claimants is given relatively short-shrift in the 1999 monumental *Report on Mass Tort Litigation*. See ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 34-35, 58 (1999) [hereinafter REPORT ON MASS TORT LITIGATION] (discussing the problems associated with future claimants); see also *id.* app. F-1 at 2 (same); *id.* app. F-4 § 2.1.2 (“Protecting the Interests of Holders of Mass Future Claims”); *id.* § 2.1.3 (“Determination of Mass Future Claims”); *id.* app. F-6 (“Future Mass Tort Claimants”).

² See Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1902-03 (2000) (describing different types of mass torts).

³ See *id.* at 1903 (noting that the futures problem only relates to toxic mass torts).

⁴ See *id.* at 1905-06 (discussing the limitations of medical monitoring).

⁵ See *id.* at 1908-10 (discussing problems with a bankruptcy solution).

⁶ See *id.* at 1916 (noting the influence of interest groups on Congress).

Supreme Court's 1999 *Ortiz* decision,⁷ the limited fund concept is moribund for resolving future claims.⁸ Seventh, class actions may compromise Seventh Amendment rights.⁹ And last, the class action is dead.¹⁰

If this were not grim enough, the country's senior-ranking and highly eminent *proceduralist* ends his paper with a four-paragraph *substantive* solution to the futures problem.¹¹ Clearly, we are in trouble.

I join Professor Hazard in his dour pessimism. He correctly and poignantly describes the consequences for asbestos claimants of the Supreme Court's repudiation of the *Amchem*¹² and *Ortiz* settlements. Although the Court's rejection of these settlements vindicates due process, it also delays, denies, or devalues justice for thousands of genuinely injured claimants, a practical consequence that largely has been overlooked in the commentary on these decisions.¹³

I part company with Professor Hazard's gloom, however, in two respects. Although a consequence of the *Amchem* and *Ortiz* decisions may be a decline in the volume of class litigation¹⁴—a proposition I

⁷ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295 (1999).

⁸ See Hazard, *supra* note 2, at 1910 (noting the Court's disapproval of the "limited fund" concept).

⁹ See *id.* at 1914 (noting the potential Seventh Amendment right to jury trial issues inherent in some mass tort litigation).

¹⁰ See *id.* at 1915 ("Perhaps *Ortiz* thus has ended class suits of all kinds . . .").

¹¹ See *id.* at 1917-18.

¹² *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

¹³ See Linda S. Mullenix, *Court Nixes Latest Settlement Class*, NAT'L L.J., Aug. 16, 1999, at B12 [hereinafter Mullenix, *Court Nixes Latest Settlement Class*] (discussing the impact of the *Ortiz* and *Amchem* decisions on efforts to afford justice to injured claimants); Linda S. Mullenix, *Court Settles Settlement Class Issue*, NAT'L L.J., Aug. 11, 1997, at B12 (noting that the resolution of asbestos claims is "back to square one in the judicial system").

¹⁴ The vitality and volume of class action litigation runs in cycles, often in reaction to court decisions. Thus, the 1966 amendments to Rule 23 inspired an increase in class action litigation in the ensuing decade. However, three Supreme Court decisions in the early 1970s slowed the volume of class litigation by imposing various requirements on class plaintiffs regarding the financing of notice costs and limiting the ability to aggregate damages to satisfy the amount in controversy requirement. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79 (1974) (requiring plaintiffs to pay costs of notice); *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (prohibiting the aggregation of damages for purposes of meeting the amount in controversy requirement); *Snyder v. Harris*, 394 U.S. 332, 338-42 (1969) (same). After 1983, with the amendment of Federal Rule of Civil Procedure 11 (providing for sanctions against lawyers litigating spurious claims), Rule 11 sanctions were effectively deployed in some federal courts to discourage plaintiffs' attorneys from pursuing certain types of civil rights class action litigation. See generally Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 487 (1988-1989). See also *id.* (discussing how implementation of

doubt¹⁵—class action litigation is far from dead.

