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# Is There a Future for Future Claimants After *Amchem Products, Inc. v. Windsor*?

Alex Raskolnikov

## I. INTRODUCTION: THE PROBLEM OF FUTURE CLAIMS

In September 1990, the Chief Justice of the U.S. Supreme Court appointed an Ad Hoc Committee on Asbestos Litigation in response to what was widely perceived as a “failure of the federal court system to perform one of its vital roles in our society.”<sup>1</sup> Less than a year later, the Judicial Panel on Multidistrict Litigation transferred all untried asbestos cases to the eastern district of Pennsylvania for pretrial proceedings.<sup>2</sup> In January 1993, these proceedings produced a global settlement class action of historic proportions, which the district court eventually approved in August 1994.<sup>3</sup> In May 1996, in *Georgine v. Amchem Products, Inc.*,<sup>4</sup> the Third Circuit vacated the settlement and remanded the case to the district court with directions to decertify the class. One month later, the Fifth Circuit affirmed a \$1.535 billion global settlement between Fibreboard Corp. and a class virtually identical to that decertified by the Third Circuit.<sup>5</sup> In June 1997, the Supreme Court decided *Amchem Products, Inc. v. Windsor*,<sup>6</sup> in which it affirmed the *Georgine* decision, and vacated the Fifth Circuit settlement.<sup>7</sup> Decades of asbestos litigation,<sup>8</sup> years of effort by the

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1. *In re Fibreboard Corp.*, 893 F.2d 706, 708 (5th Cir. 1990) (quoting the district court).

2. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422-24 (J.P.M.L. 1991). The transfer followed five previous rejections by the Multidistrict Litigation (MDL) Panel. See *id.* at 417.

3. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), vacated, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). A global settlement is a settlement binding all future claimants. There is no standard definition of the term “future claimants.” See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1424 n.320 (1995). In this Note, I define future claimants as persons who may, at any time in the future, bring an action against a defendant based on the claimants’ or their relatives’ contact with the defendant’s products (a contact which itself may not have yet occurred).

4. 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem*, 117 S. Ct. 2231 (1997).

5. See *In re Asbestos Litig.* (Flanagan v. Ahearn), 90 F.3d 963 (5th Cir. 1996), vacated, 117 S. Ct. 2503 (1997).

6. 117 S. Ct. 2231 (1997). Throughout this Note, I refer to the asbestos settlement affirmed by the district court in Pennsylvania as *Georgine*. I refer to the Supreme Court’s decision reversing this settlement as *Amchem* (Robert A. Georgine was no longer a party to the case at the time it reached the Supreme Court). This is to distinguish the Pennsylvania settlement from the Supreme Court decision that established standards for all global settlements.

7. See *Ahearn*, 117 S. Ct. at 2503.

8. The first paradigmatic mass tort action against the asbestos industry was decided in 1973. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

most sophisticated members of the mass tort bar,<sup>9</sup> and millions of dollars in transaction costs were rendered moot by the same Court that had recognized the crisis and called for an extraordinary response seven years before.

The Court rejected the settlement for two reasons. First, it held that common questions of law or fact did not predominate and thus the *Georgine* class failed to satisfy the requirement of Rule 23(b)(3).<sup>10</sup> Second, the Court concluded that because the named plaintiffs could not adequately represent the interests of the class, the action failed the adequacy prong of Rule 23(a).<sup>11</sup> Almost as important as the holding itself were the opinion's dicta. Justice Ginsburg, writing for the Court, expressed skepticism about whether class action notice to a class of the kind presented in the case could ever satisfy Rule 23 or the Constitution,<sup>12</sup> though she stopped short of holding that the notice violated due process. The Court also reserved its opinion about the standing of future claimants to bring suit.<sup>13</sup> This exercise of judicial restraint helps to put some of the *Amchem* language in perspective. The Court announced that "any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard."<sup>14</sup> It emphasized that the "specifications of [Rule 23(b)(3)(D)]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand *undiluted, even heightened, attention* in the settlement context."<sup>15</sup> Finally, the Court did more than merely reverse *Georgine*, the principal case, on the narrowest grounds. It insured that at least one of its holdings applied to the Fifth Circuit's decision as well.<sup>16</sup> The Court clearly raised the standards used to evaluate class action settlements in mass torts. The question that remains is whether these new standards can *ever* be satisfied.

The Court rejected a long-awaited solution to the mass tort crisis in part because the legions of asbestos victims may still have alternative avenues for relief. One such alternative is congressional action. While the Court clearly prefers this alternative,<sup>17</sup> such action is highly unlikely.<sup>18</sup> This may be a

9. See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 951-52 (1995) (noting the experience, specialization, and sophistication of the mass tort bar on both sides).

10. See *Amchem*, 117 S. Ct. at 2250 (citing FED. R. CIV. P. 23(b)(3)).

11. See *id.* (citing FED. R. CIV. P. 23(a)(4)).

12. See *id.* at 2252.

13. See *id.* at 2244.

14. *Id.* at 2250 (emphasis added).

15. *Id.* at 2248 (emphasis added).

16. Because *Ahearn* was a mandatory class action under Rule 23(b)(1)(B), it did not have to satisfy Rule 23(b)(3)'s predominance requirement as the *Georgine* class did.

17. See *Amchem*, 117 S. Ct. at 2252 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

18. The judiciary has made concerted and continuous attempts to shift the burden of mass tort administration onto Congress, with little success. See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996) (suggesting ways in which Congress may deal with asbestos litigation), *aff'd sub nom. Amchem*, 117 S. Ct. 2231 (1997); JUDICIAL CONFERENCE OF THE U.S. AD HOC COMM. ON ASBESTOS

blessing, not a curse. The only congressional venture into the mass tort arena to date<sup>19</sup> has been a well-documented disaster.<sup>20</sup> A second alternative is bankruptcy, which may be the only judicial solution available in the absence of class actions.<sup>21</sup> Indeed, many have argued that bankruptcy is a better remedy for mass torts than class actions like *Ahearn*<sup>22</sup> and *Georgine*.<sup>23</sup>

An insight into the Court's views on the continuing vitality of settlement class actions to resolve mass torts and on whether bankruptcy would be preferable to any class action may come from discerning the Court's main concerns in *Amchem*. This Note asserts that the Court was fundamentally concerned with the (mis)treatment of future claimants.<sup>24</sup> To be sure, the *Amchem* holding was not expressly based on the grossly disparate treatment of future claimants in the *Georgine* global class as compared to the present claimants in the "inventory settlements" negotiated by the same parties almost

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LITIG., REPORT OF AD HOC COMMITTEE ON ASBESTOS LITIGATION I, 27-35 (1991) [hereinafter ASBESTOS REPORT] (urging Congress to resolve the asbestos crisis). Recent developments concerning the global tobacco settlement, however, may be a sign that Congress has decided to take a more active role in resolving at least some products liability disputes. See, e.g., *Hatch Wants Tobacco Bill Before Recess*, WASH. POST, Oct. 30, 1997, at A9; *Tobacco Funds Allocation Adds Settlement Pressure*, WASH. POST, Feb. 3, 1998, at A8.

19. See Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1994). The Act created a benefits program for miners afflicted with pneumoconiosis. See generally Robert L. Ramsey & Robert S. Habermann, *The Federal Black Lung Program—The View from the Top*, 87 W. VA. L. REV. 575 (1985).

20. The black lung program is widely considered to be a "fiasco." Schuck, *supra* note 9, at 970; see also Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 552 n.46 (1992) (citing studies critiquing the program).

21. A broad revision of Rule 23—another possible alternative—seems highly unlikely. The Advisory Committee to the Judicial Conference of the United States has been working on such amendments for the past several years. Its proposed revision was published in 1996 for public comment. See Proposed Rules, 167 F.R.D. 523, 524 (1996). So far, only the least controversial change has made it to the next step: A new Rule 23(f), allowing immediate appeal of a trial court's decision certifying or decertifying a class, was submitted and approved by the Judicial Conference. See *Judicial Conference Approves Single Change to Federal Rule Governing Class Action Suits*, 66 U.S.L.W. 2182 (Sept. 30, 1997). The rule still requires approval from the U.S. Supreme Court and Congress to go into effect on December 1, 1998, as planned. See *id.* The more controversial and far-reaching amendments, including a new Rule 23(b)(4) that would have allowed certification of a settlement-only class even though the class might not have been certifiable for trial under Rule 23(b)(3), never made it out of the Advisory Committee, though the Committee decided to review its decision in light of *Amchem*. See *id.* at 2183. The support for far-reaching changes aimed at adapting Rule 23 to a mass torts context seems to be dwindling, however. Even the Chairperson of the Advisory Committee now admits that the federal rules simply cannot resolve the future-claims problem. See *id.*

22. *In re Asbestos Litig.* (Flanagan v. Ahearn), 90 F.3d 963 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997).

23. See, e.g., Coffee, *supra* note 3, at 1457-61 (arguing that bankruptcy gives better procedural and substantive protection to mass tort victims, provides clearer rules, and better handles conflict-of-interests problems); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims. The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 488 (1995) (explaining that bankruptcy is "the most effective framework for treating future claims"); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 610 (1997) (concluding that bankruptcy better protects victims while class actions favor management and shareholders); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1002-05 (1995) (dismissing the views of those who argue that bankruptcy is inappropriate in mass torts, and insisting that it is the logical and correct resolution for many mass tort defendants).

24. For a definition of the term "future claimants," see *supra* note 3.

simultaneously. But the Court was certainly aware of this disparity.<sup>25</sup> And as I try to demonstrate, it was this disparity that prompted the Court to act.

The Court had had many chances to consider mass tort settlements—and it had always declined to do so.<sup>26</sup> What was different this time? *Georgine* and *Ahearn* combined for the first time a global settlement—i.e., a settlement binding all future plaintiffs—with a complete exclusion of present claimants from the class. As Judge Smith noted in his *Ahearn* dissent, this combination had the effect (if not the purpose) of excluding all those who were likely to receive notice, monitor the class action, and oppose the class attorneys' conflicts and other inadequacies.<sup>27</sup> Conceivably, the Court abandoned its noninterventionist posture because it could not allow abrogation of future claimants' rights on such a grand scale. The Court's uncompromising stand vis-à-vis the Rule 23(b)(3) predominance standard supports this conclusion. Class actions under Rule 23(b)(3) are the only ones that are optional for present plaintiffs. Because future claimants cannot opt out, at least at the front end,<sup>28</sup> 23(b)(3) class actions have the highest potential for unequal treatment of present and future claimants. Consequently, it is revealing that the Court went to the greatest lengths to make sure that *these* class actions fail by using the broadest possible language.<sup>29</sup> Finally, the Court emphasized its dissatisfaction with a "settlement [that] includes no adjustment for inflation; in which only a few claimants per year can opt out at the back end; and in which loss-of-consortium claims are extinguished with no compensation."<sup>30</sup> All of these concerns relate explicitly to the protection of future claimants.

If one of the main purposes behind the *Amchem* decision was to protect future claimants, the future of mass tort class actions becomes clearer. Whether the new class action standards can ever be satisfied, and whether class actions will ever be preferable to bankruptcy, depends on whether one can devise a regime that would, while satisfying other requirements, guarantee appropriate protection for future claimants. In this Note, I propose just such a solution, one that is a more fair and efficient way to deal with mature mass torts.<sup>31</sup> I call

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25. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2239 (1997).

26. See, e.g., *In re School Asbestos Litig.* (Celotex Corp. v. School Dist.), 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852 (1986); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.* (A.H. Robins Co. v. Abed), 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *In re Federal Skywalk Cases* (Stover v. Rau), 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982); *In re "Agent Orange" Prod. Liab. Litig.* (Chapman v. Dow Chem. Co.), 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981).

27. See *Ahearn*, 90 F.3d at 1000 (Smith, J., dissenting).

28. Usually, global settlements provide for so-called back-end opt outs to alleviate concerns about inequitable treatment of future claimants and due process. See, e.g., *id.* at 972-73 (majority opinion). Unlike a front-end opt out by plaintiffs who are aware of the pending class action and decide not to participate, the back-end opt out is a right preserved for future claimants who will be bound by the settlement to withdraw and litigate their individual cases at some future date. For further discussion of back-end opt outs, see *infra* notes 153-159 and accompanying text.

29. See *Amchem*, 117 S. Ct. at 2249-50.

30. *Id.* at 2251.

31. For a definition of the term "mature mass tort," see *infra* text accompanying notes 34-35.

this solution a *global limited fund mandatory settlement class action with a modified pro rata distribution of benefits for present and future claimants*.

My proposal does not provide future claimants with absolute protection or discover a way to resolve all the uncertainties facing the parties to a global settlement. No realistic proposal could accomplish these goals. No matter how successful our judicial system is in discovering “the truth,” no matter how advanced our science is in unearthing “the facts,” it is impossible to know everything one must know to insure that a global settlement is entirely “fair” to future claimants. Nevertheless, there are ways to make global settlements *fairer*. My proposal suggests one such way.

Because most of the discussion in this Note focuses on future claimants, it is helpful to define who they are, when they appear, and what threats they face. Part II addresses these questions. In Part III, I explain my proposal. In Section III.A, I clarify the substance of the pro rata rule and argue that it is fair, responsive to the Court’s concerns in *Amchem*, beneficial to some present parties, and much more protective of future plaintiffs’ interests than is the current regime. Another advantage of the pro rata rule, I argue, is its consistency with the law of bankruptcy, which is highly relevant at the global settlement stage. I go on, in Section III.B, to introduce a new interpretation of the Rule 23(b)(1) limited fund concept, which I assert brings many advantages both to future claimants and to mass tort participants generally. Such class actions may also be acceptable to the courts, as they are both similar to and clearly different from bankruptcy. In Section III.C, I argue for a mandatory class action with no opt outs at the front or the back end. Recognizing serious problems with this proposal, I attempt to demonstrate that its benefits, at least within my overall scheme, outweigh its costs. I conclude Part III by discussing the modifications to the pro rata rule made necessary by great indeterminacies external to particular mass torts. Reversing the overall thrust of the Note, I suggest that future claimants should bear most of such external risks. Part IV argues that the proposed regime is preferable to bankruptcy, mainly because it creates incentives to initiate global settlement negotiations at the right time. I conclude by suggesting that just before the *Georgine* and *Ahearn* settlements were negotiated, asbestos was ripe for the treatment proposed in this Note. I also argue that recent procedural and substantive legal changes, especially those at the state level, have created an environment in which an increasing number of mass torts will soon become prime candidates for my proposal.

