NOT SO "FREE AND CLEAR": A CRITICAL EXAMINATION OF THE *PIPER* TEST IN LIGHT OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

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Chapter 11 of the Bankruptcy Code provides for a complete discharge of "claims" against the debtor once a plan of reorganization has been confirmed. The approach taken by bankruptcy courts to define a bankruptcy claim has varied. One such approach—the Piper *test—has sought to balance discharging the maximum amount of claims against a debtor while still providing due process to the debtor's claimants, including future claimants. The* Piper *test defines dischargeable claims to include those claims that accrued post-petition, but before plan confirmation. This Note seeks to explore the effectiveness of the* Piper *test in light of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which has significantly altered the bankruptcy process by incentivizing debtors to enter and exit Chapter 11 quickly. The consequentially reduced interval between petition and confirmation has weakened the effectiveness of the* Piper *test, potentially leaving many more liabilities against a debtor outstanding after the bankruptcy process is complete and thereby threatening the going concern value of the reorganized debtor. In light of such an effect, this Note advocates an alternative approach to handling bankruptcy claims. This Note recommends defining a claim as broadly as possible so that the going concern value of reorganized debtors is preserved, while mitigating the resulting due process concerns by adopting wider usage of specific mechanisms to preserve due process to the debtor's current and future claimants.*

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Introduction

Imagine a company, ProductCo, that manufactures and sells high-risk products. ProductCo is distressed and can no longer operate with its current capital structure.[1] ProductCo elects to enter bankruptcy under Chapter 11, confirms a plan of reorganization, and is able to successfully exit bankruptcy "free and clear of all claims and interests of creditors, equity security holders, and of general partners."[2] BuyerCo, seeing that ProductCo is now a viable business, acquires ProductCo[3] from its existing shareholders.[4] Further imagine a

[1] A company is "distressed" when it "is having difficulty in dealing with its debt—either servicing its interest and principal amortization payments, addressing covenant breaches in debt instruments, paying or refinancing debt at maturity, or raising additional debt to address liquidity needs." Harold Novikoff et al., Distressed Mergers and Acquisitions 1 (2012), *available at* http://www.wlrk.com/files/2012/DistressedMAOutline.pdf.

[2] 11 U.S.C. § 1141(c) (2012).

[3] Bankruptcy cases that include a sale of certain assets pursuant to 11 U.S.C. § 363 are also a viable alternative M&A strategy, but such § 363 sales are outside the scope of this Note. *See* Novikoff et al., *supra* note 1, at 47 ("When a company enters bankruptcy, the company can be acquired either through an auction or a plan of reorganization. Auctions conducted under section 363 of the Bankruptcy Code generally are expeditious processes to sell assets that are rapidly losing value.").

[4] In cases where creditors of a company are not paid in full, the pre-petition shareholders are often extinguished and new shares are issued to the former creditors who then become the post-petition shareholders. *See* Tiffany Kary, *Why People Buy Stock in*

customer who had purchased a high-risk product from ProductCo prior to its petition for bankruptcy. The product worked well at first, but then it malfunctioned, seriously injuring the buyer. This accident occurred well after ProductCo's exit from bankruptcy and the BuyerCo acquisition. Whether the customer can bring a successful action against BuyerCo depends on whether the injured customer would have had a "claim," as defined in § 101(5) of the Bankruptcy Code, against ProductCo when ProductCo was a debtor in possession (DIP) in bankruptcy.[5] All claims, according to § 1141(c) of the Bankruptcy Code, would have been discharged (i.e., no longer justiciable) upon confirmation of ProductCo's plan of reorganization.[6]

The existence of "long-tail" liabilities[7] creates real potential for future liabilities not discharged in bankruptcy to be brought against reorganized businesses that have successfully exited Chapter 11, threatening their viability. In the context of an asbestos-related Chapter 11 case, the Bankruptcy Code and a well-developed body of case law provide a means to protect the reorganized debtor from unbridled future liability while ensuring representation and recovery for future claimants. Asbestos bankruptcies are not the norm, however. Outside the narrow asbestos context, there still exists the potential for a reorganized debtor—and its successor in interest in the case of a merger or acquisition—to be burdened with potentially crippling long-tail products liability.[8]

Bankrupt Companies, BLOOMBERG BUSINESSWEEK (May 19, 2011), http://www.businessweek.com/magazine/content/11_22/b4230047133608.htm ("Unless creditors are paid in full, shareholders get nothing. If the company reorganizes, any stock in the new company usually goes to creditors.").

[5] The term "debtor in possession" applies to a company that has filed a petition for bankruptcy relief, but remains "in possession"—or in "control"—of the company's assets. *See* Thomas G. Kelch, *The Phantom Fiduciary: The Debtor in Possession in Chapter 11*, 38 WAYNE L. REV. 1323, 1325 (1992).

[6] § 1141(c); *see also* Universal Suppliers, Inc. v. Reg'l Bldg. Sys., Inc. (*In re* Reg'l Bldg. Sys., Inc.), 254 F.3d 528, 531 (4th Cir. 2001) (noting that under § 1141(c), a confirmed plan extinguishes all unpreserved liens against the DIP, and that "every other circuit court of appeals . . . has reached the same conclusion").

[7] The term "long-tail" liability "refers to legal obligations that emerge years or decades after the conduct of the responsible party." *See* Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal*, 87 NW. U. L. REV. 897, 898 n.8 (1993).

[8] Given "modern design, engineering and materials," many a product now sold will "stay in circulation long after its original manufacturer has . . . disappeared." Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435, 440 (1999); *see also* Sheldon S. Toll, *Bankruptcy and Mass Torts: The Commission's Proposals*, 5 AM. BANKR. INST. L. REV. 363, 363 (1997) ("Mass tort litigation looms large on the American horizon. A by-product of our highly technical, industrial and litigious society are claims regarding chemicals and other materials that sometimes prove to be toxic or hazardous to large numbers of persons.").

Traditionally, courts have used a number of methods to define a § 101(5) claim.[9] In choosing one method over another, bankruptcy courts have struggled over where to draw the line in determining whether a post-petition liability would be considered a dischargeable § 101(5) claim.[10] The struggle stems from trying to balance two competing concerns: On the one hand, a broad definition of a claim effectuates the Bankruptcy Code's policy of discharging as many obligations as possible within the bankruptcy system; on the other hand, a claim definition that is *too* broad may potentially violate the constitutional guarantee of due process if a court extinguishes the rights of unknown claimants without adequate notice.[11] In 1995, the Eleventh Circuit in *Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp.* (*In re Piper Aircraft Corp.*) evaluated the traditional approaches and fashioned a compromise test—now known as the *Piper* test—to balance such concerns.[12] Under the *Piper* test, a § 101(5) bankruptcy claim exists if the effects of a DIP's pre-petition conduct manifested[13] before the final confirmation of a reorganization plan.[14] The *Piper* test was an adequate compromise at its inception, when bankruptcies often lasted for years.[15]

Ten years after the establishment of the *Piper* test, Congress passed sea-change bankruptcy legislation: the Bankruptcy Abuse

9 The traditional tests are: (1) the accrued state law test; (2) the conduct test; and (3) the pre-petition relationship test. I discuss these tests in depth *infra* Part I.B.2.

10 "There is long-standing controversy among courts as to where and how to draw the line between dischargeable claims and potential future claims that cannot be cut off . . . through the confirmation of a reorganization plan." NOVIKOFF ET AL., *supra* note 1, at 120.

11 The Third Circuit recognized this concern in *Wright v. Owens Corning*: "[T]reatment of unknown future claims involves two competing concerns: the Bankruptcy Code's goal of . . . resolving all claims arising from the debtor's conduct prior to its emergence from bankruptcy; and the rights of individuals . . . damaged by that conduct but . . . unaware of the potential harm at the time of . . . bankruptcy." 679 F.3d 101, 105 (3d Cir. 2012).

12 58 F.3d 1573, 1576–77 (11th Cir. 1995) [hereinafter *In re Piper*].

13 For example, if the DIP manufactures a product with a latent defect which later appears and injures the customer.

14 A plan of reorganization is "confirmed" once the bankruptcy court determines that "(1) the plan is feasible; (2) it is proposed in good faith; and (3) the plan and the proponent of the plan are in compliance with the Bankruptcy Code." *Reorganization Under the Bankruptcy Code*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx (click "Acceptance of the Plan of Reorganization" hyperlink) (last visited Aug. 4, 2013).

15 *See infra* text accompanying note 82 (noting that at the time of the *Piper* test's formulation, bankruptcies had an average duration of 690 days, or 1.9 years, according to one study); *see also infra* text accompanying notes 112–13 (citing the bankruptcy of Eastern Airlines, which lasted 2114 days, or about six years).

Prevention and Consumer Protection Act of 2005 (BAPCPA).[16] Among BAPCPA's reforms was a modification that capped the exclusivity period (i.e., the period in which a DIP has the exclusive right to propose a plan of reorganization) at a maximum of eighteen months. Many commentators believe that this exclusivity-period cap pressures debtors to propose plans more quickly, leading to faster confirmations.[17] In fact, many debtors now use "prepackaged" bankruptcies as a way to enter and exit Chapter 11 very quickly.[18]

Given this pressure and the shrinking petition-to-confirmation interval, those districts that interpret a claim using the once-innovative *Piper* test will theoretically see cases with fewer dischargeable § 101(5) claims that could be asserted against the DIP by claimants. The liabilities that do not receive a discharge and survive bankruptcy can then be asserted against the reorganized entity (or a successor that acquires such entity under a state law successor-liability theory), which can risk substantial financial distress.

In this Note, I argue that this potential chain of events undermines one of the central policies behind the United States bankruptcy system, namely "preserv[ing] . . . going concern surplus for the benefit of [a DIP's] creditors and investors"[19] through successful reorganization.[20] In response, those bankruptcy courts that utilize the *Piper* test should interpret § 101(5) claims more broadly. Furthermore, I assert that any due process issues that would be raised by such a broad interpretation can be addressed through multiple safeguards: a future claims representative (FCR) appointed at the time of the petition, the establishment of a compensatory mechanism for future claimants, and a subsequent channeling injunction issued by the bankruptcy court. This Note specifically adds to the bankruptcy literature by

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16 Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.); *see also* Neill D. Fuquay, Note, *Be Careful What You Wish for, You Just Might Get It: The Effect on Chapter 11 Case Length of the New Cap on a Debtor's Exclusive Period to File a Plan*, 85 Tex. L. Rev. 431, 431 (2006) (noting that BAPCPA was "one of the most comprehensive reforms of the bankruptcy code since the Bankruptcy Reform Act of 1978").

17 *See infra* notes 118–19 and accompanying text (noting commentary on BAPCPA-induced pressure to file plans faster).

18 *See infra* note 120 (defining "prepackaged bankruptcy"). For an example of a very quick prepackaged bankruptcy resolution, see *infra* note 122.

19 James Steven Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 Harv. L. Rev. 973, 975 (1983).

20 "A going-concern surplus exists to the extent that the expected value of the business's ongoing operations exceeds the value that could be generated by putting the assets to some other use." Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 685 (2003).

reexamining the *Piper* test after the passage of BAPCPA, a major overhaul of the Bankruptcy Code.