As I have written elsewhere, I do not agree that the *Ortiz* decision effectively killed off the limited-fund class as a means for resolving mass torts or future claims.¹⁶ I do not read *Ortiz* as flatly prohibiting limited fund class actions or certification of limited fund classes in mass tort litigation. In the future, attorneys will parse the *Ortiz* decision carefully, making every attempt to “prove up” the existence of the limited fund within the parameters Justice Souter believes the rule requires.

Nor do I read *Ortiz* so narrowly as to repudiate mandatory injunctive classes, a sweeping proposition so untenable that it seems incredible.¹⁷ If Professor Hazard is correct, then what are we to make of the entire realm of public law litigation, which is built on the mandatory structural injunction?¹⁸

Rule 11's amendments “has disadvantaged civil rights litigants and attorneys during the initial half-decade of experience”). A series of federal appellate decisions in 1995-1996 effectively discouraged plaintiffs' tort lawyers from pursuing nationwide mass tort class actions in the federal courts. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 740-45 (5th Cir. 1996) (discussing the impropriety of a class certification); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1078-86 (6th Cir. 1996) (same); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1295-1302 (7th Cir. 1995) (same). Consequently, plaintiffs' tort lawyers pursued the *Amchem* and *Ortiz* litigation in state courts.

It remains to be seen whether the Court's *Amchem* and *Ortiz* decisions will have the same effect on settlement classes as did the *Eisen* and *Zahn* decisions in the early 1970s.

¹⁵ The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998), were intended to reduce the abuses of securities and derivative litigation by tightening the substantive and procedural requirements for this litigation (including class actions). Notwithstanding these statutes' heightened requirements, the volume of securities and derivative actions seems not to have abated significantly. See David Priebe, *Piling On: The Reemergence of the Parallel Derivative Lawsuit as the Federal Securities Class Action Window Closes*, in SECURITIES LITIGATION 1999, at 333, 335 (PLI Corp. Law & Practice Course Handbook Series No. B-1136, 1999) (discussing the emergence of parallel derivative suits in the place of federal securities class actions); Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?*, 76 WASH. U. L.Q. 645, 645 (1998) (arguing that the legislation has failed to “foster more forward-looking disclosure by issuers”).

¹⁶ See Mullenix, *Court Nixes Latest Settlement Class*, *supra* note 13 (discussing the impact that the *Ortiz* decision had on creating a new structure for limited-fund class actions).

¹⁷ See Hazard, *supra* note 2, Part V (suggesting that the reasoning in *Ortiz* would severely limit the availability of an injunctive class suit).

¹⁸ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-96 (1976) (describing the injunctive class as the key remedial feature of public interest litigation). But see Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 424

I do agree that the originalist view on Rule 23 expressed by Justice Souter will have a limiting, if not crippling, effect on class actions. We are entering a new era of class litigation that will be profoundly informed and shaped by the *Amchem* and *Ortiz* decisions. We cannot predict, however, the ultimate impact of these opinions based only on the current enthusiasm for class action litigation.

I. THE FUTURES PROBLEM AND THE COURTS

The futures problem is very much with us.¹⁹ As Professor Hazard accurately recognizes, the judicial system deals fairly well, if imperfectly, in resolving mass accident cases of the airplane crash/train-wreck variety.²⁰ Latent-injury mass torts, however, are more difficult to resolve because defendants and their insurers are unwilling to negotiate any deal that does not include future claims. Resolving future claims, then, is the ticket to the settlement table and what the defense lawyers call "global peace."²¹

As we have learned, plaintiffs' lawyers are quite willing to punch the futures ticket and negotiate with defendants and their insurers to resolve future claims in latent injury mass torts.²² Hence, plaintiff and

(1999) (rejecting applicability of public interest paradigm to mass tort litigation).

¹⁹ See generally John W. Ames et al., *Future Claimants in Mass Tort Bankruptcy Cases*, 13 AM. BANKR. INST. J. 8 (1994) (discussing the difficulty courts face when dealing with futures claims); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 497 (1995) (indicating the uncertainty surrounding futures claims in bankruptcy); Alex Raskolnikov, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 YALE L.J. 2545, 2581 (1998) (offering a solution to the future claimants problem); Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066, 1076-82 (1996) (offering a framework for fitting future injury cases within the Article III standing requirement); Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215, 217 (1998) (defending a "bright line denial of standing" to future claimants); Daniel M. Weddle, Note, *Settlement Class Actions and "Mere-Exposure" Future Claimants: Problems in Mass Toxic Tort Liability*, 47 DRAKE L. REV. 113, 115-26 (1998) (discussing the difficulties with future claims litigation).