## II. THE CURRENT REGIME—UNPROTECTED FUTURE CLAIMANTS

The *Georgine* and *Ahearn* settlements are the latest and the most vivid examples of the grossly inadequate protection given future claimants under the current class action regime. The settlements exploited both factual and legal uncertainties surrounding future claimants to reduce disproportionately their

share of the overall recoveries. It is necessary to examine both the nature of these uncertainties and their magnitudes in order to see how my proposal gives better protection to future claimants by bringing more certainty to the system.

Future claimants (or “futures”) are a very diverse group. They share most of the differences typical of present claimants and, in addition, have their own unique distinctions. It is common today to identify two types of present claimants: large and small.<sup>32</sup> Future claimants can be large and small as well. They can also be near, intermediate, or far.<sup>33</sup> To complicate the picture further, future claims usually do not appear contemporaneously with present ones, but only as a mass tort matures.

The term “mature tort” was coined by Professor Francis McGovern, who defines it as a situation “where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs’ contentions.”<sup>34</sup> As he explains, “Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.”<sup>35</sup> Developed in the 1970s, McGovern’s framework has proven to be useful in determining whether a mass tort is ready for a settlement. It needs to be modified, however, to account for a phenomenon of the 1990s—the global settlement. The criteria needed to complement McGovern’s definition are focused on future claims. In particular, when a mature mass tort is ready for a global settlement (when it is “globally mature”), the following information should be well estimated, or at least more than speculative: (1) the existence of future claims; (2) their overall number; (3) their approximate time distribution in the future (including the approximate date that they will cease to appear); and, finally, (4) the ratio of small to large claimants within the future claimants’ class.

These factors are unlikely to be known with equal certainty. The first factor will become apparent early on as a mass tort matures.<sup>36</sup> Indeed, by the time a tort reaches global maturity, there will be no doubt about the futures’ existence. The fourth factor will often be the next to develop. There are two reasons that the small-large ratio among the futures will likely be known with

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32. See, e.g., *Coffee*, *supra* note 3, at 1351. Large claimants are seriously injured people who have the potential to obtain substantial recoveries. These claims are worth pursuing on individual bases. The opposite is true for small claimants. Their claims are so small that it is inefficient to resolve them in individual suits. Yet their claims are meritorious, and in the aggregate, they create the potential for a significant gross recovery.

33. See *id.* at 1424. Near futures are persons who have suffered a legally cognizable injury, but have not yet filed a suit. Intermediate futures are those who have been exposed to a toxic or defective substance or product but have not yet manifested an injury. Far futures are persons who have not yet been exposed or injured but will be in the future as a result of the defendant’s past conduct.

34. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

35. *Id.*

36. See, e.g., *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986) (recognizing the existence of future claims in asbestos litigation).

certainty. First, it is reasonable to assume that this ratio will be similar to that among the present plaintiffs. Second, as the mass tort matures and an increasing number of future claimants become present claimants, one's initial estimation can be tested and adjusted accordingly.<sup>37</sup> Speculations about the third factor—the time distribution of future claims—are likely to start early and to be incorrect.<sup>38</sup> This uncertainty will probably remain relatively high well into the mass tort maturation, but it is *itself* problematic only for the purpose of time discounting future claims. This is only a minor problem compared to the difficulty of evaluating the *number* of future claimants—the second factor. Consider asbestos litigation. By some estimates, more than eleven million Americans have been harmed or potentially harmed by asbestos.<sup>39</sup> Others opine that this number is between twenty and thirty million.<sup>40</sup> Predictions of the number of asbestos-related deaths vary from 200,000 to 500,000.<sup>41</sup> If there is a globally mature mass tort, asbestos is the one.<sup>42</sup> Yet the number of future asbestos-related claimants is still uncertain. This uncertainty is an unavoidable problem that any global settlement regime must address. My proposal includes suggestions for ameliorating this problem.<sup>43</sup>

Compliance with the four global maturity requirements is necessary for the success of any global settlement. These requirements insure that there is enough information for evaluating future claims. The importance of this information becomes clear once one considers the reasons for concern about

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37. Compare, for example, the great similarity of futures' "subclassing" (distribution between different types of claimants) in the latest global settlement, *see, e.g.*, Coffee, *supra* note 3, at 1395 (describing the 1994 *Georgine* payment schedule), with the futures' payment schedule established eight years earlier, *see id.* at 1396 (describing the Johns-Manville settlement), and with the 1989 *grd* for present plaintiffs' compensation, *see In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir. 1990). Thus, when a mass tort is globally mature, the internal small-large ratio among the futures is usually well known.

38. The Fifth Circuit opined in 1986 that asbestos-related claims would continue to appear for the next 15 years. *See Jenkins*, 782 F.2d at 470. Five years later, estimates extended to the year 2015. *See, e.g.*, ASBESTOS REPORT, *supra* note 18, at 2. Shortly thereafter, an expert panel concluded that asbestos-related claims would not cease until the year 2049. *See In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 490 (E. & S.D.N.Y. 1995), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996). The *rate* with which future claims will turn into present ones is also likely to remain uncertain for some time before a mass tort becomes globally mature. The *Jenkins* court, for example, predicted in 1986 that "filings will continue at a steady rate until the year 2000." *Jenkins*, 782 F.2d at 470. It was wrong. For example, the number of asbestos-related filings increased by 66% between 1989 and 1990. *See Note, In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 555 n.9 (1992).

39. *See ASBESTOS REPORT, supra* note 18, at 6-7.

40. *See Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 325 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

41. Compare ASBESTOS REPORT, *supra* note 18, at 2 (200,000), with Coffee, *supra* note 3, at 1385 (500,000).

42. *See, e.g.*, Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 528 (E.D. Tex. 1995) (asserting that "[a]sbestos litigation is undoubtedly the most 'mature' of all mass tort litigation"), *aff'd sub nom. In re Asbestos Litig. (Flanagan v. Ahearn)*, 90 F.3d 963 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997); Coffee, *supra* note 3, at 1433 (suggesting that asbestos cases "are the paradigm of a 'mature' mass tort").

43. *See infra* notes 77-89 and accompanying text.



the futures' fate. The following equation is a simplified but helpful model for analyzing the threats faced by the futures:

$$(1) \quad F = W_L \times N_L + W_S \times N_S + (1 - \alpha) \times W_F \times N_F.$$

Here,  $F$  is a total settlement fund that defendants agree to pay.  $N_L$ ,  $N_S$ , and  $N_F$  are the numbers of present large claimants, present small claimants, and future claimants, respectively.<sup>44</sup>  $W_L$  and  $W_S$  are the values of the adjusted expected individual recoveries for large and small present claimants, respectively.<sup>45</sup>  $W_F$  is the adjusted expected value of a future claim.<sup>46</sup>  $\alpha$  is a discount coefficient reflecting a reduction of the futures' claims due to their uncertainty.

The reason for concern about future claimants is apparent from the equation. While the total fund amount  $F$  and the present claims' values and numbers are relatively fixed, the overall value of future claims is subject to the uncertainties embedded in  $\alpha$ .<sup>47</sup> The history of global settlements shows that defendants and present plaintiffs have learned to exploit these uncertainties and to transfer substantial wealth (namely,  $\alpha \times W_F \times N_F$ ) from future claimants to themselves by persuading courts to agree to ever-increasing values for  $\alpha$ . There are at least three ways to discount future claims: Their value can be discounted (value discount,  $\alpha_v$ ), their number can be reduced (number discount,  $\alpha_N$ ),<sup>48</sup> or some claims can be excluded from the agreement altogether (exclusion discount,  $\alpha_E$ ). Overall,

44. While  $N_L$  and  $N_S$  will be virtually certain (because their sum is the overall number of cases filed against the mass tort defendants), the number of future claimants will not be certain until the last future claimant becomes a present one, possibly decades after the settlement. For the purposes of Equation (1), however,  $N_F$  is a known number. The uncertainty about the *expected* number of future claims is impounded in  $\alpha$ .

45. The adjustments are for attorney's fees, the probability of loss at trial, the time delay in getting to trial and in receiving an award upon winning a verdict, and intangible costs such as being denied a day in court. In other words,  $W_L$  and  $W_S$  are the median values taken from the latest individual and nonglobal settlements.

46.  $W_F$  is arrived at in the following way. First, the negotiators (plaintiffs' attorneys, defense attorneys, and, possibly, the court) agree on  $W_L$  and  $W_S$ . Second, they determine the percentage,  $\delta$ , of, for example, large claimants in the future claimants' total pool (the fourth factor in the global maturity test). Often,  $\delta = N_L \div (N_L + N_S) \times 100\%$ . Finally, they calculate  $W_F = \delta \times W_L + (1 - \delta) \times W_S$ . In reality, of course, present (and future) claimants are separated into more than just two categories. As long as the distribution between these categories is known (and it usually is, *see supra* note 37 and accompanying text),  $W_F$  can be easily calculated. Finally,  $W_F$  is discounted to present value, possibly at a standard long-term interest rate on government securities of duration matching the expected duration of the mass tort. Present-value discount is *not* a part of  $\alpha$ .

47. In other words, the uncertainties in the fund amount  $F$  and the present claims' values and numbers are much less than the uncertainty of the overall value of future claims due to a greater uncertainty in  $\alpha$ .

48. The parties could mistakenly agree on a number that turns out to be too high. This is highly unlikely, however, because both the defendants and the present claimants would be better off understating the number of future claimants. Such an agreement would also go against the vast mass tort experience of underestimating the number of future claims. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Blinken), 982 F.2d 721, 726 (2d Cir. 1992) (describing the unraveling of the Johns-Manville Trust when, within several months of its formation, it received 50% more claims than the highest estimate made when the plan was approved).

$$(2) \quad (1 - \alpha) = (1 - \alpha_V) \times (1 - \alpha_N) \times (1 - \alpha_E).$$

The *Georgine* settlement is a vivid example of how substantial these discounts can be. In it, the district court approved a settlement in which the futures were to receive a whopping 30% to 40% less than present claimants with *identical* injuries.<sup>49</sup> This was equivalent to setting  $\alpha_V \approx 0.3 \sim 0.4$ . The exclusion discount was also substantial. In addition to the exclusion of the loss-of-consortium claims emphasized by the Supreme Court,<sup>50</sup> future claimants received no compensation for “exposure only” claims such as increased risk of cancer, fear of future asbestos-related injury, and medical monitoring.<sup>51</sup> Those having asbestos-related pleural thickening on their lungs, but not physical impairment, went uncompensated as well.<sup>52</sup> All of these types of claimants received some compensation in the inventory settlements binding present plaintiffs. According to those who objected to the *Georgine* settlement, approximately *half* of the claims that the *Georgine* defendants paid in the tort system would not have qualified for payment under the exposure and medical criteria set forth in the settlement proposal.<sup>53</sup> In other words, the *Georgine* proponents persuaded the court to accept a global settlement in which  $\alpha_E = 0.5$ .

Even without considering  $\alpha_N$ ,<sup>54</sup> therefore, one can conclude that future claimants in *Georgine* were destined to receive a meager thirty-five percent of the known values of their claims.<sup>55</sup> Sixty-five percent of their awards was split between the present claimants and the defendants—meaning that future claimants lost two-thirds of their potential recovery based on almost nothing but the fact that they held future rather than present claims.<sup>56</sup> The picture in the *Ahearn* settlement was not much prettier.<sup>57</sup> Both settlements were approved by the district courts; one was affirmed on appeal. It is not

49. See Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1066-68 (1995). Note that the same plaintiffs’ attorneys settled their present claims with the same defendants shortly prior to the global settlement in separate inventory settlements providing a convenient reference point for the established historic values. The parties also had the awards schedules from the Johns-Manville bankruptcy, also involving asbestos, as a reference. Nevertheless, the *Georgine* awards were on average about *one-seventh* of those in the Johns-Manville case, despite the fact that the *Georgine* defendants were financially viable companies while Johns-Manville was in bankruptcy. See Coffee, *supra* note 3, at 1395-96.

50. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2251 (1997).

51. See *id.* at 2240.

52. See *id.*

53. See Coffee, *supra* note 3, at 1394.

54. For a detailed discussion of  $\alpha_N$  estimation, see *infra* notes 77-89 and accompanying text.

55. This figure is calculated in the following way:  $(1 - \alpha_V) \times (1 - \alpha_E) = (1 - 0.3) \times (1 - 0.5) = 0.35$ .

56. I say “almost” because discounting to present value should have made futures’ awards somewhat smaller.

57. While the disparities in treatment of present and future claimants were not as glaring in *Ahearn* as they were in *Georgine*, they were still very substantial. See Coffee, *supra* note 3, at 1401-02 (suggesting that the soaring stock price of the Fibreboard Corp., the defendant in *Ahearn*, was strong evidence that future claimants lost substantial wealth as the result of the settlement).

surprising, then, that the Supreme Court might have felt that a system allowing these kinds of inequities needed to be fixed.

### III. THE PROPOSED GLOBAL CLASS ACTION

In this Note, I suggest a solution that prevents the “robbing” of future claimants that took place in *Georgine* and *Ahearn*. This solution is also more fair and more acceptable to defendants. Moreover, it may fulfill the Supreme Court’s requirements and satisfy the Court’s concerns as expressed in *Amchem*. I call this solution a *global limited fund mandatory settlement class action with a modified pro rata distribution of benefits for present and future claimants*. The pro rata rule is at the heart of my proposal.