Part I presents an overview of relevant bankruptcy concepts. It also examines the viability of post-confirmation tort suits, which would provide a basis for litigation against reorganized debtors that could not discharge all future liability claims in the bankruptcy process. Part II explores BAPCPA's effect on the bankruptcy exclusivity period and the speed at which DIPs confirm plans of reorganization. Specifically, Part II explores the rise of the "prepackaged" bankruptcy form as a proxy for the increased confirmation speed among DIPs. It then evaluates the viability of the *Piper* test to classify a critical mass of future liabilities as § 101(5) claims in light of BAPCPA's effect on confirmation speed. It notes the tension that BAPCPA creates with the Bankruptcy Code's policy to promote DIPs as a going concern through successful reorganization. Finally, Part III advocates for the broadest interpretation of a § 101(5) claim to replace the *Piper* test. It posits that any due process concerns that may result from implementing such a broad test can be addressed through the wider usage of FCRs, compensation mechanisms, and channeling injunctions.

I
Overview of Relevant Bankruptcy Concepts and Post-Confirmation Liability

A. *The Policy of Preserving DIPs as Going Concerns and Its Due Process Tension*

When a company is distressed and can no longer service its debt, it becomes beholden to its creditors, who can demand that the company be sold piece by piece until its debts are satisfied.[21] In most cases, however, a company is worth more than the sum of its parts, and thus has a "going concern" surplus.[22] To the extent that a DIP has such a surplus, a central aim of Chapter 11 bankruptcy is to preserve the surplus so that it is intact and available post-bankruptcy.[23] As the Supreme Court proclaimed, "the two recognized policies underlying Chapter 11 [are] preserving going concerns and maximizing property

[21] *See* Novikoff et al., *supra* note 1, at 9 (noting that "[i]f a financially distressed company cannot restructure its debt with the cooperation of its lenders . . . then it may be forced to take other measures" such as selling its assets or businesses).

[22] *See supra* note 20 (defining a "going concern" surplus).

[23] *See* Richard V. Butler & Scott M. Gilpatric, *A Re-Examination of the Purposes and Goals of Bankruptcy*, 2 Am. Bankr. Inst. L. Rev. 269, 278 (1994) ("[A] common goal espoused in virtually all bankruptcy scholarship is preserving the 'going concern surplus' of a firm . . . .").

available to satisfy creditors."[24] The procedures embodied in Chapter 11 prevent creditors from immediately seeking repayment from insolvent DIPs, so that DIPs can have time to "assess [their] affairs, effect economies in [their] operations, and attempt to reorder [their] financial structure[s]."[25]

Once a plan is proposed and confirmed—no matter how quickly—the Bankruptcy Code provides for an immediate discharge of all "claims."[26] Specifically, § 1141(c) of the Bankruptcy Code provides that "after confirmation of a plan, the property dealt with by the plan is *free and clear of all claims and interests* of creditors, equity security holders, and of general partners in the debtor."[27] This discharge order is a key tool in preserving going concern surplus. When a claim is discharged in bankruptcy, the holder of that cause of action can no longer pursue it outside of the bankruptcy case.[28] A DIP thus seeks to discharge as many claims as possible within the bankruptcy process, because this facilitates its "fresh start."[29]

Notwithstanding the very broad language in § 1141(c) purporting to extinguish all claims, however, a reorganized debtor may not be free and clear from all liabilities—specifically those liabilities that

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24 Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 452 (1999).

25 Rogers, *supra* note 19, at 975.

26 *See* George M. Treister et al., Fundamentals of Bankruptcy Law 425 (7th ed. 2010) ("Congress in Chapter 11 intended that the confirmed plan would . . . discharg[e] all obligations to creditors, whether or not the creditors participated in the reorganization process."); Nathan F. Coco, Note, *An Examination of Successor Liability in the Post-Bankruptcy Context*, 22 J. Corp. L. 345, 356 (1997) ("[I]f a successor liability action 'is in fact one properly characterized as a "claim" within the meaning of the Bankruptcy Code . . . then the sale of assets via the bankruptcy process could certainly transfer the assets free of any such *in personam* bankruptcy claims against the estate.'" (quoting Fairchild Aircraft, Inc. v. Cambell (*In re* Fairchild Aircraft, Corp.), 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998))).

27 11 U.S.C. § 1141(c) (2012) (emphasis added). It is important to note that the discharge is only available to those businesses that emerge from Chapter 11 as reorganized entities; the discharge is not available to those businesses that cease operating through liquidation. *See* § 1141(d)(3) (stating that there is no discharge if "(A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title"); Elizabeth Warren, Chapter 11: Reorganizing American Business 160 (2008) ("For those businesses that confirm a Chapter 11 plan that liquidates the business . . . the discharge remains unavailable.").

28 *See* Bd. of Cnty. Comm'rs v. Coleman Am. Props., Inc. (*In re* Am. Props., Inc.), 30 B.R. 239, 246 (Bankr. D. Kan. 1983) ("After confirmation of a chapter 11 plan, . . . [a] creditor no longer can enforce its pre-confirmation lien rights; a creditor must seek to enforce its lien rights granted in the plan, rather than its pre-chapter 11 lien rights.").

29 *See infra* note 153 and accompanying text (explaining how a broad discharge of claims facilitates a DIP's fresh start).

arise some time after the confirmation of a plan.[30] Indeed, the Due Process Clause of the Fifth Amendment limits the scope of the discharge[31] and "overrides the literal statutory language if the creditor received no notice at all."[32] Future claimants who do not surface until well after a bankruptcy would be protected by this constitutional mandate, such that their claims would not be considered discharged within the bankruptcy process. For example, the DIP in *In re Grumman Olson Industries, Inc.* "manufactured and sold products for the truck body industry that were mounted on [automobile] chassis."[33] The DIP manufactured one of these products *before* its petition for bankruptcy, but the product injured a customer *after* the bankruptcy was consummated.[34] The court held that there could not be a valid and dischargeable § 101(5) claim because the injured customer "did not receive adequate notice of the bankruptcy" sufficient to satisfy due process.[35] This requirement to provide sufficient due process to future claimants creates a tension because a DIP may not receive a complete "fresh start" if it cannot discharge certain contingent claims that have not yet come to fruition.[36]

This tension arises directly in the definition of a § 101(5) claim. If a court interprets a claim too broadly and extinguishes all liabilities without any further protective measures, it may run afoul of the Due Process Clause.[37] Nonetheless, a broad interpretation of a claim can

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[30] *See* Treister et al., *supra* note 26, at 425 ("Whether, despite the broad statutory language, confirmation can constitutionally discharge the claim of a creditor who lacks timely notice or knowledge of the pendency of the case is not clear, because of the in rem nature of a bankruptcy case.").

[31] *See infra* note 35 and accompanying text (noting the limits on the scope of the Chapter 11 discharge imposed by the Due Process Clause); *see also In re* Huffy Corp., 424 B.R. 295, 301 (Bankr. S.D. Ohio 2010) ("[M]any courts conclude that there are outer limits to what may constitute a claim dischargeable in bankruptcy . . . . With respect to contingent claims, courts often discuss the need for adequate notice to creditors and procedural due process requirements found in the Fifth Amendment.").

[32] Treister et al., *supra* note 26, at 425 (citation omitted).

[33] Olson v. Frederico (*In re* Grumman Olson Indus., Inc.), 445 B.R. 243, 245 (Bankr. S.D.N.Y. 2011).

[34] *See id.* at 247 (noting that the customer sustained injury in 2008 after the DIP had exited bankruptcy, but the product had been manufactured and sold in 1994 prior to the filing of the bankruptcy petition).

[35] *See id.* at 254. According to the court, "[t]o satisfy due process, a party seeking relief must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[36] *See id.* (holding that the injured customer was not bound by the outcome of the bankruptcy case).

[37] *See infra* notes 52–60 and accompanying text (exploring the potential consequences of defining a claim too broadly).

ensure the long-term viability of a reorganized business as a going concern by adjudicating and discharging as many liabilities as possible through bankruptcy.[38] Without an adequate discharge, certain liabilities would survive the bankruptcy process and could threaten going concern surplus down the line.

I next turn to the various ways that bankruptcy courts have traditionally balanced these concerns through competing definitions of § 101(5) claims. I also examine the compromise test fashioned by the Eleventh Circuit: the *Piper* test.

B. Interpreting a "Claim" Under § 101(5) of the Bankruptcy Code

1. Section 101(5) of the Bankruptcy Code and Related Policies

How a § 101(5) claim is defined has profound implications for a DIP and the administration of its bankruptcy case. Firstly, only holders of claims have rights to distribution of the assets belonging to the DIP's estate.[39] Secondly, all claims are discharged upon the DIP's confirmation of a plan of reorganization.[40] The Bankruptcy Code in § 101(5) defines a claim as a right to payment regardless of whether such right has been "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[41] As this language conveys, Congress defines a claim very broadly. This expansive definition reflects the goal of handling all of a DIP's legal relationships within the orderly bankruptcy system.[42] One result is that future damages that have not yet come to fruition can be included within the definition of a § 101(5) claim.[43]

By employing the various methods of defining a claim, which I will discuss *infra*, courts are trying to balance Congress's intention of handling within bankruptcy all of a DIP's legal relationships with

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38 *See supra* notes 28–36 and accompanying text (noting the tension between the requirement of Due Process and the fresh start policy of the Bankruptcy Code).

39 *See* TREISTER ET AL., *supra* note 26, at 249 ("[D]istribution of the assets of the estate is made only to holders of 'claims.'").

40 *See supra* notes 26–27 and accompanying text (examining the effect of confirming a plan of reorganization).

41 11 U.S.C. § 101(5) (2012).

42 *See* TREISTER ET AL., *supra* note 26, at 249 ("Congress's policy in the [Bankruptcy] Code is to allow a bankruptcy case to settle all of a debtor's legal relationships."). The legislative history behind the Bankruptcy Code is illustrative. As one House Report notes, "all legal obligations of the debtor, *no matter how remote or contingent*, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266 (emphasis added).

43 *See* TREISTER ET AL., *supra* note 26, at 249 ("[D]amages that will arise in the future . . . that are yet to be determined are all included within the definition [of a claim].").

fairness to unknown, future victims of torts set in motion by a DIP's pre-petition conduct.[44] This balance is especially hard to strike for those DIPs that produce products that are prone to late-manifesting liabilities.[45]

2. *Traditional Judge-Made Tests to Define § 101(5) Claims*

Before the advent of the *Piper* test, there were a handful of tests used by bankruptcy courts to classify § 101(5) claims. The tests varied in terms of the temporal threshold for a § 101(5) claim, and some are still followed to various degrees today.

Under the accrued state law test, § 101(5) requires a bankruptcy court to look to state law to see if a claim exists that can be handled within the bankruptcy case.[46] The Third Circuit conceived this test in *In re M. Frenville Co.*[47] The *Frenville* court noted that "while federal law controls which claims are cognizable under the [Bankruptcy] Code, the threshold question of when a right to payment arises, absent overriding federal law, is to be determined by reference to state law."[48] Many commentators were critical of the test and its "practical and theoretical flaws,"[49] including its unnecessary narrowness.[50] Eventually the test was abandoned and is no longer in use today.[51]

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[44] *See id.* at 251 ("[A]ll of the debtor's conduct necessary for liability may have occurred but some external event necessary for liability has yet to happen."); *see also* Coco, *supra* note 26, at 357 ("While it is almost universally recognized that Congress intended to give the term 'claim' a broader interpretation than that of the earlier Bankruptcy Act, courts and commentators have struggled to find the outer boundaries of the definition." (internal citation omitted)).