²⁰ See Hazard, *supra* note 2, at 1904 (noting that the issues raised by mass torts of the airplane crash sort are similar to those dealt with by courts in many types of modern litigation).

²¹ See REPORT ON MASS TORT LITIGATION, *supra* note 1, at 35 ("The mirror image of these questions arises from the desire of defendants to achieve closure—to buy 'global peace'—by resolving all present and future claims at once.").

²² Indeed, the willingness of the plaintiffs' lawyers to negotiate the fate of the future claimants sets the stage for both the *Amchem* and the *Ortiz* deals. For a brief history of the negotiations leading to these settlements, see generally Linda S. Mullenix, *Asbestos at the Crossroads: Will a Mandatory Class Pass Muster?*, 1998 Term PREVIEW U.S. SUP. CT.

defense lawyers, aided and abetted by adventuresome judges,²³ have creatively exploited various techniques to solve the futures problem.

This endeavor has leaned heavily on metaphor, simile, and analogy. Thus, courts have found a future-claims fund to be similar to a res,²⁴ a limited fund,²⁵ an action in interpleader,²⁶ or a bankruptcy.²⁷ The signature theme of Justice Souter's *Ortiz* opinion is the direction to stop all this inventiveness.²⁸ As a result, courts have emphatically said that plaintiffs with current claims cannot negotiate for future claimants, or do so only at the peril of being charged with collusion, conflict of interest, inadequacy, and self-dealing.²⁹

CAS. 118 (1998) (focusing on *Ortiz*); Linda S. Mullenix, *Settlement Class at Issue in the 'Ortiz' Appeal*, NAT'L L.J., Nov. 16, 1998, at B10 (same); Linda S. Mullenix, *Must Settlement Classes Satisfy All the Requirements of Litigation Classes?*, 1996 Term PREVIEW U.S. SUP. CT. CAS. 296 (1997) (focusing on *Amchem*).

²³ See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 968 (5th Cir. 1996) (upholding limited-fund class settlement of asbestos future claims), *rev'd*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 745 (2d Cir. 1992) (holding that the insolvency of Manville Trust rendered it a limited fund and qualified it for treatment under Rule 23(b)(1)(B)).

²⁴ See *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32, 38 (E.D.N.Y. 1990) ("Several courts have considered class action litigation analogous to *in rem* actions given their magnitude and complexity. In *Baldwin-United* the class action proceeding was 'so far advanced that it was the virtual equivalent of a res over which the district judge required full control.'" (citation omitted)).

²⁵ See *id.* at 38; see also *In re Asbestos Litig.*, 90 F.3d at 968.

²⁶ See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. at 38 ("Limited fund class actions closely resemble an interpleader action.").

²⁷ See, e.g., *In re Asbestos Litig.*, 90 F.3d at 984 ("The plain meaning of Rule 23 also supports a finding that the insolvency of a defendant can support a [Rule] 23(b)(1)(B) class action.").

²⁸ See *Ortiz*, 119 S. Ct. at 2314 ("Finally, if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale.").

²⁹ See *Ortiz*, 119 S. Ct. at 2318-20 (describing the impropriety of certifying a class with both present and future claimants); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997) (noting that the differences between the currently injured and exposure-only plaintiffs prevented certification of a single class). There is a substantial literature discussing the ethical implications of settlement classes that involve simultaneous negotiation of present and future claimants. See generally Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995).

II. PROFESSOR HAZARD'S PROPOSAL TO DEAL WITH THE FUTURES PROBLEM

Where does this leave us and what is to be done?³⁰

To deal with the futures problem, Professor Hazard would jettison all past attempts at inventiveness under Rule 23 or the Bankruptcy Code. Instead he proposes to federalize products liability law, underwritten by insurance, with relief administered by state workers' compensation systems.³¹ This proposal combines federalization and the modern administrative state with a dab of private enterprise for good measure. This proposal also suggests that, notwithstanding our President's pronouncements, the era of big government is perhaps not over yet.