#### A. The Pro Rata Rule

The pro rata rule means that equally injured plaintiffs receive equal awards regardless of whether they are present, near, or far future claimants.<sup>58</sup> Courts, scholars, and practitioners have acknowledged that this rule is intrinsically fair. Indeed, this is a logical default; any deviation from it must be explained. For example, one of the two pillars on which the Second Circuit rested its affirmation of the first ever global settlement was that it provided for “the *even-handed treatment* of both identified and unidentified legitimate claimants.”<sup>59</sup> Likewise, Professor Roger Cramton contends that “[a] sound general principle is that individuals who have similar claims against the same defendants should be treated similarly.”<sup>60</sup> Professor Susan Koniak agrees.<sup>61</sup> Professor John Coffee argues as well that a close nexus should be required between the injuries sustained by at least some present plaintiffs and those to be sustained by the worst-off future claimants.<sup>62</sup> Even the attorney arguing in favor of the *Georgine* settlement represented it as “treat[ing] similarly-

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58. For example, assume that *A* has mesothelioma caused by the defendant firm *X* and *A* has filed a law suit against *X*. *B* has mesothelioma caused by *X*, but has not filed a suit yet. *C* does not have mesothelioma, but will develop it five years from now because of *X* as well. Assuming that the consequences of their respective mesotheliomas will be the same, *A*, *B*, and *C* are “equally injured” for the purposes of the pro rata rule. (It is conceivable that future changes in medicine and science will render our assumptions false. I address such changes later. *See infra* notes 167-170 and accompanying text.) Under the pro rata rule, *A*, *B*, and *C* would receive equal awards (with *B*’s and *C*’s awards discounted to present value and adjusted downward to reflect the part of *A*’s award that would go to *A*’s attorney.) Of course, *B* and *C* are unknown today. If a tort is globally mature, however, the approximate number of *B*s and *C*s and the expected date of their “appearance” will be known. *See supra* notes 36-43 and accompanying text. This knowledge would suffice to establish the pro rata distribution. Under this rule,  $\alpha_v$  and  $\alpha_g$  are always zero.

59. *In re* “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425, 1437 (2d Cir. 1993) (emphasis added).

60. Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 CORNELL L. REV. 811, 831 (1995).

61. *See* Koniak, *supra* note 49, at 1075-78.

62. *See* Coffee, *supra* note 3, at 1435.

situated claimants similarly.<sup>63</sup> Yet, despite this seeming consensus, courts and scholars stop short of stating unequivocally that pro rata distribution must be the rule of mass tort global settlements. This Note makes such a statement.

The pro rata rule satisfies the Court's adequacy requirement that "either . . . the terms of the settlement or . . . the structure of the negotiations . . . [must assure the court] that the named plaintiffs operated under a proper understanding of their representational responsibilities."<sup>64</sup> The *Georgine* settlement failed to satisfy this demand for two reasons. First, the named *Georgine* plaintiffs purported to represent the entire class rather than discrete subclasses.<sup>65</sup> Second, there were significant conflicts between named plaintiffs who were near futures and unnamed plaintiffs who were intermediate and far futures.<sup>66</sup> Although the pro rata rule would not completely resolve the first problem, it would alleviate it significantly by collapsing numerous subclasses into just a few. With no need to account for differences between near, intermediate, and far futures, the only relevant subclasses are for large and small plaintiffs. To be sure, even this type of subclassing is not as easy as it sounds; but it is possible.<sup>67</sup> The pro rata rule goes a great distance in reducing the second problem raised by the Court as well. Because the values of identical claims of a present and a future plaintiff are the same,<sup>68</sup> present plaintiffs negotiating for higher values for their claims necessarily maximize awards for the futures.<sup>69</sup> Thus, the pro rata regime not only makes it harder for present claimants to obtain a larger share of the pie, *F*, but it also encourages them to enlarge the pie itself—thus benefiting the futures. The greater alignment of interests between the present and the future claimants mitigates the insoluble problem of finding a representative for claimants who do not yet exist.

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63. Koniak, *supra* note 49, at 1149 n.475 (quoting an attorney representing the Center for Claims Resolution). While one might attribute this statement to an extreme case of trial advocacy, it shows that even the *Georgine* advocates advocated recognized equal treatment as a normative goal.

64. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2251 (1997) (citing FED. R. CIV. P. 23(a)(4)).

65. *See id.* Other courts had already demanded subclassing in asbestos settlements. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken)*, 982 F.2d 721, 739 (2d Cir. 1992).

66. *See Amchem*, 117 S. Ct. at 2251. Just as present claimants can "rob" future ones, near futures can "rob" far futures by providing for front-loaded payments, not accounting for inflation, etc. The Court's concern was clearly not about a particular conflict (present plaintiffs versus futures or near futures versus far futures), but about a fundamental conflict of interests among claimants whose claims appear at different points in time.

67. For examples of subclassing along the size scale (and ignoring the temporal scale), see RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 312-14 (1991); and Coffee, *supra* note 3, at 1394-95. These examples show that real settlements have many more than the small and large categories used for the analysis in this Note. They also show that this larger number of categories is manageable. But these categories are manageable only as long as all of them apply only to present plaintiffs. It is hard to imagine how the settling parties could separate present, near, intermediate, and far futures into each of these categories and provide each category with separate representation.

68. That is, they are the same with time discounting for the future claim's value.

69. To be sure, present claimants still have opportunities to transfer wealth from the futures by, for example, persuading the court to accept a high  $\alpha_v$  or not to account for inflation. But their overall opportunities are significantly curtailed. As the analysis of the *Georgine* settlement showed, *see supra* notes 49-56 and accompanying text, present plaintiffs in that case discounted future claims by 65% just by establishing a high  $\alpha_v$  and  $\alpha_E$ —something they would not have been able to do under the pro rata rule.

Because the alignment of present and future interests is not complete even under the pro rata rule, future claimants still need separate representation.<sup>70</sup> But by making subclassing and separate representation manageable, and by better aligning the interests of present and future claimants, the pro rata rule responds to the two concerns underlying the Court's finding of inadequate representation in *Georgine* and *Ahearn*.

Another benefit of the pro rata rule is the increased certainty of the future claims' values. According to Professor Peter Schuck, uncertainty has been the core problem of mass tort litigation.<sup>71</sup> It has decreased as individual mass torts have matured and as the entire system has undergone an evolutionary development not unlike the maturation of a particular mass tort.<sup>72</sup> Relentless efforts by litigants, lawyers, insurers, and judges went into achieving greater predictability. Yet, as applied to future claimants, certainty seems to have become an undesirable side-effect. The discussion of Equation (1) demonstrated that greater uncertainty surrounding future claims creates an opportunity to transfer a larger portion of the fund  $F$  to present plaintiffs and defendants. While these parties perceive certainty as being against their self-interest, there may be compelling reasons for them to reconsider.

Uncertainty greatly increases opportunistic behavior. Because, under the current regime, the amount eventually transferred from futures to present claimants and defendants ( $\alpha \times W_F \times N_F$ ) is highly uncertain, present plaintiffs cannot reliably estimate the relation between the defendants' assets and the total value of the plaintiffs' claims. Instead of settling earlier and preserving a higher overall recovery, present plaintiffs would gamble and hold out for individual litigation, hoping that if they do not get to trial before the settlement is finally reached, they will increase  $\alpha$  even further. A similar analysis applies to the defendants. Even if they have a good estimate of the future claims' value,  $W_F$ , the indeterminacy of  $\alpha$  prevents them from reliably evaluating their own position and adopting an appropriate negotiating strategy. Therefore, the indeterminacy of  $\alpha$  both postpones the settlement past the optimal time and complicates the negotiations by introducing a critical variable on which the parties need to agree. Moreover, even after they have agreed on the value of  $\alpha$ , they need to decide how to split  $\alpha \times W_F \times N_F$ —another factor that might cause the talks to go sour. Finally, an unacceptably high  $\alpha$  may lead to decertification on appeal.<sup>73</sup>

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70. Present claimants' and future claimants' interests diverge due to the indeterminacy in the number of future claims and uncertainties external to a particular mass tort. For a discussion of the latter type of uncertainties, see *infra* notes 165-177 and accompanying text.

71. See Schuck, *supra* note 9, at 948-50.

72. See *id.*

73. This Note argues that this is exactly what happened in *Amchem*. Saying that the Court disapproved of the settlement because of its concern for future claimants is almost the same as saying that the Court found  $\alpha$  to be unacceptably high.

The pro rata rule reduces opportunistic behavior by making  $\alpha$  more certain. The rule eliminates two of the three components embedded in  $\alpha$ . First, the pro rata rule sets future awards (in present discounted value) equal to the recoveries of identically injured present claimants. Under the pro rata regime, therefore,  $\alpha_v = 0$ . Second, the pro rata rule resolves the exclusion problems reflected in  $\alpha_E$ . The *Georgine* settlement contained many details about what types of future plaintiffs would be eligible for recovery from the fund and on what conditions.<sup>74</sup> The settlement contained case flow limitations, processing rules, and other payment terms that would have enabled present claimants to seize a disproportionate share of the total fund.<sup>75</sup> The pro rata rule resolves all these issues in a consistent and predictable fashion. Whatever the rules are for the present claimants, the rules for future claimants will be the same. Whatever types of present claims are included in the settlement, the identical types of future claims will be included as well.<sup>76</sup> Under the pro rata rule, then,  $\alpha_E = 0$ . Because the only partial discount coefficient that is not set to zero by the pro rata rule is  $\alpha_N$ ,  $\alpha$  under that rule is equivalent to  $\alpha_N$ .

Indeterminacy about the number of future claimants may be significant even when a mass tort is globally mature.<sup>77</sup> This, however, does not negate the benefits of the pro rata rule. First, as I have just explained, the rule brings *more* certainty and *fewer* opportunities to discount future claims. Second,  $\alpha_N$  for a globally mature mass tort may be more certain than it appears at first glance. While the range of available estimates is often staggering,<sup>78</sup> there are usually several middle-of-the-road estimates that are not too far from one

74. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 620 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

75. See Coffee, *supra* note 3, at 1446.

76. This also helps to resolve another perpetual problem plaguing mass torts—so-called “junk” claims. These are insubstantial claims attracted *en masse* by the settlement itself. According to one plaintiff’s lawyer, 90% of all claims are “junk.” See Schuck, *supra* note 9, at 961 n.97 (quoting Paul D. Rheingold, Esq.). Inclusion of junk claims increases  $N_S$  and  $N_F$  (for a part of the futures’ total pool consists of small claimants). It leads inescapably to a reduction in individual recoveries by non-junk claimants. Without the pro rata regime, the claimants’ interests are as follows: Large claimants prefer the narrowest possible definition of compensable claims, ideally (but unrealistically) limited to the present large claims only. Small claimants prefer the widest possible definition of compensable injuries for themselves, but the narrowest possible range for the futures. The interests of all present claimants converge in seeking to exclude most of the future claims—regardless of their merits. Under the pro rata regime, these interests realign. Because the definition of a “junk” claim is the same for the futures as it is for present small claimants (i.e.,  $\alpha_E = 0$ ), the latter, by protecting their own interests, necessarily protect future small claimants as well. Thus, from a situation where the interests of the present plaintiffs conflict with those of the future ones, the pro rata rule creates a regime where the interests of the present (and future) large plaintiffs conflict with the interests of present (and future) small claimants. All futures have representatives among present plaintiffs negotiating a global settlement.

77. See *supra* text accompanying notes 39–43. The Dalkon Shield litigation is another example. Even when this mass tort was mature, the discount coefficient for future claimants was hotly disputed. See SOBOL, *supra* note 67, at 183.

78. In the Dalkon Shield litigation, for example, the lowest estimate of future defendant’s liability was \$1.215 billion, and the highest was \$7.167 billion. See SOBOL, *supra* note 67, at 183. The more recent estimates of the total number of asbestos-related claims against Manville Trust range from 210,000 to 600,000. See Coffee, *supra* note 3, at 1361 nn.58–59.

another.<sup>79</sup> Moreover, considering that the most biased parties usually produce the outliers,<sup>80</sup> it seems reasonable to trust the middle figures more. Finally, while  $\alpha_N$ -type indeterminacies are likely to be present in all mature mass torts, their magnitude will surely differ.<sup>81</sup> There is no reason to expect that persistent lack of success in valuing asbestos-related claims will be the rule for every future mass tort.<sup>82</sup>

Another reason that  $\alpha_N$ -type uncertainty does not negate the benefits of the pro rata rule is that courts—the final arbiters of  $\alpha_N$ —have gained substantial expertise in evaluating expected numbers of future claimants. Special masters, independent experts, expert panels, specifically commissioned independent scientific studies, and court-mandated valuations by the parties themselves have all been used by courts to clarify the uncertainties surrounding future claimants.<sup>83</sup> The courts are adopting increasingly sophisticated statistical techniques, such as random and representative samples, common-issue extrapolation, statistical analysis (including regression modeling), and even expert systems.<sup>84</sup> To be sure, courts' experience with assessing future claims

79. Two or three out of the five figures suggested during evaluation of A.H. Robins's liability in the Dalkon Shield litigation were close to each other. See SOBOL, *supra* note 67, at 183. A similar middle ground may be found if one looks at all estimates suggested for Manville Trust asbestos liability: 210,000; 306,000; 450,000; 560,000; and from 300,000 to 600,000. See Coffee, *supra* note 3, at 1361 nn. 58-59. While these numbers are quite different, one can detect a range suggesting at least the order of magnitude for the expected number of future claims.

80. During the Dalkon Shield litigation, for example, the company itself presented the \$1.215 billion estimate while the tort claimants provided the \$7.167 billion estimate. The equity committee, the unsecured creditors committee, and the defendant's insurance company produced the middle-ground valuations. See SOBOL, *supra* note 67, at 183.

81. Arguably, less complicated valuation problems in the Dalkon Shield case led to more accurate predictions and to more adequate compensation of future claimants. See, e.g., Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 651-60 (1992) (describing the A.H. Robins bankruptcy as a success). In other mass torts, such as asbestos, estimating the futures' expected numbers and total liabilities has been much harder. In the asbestos context, the courts, and the experts working under their supervision, have struggled to produce accurate valuations. Both the Johns-Manville and the National Gypsum bankruptcies resulted in underfunded trusts. See Coffee, *supra* note 3, at 1387, 1422 n.308.

82. Note that where  $\alpha_N$ -type uncertainties are relatively small, elimination of other contingencies by the pro rata rule is even more valuable because present plaintiffs would have added incentives to increase  $\alpha_V$  and  $\alpha_E$  (because they are less able to manipulate  $\alpha_N$ ).