[45] *See* TREISTER ET AL., *supra* note 26, at 251 (noting the difficulty courts have had determining which potential rights to recovery for long-tail liabilities should be considered "claims" within bankruptcy). Examples of such products run the gamut. *See infra* text accompanying note 190.

[46] Coco, *supra* note 26, at 358 (discussing this test).

[47] Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 336–37 (3d Cir. 1984).

[48] *Id.* at 337 (internal quotation marks omitted).

[49] *See* Coco, *supra* note 26, at 358–59 & nn.96–97 (collecting criticism). The accrued state law test suffers from three main flaws. First, the test relies on "*state* law to provide content to the scope of the Bankruptcy Code," which contravenes Congress's intention that non-bankruptcy law should not drive the definition of a claim. *Id.* at 358 (emphasis added). Second, by relying on state law, it provides an opportunity for circumvention by allowing states to "simply tinker[ ] with their own definition of a 'right to payment.'" *Id.* at 359. Third, relying on state law to define a § 101(5) claim will lead to varying definitions of a claim and thus "inconsistent results because [of] slight differences in state law." *Id.*

[50] *See* Matthew Petrie, Comment, *When a Claim Arises and Why It Matters*, 16 NORTON J. BANKR. L. & PRAC. 599, 602 (2007) (noting the narrowness of the accrued state law test).

[51] The Third Circuit, the last remaining circuit to use the accrued state law test, recognized the perceived shortcomings of the approach and changed course. *See* Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010) ("[T]here seems to

The conduct test, on the other hand, focuses solely on a DIP's pre-petition conduct to determine if there is a § 101(5) claim. The conduct test recognizes a claim irrespective of when the *effects* of the DIP's actions take place, so long as the actions were performed by the DIP pre-petition.[52] For example, if ProductCo sold a number of products with latent defects prior to filing a bankruptcy petition, those buyers would have § 101(5) claims against ProductCo even if the product malfunctions *after* ProductCo has emerged from bankruptcy. Accordingly, because of the broad scope of the test, the § 101(5) claims of future tort victims will be extinguished long before the injuries have manifested so long as the injuries can be tied to ProductCo's pre-petition conduct (i.e., the sale of the defective products).[53]

As the Second Circuit has expressed, however, the conduct test can "yield[ ] questionable results"[54] that are constitutionally dubious. Fully extinguishing the claims of post-confirmation tort victims is problematic in such instances where they are not given any notice, and thus will be denied the ability to prosecute their claims against a DIP within the bankruptcy process.[55] Courts have responded to these due process concerns in the narrow context of asbestos-related bankruptcies.[56] In these cases, any potential due process issue is muted by the fact that there is normally an appointed future claims representative (FCR)[57] and an established trust, which is set up to settle future

be something approaching a consensus among the courts that a prerequisite for recognizing a 'claim' is that the claimant's exposure to a product giving rise to the 'claim' occurred pre-petition, even though the injury manifested after the reorganization."). Furthermore, the Third Circuit has since adopted a test that is similar to the *Piper* test. *See infra* note 85 and accompanying text.

[52] Coco, *supra* note 26, at 359.

[53] *See id.* at 360 (noting that, under the conduct test, "claims" of tort victims are extinguished before their injuries appear).

[54] United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1003 (2d Cir. 1991). The Court noted that there are "enormous practical *and perhaps constitutional problems* . . . [when future] potential victims are not only unidentified, but there is no way to identify them." *Id.* (emphasis added).

[55] *See* Coco, *supra* note 26, at 360 ("To deny tort victims the opportunity to prosecute their claims in such instances runs afoul of traditional notions of due process, especially where the injuries were not at all foreseeable and the victims were given no notice of the bankruptcy proceeding.").

[56] *See infra* Part III.A (describing how courts have addressed due process concerns within the context of asbestos bankruptcies).

[57] An FCR is "a court-appointed agent named to represent then-nameless, faceless future victims of claimed tortious acts already committed by the corporate debtor." Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 44 (2000).

post-confirmation claims as they come to fruition.[58] Outside this narrow context, however, where FCRs and special compensatory trusts are not commonplace, the due process issue looms. Nevertheless, the conduct test has a discrete judicial following in a number of jurisdictions.[59] Courts using the conduct test find that it is more in line with the Bankruptcy Code's objective of handling the maximum number of DIP liabilities within the bankruptcy case than alternative tests.[60]

Finally, other courts have instead constructed a narrower definition of a § 101(5) claim, limiting it to those tort victims with a defined pre-petition relationship with the DIP.[61] The pre-petition relationship test, like the conduct test, requires some form of pre-petition conduct by the DIP.[62] Additionally, however, the pre-petition relationship test requires "some *pre-bankruptcy* privity, contact, impact, or hidden harm to the ultimately injured plaintiff or indemnity claimant," effectively limiting the scope of the test.[63] In denying the existence of a § 101(5) claim against a bankrupt manufacturer through an embrace of the pre-petition relationship test, the Fifth Circuit noted that "the absence of [any evidence of pre-petition contact, privity, or other relationship between the DIP and the litigants] precludes a finding by the district court that the claims asserted by [the litigants] were discharged

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58 Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L.J. 329, 336 (1996) (describing the trust setup in two asbestos cases).

59 *See* Petrie, *supra* note 50, at 603 (noting the judicial adherence to the conduct test in both the Seventh and Tenth Circuits); *see also* Watson v. Parker (*In re* Parker), 313 F.3d 1267, 1269 (10th Cir. 2002) ("We now adopt the conduct theory as the one more in tune with the plain language and the policy underlying the Bankruptcy Code."); Fogel v. Zell, 221 F.3d 955, 961 (7th Cir. 2000) ("[C]ourts, including our own, . . . allow[ ] products-liability . . . claims to be filed in bankruptcy as long as the conduct giving rise to the claim . . . had occurred before the petition in bankruptcy had been filed.").

60 *See* Petrie, *supra* note 50, at 603 (observing that the conduct test is "more in tune with the plain language and policies of the Bankruptcy Code as it deals with the maximum amount of claims inside bankruptcy").

61 *See In re* Piper Aircraft Corp., 162 B.R. 619, 625–26 (Bankr. S.D. Fla. 1994) [hereinafter *Piper I*] ("[S]everal courts have recognized 'claims' only for those individuals with some type of prepetition relationship with the Debtor."), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd as modified sub nom. In re Piper*, 58 F.3d 1573 (11th Cir. 1995).

62 *See* Epstein v. Official Comm. of Unsecured Creditors (*In re* Piper Aircraft Corp.), 168 B.R. 434, 439 (S.D. Fla. 1994) [hereinafter *Piper II*] ("The Court notes that the Prepetition Relationship Test and the Conduct Test are not mutually exclusive."), *aff'd as modified sub nom. In re Piper*, 58 F.3d 1573 (11th Cir. 1995).

63 *See* Pettibone Corp. v. Ramirez (*In re* Pettibone Corp.), 90 B.R. 918, 931 (Bankr. N.D. Ill. 1988) (emphasis added); *see also* Debra A. Dandeneau et al., *Mass Tort Claims in Chapter 11 Cases*, *in* 1 REORGANIZING FAILING BUSINESSES, 14-1, 14-12 (Marvin E. Jacobs et al. eds., 2006) (stating that the pre-petition relationship test "simply grafts the additional requirement onto the conduct test that there be some prepetition or preconfirmation relationship" (internal citations omitted)).

in [the DIP's] bankruptcy proceedings."[64] In the case of ProductCo, the injured party would not only have to buy the product pre-petition, but the product also would have to *malfunction* pre-petition and injure the buyer before the buyer would have a § 101(5) claim against ProductCo.

Even though the pre-petition relationship test better addresses the potential due process issue inherent in the conduct test, some courts have nonetheless criticized the test as being overly restrictive and at odds with the goal of handling as many of the DIP's liabilities within the bankruptcy system as possible.[65] The Eleventh Circuit, in *In re Piper Aircraft Corp.*, sought to resolve this apparent tension between fairness and defining a claim as broadly as possible.[66]

3. *The Great Compromise: The* Piper *Test*

The Piper Aircraft Corporation (Piper)—the DIP underlying the *In re Piper Aircraft Corp.* decision—was in the business of designing and manufacturing airplanes and airplane parts.[67] At the time of its petition for Chapter 11, Piper had between 50,000 and 60,000 operational aircraft within the United States.[68] The bankruptcy court recognized that given the magnitude of outstanding aircraft still in operation, coupled with the complex nature of the machinery and the likelihood of malfunction, some people would inevitably be injured or killed in the future.[69] Furthermore, the court realized that some of the injuries or deaths might be the result of pre-petition design or construction defects in the planes.[70]

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64 Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994).

65 *See* Dandeneau et al., *supra* note 63, at 14-13 (noting that even though "the [pre-petition] relationship test ostensibly addresses the 'fairness' problem that has caused some courts to question the conduct test, some courts have questioned whether 'accommodating notions of fairness . . . compels [such] a restriction in the breadth . . . of what might be a claim'" (quoting Fairchild Aircraft, Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 925 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998))).

66 *See In re Piper*, 58 F.3d 1573, 1577 (11th Cir. 1995) (balancing the argument "that any right to payment arising out of the [debtor's] prepetition conduct . . . no matter how remote, should be deemed a claim" against the argument that "the scope of claim cannot extend so far as to include unidentified . . . individuals with no discernible prepetition relationship to [the debtor]").

67 *See Piper I*, 162 B.R. 619, 620 (Bankr. S.D. Fla. 1994) (recounting that Piper was in the business of "designing, manufacturing and selling general aviation aircraft and associated spare parts").

68 *Id.* at 621.

69 *See id.* (noting that given the number of outstanding Piper aircraft in circulation, "[p]eople [would] be killed or injured").

70 *See id.* ("Some of the crashes may be caused in whole or in part by design or construction defects in the planes or in their parts."); *see also* Tara Adyanthaya, *An Analysis of* In re Piper Aircraft Corporation, 47 MERCER L. REV. 927, 927–28 (1995) ("Because many Piper aircraft were operational at the time of the filing, it was a statistical certainty that

Piper's plan of reorganization called for a court-appointed legal representative for all the future claimants, which the court granted.[71] The legal representative then filed a $100,000,000 claim against the DIP based on a statistical estimation of post-confirmation damages to future claimants.[72] The committee representing the unsecured creditors immediately objected to the validity of the claim under § 101(5).[73] The future claimants' legal representative advocated for a definition of "claim" consistent with the conduct test.[74] The unsecured creditors' committee, on the other hand, advocated for a definition based on the pre-petition relationship test.[75] On appeal, the Eleventh Circuit sought a compromise.