With all due respect, and understanding very well the complexity of the futures problem, Professor Hazard's proposal nonetheless embodies another Rube-Goldberg-like contraption that cobbles together various schemes that individually make sense. It kind of sounds good. He has, of course, neglected to tell us why this proposal would appeal to Congress, as opposed to all other failed attempts to federalize products liability law.³²

Because I agree with Professor Hazard that prior attempts at dealing with the futures problems have been ineffectual—if not illegal—I propose an alternative idea to privatize effectively the resolution of future claims.

³⁰ The Advisory Committee on Civil Rules of the Judicial Conference of the United States apparently has chosen to do nothing about the futures problem, at least in the short run. Thus, the conclusion of the Working Group on Mass Tort Litigation included the following:

Even greater difficulties are presented by the issue of certifying a class of plaintiffs who will experience injury only in the future. Although the Advisory Committee has held resolution of these problems in abeyance, it is likely that realistic, workable answers will be found only through a combination of legislation and implementing procedural rules.

REPORT ON MASS TORT LITIGATION, *supra* note 1, at 58.

³¹ See Hazard, *supra* note 2, at 1917 (proposing a solution to the futures problem).

³² See Thomas E. Willging, *Mass Torts & Proposals: A Report to the Mass Torts Working Group*, in REPORT ON MASS TORT LITIGATION, *supra* note 1, app. C at 21 ("Congress has been reluctant to federalize products liability laws because they have traditionally been within the province of the States.").

III. PRIVATIZING FUTURE CLAIMS

A. *Framing the Practical Problems*

The idea to privatize the resolution of future claims is derived from a few propositions that frame the practical problems involved in these claims. These include the necessities to: (1) resolve future claims as a part of any latent injury mass tort settlement; (2) sever future claims from current claims resolution; (3) estimate future claims accurately; and (4) create an independent entity to process future claims. As I will discuss below,³³ these practical problems can be addressed by utilizing current procedural mechanisms coupled with economic incentives.

First, defendants will not settle a latent injury mass tort litigation unless the deal includes some disposition of future claims.³⁴ If latent injury mass torts are to be settled or resolved under judicial auspices—or through legislative initiative, for that matter—the resolution must include some disposition of future claims.

Second, the resolution of future claims must be accomplished separately from the resolution of current or “inventory” claims. Hence, plaintiffs’ attorneys cannot be involved in simultaneous negotiations for the resolution of current and future claims. If a latent injury mass tort involves future claims, that fact must be identified early in the litigation and the future claims should be severed from the litigation to avoid any possibility of conflicts of interest, sell-outs, or taint of collusion.

Third, some entity other than the parties, their attorneys, and their experts should be responsible for determining the number of future claimants. If we have learned anything from three decades of mass tort litigation, it is that the actors involved in latent injury mass torts have proven to be notoriously bad at estimating the universe of future claimants.³⁵

³³ See *infra* Part III.C (discussing the implementation of private future claims processing).

³⁴ See *supra* text accompanying notes 1 & 21 (discussing the importance of the future claims problem).

³⁵ Most famously, the Manville Personal Injury Trust greatly underestimated the number of asbestos future claimants who subsequently would make claims against the Trust, a fact that led to the dismissal of the Trustees and a reorganization of the Trust under new court supervision. See Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 622 (1996) (indicating that in 1986, the initial estimate of future claimants against the Trust were between 83,000 and 100,000 claims, but that within a decade, the Trust projected more than

The miscalculation of the numbers of future claimants has a cascade effect because the underestimation of future claims will quickly exhaust a settlement fund to the detriment of other future claimants. Thus, any system for dealing with future claims must include some mechanism for inducing the most accurate estimate of the universe of future claimants.