83. Several courts have shown a robust capacity to address  $\alpha_N$ -type indeterminacies. In the Manville case, for example, Judge Weinstein used a special master (a mass tort expert), a court expert (a law school dean), another expert (a professor of demographics), and a consultant to establish the number of future claimants. See *In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken)*, 982 F.2d 721, 731-32 (2d Cir. 1992). The judge appropriated \$60,000 for studies of the expected numbers of future claimants. See *id.* at 732. In the Dalkon Shield case, Judge Merhige required each party to make its own evaluation of the expected number of future claims and their total value. See SOBOL, *supra* note 67, at 178-97. As a result, five different teams of experts used various statistical techniques to produce five different estimates of the future claims' number. Far from simply accepting the numbers, the judge interrogated the proponents of each valuation at a special hearing and invited all parties to contest one another's findings. See *id.* Yet another example of an extensive effort to evaluate the expected number and total value of future claims is the National Gypsum bankruptcy. See FREDERICK C. DUNBAR & DENISE A. NEUMANN, NATIONAL ECON. RESEARCH ASSOC., INC., *ESTIMATING FUTURE ASBESTOS CLAIMS: LESSONS FROM THE NATIONAL GYPSUM LITIGATION* (1993).

84. See Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 *CORNELL L. REV.* 1022, 1027-32 (1995).

is not yet as expansive as their use of statistical techniques in estimating claims' values and causation.<sup>85</sup> But such experience clearly exists. A very similar problem of statistical valuation of contingent bankruptcy claims has been the subject of great interest for some time.<sup>86</sup> Numerous models have been proposed, and new ones continue to appear.<sup>87</sup> All this information would be at the disposal of courts considering global settlements under the proposed regime. Moreover, as more mass torts globally mature and as courts focus more on the expected number of future claims, they will undoubtedly use their familiarity with statistical analysis and the methods developed for bankruptcy proceedings in a new context. As more estimates of the future claims' number are made and revised, the statistical techniques will be adjusted for past mistakes and become increasingly reliable.

Yet another reason not to dismiss the proposed rule because of  $\alpha_w$  indeterminacies is the parties' own self-interest. Global settlement negotiators are sophisticated repeat players with a wealth of institutional knowledge.<sup>88</sup> They have just witnessed the failure of the two most innovative global mass tort settlements, caused in large part by an unacceptably high  $\alpha$ . To the extent a more uncertain  $\alpha$  is synonymous with a higher  $\alpha$ , present plaintiffs and defendants benefit from the uncertainty. But this uncertainty is also very costly. It leads to lost efforts and time spent in negotiating for a mutually acceptable  $\alpha$ . Perhaps even more importantly, too high an  $\alpha$  may cause decertification on appeal. Having considered the costs as well as the benefits, even defendants and present plaintiffs may conclude that a predictable  $\alpha$ , even if closer to zero, is better not only for the futures, but for themselves as well.<sup>89</sup>

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85. See Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993); Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469 (1988); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992); Steve Gold, Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376 (1986). The differences among courts' experiences can be easily explained. Estimation of the claims' values is the critical issue in traditional (nonglobal) mass torts class actions—something the courts have been dealing with for some time. See, e.g., *Jenkins v. Raymark Indus.*, 782 F.2d 468, 471 (5th Cir. 1986) (affirming a scheme of determining class members' claim values based on jury "mini-trials" and conclusions of a special master). Until recently, courts simply had less need to use statistics to predict the expected number of future claimants. The Dalkon Shield settlement was not approved until the late 1980s. See *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989). The National Gypsum and the Johns-Manville bankruptcies reached their initial conclusions in the early 1990s. See *Coffee*, *supra* note 3, at 1422 n.308.

86. See David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy*, 32 WAKE FOREST L. REV. 1119 (1997) (critiquing existing statistical techniques and suggesting a new one).

87. See, e.g., *id.* at 1130-38 (describing an existing face-value model, a zero-value model, a market-theory model, a forced-settlement model, a discounted-value model, and a summary-trial model, and proposing a new model).

88. See Schuck, *supra* note 9, at 951-53.

89. To bolster the incentives against skewing  $\alpha_w$  estimates, I later propose additional procedural protections for future claimants. See *infra* notes 160-164 and accompanying text.



Uncertainties surrounding future claims are great indeed. Yet these uncertainties should not paralyze policymakers. The choice is not between making a hasty judgment now or a wise one later. The choice is between making a reasonable decision under the circumstances now or leaving future victims with no compensation (as in the case of a defendant's future bankruptcy) or virtually no compensation (as in the *Georgine* and *Ahearn* settlements) later. Several of the factors outlined above combine with the pro rata rule to reduce the inevitable uncertainty to a reasonable level.

My final argument in support of the pro rata rule is that it is the law of bankruptcy,<sup>90</sup> where it applies equally to future and present claimants. Prior to the *Amchem* decision, two vastly different legal regimes existed side by side. If a mass tort defendant ended in bankruptcy, its assets were distributed pro rata.<sup>91</sup> If bankruptcy was averted by a global settlement, future claims were treated separately, discounted, and subjected to the mercy of whatever the attorneys and courts thought was "fair."<sup>92</sup> This disparity is indefensible. While an ordinary class action is very different from bankruptcy, the "smell" of bankruptcy is in the air whenever the parties contemplate a global mass tort settlement.<sup>93</sup> This does not mean that the proposed regime should mimic every feature of bankruptcy law. In fact, the bankruptcy regime itself has failed in several important respects when dealing with mass torts.<sup>94</sup> Yet bankruptcy and the proposed global settlement regime are similarly motivated: Resources available to satisfy claims are insufficient and must be apportioned according to some principle. In these circumstances, there is no justification for deviating from the distributive rule chosen by Congress.

Pro rata distribution is widely acknowledged as being intrinsically fair. It responds to the reasons underlying the Supreme Court's holding that the *Georgine* and *Ahearn* plaintiffs did not adequately represent their respective classes. It increases certainty and brings some benefits to the present plaintiffs and defendants while giving unmatched protection to the future claimants. Although it does not guarantee the futures absolute equality with the present

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90. In bankruptcy, the pro rata rule is called temporal equality. See Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 853 (1984).

91. See, e.g., *In re Klein Sleep Prods., Inc.*, 78 F.3d 18, 20 (2d Cir. 1996); *In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken)*, 982 F.2d 721, 736-37 (2d Cir. 1992); Coffee, *supra* note 3, at 1458-59.

92. The courts have gone so far as to adopt a rule that if a settlement is fair, then the negotiations were fair as well. See, e.g., *Bowling v. Pfizer*, 143 F.R.D. 141, 152 (S.D. Ohio 1992) (citing cases). The *Amchem* Court chastised the district court for overreliance on "fairness" of the settlement by explicitly stating that "[f]ederal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper." *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2249 (1997).

93. In *Ahearn*, for example, the court used a mandatory class action because available assets comprised a limited fund of insurance proceeds. If a \$2 billion insurance fund was almost insufficient to satisfy all existing and future claims, an extra tenth of this amount (\$250 million, representing all of the defendant's assets) could not have been enough to guarantee a comfortable distance from Chapter 11. *But see infra* note 104 and accompanying text (arguing that a company's assets may not reflect its true market value).

94. See *infra* Part IV.

claimants, the rule substantially reduces the freedom to “rob” the futures that present plaintiffs possess today. The rule is also consistent with the law of bankruptcy, which is extremely relevant in the global settlement context. These are powerful reasons to take a decisive step and to recognize that pro rata should be the only distributive rule for global mass tort settlements.

### B. *A Limited Fund Class Action*

A limited fund mandatory class action under Rule 23(b)(1) could be the only remaining avenue for global settlements via Rule 23 in view of the Court’s broad rejection of the *Georgine* class on predominance grounds. The Court explained that Rule 23(b)(3) cannot be satisfied because of the numerous differences between the members of the class.<sup>95</sup> This led the Court to conclude that “any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.”<sup>96</sup> But these differences are by no means idiosyncratic to asbestos litigation. Breast implants, Agent Orange, tobacco, and just about any other mass tort share most of the disparities present in the *Georgine* class. It is thus hard to see how any overarching dispute about the health consequences of any of these mass torts can satisfy the Rule 23(b)(3) predominance standard under *Amchem*. If common questions of law or fact can never predominate in a mass tort setting, the only available alternative is a 23(b)(1) mandatory class action, which does not need to satisfy the predominance requirement.<sup>97</sup> Necessity, however, is not the only reason to favor the limited fund class action.

One of the oft-expressed concerns about the class action is that the collective processing of claims, especially future claims, violates an important maxim of litigant autonomy.<sup>98</sup> There is a credible argument that the conflict between the traditional paradigm of individual justice and a modern compensation-driven conception of collective justice is the dominant tension in achieving a satisfactory resolution of mass tort cases.<sup>99</sup> A global settlement

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95. The *Georgine* plaintiffs were exposed to different products, for different durations, and in different ways, suffered different illnesses, and had different complicating factors. See *Amchem*, 117 S. Ct. at 2250. In addition, it remains unclear whether any exposure-only plaintiffs will contract a disease at all, and if so, which ones will do so and what their medical expenses will be. See *id.*

96. *Id.*

97. Note that 23(b)(1) class actions are still subject to the four-prong test of Rule 23(a), including the commonality requirement. Importantly, the Court acknowledged that the commonality requirement, while similar to the predominance inquiry, is far less demanding. See *id.*

98. This was one of the main reasons that courts were slow to accept mass tort class actions in the first place. See Coffee, *supra* note 3, at 1344 & n.2. It was also one of the greatest complaints of the injured veterans in the Agent Orange case—the first case to approve a global settlement. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 171-73 (1986). There is a “deep-rooted historic tradition that everyone should have his own day in court.” 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4449, at 417 (1981).

99. See Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases*. *A Comment*, 80 CORNELL L. REV. 1037, 1041 (1995).

is the ultimate de-individualization;<sup>100</sup> it is thus desirable to postpone it until the last appropriate moment.<sup>101</sup> This moment arrives when abandoning the traditional means of recovery for some is the only way to preserve some recovery for all. Modifying Equation (1), one can describe this moment as a situation when the following inequality holds true:

$$(3) \quad V < W_L \times N_L + W_S \times N_S + (1 + \gamma) \times W_F \times N_F^E.$$

Here,  $W_L$ ,  $W_S$ ,  $W_F$ ,  $N_L$ , and  $N_S$  have the same meaning as they did in Equation (1).  $\gamma$  is a premium coefficient representing the need to modify a strict pro rata rule.<sup>102</sup>  $N_F^E$  is the *expected* number of future claimants:  $N_F^E = (1 - \alpha_N) \times N_F$ .<sup>103</sup>  $V$  is the value of the defendant firm in a special sense. First, it is the value of the firm as a going concern, not merely the book value of its assets.<sup>104</sup> Second, it includes all available insurance proceeds as well as contributions from codefendants, if available. Finally, it is reduced, for simplicity, by the present value of all liabilities unrelated to the mass tort.

Inequality (3) compares the present value of future cash flows available to satisfy the firm's mass tort liability,  $V$ , with the present value of this liability. The firm's mass tort liability has three components: the total value of existing large claims ( $W_L \times N_L$ ), the total value of existing small claims ( $W_S \times N_S$ ), and the present value of all future claims modified by  $\gamma$  ( $(1 + \gamma) \times W_F \times N_F^E$ ). If Inequality (3) is true, the court should find that the defendants' assets are a limited fund, and global settlement negotiations should follow.

100. This is true at least within a litigation-based regime. For alternative ways of resolving mass torts through an administrative-law-type system, see, for example, Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993); and David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

101. For discussion of the harms brought by immature global settlements, see *infra* notes 121-128 and accompanying text.

102. For a detailed discussion of the factors affecting  $\gamma$ , see *infra* notes 165-177 and accompanying text.

103. Because under the pro rata regime  $\alpha = \alpha_N$ , it is possible to simplify Equation (1) by substituting  $\alpha_N$  for  $\alpha$ . It makes sense to supplement  $(1 - \alpha_N) \times N_F$  with  $N_F^E$  because this is the number the parties in fact negotiate. It also eliminates the unrealistic assumption of Equation (1) that  $N_F$  is known.

104. These two figures can be dramatically different. For example, Judge Williams concluded in 1981 that the assets of A.H. Robins totaled \$280 million. See *In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 893 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982). Six years later, bankruptcy proceedings led to the sale of the same company and the creation of a fund totaling \$2.475 billion. See *In re A.H. Robins Co.*, 880 F.2d 709, 721 (4th Cir. 1989). The difference was due to the fact that the district court looked at the defendant's *net assets* while the bankruptcy sale produced the amount equal to the defendant's value as a *going concern*. Microsoft Corp. offers another example of a possible difference between these two figures. Its net assets (total assets minus total liabilities) for 1997 were roughly \$11 billion. See Microsoft Corp., *1997 Annual Report* (visited Feb. 3, 1997) <<http://www.microsoft.com/msft/ar97/financial/income.htm>>, <<http://www.microsoft.com/msft/ar97/financial/highlights.htm>>, <<http://www.microsoft.com/msft/ar97/financial/notes.htm>>. Its market value (roughly estimated as the weighted average number of shares outstanding during 1997 times the arithmetic average of the lowest and the highest share price for 1997) equals \$125 billion. See *id.*

This definition of a limited fund is different from the traditional understanding of a "limited fund" class action under Rule 23(b)(1).<sup>105</sup> Courts have interpreted the Rule and the Advisory Committee notes on the Rule by distinguishing between two types of limited funds. The first type is a fund limited as a matter of law, such as a fund comprising the total amount that a defendant is required to pay in punitive damages resulting from the same tort.<sup>106</sup> The second type is a fund limited as a matter of fact. A "classic instance" of such a fund is a "fixed sum of money,"<sup>107</sup> such as the total insurance fund available to the defendant,<sup>108</sup> or a fund established outside the mass tort litigation.<sup>109</sup> Finally, the overwhelming majority of courts have concluded that the assets of the defendant are *not* a "limited fund" within the meaning of Rule 23(b)(1)(B). These courts have decertified limited fund class actions where the limited fund consisted of the defendant firm's assets as "self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief."<sup>110</sup>

The problems with my proposal to treat *V* as a limited fund are apparent from the preceding discussion. *V* is not a "fixed sum of money." In fact, it is not fixed at all. Many factors, both related and unrelated to the mass tort in question, can affect *V* in the future.<sup>111</sup> Moreover, the limited fund concept proposed in this Note resembles bankruptcy. Nevertheless, there are several reasons that the "new" limited fund might withstand judicial scrutiny. First,

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105. FED. R. CIV. P. 23(b)(1). The Advisory Committee has interpreted this rule as satisfied "when claims are made by numerous persons against a fund insufficient to satisfy all claims" *Id.* 23(b)(1)(B) advisory committee's note (1966).