The Eleventh Circuit noted that "[u]nder the Bankruptcy Code, only parties that hold *preconfirmation* claims have a legal right to participate in a Chapter 11 bankruptcy case and share in payments pursuant to a Chapter 11 plan."[76] The court reiterated that a valid § 101(5) claim requires some form of relationship between the claimant and the DIP to exist before or during the bankruptcy proceedings. The court noted that using "the conduct test would enable anyone to hold a claim against Piper by virtue of their potential future exposure to any aircraft in the existing fleet."[77] However, the court also recognized the unnecessarily narrow nature of the pre-petition relationship test.[78] In the spirit of compromise, the court acknowledged that the pre-petition relationship test had room for

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individuals would be injured in accidents after confirmation of the reorganization plan, but arising out of or relating to products manufactured, sold, designed, or distributed by Piper prior to confirmation." (internal citation omitted)).

71 *See Piper I*, 162 B.R. at 621.

72 *See id.* at 622 ("The Claim purports to be based on statistical assumptions regarding the number of people who are likely to suffer personal injury or property damage after the confirmation of a reorganization plan, which is caused by Debtor's pre-confirmation manufacture, sale, design, distribution or support of aircraft and spare parts.").

73 *See id.* (noting that the court was urged to consider whether the future claimants in fact had "claims" under § 101(5)).

74 The legal representative "argue[d] that any right to payment arising out of the prepetition conduct of the Debtor, *no matter how remote*, should be deemed a claim and provided for in this case." *Id.* at 623 (emphasis added).

75 *See id.* at 623–24 ("The Committee and the Debtor argue that while Congress intended to expand the definition of claim, the definition is not so broad as to include unidentified, and presently unidentifiable, individuals with no discernible prepetition relationship to Piper.").

76 *In re Piper*, 58 F.3d 1573, 1576 (11th Cir. 1995) (emphasis added).

77 *Id.* at 1577.

78 The court determined that the pre-petition relationship test "unnecessarily restricts the class of claimants to those who could be identified prior to the filing of the petition." *Id.*

flexibility.[79] The Eleventh Circuit thus formulated a test where a claim would be recognized "if (i) events occurring before *confirmation* create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's pre-petition conduct in designing, manufacturing and selling the allegedly defective or dangerous product."[80] The so-called "*Piper* test"—keeping the pre-petition relationship test's insistence on a temporal limitation but moving that limitation from petition to confirmation—was born.[81] Therefore, in the case of ProductCo, a buyer would have a valid § 101(5) claim if she bought the defective product before ProductCo filed for bankruptcy *and* if the product malfunctioned before the confirmation of ProductCo's plan of reorganization.

This approach, for some time, allowed courts to better satisfy the Bankruptcy Code's policy of handling as many claims as possible within the bankruptcy process without the due process issues associated with the conduct test. Specifically, from 1980 until 1994 there were 208 confirmed plans of reorganization, which had an average duration of 690 days in bankruptcy.[82] This amount of time in bankruptcy allowed more § 101(5) claims to come to fruition and be discharged without raising any due process issues.[83] Recognizing the appeal of this approach, the Third Circuit (which includes the

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[79] *See id.* ("Those claimants having contact with the debtor's product post-petition but prior to confirmation also could be identified, during the course of the bankruptcy proceeding, as potential victims, who might have claims arising out of debtor's prepetition conduct.").

[80] *Id.* (emphasis added); *see also* Petrie, *supra* note 50, at 604 ("This test changes the focal date from the petition date to confirmation date. Prepetition conduct gives rise to a claim only if there is a relationship established before confirmation between an identifiable claimant . . . and that prepetition conduct. It is essentially a two-prong Prepetition Conduct, Preconfirmation Relationship Test." (internal citations and quotation marks omitted)).

[81] *See In re Piper*, 58 F.3d at 1577 ("We therefore modify the test used by the district court and adopt what we will call the 'Piper test' False.").

[82] The median duration was 570 days. This is according to UCLA-LoPucki Bankruptcy Research Database, which has compiled data on bankruptcy filings from 32 years, starting in 1980. *See* UCLA-LoPucki Bankruptcy Research Database, http://lopucki.law.ucla.edu/ [hereinafter "UCLA-LoPucki Database"] (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 1980 through 1994; then under "Dispositions" select "confirmed"; then follow "Submit query" hyperlink) (last visited Aug. 4, 2013).

[83] The significance of this period of time will depend on the circumstances of each company's bankruptcy. It is nevertheless reasonable to assume that a significant amount of injury *could* arise in such a long span of time after the bankruptcy petition has been filed.

corporate epicenter of Delaware)[84] joined the Eleventh Circuit in adopting a similar test.[85]

I next turn to an overview of post-confirmation tort actions against reorganized debtors or their successors in interest. Where the DIP has not discharged all existing liabilities—either because the court's definition of a § 101(5) claim is too narrow or it is overly broad without due process protections—future claimants would have the opportunity to proceed against the reorganized debtor or its successor in interest. If such actions are significant, then they may jeopardize the reorganized debtor as a going concern, putting at risk one of the main goals of the bankruptcy process.

C. Post-Confirmation Liability

There are two instances in which an injured plaintiff can disregard a bankruptcy court's discharge order and file a post-confirmation tort suit against a reorganized debtor: (1) when the claim was not addressed in bankruptcy because the definition of a § 101(5) claim used was too narrow and therefore not all future liabilities were addressed in the bankruptcy process, or (2) when the definition used was too broad, causing due process considerations to trump the sanctity of the discharge order.[86] For example, in *In re Chance Industries, Inc.*, the court applied the pre-petition relationship test, narrowly interpreting the term "claim."[87] Consequently, the court did not enjoin a state liability claim based on a post-confirmation injury caused by the reorganized debtor's amusement ride, which was

[84] Delaware, which is the state of incorporation for a large portion of U.S. corporations, attracts a "disproportionate share of corporate bankruptcies" given that companies can file for bankruptcy in the state in which they are incorporated. *See* Nathan Koppel, *Biden Helped Delaware Keep Corporate Bankruptcy Filings*, WALL ST. J., Aug. 27, 2008, at A5 (noting that powerful interest groups have helped preserve Delaware's disproportionate share of bankruptcy proceedings).

[85] The Third Circuit in *Wright v. Owens Corning* defined a § 101(5) claim as "aris[ing] when an individual is exposed *pre-confirmation* to a product or other conduct giving rise to an injury that underlies a 'right to payment' under the Code." 679 F.3d 101, 107 (3d Cir. 2012). The court noted that "[n]ot extending our test to post-petition, but pre-confirmation, exposure would unnecessarily restrict the Bankruptcy Code's expansive treatment of 'claims.'" *Id.*

[86] *See* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy-Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339, 342 (2004) ("If [future tort victims] are found not to have [§ 101(5)] 'claims,' by the time their injury becomes apparent and they have a right to pursue a remedy, . . . the reorganized debtor may have thrived, allowing them a full recovery.").

[87] White v. Chance Indus., Inc. (*In re* Chance Indus., Inc.), 367 B.R. 689, 705 (Bankr. D. Kan. 2006) ("The Court concludes that the pre-petition relationship test is the better test for determining whether an unknown future claimant has a claim that is subject to discharge under § 524 and the confirmation order.").

manufactured and sold pre-petition.[88] Furthermore, in *In re Kewanee Boiler Corp.*, the reorganized debtor sought to enjoin a tort suit based on a post-confirmation accident, involving a boiler that was manufactured and sold pre-petition.[89] In denying the injunction, the court noted that "enjoining [the tort victim's] efforts to liquidate his claim against the reorganized debtor and forcing him to partake in [the DIP's] bankruptcy would be an inadmissible deprivation of his property interest in that claim, wholly without prior due process notice or bankruptcy notice."[90]

These plaintiffs are allowed to pursue their claims based on the doctrine of successor liability, which allows post-confirmation lawsuits based on pre-petition conduct—potentially threatening the going concern surplus even when the DIP is acquired after bankruptcy. To the extent that a third party acquires a reorganized debtor after the bankruptcy process (such as BuyerCo's acquisition of ProductCo), the application of successor liability is neither clear nor consistent.[91] While there is a general rule in corporate law against successor

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[88] *Id.* at 705 (concluding that since the victim's products liability claims were not discharged by the DIP's Confirmation Order, the victim could pursue the claims in state court).

[89] *See* Kewanee Boiler Corp. v. Smith (*In re* Kewanee Boiler Corp.), 198 B.R. 519, 522 (Bankr. N.D. Ill. 1996) ("Sometime in 1952, [the DIP] manufactured [and sold] a boiler . . . . In November 1989, about 20 months after the [DIP's] Plan was confirmed, [a tort victim] was injured when he was attempting to tighten a washout plug on the . . . boiler.").

[90] *Id.* at 540.

[91] *See* Coco, *supra* note 26, at 347 ("Even among the courts that are in agreement regarding the validity of post-bankruptcy successor liability claims, analytical approaches are varied and incongruous."). *Compare* Paris Mfg. Corp. v. Ace Hardware Corp., 132 B.R. 504, 510 (Bankr. D. Me. 1991) (upholding the bankruptcy court's permanent injunction, thereby barring the plaintiffs' successor liability claim against the asset-purchasing corporation), *and* Rubinstein v. Alaska Pac. Consortium, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (arguing that successor liability claims in the post-bankruptcy and reorganization context afford the claimants an unwarranted priority and that the Bankruptcy Code permits the sale of assets "free and clear" of such claims), *with* Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d 159, 163–64 (7th Cir. 1994) (noting that the plaintiff's successor liability claim was different in nature than the liens that were extinguished by the bankruptcy proceeding, and the bankruptcy court did not have the jurisdiction to enjoin the claim against the asset-purchasing corporation), Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994) (holding that because the claimants were not given adequate notice, and because their interests were not represented in the bankruptcy proceeding, their successor liability claim was not extinguished), R.C.M. Exec. Gallery Corp. v. Rols Capital Co., 901 F. Supp. 630, 637 (S.D.N.Y. 1995) (holding that "there is no federal preemption of state law successor liability merely because the sale of assets occurred in a bankruptcy proceeding"), *and* Waterman Steamship Corp. v. Aguiar, 141 B.R. 552, 559 (Bankr. S.D.N.Y. 1992) (holding that because the claimants were not given adequate notice, and because their interests were not represented in the bankruptcy proceeding, their successor liability claim was not extinguished), *vacated* 157 B.R. 220 (S.D.N.Y. 1993).

liability,[92] there are exceptions. In the context of a Chapter 11 bankruptcy, both the "business continuation" and "product line" exceptions play a role in allowing liability to transfer to the reorganized company.[93] Courts apply the business continuation exception "whenever the successor corporation more closely resembles a reorganized version of its predecessor rather than an entirely new corporate entity."[94] Those courts that follow the business continuation exception vary in their application of the exception and use a number of factors as guidelines.[95] In comparison with the business continuation exception, the product line exception poses the greatest risk of successor liability given that it is not necessary that an entire business be acquired; the assimilation of a single line of products is sufficient to trigger liability.[96] In some cases, the product line exception has been further expanded to apply successor liability to acquirers who manufacture similar but not *identical* products.[97] Should an acquired DIP

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[92] *See* Coco, *supra* note 26, at 346 ("[A] corporation that purchases all, or substantially all, of the assets of another corporation does not thereby become liable for the predecessor corporation's unknown or contingent liabilities.").