There are several reasons why the current system results in the miscalculation of the number of futures claims. The actors involved in mass tort settlements—including the judges who must approve the fairness of those settlements—have few incentives to determine accurately the estimates of future claims. Such estimates typically are provided through expert testimony. The major motivation for providing a reasonably plausible estimate of future claims is to induce the court's approval of the settlement. However, hardly anyone involved in a mass tort settlement (other than an objector or a guardian *ad litem* for future claimants) has a great incentive to challenge the estimate.³⁶

After the court approves a settlement, if the money runs out, neither the parties nor the court especially cares about the future claimants. The defendants contribute to a fund to be administered by a claims facility; the plaintiffs' attorneys take their fees and have little hands-on management of the settlement fund; and the court largely is out of the picture. A miscalculation of future claims becomes the problem of the claims administrators or fund trustees.

Fourth, any resolution of future claims must involve a professional administrative claims facility. Plaintiffs, defendants, attorneys, and the judiciary do not want to administer claims, nor do any of these actors have the expertise to do so. Professional commercial entities should process future claims and, with proper economic incentives, future claims resolution should bring into existence such entities.

500,000 claims).

³⁶ Objectors may or may not have a great incentive to challenge the parties' estimates of future claimants. Moreover, to assert this type of challenge, the objector would have to retain an independent expert witness to perform the actuarial studies to provide another estimate. In theory, a court-appointed guardian *ad litem* has the greatest incentive (if not a fiduciary duty) to determine independently an accurate estimate of future claims. Performance of this task, however, assumes that the court, in appointing the guardian, provides resources sufficient to allow the guardian to hire an independent expert witness to future claims—an assumption that may have no basis in fact.

B. Framing the Legal Problems

Apart from practical problems, the resolution of future claims entails an array of legal issues, many of constitutional dimension. These include: (1) defining a future claimant, (2) standing, (3) statute of limitations, (4) notice, and (5) consent.³⁷ Indeed, Professor Hazard's despair about future claims arises chiefly from his contemplation of these issues.

The first two problems—defining the future claimant and standing—are related. Objectors in latent injury mass tort cases have argued that future claimants have no actual injury and therefore can have no standing,³⁸ an Article III “case and controversy” objection.³⁹ In this version, the future claimant is a phantasmagoric figment of the imagination for whom no one can provide remediation. More starkly, according to this view, the future claimant is an oxymoron: the future claimant is no claimant. Any resolution of the future claims problem, then, must resolve this conundrum by acknowledging the existence and legal force of future claims.⁴⁰

Future claimants also run afoul of limitations problems because of the intrinsic nature of latent injury. Of all the problems implicated in the resolution of future claims, limitations problems seem the easiest to rectify, either by party consent or legislative action.

The problem of notice also has dogged resolution of future claims: simply stated, how can unknown and unidentified future claimants have notice of the resolution of their claims? Even more problematic, how can any court approve a settlement of future claims, consistent with due process, without adequate notice to future claimants?⁴¹ It

³⁷ See *supra* note 1 (discussing the problems attending mass tort litigation).

³⁸ See, e.g., *Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437, 1446-56 (E.D. Pa. 1993) (concluding that “exposure to a toxic substance constitutes sufficient injury in fact to give plaintiff standing to sue in federal court”).

³⁹ See *supra* note 19 (citing numerous sources discussing the Article III case and controversy objection). The petitioners in *Amchem* and *Ortiz* raised these Article III arguments; however, the Supreme Court did not address the Article III issues in either decision. See Brief for Petitioner at 13, 44-45, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999) (No. 97-1704) (making Article III arguments); Brief for Petitioner at 7-8, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (No. 96-270) (raising an Article III issue); see also *Ortiz*, 119 S. Ct. at 2307 (declining to address the issue); *Amchem*, 521 U.S. at 612-13 (same).

⁴⁰ Plaintiff and defense attorneys, at least, know future claims when they see them.

⁴¹ Issues around notice were raised in both the *Amchem* and *Ortiz* appeals, but the Supreme Court also left these issues unresolved. See Brief for Petitioner at 13, *Amchem*, (No. 96-270) (raising the notice issue); Brief for Petitioner at 42-43, *Ortiz*, (No. 97-1704) (same); *Ortiz*, 119 S. Ct. at 2312 n.19 (“Since satisfaction or not of a notice

becomes clear from these queries that resolution of future claims must in some way deal with notice.

Finally, any resolution of future tort claims must be based on consent. Constitutional due process requires no less.