106. See *In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Blinken), 982 F.2d 721, 736-37 (2d Cir. 1992). See generally Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 878 (1995) (noting that there are "situations in which there is a finite legal limit to the fund available to satisfy claims," such as when a dollar limit on recovery is placed by a law such as the Price-Anderson Act).

107. *Findley*, 982 F.2d at 735.

108. See, e.g., *In re Asbestos Litig.* (Flanagan v. Ahearn), 90 F.3d 963, 982 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997).

109. See, e.g., *Findley*, 982 F.2d at 737 (referring to Drexel Burnham Lambert Group's settlement of its litigation with the Securities and Exchange Commission providing for payment of \$200 million into a fund created for "defrauded purchasers, with the fund to be augmented by an additional payment of \$150 million").

110. *In re Joint E. & S. Dist. Asbestos Litig.* (Keene Corp. v. Fiorelli), 14 F.3d 726, 732 (2d Cir. 1993); accord *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *In re Benedictin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982). But see *Ahearn*, 90 F.3d at 983 (concluding that in appropriate and limited circumstances the defendant's potential or probable insolvency can create a limited fund within the meaning of Rule 23(b)(1)(B)); *Findley*, 982 F.2d at 739 (stating in dicta that a limited fund class action may be possible in the case, but decertifying the class anyway); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) (approving a limited fund class action under particular circumstances while recognizing that normally it should not be used in the bankruptcy context).

111. For discussion of mass-tort-related factors, see *infra* text accompanying note 152. Unrelated factors affecting *V* may include making and patenting major inventions, securing the services of valuable key personnel, reaching an advantageous agreement with labor unions, prevailing in lawsuits, and making successful investments. The state of the national and global economy may also affect *V*.

although *V* is not *fixed*, it is *limited*.<sup>112</sup> Second, the suggested regime does not circumvent the law of bankruptcy, because it operates at a different stage in the life of the defendant firm.<sup>113</sup> Third, courts' reluctance to approve limited fund settlements would be alleviated by the mandatory pro rata rule of distribution.<sup>114</sup> Finally, the proposed limited fund global settlement produces a net surplus by increasing the value of the defendant firm *V*.<sup>115</sup>

*Keene Corp. v. Fiorelli*<sup>116</sup> is an example of a case in which a court rejected certification in part because it "mirror[ed] a bankruptcy proceeding."<sup>117</sup> The limited fund proposed in this Note, while similar to bankruptcy in some sense, is dramatically different both from bankruptcy and from the sort of class action at issue in *Keene*. At the time of the suit, Keene Corp. was economically bankrupt; its liabilities exceeded its assets.<sup>118</sup> The defendant attempted to circumvent legal bankruptcy by using a class action mechanism, but the Second Circuit blocked the attempt. The limited fund concept proposed in this Note differs from Keene's action in the following way: Under Inequality (3), the mass tort is ready for a global settlement when the value of the defendant firm as a going concern (i.e., its market value) is less than its current liabilities plus the present value of its expected future liabilities. This condition may obtain while the firm's current assets substantially exceed its current liabilities and the firm is nowhere close to bankruptcy, economically or legally. A second inequality necessary to insure that this condition *does* obtain is:

$$(4) \quad A > W_L \times N_L + W_S \times N_S.$$

Here, *A* is the book value of the defendant firm's assets available for tort claimants.<sup>119</sup> The requirement expressed in Inequality (4) insures that a

112. A firm's value *V* is limited in the sense that it can be determined at any given moment from certain available information. Those who believe in a semi-strong version of efficient market theory think that the stock price of a firm reflects all publicly available information about it. See, e.g., STEPHEN A. ROSS ET AL., CORPORATE FINANCE 340 (4th ed. 1996). Conceivably, discovery during negotiations may yield even more information, which could help produce an even better estimate of the firm's value. Amounts of available insurance funds, contributions by codefendants, and non-tort liabilities can be estimated and are never infinite.

113. See *infra* text accompanying notes 116-118.

114. See, e.g., *Ahearn*, 90 F.3d at 1006 (Smith, J., dissenting) (arguing that 23(b)(1)(B) class actions are only constitutional for equitable (as opposed to legal) actions, such as actions by a trust beneficiary, where the plaintiff's pro rata rights to the trust corpus are already established by law); *Findley*, 982 F.2d at 736 (noting that it would be easier to approve a limited fund class action in the context of insolvency when it is used "for its traditional purpose of effecting a pro rata reduction of all claims").

115. See *infra* text accompanying note 152.

116. *In re Joint E. & S. Dist. Asbestos Litig. (Keene Corp. v. Fiorelli)*, 14 F.3d 726 (2d Cir. 1993).

117. *Id.* at 732; see also *Findley*, 982 F.2d at 735-36.

118. See *Keene*, 14 F.3d at 728 (reporting that Keene's net assets, including the disputed insurance claims, were around \$51 million while its asbestos-related liabilities were approximately \$500 million).

119. *A* is thus the amount of the firm's net assets—its total assets reduced by the amount of its total non-tort liabilities.

defendant asking for a global settlement class action is not nearly bankrupt: The *book* value of its assets available to satisfy *existing* tort claims exceeds the value of these claims. Meanwhile, where Inequality (3) is satisfied, the *market* value of the defendant firm is less than the firm's *overall* mass tort liability. When both Inequality (3) and Inequality (4) are true, therefore, the defendant is ready for a global settlement.<sup>120</sup> The greater the expected number of future claimants,  $N_F^E$ , the greater the likelihood that this situation will exist. A combination of Inequalities (3) and (4) separates the proposed regime from every limited fund mass tort settlement rejected by an appellate court until now.

Inequality (4) insures that a global settlement does not come too late; Inequality (3) guarantees that it does not come too early. Two types of immature global settlements are the "preemptive" settlement and the "nuisance"<sup>121</sup> settlement. A defendant may initiate a preemptive settlement for several reasons. It may be aware of some extremely harmful evidence unknown to the plaintiffs. It may expect that recoveries will increase substantially in the future. It may want to prevent plaintiff forum shopping.<sup>122</sup> Or it may simply seek good publicity. Whatever the reason, the defendant in a preemptive settlement acts sooner rather than later to preempt further maturation of a mass tort. If the defendant succeeds in reaching a global settlement at this stage, plaintiffs are likely to be shortchanged.<sup>123</sup>

Defendants face nuisance class actions much more often. Sometimes, a nuisance settlement follows as it did in the Agent Orange case. In that case, the plaintiffs at the time of the settlement had virtually no chance of success on the merits: The defendants' product had no clear connection to the plaintiffs' diseases, and the government, which purchased and used Agent

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120. These conditions obtain every time the difference between the defendant firm's market and book values ( $V - A$ ) is less than the present value of the firm's future modified mass tort liability  $((1 + \gamma) \times W_F \times N_F^E)$ .

121. I adopt the term "nuisance" settlement in view of Professor Schuck's conclusion that the only possible explanation for the Agent Orange settlement amount was its "nuisance value" on the eve of the trial. SCHUCK, *supra* note 98, at 259.

122. By acting preemptively, the defendant may choose plaintiffs' lawyers who agree to the legal environment favorable to the defendant. The term legal environment includes factors ranging from the law of a particular state to the views of a particular judge. For a demonstration of the crucial importance of the legal environment, see SOBOL, *supra* note 67, at 40, which describes the troubles of A.H. Robins in the courtroom of Judge Theis.

123. The breast implants settlement may be an example of a preemptive settlement. See *In re Silicone Gel Breast Implant Prod. Liab. Litig.* (Breast Implants Litigation), No. CV 92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at \*1 (N.D. Ala. Sept. 1, 1994). As this example shows, defendants planning a preemptive settlement may underestimate the number of claims, overestimate their own liability, or both. Former FDA Commissioner David Kessler, whose decision on January 7, 1992, to impose a temporary moratorium on the use of silicone breast implants transformed the breast implant litigation into a mass tort, said recently: "We now have, for the first time, a reasonable assurance that silicone-gel implants do not cause a large increase in disease in women." *West's Legal News. Torts and Personal Injury: Breast Implants Pathfinder*, 1997 WL 12523, at \*4 (Jan. 16, 1997).

Orange, was unwilling to accept any responsibility.<sup>124</sup> Yet the defendant companies were forced to pay \$180 million for their legally nonexistent misdeeds. As with defendants in other nuisance class actions, the Agent Orange manufacturers were under insurmountable pressure to settle—even though the probability of an adverse judgment was low—because of the risk of facing an all-or-nothing verdict. It is not surprising, then, that some courts have referred to nuisance class actions as “judicial blackmail.”<sup>125</sup> A legal regime favorable to such actions is hardly socially desirable. In addition to being unfair to defendants, it precludes later plaintiffs, possibly with better arguments and evidence, from litigating and receiving higher and more justifiable awards.<sup>126</sup>

Thus, an early global settlement is often undesirable. A preemptive settlement benefits defendants by letting them off the hook before the full extent of their liability is known, and thus is unfair to plaintiffs. A nuisance settlement benefits plaintiffs who exact substantial sums from defendants whose liability cannot be proven, at least at the time. All premature global settlements unnecessarily abridge litigants’ autonomy. Moreover, they often produce arbitrary results because they are not based on historic claim values established by repeated adjudication and individual settlements.<sup>127</sup> Maturation of claim values is, thus, a necessary prerequisite for any global settlement.<sup>128</sup> The limited fund requirement, including the necessity to prove that Inequality (3) is true, insures such maturation.

Finally, the new limited fund proposal may be extremely helpful to courts. As one federal judge has pointed out, “[S]urprising as it may seem . . . Rule 23 contains *no standards at all* governing judicial approval of class action settlements.”<sup>129</sup> A more specific inquiry resulted in an identical conclusion: “Rule 23(b)(1)(B) simply *does not prescribe any standards* for resolving

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124. The Agent Orange fact pattern proved typical of nuisance mass tort class actions. In the Rhone-Poulenc controversy, for example, plaintiffs’ statistical chances of success were a meager 7.7%. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). In the 15-year history of the breast implants litigation, only about a dozen cases were adjudicated prior to consolidation in Judge Pointer’s court. See *Breast Implants Litigation*, 1994 WL 578353, at \*1. Smokers had *no* cases to rely on in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). The long history of tobacco litigation was of no help to the *Castano* plaintiffs because they were relying both on a new theory of liability and on entirely new evidence. See *id.* at 751.

125. *Castano*, 84 F.3d at 746 (citing cases).

126. Such plaintiffs appeared in the Agent Orange case and attempted to reopen the settlement. See *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993). The court barred their actions in view of the earlier settlement.

127. To be sure, historic values themselves are susceptible to criticism, but short of a massive shift in the compensation regime to an administrative-agency-type scheme, these values are the best estimates the parties could have.

128. See Schuck, *supra* note 9, at 958-59 (arguing that the importance of accurate evaluation of mass tort claims cannot be overestimated and can be achieved only by maturation of a mass tort).

129. William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 CORNELL L. REV. 837, 841 (1995) (emphasis added).

competing claims to the limited fund, if one is found to exist."<sup>130</sup> Many courts have used a fairness inquiry as the only test of settlement class actions—a practice recognized and strongly criticized by the *Amchem* Court.<sup>131</sup> As a result of this lack of standards, judicial approval of mass tort global settlements has often turned on the outcome of a battle of ethicists—a clear sign that “the legal process is truly at sea.”<sup>132</sup>

Devoting most of their attention to the question of fairness, courts certifying the latest global settlements have virtually ignored a seemingly critical question: *How many future claimants are there?*<sup>133</sup> They have left this crucial inquiry out, not because the issue is too uncertain, nor because the courts are ill-prepared to deal with it for institutional reasons. On the contrary, courts have dealt with this very question before, even in the mass tort context. But each time this happened in the past, the mass tort defendant was in bankruptcy.<sup>134</sup> The *Georgine* and *Ahearn* courts’ lack of attention to the size of the futures’ pool—no matter how unjustifiable it may seem—has a simple explanation. Bankruptcy rules of absolute priority and temporal equality effectively *require* courts, when dealing with mass torts, to inquire into the existence of future claimants and to determine their expected number,  $N_F^E$ .<sup>135</sup> Courts have no similar obligations when dealing with class actions—even limited fund global class actions. All that was required of the *Ahearn* court, for

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130. Marcus, *supra* note 106, at 880 (emphasis added).

131. See *Amchem Prods. Inc. v. Windsor*, 117 S. Ct. 2231, 2249 (1997) (criticizing the practice of finding certification proper based on the finding that the settlement is fair, and rejecting the conclusion that a common interest in a fair compromise could satisfy the predominance requirement).