[93] The "business continuation" and the "product line" exceptions "allow suit against the acquirer by the claimant, unknown at the time of the acquisition, who suffers injury from a product manufactured by the target—that is, the predecessor owner. In this way, a means of recovery is provided to the future claimant." Tung, *supra* note 8, at 446–47.

[94] J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1, 12 (1995).

[95] The court in *Turner v. Bituminous Cas. Co.* looked to a number of factors to determine if a plaintiff established a prima facie claim for successor liability. 244 N.W.2d 873 (Mich. 1976). The *Turner* factors looked to see if: (1) there is a continuation of the previous business, including the "retention of key personnel, assets, general business operations, and even the [corporate] name"; (2) the selling company has dissolved, ceasing "ordinary business operations, liquidat[ing], and dissolv[ing] soon after distribution of consideration received from the buying corporation"; (3) the buying company has "assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation"; and (4) the buying company has "held itself out to the world as the effective continuation of the seller corporation." *Id.* at 883–84. It was "somewhat ambiguous" whether the *Turner* factors "were required elements or non-exclusive factors, or if they were to be weighed and balanced." George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 36 (2007).

[96] Tucker, *supra* note 94, at 14. The California Supreme Court in *Ray v. Alad Corp.* first articulated the product line exception. 560 P.2d 3 (Cal. 1977). The *Ray* court mandated that "a party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired." *Id.* at 11. The *Ray* court justified the exception because of the destruction of any kind of remedy for plaintiffs, "the successor's ability to assume the original manufacturer's risk-spreading," and because the successor was using the predecessor's goodwill, which necessitated responsibility out of fairness. *Id.* at 9.

[97] *See* Tucker, *supra* note 94, at 14 (noting that some courts have "imposed successor liability despite the fact that the successor did not continue to manufacture the *identical*

not manage to discharge all existing liabilities through bankruptcy, a future purchaser may find itself vulnerable if a court allows successor liability.

I next turn to Congress's passage of BAPCPA and its effect on the speed at which DIPs propose and confirm plans of reorganization—as embodied in the rise of the "prepackaged" bankruptcy. As I will argue, the increased use of prepackaged bankruptcies and the truncation of the petition-to-confirmation window weakens the effectiveness of the *Piper* test, creating the potential for a rise in viable post-confirmation tort suits against reorganized debtors or their successors and ultimately affecting their viability as going concerns.

II
The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), and Its Effect on the *Piper* Test

A. Plan Confirmation and BAPCPA

At the heart of Chapter 11 is the concept of a plan of reorganization, which is where § 101(5) claims are addressed and resolved. The parties with the ability to propose a plan wield much power in structuring the reorganized company,[98] and thus a DIP seeks to have its proposed plan be the one that is confirmed. Section 1121(b) of the Bankruptcy Code gives the DIP[99] the initial and exclusive right to propose a plan of reorganization for 120 days from the date of its petition for bankruptcy.[100] Moreover, the DIP has the exclusive right to solicit votes to confirm its plan for up to 180 days.[101] If ProductCo were able to meet its initial 120-day deadline, it would then have another 60 days to solicit acceptances for its plan from each impaired class of creditors.[102] For smaller businesses, 120 days to propose a plan and an

product" (emphasis added)); *see also* Rawlings v. D.M. Oliver, Inc., 159 Cal. Rptr. 119, 120 (Cal. App. 1979) (holding that "the successor corporation may be liable for a product defect . . . even where . . . the successor did not continue the identical product line").

98 *See* Warren, *supra* note 27, at 136 ("The party who can propose a plan has much control over both the shape of the post-reorganization business and the operation of the business in Chapter 11.").

99 This assumes that a trustee has not been appointed to oversee the bankruptcy estate. *See* 11 U.S.C. § 1121(c)(1) (2012) (allowing other parties in interest to propose a plan if a trustee has been appointed).

100 § 1121(b) ("Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.").

101 *See* § 1121(c)(3).

102 *See* Jeffrey M. Schlerf, *BABCPA's Impact on Exclusivity Is Hard to Gauge*, J. Corp. Renewal (July 1, 2007), http://www.turnaround.org/Publications/Articles.aspx?objectID=7797 (noting that after the initial 120-day deadline the DIP would have "an additional 60 days to obtain acceptance from each impaired class under its plan").

additional 60 days to solicit acceptance of such plan may be sufficient, but this is not necessarily the case for DIPs with large, complex businesses.[103] As such, up until 2005, bankruptcy courts had the power to extend the exclusivity period indefinitely if the debtor showed sufficient cause.[104] A showing of sufficient cause was up to the "independent judgment" of the bankruptcy court.[105]

Congress, however, has drastically constrained the discretion of bankruptcy courts to respond to DIPs who face especially challenging situations. On April 20, 2005—after considerable "debate, delay, and consideration"[106]—Congress enacted BAPCPA.[107] The legislation "represent[ed] one of the most comprehensive overhauls of the Bankruptcy Code in more than twenty-five years."[108] With its flurry of changes to the Bankruptcy Code, BAPCPA sought to limit the perceived abuse of the bankruptcy system by debtors.[109]

BAPCPA's amendments to § 1121 of the Bankruptcy Code have had a profound impact on a DIP's exclusive right to propose and confirm a plan of reorganization.[110] In shortening the exclusivity period for DIPs, Congress sought to limit any unfair advantage that DIPs may have had from the bankruptcy court's power to grant potentially unlimited extensions for cause.[111] The paradigmatic example for critics, the Eastern Airlines bankruptcy,[112] lasted 2114 days, or approximately six years, in Chapter 11.[113] The BAPCPA amendments modified § 1121(d) in two key ways: (1) the DIP has a maximum of eighteen months from the time of filing to propose a plan; and (2) the DIP has a maximum of twenty months from the time of filing to solicit

[103] *See* WARREN, *supra* note 27, at 137 ("In big reorganizations, those with thousands of outstanding contracts and leases, complex financial structures, and far-flung operations, 120 days of exclusivity was unlikely to provide the time needed to reorganize a business.").

[104] *See id.* ("[C]ourts had the power to extend exclusivity indefinitely . . . .").

[105] *See* TREISTER ET AL., *supra* note 26, at 375 (discussing judicial treatment of requests to extend the exclusivity period).

[106] Garrett A. Fail & John J. Rapisardi, *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: A Summary of Corporate Bankruptcy Provisions*, *in* REORGANIZING FAILING BUSINESSES, *supra* note 63, at 6-1, 6-1.

[107] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

[108] Fail & Rapisardi, *supra* note 106.

[109] *See id.* (noting that BAPCPA proponents believed it would limit abuses by debtors).

[110] *See id.* at 6-29 ("The right to extend [a DIP's exclusive period to propose and confirm a plan] for 'cause' beyond the initial time limitation has been eliminated.").

[111] *See* Schlerf, *supra* note 102 (noting the "successive extensions [that bankruptcy courts] were freely grant[ing] [to DIPs], giving [them] an unfair advantage in the plan negotiation process").

[112] Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. of Chi. (*In re* Ionosphere Clubs, Inc.), 156 B.R. 414 (S.D.N.Y. 1993), *aff'd sub nom.* Sobchack v. Am. Nat'l Bank & Trust Co. of Chi. (*In re* Ionosphere Clubs, Inc.), 17 F.3d 600 (2d Cir. 1994).

[113] Fuquay, *supra* note 16, at 432 n.7.

sufficient votes to confirm such a plan.[114] Accordingly, the bankruptcy court's ability to grant extensions of the exclusivity period to both propose and confirm a plan is limited to eighteen and twenty months after petition, respectively.[115] Gone are the days where a judge could rely on her discretion to extend the period of exclusivity for cause indefinitely beyond the initial 120-day limit.[116]

B. The Incentive for a Quick Confirmation and the Rise of Prepackaged Bankruptcies

As previously discussed, the DIP has ample incentive to want to retain control—at least for a reasonable period of time—over the bankruptcy process.[117] Thus, it is no surprise that the eighteen-month exclusivity cap has pushed DIPs to accelerate their bankruptcy proceedings in order to maintain control over their bankruptcy cases.[118] Even DIPs with more complex, cumbersome bankruptcy cases are pushing for quicker confirmations in light of BAPCPA's limits on exclusivity.[119]

Distressed companies are also more frequently using the "prepackaged" bankruptcy to enter and exit the bankruptcy process quickly.[120] With a prepackaged bankruptcy, a troubled debtor can enter bankruptcy with a high degree of certainty that it will make the

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114 *See* 11 U.S.C. § 1121(d)(2) (2012).

115 *See* Fail & Rapisardi, *supra* note 106, at 6-29.

116 *See id.* (noting the elimination of judicial discretion).

117 *See* Marcia L. Goldstein et al., *Prepackaged Chapter 11 Case Considerations and Techniques*, *in* REORGANIZING FAILING BUSINESSES, *supra* note 63, at 12-1, 12-5 ("From the perspective of the debtor/borrower, one of the unfortunate aspects of chapter 11 is the potential for management or the current board of directors to lose control of the restructuring process or of control of the company itself."); *supra* note 98 and accompanying text (explaining the DIP's incentive to retain control of the bankruptcy process).

118 *See* Elizabeth M. Bohn, *Faster, but Not Cheaper: Trends and Decisions in Business Bankruptcies Under BAPCPA*, BUS. L. TODAY (ABA) Sept.–Oct. 2007, http://apps.americanbar.org/buslaw/blt/2007-09-10/bohn.shtml (explaining that debtors rushed to file plans of reorganization before BAPCPA took effect in order "to avoid the shorter exclusivity period and *the pressure this puts on debtors, especially larger debtors*, who have to negotiate with various creditor constituencies, vendors, labor unions, nonunion employees, and other groups in trying to reorganize" (emphasis added)); Erin Coe, *Bankruptcy Reform Forces Lawyers to Plan Ahead*, LAW360 (Dec. 21, 2006), http://www.law360.com/articles/15545/bankruptcy-reform-forces-lawyers-to-plan-ahead (subscription required) (noting that BAPCPA "has spurred debtors to kick their bankruptcy proceedings into high gear in order to retain control of the direction of their cases").

119 *See* Coe, *supra* note 118 ("Complex cases are moving much more quickly than if [BAPCPA] had not imposed [exclusivity] limits.").

120 A "prepackaged" bankruptcy, or "prepack," is a bankruptcy technique where "the negotiation of the plan and solicitation of votes take place prior to the chapter 11 filing." NOVIKOFF ET AL., *supra* note 1, at 39. Such pre-petition negotiation and solicitation allows for a shorter stay within the bankruptcy process. *See id.* at 40 ("Prepacks . . . minimize the time that a company needs to be in bankruptcy by enabling the case to proceed directly to

eighteen-month limit to propose a plan (and the twenty-month limit to confirm the plan).[121] In fact, if need be, a one-day prepackaged bankruptcy is now a possibility.[122] Unsurprisingly, in the years following the passage of BAPCPA, the instances of prepackaged bankruptcies have increased.