C. *Implementing Private Future Claims Processing*

The idea for privatizing the resolution of future claims is simple. It is based on three fundamental propositions: (1) that future claims in latent mass tort litigation can be resolved in a manner that is fair and consistent with due process; (2) that parties in the present litigation and the judiciary are not the best actors to resolve future claims property, because among other reasons they lack incentives to do so; and (3) that economic incentives will encourage private vendors to efficiently, expeditiously, and fairly resolve future claims. Here is how privatization would work: First, any mass tort litigation filed in federal court would be subject, under local rules or C.J.R.A. (Civil Justice Reform Act) plans,⁴² to complex case tracking.⁴³ Mass tort litigation involving latent injury claims immediately would be sent to a judge.

Second, the judge would ascertain, from the pleadings and in conference with the parties, whether the litigation involved a latent injury mass tort. If so, the judge would exercise power, under the Federal Rules of Civil Procedure, to sever the future claims from the litigation.⁴⁴

Third, the judge would meet and confer with the parties regarding the remainder of the litigation,⁴⁵ which would consist of current claims

requirement would not effect the disposition of this case, we express no opinion on the need for notice . . . in this case."); *Amchem*, 521 U.S. at 628 ("Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule . . . on the notice given here.").

⁴² See Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 471-73, 104 Stat. 5089, 5090-93. All 94 federal district courts now have C.J.R.A. plans in effect.

⁴³ Complex case tracking is also sometimes called "differential case tracking." Many federal district courts currently have differential case management rules in place either as a matter of local rulemaking, or as a consequence of implementing the 1990 Civil Justice Reform Act. See e.g., U.S. DIST. CT., M.D. ALA., CIV. J. EXPENSE AND DELAY REDUCTION PLAN at II ("Differentiated Case Management"); U.S. DIST. CT. D.C., L. CIV. R. 16.4 (assigning all civil actions to either a "fast track," "standard track," or "complex track").

⁴⁴ See FED. R. CIV. P. 42(b) (empowering courts to order separate trial of claims or issues).

⁴⁵ See FED. R. CIV. P. 16 (empowering courts to direct pretrial conferences).

only. The plaintiffs and defendants could proceed to trial or negotiate a settlement, but the parties would deal only with current claimants.

Fourth, the judge—under a local rule authorizing such referral—would refer the future claims to “future claims vendors”⁴⁶ for a bidding process. The court would appoint a guardian or other fiduciary for the future claimants and maintain continuing jurisdiction over the future claims. The court would pre-screen and approve future claims vendors. These vendors would have to demonstrate sufficient capitalization and expertise in administering future claims funds. Vendors could demonstrate adequate capitalization through multiple mass tort funds, thereby spreading risk among pooled assets.

Fifth, the interested future claims vendors would prepare and submit bids to the defendant for administering future claims involved in the latent injury mass tort. This bid would include a guaranteed payment to the claimant, based on current values for like claims resolved in the tort system, and adjusted for the time value of money (or inflation or escalation). The bid also would include the vendor’s estimate of the number of claims, administration expenses, and profit. The bid would include details relating to claims administration, including mechanisms for providing notice, proof of claims, and pay-outs.

Sixth, the defendant could accept or reject any bid from a future claims vendor.

Seventh, the defendant and the vendor would present their agreement to the court for approval. The guardian or fiduciary for the future claimants would present an independent report to the court concerning the substantive and procedural sufficiency of the bid. The court would assess the agreement for substantive and procedural sufficiency. Consent of future claimants to a fair, court-approved future claims fund would be implied.

Finally, when the defendant has accepted and the court has approved a vendor’s bid, the defendant would deposit the agreed fund and be relieved of any further obligation to future claimants. Future claimants could not sue the defendant in the tort system but rather would be referred to the vendor. The future claims vendor would administer claims under the terms of the agreement.

⁴⁶ Some federal courts, by local rule or under the authority of C.J.R.A. plans, authorize referral of cases to alternative dispute resolution vendors. *See* S.D. TEX. LOCAL R. 20B (allowing the district court to “refer a case to ADR,” and authorizing the court to choose an Alternative Dispute Resolution provider if the court believes an ADR provider is suitable for the case).