132. Schwarzer, *supra* note 129, at 841.

133. See Coffee, *supra* note 3, at 1362 n.60 (“[N]o effort was made to develop any actuarial estimate of future claims in the recent asbestos class actions.”). This disinterest is hard to understand in *Georgine* and impossible to understand in *Ahearn*. While *Georgine* was a global settlement, one could argue that, because it was not a limited fund class action, the estimate of the futures’ number was less crucial. The argument is plausible—but false. The *Georgine* settlement had many limited fund features. It imposed “case flow maximums” on the number of claims in each category to be paid each year. These “maximums” were already set “less than the annual new case filings against the [*Georgine*] defendants.” *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 280 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom. Amchem*, 117 S. Ct. 2231 (1997). The court recognized the “numbers” issue, but treated it with “casual disdain.” Coffee, *supra* note 3, at 1362 n.60. The *Ahearn* court’s superfluous treatment of the same problem is even harder to accept. *Ahearn*, after all, was a global limited fund class action. Unlike *Georgine*, it was not only certified, but also approved on appeal. In its lengthy opinion, the Fifth Circuit devoted *one paragraph* to discussion of the expected size of the futures’ pool and of the reason why the defendant’s assets were a limited fund. See *In re Asbestos Litig. (Flanagan v. Ahearn)*, 90 F.3d 963, 982 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997). The court preceded this with *six pages* analyzing the arguments of legal ethicists. See *id.* at 977-82. What were the arguments about? They purportedly showed that because the parties negotiating the settlement had no conflicts of interests, the substantial  $\alpha_r$ - and  $\alpha_e$ -type discounts of future claims were “fair.” *Id.* at 982.

134. The A.H. Robins Company, National Gypsum Corp., and Johns-Manville Corp. were all bankrupt when the issue of future claimants arose. See *supra* note 81.

135. See, e.g., Coffee, *supra* note 3, at 1458-59. Because the rule of absolute priority requires that tort claimants receive full payment before stockholders can share in the firm’s value, the value of all tort claims must be established by a bankruptcy court.



example, was to find that future claimants were *numerous enough*.<sup>136</sup> Paradoxically, once the court was convinced that the futures' claims exceeded the defendant's assets (i.e., just when it was alerted to the possible futures' undercompensation), it fulfilled its obligations, at least under the pre-*Amchem* class action doctrine, and had no further incentive to scrutinize  $N_F^E$ .

This paradox has repeated itself with regard to the value of the defendant firms. Courts dealing with bankrupt mass tort defendants oversee the process in which litigants spend considerable time and effort determining defendants' value.<sup>137</sup> Moreover, in the bankruptcy context, this figure is not just the value of the firm's assets, *A*, but the value as a going concern, *V*. Any reduction in plaintiffs' recoveries is justified explicitly by the insufficiency of the total fund, *V*.<sup>138</sup> The situation is dramatically different, again, when a mass tort defendant obtains class action treatment. In the absence of workable standards in Rule 23, nothing prevents a court from finding a limited fund and then acquiescing in a settlement under which the defendant parts with *four percent* of its assets.<sup>139</sup>

The system I suggest in this Note provides courts with the needed standards. The parties favoring a global settlement<sup>140</sup> will have the burden of persuading the court that the tort is globally mature and that Inequalities (3) and (4) are true. Because most of the variables in these inequalities will be known, or can be accurately estimated, all parties will focus their attention on

136. The Fifth Circuit satisfied itself by concluding that, without the settlement, "Fibreboard would be unable to pay all the valid claims against it within five to nine years." *Ahearn*, 90 F.3d at 982.

137. See, e.g., *In re Johns-Manville Corp.*, 68 B.R. 618, 620-22 (Bankr. S.D.N.Y. 1986) (describing a more than four-year-long process in establishing two trusts, one of which would, inter alia, hold 80% of the stock of the reorganized entity), *aff'd in part, rev'd in part*, 78 B.R. 407 (Bankr. S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). When mass tort claimants become owners of a defendant firm, they by this very fact capture the value of the firm. Another process that effectively reveals the full value of a defendant firm during bankruptcy proceedings is a bidding war between several potential acquirers of the bankrupt defendant. See, e.g., SOBOL, *supra* note 67, at 198-209 (describing the bidding for A.H. Robins).

138. See, e.g., *In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinks)*, 982 F.2d 721, 725-26 (2d Cir. 1992) (describing the creation of the original Manville Trust).

139. This was the result in *Ahearn*. See Coffee, *supra* note 3, at 1402 (noting that Fibreboard contributed \$10 million of its approximately \$250 million assets). Insurance proceeds comprised the bulk of the settlement fund. See *Ahearn*, 90 F.3d at 971-72. In the district court, Judge Parker briefly treated the issue in the following way: "There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected." *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 527 (E.D. Tex. 1995) (citing two district court cases), *aff'd sub nom. Ahearn*, 90 F.3d 963 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997). Issues of authority aside, I respectfully disagree with Judge Parker about the reason behind the inclusion requirement. As I argue in this Note, the situation is just the reverse: There is no reason *not* to include all of the defendant's resources in the settlement process. This does not mean that all these resources should be used to compensate mass tort claimants, but without considering them it is impossible to determine whether the time of global settlement has come, or what the appropriate settlement fund should be.

140. For a discussion of who these parties are likely to be, see *infra* notes 143-150 and accompanying text.

the more uncertain variables:  $\gamma$ ,  $V$ , and  $N_F^E$ .<sup>141</sup> To be sure, the new inquiry proposed here will not magically unearth the “true” value of  $V$ , or the “true” number of future claims,  $N_F$ . But courts will at least be asking the right questions. Not only will this produce more, and better, research pertaining to  $V$  and  $N_F^E$  estimations, but it will also impede the discounting of the futures’ number—something that occurred in both *Ahearn* and *Georgine*, while the courts were listening to the ethicists arguing about “fairness.”

This Note proposes a limited fund class action, in part, because this may be the only type available in view of the extremely demanding predominance standard enunciated in *Amchem*. While the proposed limited fund requirement differs from the traditional interpretation of Rule 23(b)(1)(B), it has a chance with the courts. It does not circumvent bankruptcy. It prevents immature global settlements, and it preserves litigants’ autonomy for the longest possible time. It provides courts with the workable standards that they lack under the current regime. It focuses courts on the “right” questions, which, when answered, insure better protection for the futures. Finally, the proposed regime requires courts to do nothing more than they already do in the similar (but legally distinct) bankruptcy setting. These are the benefits of the new limited fund system. To evaluate their full scope, one needs to consider the final aspect of this Note’s proposal—a mandatory class action.

### C. A Mandatory Class Action

Making a settlement mandatory is a tough proposal to make. A right to opt out is probably the greatest guarantee of settlement fairness. Unfortunately, it is also an extortion tool with which large-claim plaintiffs can delay settlement negotiations and transfer wealth from small and future claimants. Under the pre-*Amchem* law, large-claim plaintiffs had two incentives to avoid global settlement for as long as possible. First, they benefited the most from indeterminacy in  $\alpha$  because they held the largest claims. Second, they stood to receive large punitive damages in the tort system that would be unavailable in any global settlement. The pro rata rule resolves the first problem. The mandatory class action addresses the second one. Because punitive damages are worth millions of dollars, large claimants are likely to accept a settlement only when their chances for individual adjudication are very low. By then, the defendant’s assets are likely to be depleted, and a global settlement would differ from bankruptcy only in name. It is irrational to expect that large-claim plaintiffs would agree to forgo their millions out of the kindness of their

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141. One can easily see the close link between the global maturity requirements and the chance for a reasonably correct evaluation of  $N_F^E$ . I discuss  $\gamma$ -type uncertainties below. See *infra* notes 165-177 and accompanying text.

hearts.<sup>142</sup> A mandatory global settlement is thus necessary to prevent inequitable dilution of the defendant's funds.

Large-claim plaintiffs seek to prevent a global settlement from coming too early; defendants and small claimants seek to insure that it does not come too late. Defendants have already shown an interest in prebankruptcy settlements. So far, their actions have been either premature<sup>143</sup> or overdue.<sup>144</sup> While the results have been disappointing, the defendants' increasingly proactive behavior is encouraging. Because a global settlement class action is not a bankruptcy, the defendant firm retains more of its value for the shareholders. These shareholders, assured of this benefit if they face mass tort liability early enough, will have a strong incentive to settle early. The defendant firm's management would likely be much more receptive to a global settlement than to bankruptcy as well. There is a considerable stigma in going bankrupt.<sup>145</sup> A relatively early global settlement would likely result in much less dissatisfaction with the firm's management. Moreover, such settlement may be used as a public relations tool demonstrating that the firm is responsive and responsible. Probably the greatest advantage for the defendants is that the global settlement encompasses *all* plaintiffs—something a bankruptcy cannot offer.<sup>146</sup> Finally, the proposed global settlement regime allocates the bulk of the external risks to the future plaintiffs, bringing a finality unmatched by bankruptcy.<sup>147</sup> Thus, under the proposed global settlement regime, the defendants have numerous incentives not to delay the global settlement.<sup>148</sup>

Small claimants are the second group extremely interested in settling at the right time. Small claimants have none of the disincentives to strike a global settlement characteristic of large plaintiffs. They cannot lose huge punitive

142. For an argument that mass tort plaintiffs have ethical obligations toward *each other*, see Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1177 & n.71 (1995).

143. An example of a premature action is the breast implants settlement. *See Coffee, supra* note 3, at 1433.

144. *See supra* text accompanying notes 116-118.

145. For example, a recent study shows that 70% of large reorganizations resulted in a management change during the pendency of the Chapter 11 proceedings. *See Lynn M. LoPucki & William C. Whitford, Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597, 610-11 (1993).

146. *See infra* notes 192-195 and accompanying text.

147. *See infra* notes 165-177 and accompanying text.

148. To negotiate a global settlement under the proposed regime, defendants need to persuade the court that Inequality (3) obtains. When there are genuine questions whether this is true (which will typically arise relatively early in the mass tort maturation), the defendants will have two arguments to aid their cause: that  $V$  is low and, counterintuitively, that  $N_F^E$  is high. It is possible that, thinking *ex ante*, the defendants will choose to make both arguments. They will conclude that settling earlier, while arguing for higher  $N_F^E$ , will preserve more of the firm's value for the shareholders than settling later, after paying more in punitive damages, wasting more in transaction costs, and depressing more of the firm's value with mounting uncertainties. Another reason to settle earlier is a decreased likelihood that  $N_F^E$  will be reduced further (by increasing  $\alpha_N$ ) before a court focused on the issue. If the proposed regime is adopted and the defendants can adjust their behavior accordingly, future claimants may gain an unexpected "friend."

damages awards, nor can they suffer from being denied their day in court. They can, however, prevent large plaintiffs from depleting defendants' funds until all that is left is a small portion of their small claims. A mandatory settlement precludes large claimants from blackmailing small claimants.<sup>149</sup> When the settlement is mandatory, there is no threat that large plaintiffs will derail the negotiations by walking away from the settlement. Hence, defendants need not offer, and small claimants need not agree to, preferential treatment for large claimants. Small claimants would prefer a nonglobal settlement because it would allow them, together with large plaintiffs, to transfer wealth from the unaccounted futures. This option would not appeal to defendants, however, because their paramount concern is with the resolution of future claims. By striking a global settlement at the right time, small claimants would get a higher percentage of their claims than if they were to wait until a defendant's bankruptcy. As a result, small claimants will be interested in settling as early as possible.<sup>150</sup>

The pro rata rule, the principle of basing awards on historic tort system values, and the mandatory character of the settlement take away the two main sources of the large plaintiffs' negotiating leverage: opportunities to transfer wealth from the futures and from the small claimants. In the absence of these possibilities, the large plaintiffs' opposition may serve only the following positive functions: (1) preventing global resolution of immature torts; (2) revealing the most reliable estimate of the number and value of future claims; and (3) optimizing the scope of claims included in the settlement. With small claimants pushing for global settlements on one side and defendants anxious to negotiate on the other, near perfect timing may result.<sup>151</sup>

149. Under the current regime, the threat of large claimants' voting with their feet causes the defendants to structure the deal so that the difference between the large- and small-claim awards under the settlement is larger than the difference between the respective historic values. See Coffee, *supra* note 3, at 1450-51 n.431.

150. Because small claimants want to settle earlier rather than later, they are as interested in proving that Inequality (3) is true as defendants are. Unlike the defendants, the small claimants would rather argue that  $N_F^E$  is large than that  $V$  is small. After all, it is almost certain that under any global settlement plaintiffs will not receive a full value of their awards in the tort system. Unless such claimants reach a compromise with defendants allowing the latter to keep a substantial share of  $V$ , the defendants will have little incentive to settle at all. Because the proposed regime gives the defendants "total peace," if the parties underestimated  $V$  and the defendants thereby kept a larger share of their original value than was anticipated during the negotiations, none of the added value would go to the plaintiffs. Conversely, if it turns out that the total value of the plaintiffs' claims was overestimated (because, for example, of overvaluation of  $N_F^E$ ), the added value would go to increase the plaintiffs awards until they received 100% of their historic values, and only the remainder would revert to the defendants. Thus, small claimants have a good reason to argue for a higher  $N_F^E$  rather than for a lower  $V$ .

151. It is now possible to look *ex ante* at the alignment of interests under the proposed regime. Defendants and small claimants are interested in a relatively early global settlement, mainly to limit both transaction costs and multiple punitive damages. Large plaintiffs would prefer to litigate for as long as possible. They will argue, therefore, that  $V$  is high,  $N_F^E$  is low, and Inequality (3) is not yet satisfied. Future claimants would like both  $N_F^E$  and  $V$  to be high. The following table summarizes the parties' negotiating objectives:

Yet another benefit produced by the mandatory settlement regime is that it brings an unmatched certainty to the defendant firm. Uncertainty about future mass tort liability necessarily depresses the value of the firm,  $V$ , and may even cause the firm's operational collapse.<sup>152</sup> Assets will be diverted; access to capital markets will be restricted; shareholders will forgo worthwhile projects and will choose inappropriately risky ones instead; customers and suppliers will flee; and management will be preoccupied with resolving the firm's financial troubles and dealing with its mass tort problems. All of these effects will devastate the value of the defendant firm. The proposed regime insures defendants that when they—perhaps together with small claimants—are able to show that the tort is globally mature and that Inequalities (3) and (4) are true, the court will likely accept a negotiated global settlement, and the defendants' entire future liability will be resolved once and for all. If courts adopt the proposed regime, the market will include this information in defendants' stock prices, which will therefore be higher than under conditions of uncertainty. Thus, the proposed regime will produce a net surplus in the value of defendant firms.