In addition to placing express limits on a DIP's exclusivity period, BAPCPA enacted provisions that specifically fostered and *encouraged* the use of prepackaged bankruptcies.[123] By enacting § 1125(g) of the Bankruptcy Code, BAPCPA materially affected the pre-petition solicitation process.[124] Prior to the enactment of BAPCPA, the pre-petition solicitation process of a prepackaged plan halted once a petition for Chapter 11 was filed.[125] This gave creditors "the power to stop a prepackaged plan in its tracks"[126] by either filing an involuntary petition for Chapter 11 or taking steps to accelerate a debtor's voluntary petition.[127] Under BAPCPA, creditors no longer have such a

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confirmation of a reorganization plan and reducing the scope and extent of judicial involvement in the life of the company.").

[121] *See supra* note 120 (noting that the logistics of a prepackaged bankruptcy allow for a shorter time in the bankruptcy process). For prepackaged bankruptcy statistics, see *infra* notes 135–36 and accompanying text.

[122] *See* Steven Eichel & Larry Brenner, *Creditor Protections in Prepackaged Bankruptcy Cases Providing for the Sale of Assets*, 2 CORP. RESCUE & INSOLVENCY 156, 158 (2009), *available at* http://www.crowell.com/documents/Creditor-protections-in-prepackaged-bankruptcy-cases-providing-for-the-sale-of-assets.pdf ("In one extreme case, a school bus manufacturer completed a one day prepackaged bankruptcy case."). The bankruptcy of the Blue Bird Body Company showed the one-day prepackaged bankruptcy in action as the company successfully confirmed its prepackaged bankruptcy plan within thirty-three hours. *Id.*

[123] *See* Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603, 630 (2005) ("BAPCPA's provisions relating to prepackaged plans . . . encourage and foster their use.").

[124] In soliciting pre-petition votes, the Bankruptcy Code imposes a good faith solicitation requirement. *See* Goldstein et al., *supra* note 117, at 12-33. The acceptance of a plan by a specific class of claimants "requires a dual affirmative vote—two-thirds of the amount of the claims voting *and* a majority of the holders of such claims." *Id.* at 12-37. Furthermore, the solicitation period must give voters sufficient time to accept or reject the plan. *See id.* at 12-39 ("Votes on a prepackaged plan will not be counted if an unreasonably short time was prescribed . . . to accept or reject the plan." (internal quotation marks omitted)). What constitutes sufficient time is unclear, however, because neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure provide sufficient guidelines on what constitutes an appropriate voting period. *See id.* at 12-39 to 12-40.

[125] Fail & Rapisardi, *supra* note 106, at 6-29.

[126] Levin & Ranney-Marinelli, *supra* note 123.

[127] *See* Fail & Rapisardi, *supra* note 106, at 6-29. Section 1125(g) specifically provides: "Notwithstanding [§ 1125(b)], an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law." 11 U.S.C. § 1125(g) (2012).

power, which makes the task of arranging a prepackaged bankruptcy easier for DIPs.[128]

BAPCPA also affects the necessity of a creditors' meeting. Section 341(a) of the Bankruptcy Code mandates that after the commencement of a bankruptcy case, "the United States trustee *shall* convene and preside at a meeting of creditors."[129] With the addition of § 341(e), BAPCPA provides a means to waive this meeting requirement upon petition for Chapter 11.[130] This change speeds up the confirmation process for prepackaged plans.[131] Congress recognized that with a prepackaged plan, a mandatory meeting of the creditors would be superfluous given that "the debtor has already negotiated with many or all of its creditors."[132]

BAPCPA thus ended the days of multi-year bankruptcies.[133] According to one study, the pre-BAPCPA period from 1980 until 2004 saw the average stay in bankruptcy last 547 days (approximately eighteen months).[134] Post-BAPCPA, however, the average stay in bankruptcy lasted an average of 301 days (approximately ten months) before a plan was confirmed.[135] The prepackaged bankruptcy form

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[128] *See* Fail & Rapisardi, *supra* note 106, at 6-30 ("[N]ow neither a dissenting creditor's involuntary petition nor a distressed entity's voluntary petition will prevent an entity's continued solicitation on a prepackaged plan.").

[129] 11 U.S.C. § 341(a) (2012) (emphasis added). For equity shareholders a meeting is not mandated, but is permissible. § 341(b) ("The United States trustee may convene a meeting of any equity security holders.").

[130] The provision states: "Notwithstanding [§ 341(a)], the court . . . may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case." § 341(e).

[131] *See* Levin & Ranney-Marinelli, *supra* note 123, at 631 ("[Section 341(e)] changes the result in some jurisdictions, where United States Trustees . . . had successfully argued that confirmation of a plan could not occur until the meeting of creditors was held.").

[132] Brian K. Tester et al., *Need for Speed: Prepackaged and Prenegotiated Bankruptcy Plans*, 17 Ann. Ne. Bankr. Conf. 399, 408–09 (2010), *available at* http://www.abiworld.org/committees/newsletters/busreorg/vol9num7/pack.pdf.

[133] *See supra* note 115 and accompanying text (noting that BAPCPA caps the confirmation of a DIP-initiated plan to twenty months).

[134] This statistic is based on 576 bankruptcies filed from 1980 until 2004. *See* UCLA-LoPucki Database, *supra* note 82 (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 1980 through 2004; then under "Dispositions" select "confirmed"; then follow "Submit query" hyperlink). The median amount of time lasted 438 days. *Id.* This number is in contrast to the 690-day average stay in bankruptcy from 1980 until 1994, which was the statistic on the eve of the *Piper* test's formulation. *See supra* note 82 and accompanying text (noting that the average stay in bankruptcy, pre-*Piper*, was 690 days).

[135] This statistic is based on 146 bankruptcies filed from 2006 until 2012. *See* UCLA-LoPucki Database, *supra* note 82 (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 2006 through 2012; then under "Dispositions" select "confirmed"; then follow "Submit query" hyperlink). The median stay in bankruptcy lasted 259 days. *Id.*

has become an increasingly popular way to enter and exit the bankruptcy process quickly.[136]

This trend holds true for those DIPs that are specifically prone to long-tail liability. I used data from the UCLA-LoPucki Bankruptcy Research Database to analyze bankruptcy filings and outcomes over a thirty-one-year period, from 1980 to 2012, excluding 2005 (the year in which BAPCPA was passed).[137] Specifically, I focused on those DIPs that are in industries that are prone to long-tail liabilities.[138] In the period from 1980 to 2004, before BAPCPA passed, 119 plans of reorganization for DIPs prone to long-tail liabilities were confirmed.[139] Of these plans, 29 were either prepackaged or pre-negotiated,

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[136] *The Year of the Prepackaged Bankruptcy*, TOTALBANKRUPTCY.COM, http://www.totalbankruptcy.com/blog/the-year-of-the-prepackaged-bankruptcy/ (last visited Aug. 4, 2013) ("With the prepackaged bankruptcy, companies can turn around a Chapter 11 filing in a matter of months . . . ."). For example, in 2009, four years after the passage of BAPCPA, prepackaged bankruptcies tripled in number over the previous year. *See* Emily Chasan, *Prepackaged Bankruptcies Tripled in Past Year*, REUTERS (Nov. 9, 2009, 6:22 PM), http://www.reuters.com/article/2009/11/09/us-bankruptcy-prepacks-idUSTRE5A85K820091109 (noting that the number of prepackaged bankruptcies has increased to thirty in 2009 from ten in 2008, a 200% increase). Many experts explain the recent increase in the number of pre-packaged bankruptcies as partially a function of BAPCPA. *See* SALVATORE A. BARBATANO ET AL., AN OVERVIEW OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 1 (2006), *available at* http://www.martindale.com/members/Article_Atachment.aspx?od=128224&id=212200&filename=asr-212204.pdf (noting that under BAPCPA, "[t]he critical importance of early planning to successfully reorganize will tend to encourage . . . [m]ore 'prearranged' or 'prepackaged' bankruptcies"); Karen Lee Turner, *Prepackaged and Pre-Arranged Bankruptcies*, BUS. CREDIT, July–Aug. 2008, at 8, 9, *available at* http://www.eckertseamans.com/uploads/publications/turner_business_credit_0808.pdf ("BAPCPA itself may increase the use of prepacks and prearranged bankruptcies.").

[137] UCLA-LOPUCKI DATABASE, *supra* note 82. The data come from court filings (PACER), SEC filings, newspaper articles, company websites, and surveys. *Id.*

[138] The DIPs were primarily in manufacturing-based industries. Specific industry categories include: Lumber And Wood Products, Except Furniture; Furniture And Fixtures; Chemicals and Allied Products; Stone, Clay, Glass, and Concrete Products; Primary Metal Industries; Fabricated Metal Products, Except Machinery and Transportation Equipment; Industrial and Commercial Machinery and Computer Equipment; Electronic And Other Electrical Equipment And Components; Transportation Equipment; and Miscellaneous Manufacturing Industries. *See id.* (listing the aforementioned industries as categories for DIPs).

[139] *Id.* (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 1980 through 2004; then under "Dispositions" select "confirmed"; then under "Industries" select "24 Lumber And Wood Products, Except Furniture," "25 Furniture And Fixtures," "28 Chemicals and Allied Products," "32 Stone, Clay, Glass, And Concrete Products," "33 Primary Metal Industries," "34 Fabricated Metal Products, Except Machinery and Transportation Equipment," "35 Industrial and Commercial Machinery and Computer Equipment," "36 Electronic And Other Electrical Equipment And Components," "37 Transportation Equipment," and "39 Miscellaneous Manufacturing Industries"; then follow "Submit query" hyperlink).

representing 24.4% of all confirmed plans.[140] By contrast, in the period from 2006 to 2012, *after* BAPCPA went into effect, 34 plans of reorganization for DIPs prone to long-tail liabilities were confirmed.[141] Of these plans, 14 were prepackaged or prenegotiated, representing 41.2% of all confirmed plans.[142] These data show that prepackaging amongst DIPs prone to long-tail liabilities has increased in line with the overall trend. This observation is not surprising because mass-tort bankruptcies, including asbestos-related bankruptcies, are compatible with the prepackaged bankruptcy form.[143] Thus, BAPCPA has solidified a DIP's now-truncated stay in bankruptcy—a

[140] *Id.* (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 1980 through 2004; then under "Dispositions" select "confirmed"; then under "Prepackaged" select "Prenegotiated" and "Prepackaged"; then under "Industries" select "24 Lumber And Wood Products, Except Furniture," "25 Furniture And Fixtures," "28 Chemicals and Allied Products," "32 Stone, Clay, Glass, And Concrete Products," "33 Primary Metal Industries," "34 Fabricated Metal Products, Except Machinery and Transportation Equipment," "35 Industrial and Commercial Machinery and Computer Equipment," "36 Electronic And Other Electrical Equipment And Components," "37 Transportation Equipment," and "39 Miscellaneous Manufacturing Industries"; then follow "Submit query" hyperlink).