IV. BENEFITS AND FEASIBILITY

Who would benefit from privatizing future claims resolution, and why would privatization work?

The privatization of future claims resolution would work because it would call into existence commercial vendors with an economic incentive to maximize profit by accurately estimating the universe of future claimants and by minimizing transaction costs in administering claims. Any vendor with bad business judgment would fail; no such vendor would ever gain court approval as a listed vendor for referral.

Future claimants would benefit because they would be guaranteed compensation for valid claims, benchmarked by recoveries for similar current claims in the tort system. No future claimant, upon the proof of a claim, would receive less value than any current claimant, adjusted for the time value of money. In addition, future claimants might actually recover a higher percentage of their claim's value because privatization would serve to eliminate the high transaction costs endemic to mass tort recoveries, particularly attorneys' fees.

Defendants benefit in four ways. First, defendants would achieve global peace. Second, defendants benefit by a competitive bidding system to establish the size of the fund. Hence, competitive vendors will have to make very accurate estimates of the number of future claimants, the value of those claims, and the total amount of the fund necessary to pay those claims. They also have to accurately estimate a reasonable profit margin for the award of the contract. Third, defendants benefit by paying out a fund calculated by economic actors with an interest in reducing high transaction costs. Finally, defendants benefit by getting out of the future claims administration business.

Future claims vendors—a new business venture that would come into existence under this proposal—will benefit by being able to bid competitively for the business of administering future claims, and by making a profit from this enterprise. Under this system, future claims vendors would be penalized only to the extent that they made poor business judgments in estimating the number of future claims or in administering the claims payments.⁴⁷

The judicial system will also benefit. This proposal accomplishes the three values of Rule 1: to ensure the just, speedy, and inexpensive

⁴⁷ While vendors may be able to discharge their obligations by declaring bankruptcy under this proposal, this would not appear to pose a significant risk for future claimants. The proposal's provision for strong judicial oversight, as well as the "repeat-player" factor, would effectively constrain this problem.

resolution of disputes. In addition, the judicial system benefits by unpacking the resolution of future claims from the resolution of current claims and by maintaining continuing supervisory jurisdiction over future claims to ensure the legal sufficiency of the vendor agreement.

Finally, plaintiffs' lawyers benefit by being able to litigate or settle present claims, unimpaired by conflict of interest and collusion problems inherent in simultaneously representing future claimants. Plaintiffs' lawyers can sue or settle for the full current value of such claims and take full attorneys' fees.

CONCLUSION

This is, of course, a semi-shocking proposal, but no more shocking than Geoffrey Hazard's federalized product liability-insurance-workmen's compensation statute. Nor is it more shocking than stretching the limited-fund class action, doing an end-run around the bankruptcy laws, or massaging the interpleader rule.

This proposal would solve a host of problems. It cuts the head off the beast: it severs the future claims from the current claims. This ought to deal with *Amchem* and *Ortiz* issues.

This proposal lets plaintiffs' lawyers take their fees for current claims—in whatever fashion they choose to resolve them—but it does not let plaintiffs' lawyers get greedy and use future claims as a negotiating chip to inflate gross settlement values and attorneys' fees.

This proposal provides an administrative means to compensate future claimants with recoveries superior to those available in the tort system, reducing transaction costs and attorneys fees.

This proposal solves the defendants' problem of perpetual litigation.

This proposal largely takes the judicial system out of the loop, with the exception of the limited supervisory role of approving a vendor's bid for the future claims business.

Finally, this proposal has the advantage that it does not require the passage of much new legislation, modification of existing rules, or interpretation of Rule 23 in ways that Justice Souter would not approve.

In almost every respect, existing federal and local rules could implement this proposal. The major innovation would be court approval of future claims vendors. Many federal courts already

approve ADR vendors, however, so there is already significant judicial expertise in this area.

CODA

We were encouraged to come to this symposium with new ideas. The futures problem is the nub of latent-injury mass tort litigation. Either we can think and talk about new ideas, or, as Professor Hazard concludes (and I gloomily second), we can soldier on with the present law of torts and procedure, and we probably will do so.