In addition, the proposed regime would prohibit back-end opt outs. It seems plainly inconsistent to deny a right to opt out for the present claimants, but to leave it for future ones. Nonetheless, several scholars have argued in favor of this arrangement.<sup>153</sup> I disagree. First, allowing future plaintiffs to opt out is unfair to the futures themselves. It would allow near futures to deplete the defendant's funds<sup>154</sup> and to "rob" intermediate and far futures by opting out and obtaining huge awards in the tort system. Considering that a

	DEFENDANTS	SMALL CLAIMANTS	LARGE CLAIMANTS	FUTURE CLAIMANTS
Argue that $V$ is:	low	high	high	high
Argue that $N_F^E$ is:	high	high	low	high

The table demonstrates several things. First, parties other than the futures themselves are interested in arguing for a high  $N_F^E$  and  $V$ . Second, when all parties are at the negotiating table (futures through a representative), there are advocates both for and against high and low values for  $N_F^E$  and  $V$ . If one believes that an adversarial system facilitates truthfinding, this is a good result. Finally, understanding of the parties' interests enables us to predict possible dynamics of future negotiations.

The table is, of course, a simplification. Moreover, it assumes that negotiations are timely. If the negotiations begin too late, both defendants and small claimants would prefer to argue that  $N_F^E$  is small, thereby "stealing" from the futures. Nonetheless, under my proposal there are at least some circumstances when futures' interests align with those of one or more present parties. This never happened under the pre-*Amchem* class action law.

152. See, e.g., Roe, *supra* note 90, at 856-62 (describing the operational collapse of firms facing unresolved mass tort claims).

153. Professor Coffee, for example, has made a proposal to combine a mandatory class action at the liability stage with deferred limited opt-out rights. See Coffee, *supra* note 3, at 1446-53.

154. Protection of defendants' funds against depletion by present claimants is one of the central issues of contemporary debate. See generally Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995). Professor Coffee argues that unrestricted present claimants "will deplete virtually any settlement fund in short order, leaving future claimants empty-handed." Coffee, *supra* note 3, at 1387.

mandatory class action denies this advantage to the present claimants, one cannot justify bestowing it on the near futures. Second, providing for back-end opt outs from a mandatory class is unfair to the present plaintiffs because it subordinates their autonomy to that of the future claimants.<sup>155</sup> Moreover, back-end opt outs are a strange way to preserve the futures' autonomy. The proposed regime achieves this by avoiding the global settlement for as long as possible. This allows some of the future claimants to become present plaintiffs and to use the tort system to assert their individual rights. When the settlement moment is reached, however, *every* litigant, present or future, must sacrifice his or her autonomy as a condition of obtaining a meaningful recovery. Finally, back-end opt outs are a bad idea because they create a false illusion that futures will receive substantial benefits. Except for rare occasions attributable to peculiar circumstances,<sup>156</sup> the extreme limitations placed on back-end opt-out rights make these rights illusory, if not nonexistent.<sup>157</sup> Professor Schuck, a proponent of deferred opt outs, admits that it is doubtful that courts can deduce general principles to guide them in reviewing the fairness of the conditions placed on back-end opt outs.<sup>158</sup> In the absence of such principles, back-end opt outs can be (and indeed are) used to defend indefensible

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155. The ability of back-end opt outs to preserve futures' autonomy is probably the most popular argument in favor of this procedural device. *See, e.g., Coffee, supra* note 3, at 1447 (calling litigant autonomy "a value normally deserving considerable constitutional weight"); Schuck, *supra* note 9, at 964 (calling the institutionalization and enlargement of claimant autonomy a "highly desirable and important innovation for the emergent mass tort system"). The preference for the futures' autonomy is either expressly explained or supported by an implicit recognition that present claimants receive higher benefits from global settlements than do the futures. The proposed regime attacks the problem at its root—it insures that the benefits are equal (including appropriate discounts). This makes the indirect compensation via back-end opt outs unnecessary.

156. *See, e.g., Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 170 (S.D. Ohio 1992) (binding in a settlement *only* small claimants (both present and future) who had the defendant's heart valve, yet suffered no noticeable physical injury from it). The unique feature of the settlement approved in *Bowling* is an *absolute* freedom to opt out reserved for claimants who move into the large plaintiff category because of a failure of their valves. *See id.* at 150.

157. Back-end opt-out provisions almost always deny the right to claim punitive damages. *See, e.g., In re Asbestos Litig. (Flanagan v. Ahearn)*, 90 F.3d 963, 973 (5th Cir. 1996) (noting that the settlement precluded punitive damages), *vacated*, 117 S. Ct. 2503 (1997). The number of claimants who can exit each year is limited, often to a minuscule percentage of the total number of plaintiffs. *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 620 (3d Cir. 1996) (describing strict limits on "extraordinary" claims and caps on non-"extraordinary" claims paid out according to a settlement), *aff'd sub nom. Amchem Prods., Inc., v. Windsor*, 117 S. Ct. 2231 (1997). Claimants must go through one or several alternative dispute resolution proceedings before a court hearing becomes available. *See, e.g., Ahearn*, 90 F.3d at 972-73. Any award obtained in court is capped by a certain amount, *see, e.g., id.* at 973 (citing a \$500,000 cap on recovery in the tort system and preclusion of recovery of punitive damages), and even this award is paid over an extended period, *see id.* Finally, attorneys' fees are limited. *See id.* It is undeniably true that "[i]t is not a matter of semantics, not a matter of whether the talismanic word 'opt-out' is used but whether the right given exists in effect." *In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir. 1989) (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985)). But it is equally true that, as the restrictions accumulate, the back-end opt out looks more and more like no opt out at all, semantically or substantively.

158. *See Schuck, supra* note 9, at 967.

settlements. To preclude this “window dressing,”<sup>159</sup> as well as for the other reasons mentioned above, the proposed regime precludes back-end opt outs.

A mandatory settlement is not a preferred way of compensating victims in the American tort system. It denies individual litigants a right to their “day in court,” it reduces the plaintiff’s bargaining power and eliminates the opportunity to reject the settlement, and it is a potentially dangerous weapon in defendants’ hands. On the other hand, a limited fund mandatory global settlement has many advantages. It prevents premature global settlements based on nonexistent or highly uncertain claim values. It aligns the interests of different mass tort participants in a way that is likely to result in the optimal timing of the settlement and the optimal balance between those included and excluded (at least temporarily) from it. The regime precludes large plaintiffs from obtaining disproportionately favorable treatment at the expense of small and future claimants. It ends an intolerable situation in which some victims receive millions in punitive damages while thousands of others are left with no compensation at all. It ends the attempts to avoid bankruptcy by negotiating global settlements whose time has passed. It increases the value of the defendant firm by eliminating uncertainties about its future liabilities. Finally, it helps courts in evaluating proposed settlements.

#### D. *Modifications to the Pro Rata Rule*

I propose two modifications to the pro rata rule, one procedural and one substantive. Both are designed to provide further protection for future claimants. With respect to procedure, I suggest periodic judicial review and, possibly, revaluation of claims. A representative of any party would be able to initiate this review upon showing that such party’s expected recoveries have dropped below a certain percentage of their original values.<sup>160</sup> When the court, after hearing from all concerned, certifies that this devaluation has indeed occurred, all unpaid awards would be ratcheted down proportionately. The modification would bring several benefits. First, it would reduce the potential gain reaped by the present claimants from understating  $N_F^E$ .<sup>161</sup>

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159. *Ahearn*, 90 F.3d at 1007 n.30 (Smith, J., dissenting).

160. It is most likely that such parties will be future claimants.

161. This is so because earlier plaintiffs’ awards will be reduced, not late in the game when there is no cash in the settlement fund, but much earlier, when the expectation about the remaining liabilities changes. There are other ways to make both present plaintiffs and defendants more sensitive to undervaluing future claims. For example, instead of paying present claimants in full, the settlement could provide for annuity-type payments such that the present value of the annuity equals the total award amount. Combined with the ongoing revaluation technique, this would effectively hold the unpaid portion of the earlier plaintiffs’ claims as insurance against devaluation of the later claimants’ awards. An even stronger measure might be to do the same with the plaintiffs’ counsel fees (which, in the *Georgine* case, could have exceeded \$100 million). See Koniak, *supra* note 49, at 1067. There are other ways to make both present plaintiffs and defendants more sensitive to undervaluing future claims. A detailed discussion of such alternatives is beyond the scope of this Note.

Second, it would give the futures' representative both the incentive to monitor the futures' numbers and the power to act when undervaluation has become clear.<sup>162</sup> Third, if a court knows *ex ante* that if it approves an underfunded settlement it would have to deal with the problem again and again, the court would have a strong incentive to do it right the first time.<sup>163</sup> Finally, the procedure would contribute to the accumulation of institutional knowledge, which would be extremely helpful for the next mass tort global settlement.<sup>164</sup>

The substantive modification to the pro rata rule would account for additional uncertainties external to a particular mass tort. These uncertainties are caused by inflation, as well as possible future changes in medicine and science, legal rules, social valuations, and social insurance regimes. The premium coefficient  $\gamma$  reflects uncertainties created by all these changes. Both evaluating these uncertainties and assigning their risks to a particular party present serious problems.

The problem with inflation is that it is hard to predict. Some mass tort negotiators have tried, but their experiences have not been encouraging. In the National Gypsum bankruptcy, for example, the courts adopted a three to four percent annual inflation rate for future settlement values.<sup>165</sup> Not only did this rate fall below the actual rate of inflation, the rate arguably should have been set at least in part with a view toward inflation in the medical industry, where cost increases are typically twice or even three times the inflation rate.<sup>166</sup>

Changes in medicine and science can dramatically affect the fairness or reasonableness of future awards as well. When a mass tort is mature, the defendant's liability is well established. Because future discoveries can only

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162. This presumes that the court will retain the futures' representative for as long as there are future claimants. It also presumes that such a representative will be compensated enough to provide ongoing vigorous representation.

163. There is considerable evidence showing that the judges who handle mass tort cases often reach a point when they become personally interested in settling the dispute. *See, e.g., Ahearn*, 90 F.3d at 971 (describing critical negotiations at Judge Parker's home and later at a nearby coffee shop); SCHUCK, *supra* note 98, at 143-67 (describing the extraordinary efforts of Judge Weinstein to settle the Agent Orange case); SOBOL, *supra* note 67, at 44-45 (describing a critical decision in the Dalkon Shield case reached in Judge Merhige's home). Judges who spend this much time and effort settling cases are unlikely to be pleased when they come back. On the other hand, to the extent the judges feel responsible for gross undervaluations under their supervision, the proposed procedural modification will allow them to deal with the problem more easily. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken)*, 982 F.2d 721, 727 (2d Cir. 1992) (describing the Herculean efforts of Judge Weinstein to reopen the Manville Trust settlement single-handedly).

164. A significant part of this institutional knowledge would come from continual reassessment of the adequacy of original and subsequent valuations of the expected number of future claims.

165. *See DUNBAR & NEUMANN, supra* note 83, at 31.

166. *See Mike Causey, HMOs May Be Best Route*, WASH. POST, Aug. 18, 1995, at B2. While health care expenses per capita grew at about 9% annually from 1950 to 1995, the Consumer Price Index (CPI) increased at a rate of only 4.5%. *See Karen Davis, Medicare: Options for the Long Term*, in POLICY OPTIONS FOR REFORMING THE MEDICARE PROGRAM 113, 115 (Stuart H. Altman et al. eds., 1997). On the other hand, during the 1993-1995 period, health care expenses grew at a rate of 5.5% and the CPI at 2.8%. *See id.* In 1994, national health care expenditures grew *more slowly* than Gross Domestic Product. *See id.* It is hard to know what is responsible for the recent slowdown in private health outlays or whether this trend is permanent or temporary.



negate this liability, it seems that  $\gamma$  should be negative to account for possible future decreases in the certainty of the defendant's fault.<sup>167</sup> A closer examination shows that an increase in liability is also possible. It is known today, for example, that a special kind of cancer, malignant mesothelioma, is caused almost exclusively by asbestos.<sup>168</sup> Diseases falling into a category typically called "other cancer"<sup>169</sup> can be caused by asbestos or other factors, some of which are unknown. Plaintiffs' awards account for that difference: They are higher for mesothelioma victims because causation for them is certain while for the "other cancer" victims it is not.<sup>170</sup> Assume that five years from now scientists discover that a special subsection of "other cancer" can only be caused by asbestos exposure, and it turns out that eighty percent of the "other cancer" victims exposed to asbestos have this particular type of cancer. The award schedule based on today's science would have undercompensated "other cancer" sufferers after the discovery. Changes in science and medicine can thus lead to both over- and undercompensation of future plaintiffs. As with inflation, it is impossible to predict which party will benefit from these changes in the aggregate.

Judicial and legislative actions of the past decades substantially changed tort law.<sup>171</sup> There is no reason to think that the trend will not continue. Because the values of current claims are based on existing legal rules, future change in those rules will make the values obsolete. For example, most states follow the doctrine of contributory negligence. It is well established that smoking greatly increases the risk of lung cancer in persons exposed to asbestos. Today's mean recovery value for a lung cancer victim who had asbestos exposure is therefore reduced. The reduction accounts for the fact that some litigants lose their cases against asbestos manufacturers (or have their judgments substantially decreased) when they have a history of smoking. Assume that ten years from now the contributory fault defense is abandoned. Persons whose future recoveries are based on the outdated law would be undercompensated. The opposite example is just as possible.

Another variable that is very hard to estimate is change in social valuations. Examples are easy to find. The first Dalkon Shield verdict in 1975

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167. Such a decrease seems to be taking place in the breast implants litigation. See *supra* note 123.

168. See Schuck, *supra* note 20, at 546-47.

169. *E.g.*, Coffee, *supra* note 3, at 1395-96 (using the "other cancer" category).