[141] *Id.* (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 2006 through 2012; then under "Dispositions" select "confirmed"; then under "Industries" select "24 Lumber And Wood Products, Except Furniture," "25 Furniture And Fixtures," "28 Chemicals and Allied Products," "32 Stone, Clay, Glass, And Concrete Products," "33 Primary Metal Industries," "34 Fabricated Metal Products, Except Machinery and Transportation Equipment," "35 Industrial and Commercial Machinery and Computer Equipment," "36 Electronic And Other Electrical Equipment And Components," "37 Transportation Equipment," and "39 Miscellaneous Manufacturing Industries"; then follow "Submit query" hyperlink).

[142] *Id.* (follow "Query Data" hyperlink; then follow "Design a Study" hyperlink; then under "Years" select cases "filed" in years 2006 through 2012; then under "Dispositions" select "confirmed"; then under "Prepackaged" select "Prenegotiated" and "Prepackaged"; then under "Industries" select "24 Lumber And Wood Products, Except Furniture," "25 Furniture And Fixtures," "28 Chemicals and Allied Products," "32 Stone, Clay, Glass, And Concrete Products," "33 Primary Metal Industries," "34 Fabricated Metal Products, Except Machinery and Transportation Equipment," "35 Industrial and Commercial Machinery and Computer Equipment," "36 Electronic And Other Electrical Equipment And Components," "37 Transportation Equipment," and "39 Miscellaneous Manufacturing Industries"; then follow "Submit query" hyperlink).

[143] *See* S. Elizabeth Gibson, Fed. Judicial Ctr., Judicial Management of Mass Tort Bankruptcy Cases 114 (2005) ("A recent development in the evolution of mass tort bankruptcies has been the use of so-called prepackaged chapter 11 plans."); Leonard P. Goldberger, *The Mass Tort Pre-Pack: What Will They Think of Next?*, Am. Bankr. Inst. J., Jan. 1999, at 18, 31 ("[T]here may be a trend to attempt to consummate other non-asbestos mass tort settlements as pre-packaged bankruptcy cases."). Furthermore, there have been a number of DIPs in asbestos-related bankruptcies that have been able to confirm their prepackaged plans. *See* Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down but Not Out*, 63 N.Y.U. Ann. Surv. Am. L. 727, 735 (2008) ("Contrary to the criticism of such commentators, and despite the potential risks created by a delay in filing for bankruptcy, well-structured prepackaged asbestos bankruptcies can be confirmed quickly and in a cost-effective manner.").

phenomenon that was not the norm when the *Piper* test was formulated.[144]

In sum, then, the changes wrought by BAPCPA and the corresponding rise of the prepackaged bankruptcy form has led to a severe shrinkage of the petition-confirmation window. I now address the viability of the *Piper* test as an adequate compromise post-BAPCPA. I specifically address the growing futility of the *Piper* test to define a § 101(5) claim in such a way as to minimize future liability for the reorganized debtor and preserve it as a going concern.

C. *Section 101(5) "Claims" Using the* Piper *Test—Post-BAPCPA*

The *Piper* test was innovative prior to BAPCPA because it expanded the definition of a § 101(5) claim to include all liabilities that occurred post-petition, as long as they manifested before confirmation. When the confirmation date was far out from the petition date,[145] all the liabilities that occurred in the interim were dischargeable claims that could no longer be asserted against the reorganized debtor. After BAPCPA, with the resulting pressure to confirm plans more quickly and the rise of prepackaged bankruptcies, the interim period between petition and confirmation has been constricted significantly.[146] Recall that the petition-to-confirmation window shrank from 547 days to 301 days, or by eight months after BAPCPA, according to one study.[147] This could result in many liabilities that but for BAPCPA would have been dischargeable § 101(5) claims handled through bankruptcy.

Because of BAPCPA, the *Piper* test has lost some of its luster as a compromise test and become the functional equivalent of the pre-petition relationship test.[148] The result of this metamorphosis is that

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144 *See supra* notes 81–82 and accompanying text (noting that when the *Piper* test was formulated, long-lasting bankruptcies were the norm).

145 *See supra* note 82 and accompanying text (stating that the average bankruptcy stay was 690 days when the *Piper* test was formulated); *see also supra* notes 112–13 and accompanying text (providing the Eastern Airlines bankruptcy as an example of a proceeding that took six years to confirm).

146 *See supra* notes 137–44 and accompanying text (illustrating the rise of the prepackaged bankruptcy form amongst DIPs in order to comply with BAPCPA).

147 *See supra* notes 134–35 and accompanying text (citing data provided by UCLA-LoPucki Bankruptcy Research Database).

148 Recall that the pre-petition relationship test defines a claim very narrowly, requiring both pre-petition conduct and a definitive pre-petition relationship between the claimant and the DIP. *See supra* notes 61–66 and accompanying text (defining the pre-petition relationship test and its inability to define § 101(5) broadly).

use of the *Piper* test or its functional equivalent[149] could cause a rise in successful tort suits against the reorganized debtor or its successors[150] and an increasing tension with the Bankruptcy Code's "fresh start" policy.[151]

ProductCo, post-BAPCPA, would realize that it should enter and exit bankruptcy as quickly as possible and would probably do a prepackaged bankruptcy. Given the nature of prepackaged bankruptcies, the plan of reorganization would be filed and confirmed quickly.[152] If the bankruptcy court overseeing ProductCo's reorganization uses the *Piper* test, ProductCo's window of opportunity to classify as many § 101(5) claims as possible within the bankruptcy proceeding would be all but completely shut. After ProductCo "successfully" exits the bankruptcy process and is acquired by BuyerCo, a customer who is *then* injured by ProductCo's product sold pre-petition could bring a viable products liability claim against BuyerCo, which would have been handled within the bankruptcy proceeding had the *Piper* test been applied in a pre-BAPCPA world.

In light of the preceding critical examination of the *Piper* test, I next advocate for a broader interpretation of a § 101(5) claim along with certain mechanisms to cure possible due process issues.

III
An Alternative Approach to the *Piper* Test

As I have shown, the *Piper* test, in the post-BAPCPA world, is no longer an effective compromise between the conduct test and the pre-petition relationship test. This being the case, courts are left with the choice that they faced pre-*Piper*: Should they use the conduct test or the pre-petition relationship test to define a § 101(5) claim?

The conduct test is the better choice for two reasons. First, the conduct test is more in line with a major policy of the Bankruptcy Code, namely defining a claim broadly so as to discharge as many

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149 Recall that the Third Circuit in *Wright v. Owens Corning* fashioned a § 101(5)–claim test similar to the *Piper* test. *See supra* note 85 and accompanying text (defining the test established in *Wright v. Owens Corning*).

150 For a review of the viability of post-confirmation tort actions against reorganized debtors or their successors, see *supra* Part I.C.

151 *See supra* note 11 and accompanying text (outlining a major policy of the Bankruptcy Code as providing a fresh start to companies with going concern surpluses).

152 Perhaps the confirmation would happen within twenty-four hours after the filing of the petition. *See supra* note 122 and accompanying text (noting the viability of a one-day prepackaged bankruptcy).

liabilities as possible within the bankruptcy system.[153] Second, the conduct test ensures the most equal treatment of similarly situated creditors. Defining a § 101(5) claim narrowly and risking subsequent tort suits against reorganized debtors or its successors may allow future claimants to collect *more* than they would be able to had they been included in the bankruptcy like other similarly situated creditors.[154]

The conduct test does, however, raise due process issues.[155] Given that a potential deprivation of property is at stake, the constitutional due process requirement is implicated.[156] The due process requirement is why application of the conduct test alone—without instituting additional safeguards—would be deemed constitutionally dubious. This Part explains how courts can adapt their practices to both reap the benefits of the conduct test and respect due process.[157] Specifically, I argue that courts should expand the solution that

[153] *See supra* note 60 and accompanying text (noting that one of the objectives of the Bankruptcy Code is to handle the maximum number of claims within the bankruptcy system).

[154] For example, assume that within a bankruptcy a specific class of unsecured creditors is granted relief worth eighty percent of its claims (eighty cents on the dollar). Further assume that the future claimants would also be a part of this class and would be owed eighty percent of their claims as well. If the future claimants' tort claims were not discharged within bankruptcy, then they would be able to go after the reorganized debtor, potentially collecting relief worth one hundred pecent of their claims (one hundred cents on the dollar). This would constitute unequal treatment between similarly situated claimants. *See* Bartell, *supra* note 86 ("Including claims whose holders are not readily identifiable at the time of the bankruptcy permits those holders to share in whatever distribution is made by the debtor to the same extent as identifiable holders of claims.").

[155] *See supra* notes 54–55 and accompanying text (noting the due process issues that are attendant with the conduct test).

[156] *See* Bartell, *supra* note 86, at 346 ("Due process is, of course, a constitutional requirement for the discharge of any claim in bankruptcy.").

[157] The National Bankruptcy Review Commission—an independent commission established by Congress to "investigate and study issues relating to the Bankruptcy Code"—also supported similar proposals, which were recommended for future congressional legislation. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 47 (1997) [hereinafter COMMISSION REPORT], *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html; *see also id.* at i ("With this Report . . . the National Bankruptcy Review Commission submits more than 170 individual recommendations to the Congress, the President and the Chief Justice of the United States for improving bankruptcy law and procedure."). The Commission specifically recommended amending the Bankruptcy Code to explicitly: 1) define "mass future claim" within § 101(5); 2) allow mass future claims representatives as a part of the bankruptcy proceeding; 3) empower courts to estimate future claims; 4) empower courts to issue channeling injunctions; and 5) allow for explicit discharge of "mass future claims," eliminating the potential for post-confirmation liability. *Id.* at 316–17. Unfortunately, Congress has passed no such legislation. *See infra* note 192 and accompanying text (noting that the Bankruptcy Code does not explicitly address mass tort claimants outside the asbestos context). Thus, courts should act in absence of congressional action, especially post-BAPCPA where the use of prepackaged bankruptcies is the norm.

Congress enacted through statute in the narrow area of bankruptcies involving asbestos producers, which provides a way to handle all liabilities within a bankruptcy proceeding while providing adequate due process.

A. Asbestos Bankruptcies and § 524 of the Bankruptcy Code

The unprecedented bankruptcy of the asbestos-producing Johns-Manville Corporation provided the Bankruptcy Court for the Southern District of New York with the opportunity to creatively fashion a solution to rid the reorganized debtor from potentially crippling long-lived, asbestos-related liability.[158] The Bankruptcy Court, recognizing the due process implications of not considering future claimants, appointed a Future Claims Representative (FCR)[159] to advocate for the class of unknown victims.[160] The court also established a trust whose assets would be used to satisfy future claims as they came to fruition: "The [trust] arrangement was straightforward. The new Johns-Manville's financial assets, including a majority stake in the company's common-stock and product-liability insurance payouts on insurance policies it had purchased, were transferred to the trust."[161] The capstone of the court's solution was the issuance of a "channeling injunction[ ]," which would prevent all surviving liabilities outside of bankruptcy from affecting the reorganized company by enjoining all claims and "channeling" them into recovery from the trust.[162] The court relied on its equitable powers as established in § 105(a) of the Bankruptcy Code to issue the injunction.[163]

Following the reorganization of the Johns-Manville Corporation, Congress took action in 1994. With the passage of the "Manville

[158] *In re* Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986); *see also* Alison J. Brehm et al., *To Be, or Not to Be: The Undiscovered Country of Claims Estimation in Bankruptcy*, 8 J. BANKR. L. & PRAC. 197, 261 (1999) ("This sort of action was never contemplated by the Code's drafters and thus the court and the parties were left to their own devices to estimate the claims for purposes of working through the reorganization." (internal citation omitted)).