170. For an example of the awards schedules in two asbestos-related settlements, see *id.* at 1395-96. Recoveries by the "other cancer" victims were scheduled to be 80% less than by the mesothelioma victims. See *id.*

171. Courts have expanded categories of compensable harms to include fear of future injury, medical-monitoring costs, and exposure-only nonimpairing conditions, see, e.g., Schuck, *supra* note 9, at 947 & n.25, while simultaneously limiting defenses, see, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1436 (2d Cir. 1993) (acknowledging that the government contractor defense had been limited since the resolution of the original case). For a look at recent legislative changes in the law of torts, see Mark Thompson, *Letting the Air out of Tort Reform*, A.B.A. J., May 1997, at 64.

awarded the plaintiff \$85,000.<sup>172</sup> Ten years later, comparable plaintiffs were routinely awarded millions of dollars.<sup>173</sup> Dow Corning lost its first verdict to a breast implants plaintiff in 1977, costing the company \$170,000.<sup>174</sup> In 1991, a federal jury awarded another breast implants plaintiff \$7.3 million.<sup>175</sup> Some of the increase in awards in each example was a result of inflation, but clearly not all of it. There may be good reason to expect that societal valuations will only increase in the future. Even assuming that this is true, there is hardly any basis for educated estimates about how fast such valuations will change for each particular injury covered by the settlement.

Yet another uncertainty comes from possible changes in social insurance mechanisms. If, for example, the United States were to adopt universal medical coverage, any settlement that awards medical-monitoring costs would be overcompensating the plaintiffs. On the other hand, if government-sponsored disability insurance were to become unavailable, awards determined in its presence would be too low. Again, it is probably more likely that change will be toward more social insurance than less. Again, it is impossible to predict when or if such change will occur and what its nature will be.

These are just some of the contingencies impounded in  $\gamma$ . It is not hard to recognize their existence, but it is hard to allocate the risk of their occurrence. Modern settlements like *Georgine* and *Ahearn* simply ignore these risks, effectively placing their burden on future plaintiffs. We should at least consider the alternatives. First, to the extent that any of these risks may be estimated with a reasonable degree of certainty at the time of global settlement negotiations, the court should adjust  $\gamma$  when it considers Inequality (3). Inflation seems to be the most likely candidate.<sup>176</sup> Second, perhaps in the future some other contingencies will become more predictable. When these contingencies materialize, the future claimants' representative should inform the court, which should adjust the awards accordingly.<sup>177</sup> Ultimately, however,  $\gamma$ -type risks will usually be extremely hard to predict. Yet they must be allocated.

Until now, I have argued for increased protection for future claimants. I now reverse myself and suggest allocating  $\gamma$ -type risks, with the two

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172. See *In re A.H. Robins Co.*, 880 F.2d 709, 711 (3d Cir. 1989).

173. See *id.* at 715.

174. See *West's Legal News: Torts and Personal Injury: Breast Implants Pathfinder*, *supra* note 123, at \*3.

175. See *id.*

176. Among the  $\gamma$ -risks, inflation can be evaluated with the highest degree of certainty. It is therefore not surprising that both courts and scholars have focused their attention on this  $\gamma$ -factor. See, e.g., *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2251 (1997); *Coffee*, *supra* note 3, at 1459.

177. Such modification should clearly take place, for example, if Congress were to adopt universal health coverage and the settlement provides for medical-monitoring costs. The procedural modification to the pro rata rule already presupposes a continuous monitoring by the futures' representative and a possible readjustment of the awards. It provides a convenient framework to monitor and adjust for future changes in  $\gamma$ -type risks.

exceptions described above, to future plaintiffs. Several reasons bring me to this decision. First, under the proposed regime, futures would recover much higher portions of their claims than they have received under the *Georgine*-type settlements. In part, the surplus would come from reducing present plaintiffs' recoveries; in part, it would come from the defendants. *Georgine*-type settlements provide no protection from the  $\gamma$ -type uncertainties at all. Changing to the proposed regime while placing the  $\gamma$ -type risk on the futures would still make them much better off. Second, defendants are much less likely to accept a global settlement and lose a substantial part of their wealth while being far away from bankruptcy without a guarantee of "total peace."<sup>178</sup> Total peace means no future liability regardless of any future contingencies, including  $\gamma$ -type risks. Third, the history of mass tort settlements is too short to estimate reliably the overall effect of the changes discussed above. It is not clear whether future claimants will, on average, benefit or lose from taking on  $\gamma$ -risks. Therefore, I suggest the following:  $\gamma$  should be defined to reflect reasonable inflation protection and any other contingency that can be reasonably estimated at the time of the settlement. When  $\gamma$ -type risks materialize in the future, courts may, if the change is certain enough, readjust the awards to the remaining plaintiffs. All other contingencies discussed above should be allocated to the future plaintiffs.

#### IV. WHY NOT BANKRUPTCY?

Many commentators have argued that bankruptcy gives futures more procedural and substantive protection than the pre-*Amchem* global settlement class actions.<sup>179</sup> For a reorganization plan to be approved, the argument goes, it must be put to a vote of all members of impaired classes of creditors,<sup>180</sup> the vote is taken only after a solicitation based on a detailed description of the plan,<sup>181</sup> the plan can be "crammed down" over the objection of a dissenting class only if strict fairness standards are met,<sup>182</sup> and the plan may not be imposed against the wishes of an impaired class that would fare better under liquidation.<sup>183</sup> Unlike a class representative whose fee completely depends on the success of the settlement, a lawyer for a creditors' committee is compensated independently. Nevertheless, the fact that bankruptcy gives future

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178. *In re Asbestos Litig.* (Flanagan v. Ahearn), 90 F.3d 963, 970 (5th Cir. 1996) (stating that the principal defendant "made it clear from the beginning that it would only entertain a global settlement if the settlement brought 'total peace'"), *vacated*, 117 S. Ct. 2503 (1997).

179. See sources cited *supra* note 23.

180. See 11 U.S.C. § 1126 (1994).

181. See *id.* § 1125.

182. See *id.* § 1129(b)(1).

183. See *id.* § 1129(a)(7).

claimants substantial procedural and substantive protection does not automatically make bankruptcy the best possible alternative.<sup>184</sup>

To begin with, the experience of the past decade has shown that the bankruptcy solution is "neither cheap nor final."<sup>185</sup> The Johns-Manville bankruptcy did not preclude Judge Weinstein from requesting more funds from the newly organized Manville Corp. when the trust created to compensate tort claimants proved to be inadequately funded.<sup>186</sup> Although the Second Circuit reversed Judge Weinstein's decision, it expressed doubt that the bankruptcy laws alone could effectively deal with the problem of mass tort future claimants.<sup>187</sup> Another lesson learned from the asbestos and the Dow Corning bankruptcies is that late plaintiffs recover only a minuscule percentage of their claims.<sup>188</sup> Lack of finality, inadequate funding, sharp devaluation of awards, and many other reasons make an early reorganization desirable.<sup>189</sup> The problem is that no party empowered to initiate reorganization has the incentive to do so.<sup>190</sup> The situation is dramatically different under the proposed global settlement regime. Both defendants and small claimants have numerous incentives to start settlement negotiations long before the firm's liabilities exceed its assets (and Inequality (4) becomes false).<sup>191</sup> Early settlement also benefits the futures, because they recover larger portions of their claims (than in bankruptcy), as the depletion of the defendant's assets by repetitive punitive damages awards ends relatively early.

Another advantage of the proposed regime over bankruptcy is the completeness of its treatment of future claims. Future claimants are treated in bankruptcy in two different ways. To the extent their claims are recognized, they benefit from the pro rata rule. Many of them, however, are not recognized.<sup>192</sup> As the court explained in *Ahearn*, "[C]ourts that have allowed representation of future tort claimants have left them in an uncertain position

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184. Cf. Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 382-89 (1994) (discussing underestimation, and thus undercompensation, of claims in mass tort bankruptcies).

185. Coffee, *supra* note 3, at 1388 (describing the Johns-Manville bankruptcy).

186. See *In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Blinken), 982 F.2d 721, 725-28 (2d Cir. 1992).

187. See *id.* at 753.

188. Just before Dow Corning filed for Chapter 11, the plaintiffs could count on, at best, 12% to 16% of their originally scheduled benefits and, at worst, less than 5%. See Coffee, *supra* note 3, at 1408. The share of the original claim values payable by the Manville Trust was 10%. See *In re Joint E. & S. Dist. Asbestos Litig.* (Keene Corp. v. Fiorelli), 78 F.3d 764, 770 (2d Cir. 1996).

189. See Roe, *supra* note 90, at 905.

190. See *id.* at 905-17.

191. See *supra* notes 143-150 and accompanying text.

192. Recent decisions have held that there must be some "prepetition relationship" between future claimants and the bankrupt defendant in order for the future claimants to have standing. *Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995). Other courts use a more liberal "conduct test," under which a right to payment arises when the conduct giving rise to the alleged liability has occurred. See *id.* Even these courts, however, presume some prepetition relationship between the debtor's conduct and the claimant. See *id.* at 1576-77.

that falls short of full 'creditor' status."<sup>193</sup> Thus, "it was and remains unclear whether [future claimants] constitute creditors who hold claims within the meaning of section 101(4) of the Bankruptcy Code."<sup>194</sup> In view of this uncertainty, futures will prefer a guaranteed recovery from the settlement fund (albeit lower than that available in the tort system) to the unclear litigation prospects left for those whose claims are excluded from the bankruptcy proceeding.<sup>195</sup> While individual futures' recoveries from the fund will be lower than in the tort system, their expected recoveries (and their overall recovery as a class) will be higher due to the great indeterminacy of receiving a future award in the courts.

Counterintuitively, defendants will also prefer to include the future claimants in a global settlement, despite their higher overall recovery. Leaving some "extra" futures with potential claims against the reorganized entity would place the entire burden of their compensation on the entity. Placing these claims in the global settlement would allow defendants to shift at least part of this burden to present plaintiffs whose recoveries would be reduced to satisfy the pro rata rule. The most likely source of extra cash would be the funds that would have otherwise been spent on punitive damages awards.

The proposed solution is thus preferable to bankruptcy because, unlike bankruptcy, it creates incentives to negotiate a settlement *early enough*. It prevents a wasteful depletion of the defendant's resources; it brings greater certainty to both the defendants and the futures; and it preserves higher recoveries for the future plaintiffs.

## V. CONCLUSION

The Supreme Court recently broke its long silence in the area of mass torts. It refused to go along with the "adventurous" use of Rule 23,<sup>196</sup> without which, commentators had argued, secure, fair, and efficient compensation of asbestos victims would be impossible. The Court's emphatically broad statement that any global mass tort class action would not satisfy Rule 23(b)(3)'s predominance prong, the Court's skepticism of inventory settlements with awards different from those in the global settlement, and the Court's express concern about inflation protection all suggest that at least one of the main reasons behind its decision was its concern about inadequate protection of future claimants by current class action mechanisms.

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193. *In re Asbestos Litig.* (Flanagan v. Ahearn), 90 F.3d 963, 985 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997).

194. *In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Blinken), 982 F.2d 721, 752 (2d Cir. 1992) (Feinberg, J., concurring in part and dissenting in part) (internal quotations omitted).

195. Notably, in the Piper Aircraft bankruptcy it was the future claimants' representative who argued for their inclusion in the Piper creditors' ranks. *See Epstein*, 58 F.3d at 1575.

196. *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2247 (1997).

In this Note, I have argued in favor of a regime that could (1) provide for a fair and efficient resolution of mass tort claims; (2) give more protection to future claimants; and (3) satisfy the Court's requirements of structural and substantive protection under Rule 23(a). I have called this regime a *global limited fund mandatory settlement class action with a modified pro rata distribution of benefits for present and future claimants*.

The regime rests on the claim that pro rata distribution between similarly situated present and future claimants is both fair and responsive to the Court's concerns. It increases certainty and eliminates the costs of opportunistic behavior. It is also consistent with the law of bankruptcy. Several modifications to the pro rata rule aim at protecting the futures from external risks, most notably inflation. There are two main prerequisites for a successful global settlement. First, the mass tort must be globally mature. Second, the present value of present and future claims must exceed the going concern value of the defendant firm, while the firm's assets must exceed its liabilities. When this occurs, a mandatory limited fund global settlement under Rule 23(b)(1)(B) should follow.<sup>197</sup> This procedural solution has a better chance of judicial approval in light of the *Amchem* holding and analysis; it provides for optimal timing; and, above all, it gives unmatched protection to future claimants.

Many critical issues remain to be considered. I have concentrated on only what I perceived to be the critical questions that must be resolved before any other issues arise. Is the class action device still available to resolve mature mass torts? Despite the *Amchem* decision, I think it is. Should it be possible to strike deals like *Georgine* and *Ahearn* where present plaintiffs receive greater amounts than future claimants with identical injuries only because the latter were too late to file a claim or too "unfortunate" not to become injured early enough? The Supreme Court has said no, not *these* kinds of deals. There are, however, alternatives. One of them is suggested in this Note. Many more

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197. To be sure, all of these conditions may not obtain for every mass tort. Yet, ironically, they *did* obtain in the very case considered by the Supreme Court. The situation was ripe for the global settlement under the proposed regime just before the *Georgine* deal and the accompanying inventory settlements were negotiated. Asbestos was clearly the most mature mass tort. Information about future claimants was sufficient to classify it as globally mature. While several asbestos manufacturers had gone bankrupt, all 19 *Georgine* defendants were *financially viable companies*. See Koniak, *supra* note 49, at 1047. Yet all parties involved in the case, including class representatives, the plaintiffs' bar, defendants, and the *Georgine* court itself, were concerned about defendants' *possible future* bankruptcies. See *id.* at 1099-100 (citing testimony by various parties regarding their concerns about future liability as well as the concerns of the *Georgine* court). In other words, there was probably a good chance that both Inequalities (3) and (4) were true. Thus, *Georgine* is an existing example that a real mass tort may satisfy the requirements of the proposed regime. Moreover, there is a reason to expect that more mass torts will reach global maturity in the future than have in the past. Many earlier mass torts never globally matured (and went straight into bankruptcy) because of unlimited awards and relaxed substantive doctrines. All of these rules are under attack today. See Thompson, *supra* note 171, at 65. As the states limit punitive damages, cap noneconomic awards, and modify their rules prohibiting juries from learning of collateral sources for paying damages, it becomes more and more likely that defendant firms will remain financially viable for a considerable time *after* their total liabilities (including those to future claimants) begin to exceed their value as a going concern. Therefore, more firms will be able to satisfy the requirements of the proposed regime.

will appear as mass tort scholars reflect on the Court's decision. There is still a future for future claimants after *Amchem Products, Inc. v. Windsor*.