[159] *See supra* note 57 (defining future claims representative).

[160] *See In re* Johns-Manville Corp., 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984) ("Any plan not dealing with [future claimants'] interests precludes a meaningful and effective reorganization and thus inures to the detriment of the reorganization body politic.").

[161] *See* LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 5 (2010).

[162] *See In re* Johns-Manville Corp., 68 B.R. at 626 ("The Injunction sought under the Plan will preserve the rights of all asbestos claimants by establishing a corpus of funds from which all can collect.").

[163] *See id.* at 625 ("A bankruptcy court sits as a court of equity. . . . [It] may issue injunctions when necessary to effectuate reorganizations. This equitable power has been codified in § 105 of the Code . . . ." (internal citations omitted)).

Amendments," Congress amended the Bankruptcy Code to include § 524(g), which expressly authorizes channeling injunctions to be issued in tandem with the establishment of asbestos trusts.[164] Pursuant to § 524(g)(2)(B), statutory relief through a trust structure is limited only to debtors who have created or will create damage "caused by the presence of, or exposure to, asbestos or asbestos-containing products."[165] Furthermore, the appointment of an FCR by the court is mandated in order to consummate a plan using § 524(g).[166] The FCR is not a powerless figurehead, but rather a stakeholder with significant power to potentially block the issuance of a channeling injunction.[167]

Unfortunately, Congress gave the statutory blessing for the usage of trusts and channeling injunctions in asbestos-related bankruptcies only. But the setup of a channeling injunction and a compensatory trust could be used in other bankruptcies that need to address future claims.[168] To that end, bankruptcy courts are not necessarily barred from issuing channeling injunctions and approving compensatory trusts outside the asbestos context.[169] To issue a channeling injunction in the non-asbestos context, the bankruptcy court must rely on its powers to fashion equitable relief under § 105(a).[170] Recall that reliance on § 105(a) allowed the court in *In re Johns-Manville Corp.* to enjoin post-confirmation claims against the reorganized debtor and channel them into the trust, all without congressional approval.[171] The

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164 *See* Green et al., *supra* note 143, at 730. Section 524(g)(1)(B) specifically provides: "An injunction may be issued . . . to enjoin entities from taking legal action for the purpose of . . . collecting . . . payment . . . [for] any claim or demand that, under a plan of reorganization, is to be paid . . . by a trust described in paragraph (2)(B)(i), except . . . as are expressly allowed by the injunction . . . ." 11 U.S.C. § 524(g)(1)(B) (2012). Congress also added § 524(h), which retroactively applied the power of § 524(g) to "injunction[s] . . . issued before the date of the enactment of this Act." § 524(h)(1).

165 § 524(g)(2)(B).

166 *See* § 524(g)(4)(B)(i) ("[A]s part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind . . . .").

167 *See* Green et al., *supra* note 143, at 739 ("[Section] 524(g) arguably confers upon the FCR the power to veto the issuance of a channeling injunction.").

168 *Cf.* Zev Shechtman, *A Fresher Start for Debtors in Chapter 11 Reorganization Cases: Binding Future Claimants*, 31 CAL. BANKR. J. 607, 608–09 (2011) ("There are a variety of other situations, besides the asbestos cases covered by § 524(g), in which it is necessary to address future claims." (internal citation omitted)).

169 *See* Toll, *supra* note 8, at 364 ("Congress also recognized the need for a mechanism to deal with non-asbestos mass tort claims. The 1994 asbestos amendments, however, did not preclude the use of bankruptcy to deal with other types of mass future claims." (internal citation omitted)).

170 *See* Shechtman, *supra* note 168, at 621.

171 *See supra* notes 158–63 and accompanying text (noting that the court in *In re Johns-Manville Corp.* relied on its equitable powers to issue an injunction pursuant to § 105(a)).

bottom line is that "Congress left open the question of whether [the channeling injunction and compensatory trust] could be used in other types of cases."[172]

B. Wider Usage of FCRs and Channeling Injunctions

The conduct test's broad definition of a § 101(5) claim means that courts using the test must install an FCR to satisfy due process requirements, because the mechanism allows for adequate notice for those claimants who are not yet identified.[173] The FCR is in a fiduciary relationship with the represented class of future claimants and must therefore maximize the future claimants' collective welfare.[174] The due process requirement of notice is therefore satisfied whenever notice is given to an FCR.[175] Furthermore, notwithstanding the fact that Congress or the Supreme Court has not explicitly endorsed the power of the channeling injunction in a non-asbestos context, lower

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172 Michael L. Tuchin & Martin R. Barash, *Protecting the Rights of Claimants That Are Excluded from the Bankruptcy Process: The Survival of Successor Liability and Alternative Means of Recovery*, 8 J. BANKR. L. & PRAC. 273, 286 (1999). The *Congressional Record* corroborates this idea: "The [Judiciary] Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable [channeling] injunction . . . . The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved." 140 CONG. REC. H10,766 (daily ed. Oct. 4, 1994).

173 *See* COMMISSION REPORT, *supra* note 157, at 332 ("A legal representative is essential to represent the interests of classes of holders who were not identified individually during the bankruptcy proceedings."); *see also* Shechtman, *supra* note 168, at 622 ("[N]otice of the bankruptcy proceeding will be meaningless to future claimants who do not currently have claims and won't have claims until after confirmation of the plan.").

174 *See* COMMISSION REPORT, *supra* note 157, at 333 ("The [FCR] would be a fiduciary for the class of holders of mass future claims that he or she represents."); Bartell, *supra* note 86, at 357 ("The decisions that are made by the representative on behalf of these individuals are constrained by the requirement that the representative act in the best interests of those represented."). The responsibilities for an appointed FCR run the gamut. They include estimating the number of potential future claims against the DIP, determining the approximate timing of such claims, and developing the appropriate means to compensate the claimants. *See* Eric D. Green et al., *Future Claimant Trusts and "Channeling Injunctions" to Resolve Mass Tort Environmental Liability in Bankruptcy: The Met-Coil Model*, 22 EMORY BANKR. DEV. J. 157, 164 (2005) (listing the various responsibilities of an FCR). Alternatively, the Commission Report recommended that the power of estimation remain within the domain of the courts. *See* COMMISSION REPORT, *supra* note 157, at 342 ("The Commission recommends an amendment to make clear the court's power to make determinations of the present value of mass future claims, whether individually or in the aggregate, for purposes of allowance, voting, *and* distribution."). In executing her responsibilities, an FCR must rely on a series of experts to estimate the level of future liability. *See* Green et al., *supra*, at 165. When it comes to negotiating the adequate funding level for the subsequent compensatory trust, the result is often a product of a "battle of experts." *See id.* at 170.

175 *See* Bartell, *supra* note 86, at 372 ("Once an appropriate representative for such claimants is appointed, the requirements of the Due Process Clause with respect to notice should be satisfied if notice is given to the representative whenever notice is required.").

courts can look to a developed body of case law.[176] A bankruptcy court could rely on extant, flexible rules to support a decision to appoint an FCR in a case with an expected large class of future claimants.[177]

Importantly, the appointment of an FCR is consistent with the use of prepackaged bankruptcies, which, as discussed *supra*, is popular given the pressures asserted by BAPCPA.[178] In fact, negotiating a prepackaged bankruptcy "can increase the size of the economic pie available" for the class of future claimants represented by an FCR.[179] The incentives for an FCR to maximize the welfare for the class of future claimants remain intact pre-petition.[180]

In addition to appointing an FCR, a court must institute some method to ensure that future claimants affected by the DIP's pre-petition conduct can recover from the bankruptcy estate. This is necessary in order to fully eliminate the possibility of successful tort claims against reorganized debtors or their successors.[181] In establishing a trust, the imperative is to provide assurances that it will have the wherewithal to withstand a surge in future demands for recovery.[182] In order to afford "the same recovery *pro rata* as is provided to existing claimants," a fund must be endowed "based upon the most reasonable actuarial estimates that can be generated."[183] As an

176 *Cf.* Shechtman, *supra* note 168, at 627 ("[D]espite the absence of a [Bankruptcy] Code provision or Supreme Court case law expressly endorsing channeling injunctions in non-asbestos cases, given the body of case law, the debtor's plan should be binding on future claimants.").

177 *See* Bartell, *supra* note 86, at 364. ("In the absence of [c]ongressional action, Rule 17(c), made applicable to bankruptcy cases by Bankruptcy Rule 7017, already provides the authority to bankruptcy judges to appoint future claims representatives as guardians *ad litem* for future claimants.").

178 *See supra* Part II.B. (outlining the rise in popularity of prepackaged bankruptcies).

179 *See* Green et al., *supra* note 143, at 747. "A well-structured prepack will decrease a debtor's time in bankruptcy, which tends to minimize the costs of the disruptive aspects of bankruptcy proceedings. In addition, prepacks substantially reduce professional fees and expenses incurred inside of bankruptcy." *Id.* at 748.

180 *See id.* at 752 ("[T]he worst conceivable scenario would be to incur the expenses of a prepack filing only to have the prepack unravel as the court either fails to approve the FCR post-petition or declines to confirm the reorganization plan negotiated by the FCR."); *see also id.* ("[B]ankruptcy court supervision and the Bankruptcy Code sections and Bankruptcy Rules governing disclosure and disinterestedness[ ] provide strong assurances that the future claimants will receive vigorous and independent representation.").

181 *See* Tuchin & Barash, *supra* note 172, at 285.

182 *See* Green et al., *supra* note 143, at 740–41 (noting that a trust must "provide assurances to the future claimants that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner." (internal quotation marks omitted)). The Commission Report noted that "[m]ost trusts in cases involving mass future claims consistently have made timely distributions without difficulty." COMMISSION REPORT, *supra* note 157, at 344.

183 Tuchin & Barash, *supra* note 172, at 285.

alternative to establishing and maintaining a trust in perpetuity, a plan of reorganization can instead provide for the purchase of an insurance policy that will adequately compensate future claimants.[184]

"The trust or insurance policy [should] be accompanied by a channeling injunction, specifying that any and all successor liability claims may be pursued in a designated manner against the designated fund or insurance policy."[185] Since the end goal for a DIP facing potentially crippling future liability post-confirmation based on its pre-petition conduct is to leave all its "baggage" behind in bankruptcy as it emerges as a reorganized company, bankruptcy courts must enjoin all future claims arising from pre-petition conduct that could be brought against the reorganized company. All future, post-confirmation claims would instead be "channeled" and satisfied out of an established trust or insurance facility.[186]

This approach has been well vetted in the context of asbestos-related bankruptcies, but its reach does not necessarily stop there: "Since 11 U.S.C. § 524(g) went into effect in 1996, courts have continued to issue channeling injunctions in cases *not involving asbestos* based on the broad grant of authority stemming from § 105(a)."[187] To best balance the tension between preserving going concern and satisfying due process, bankruptcy courts—especially those using the *Piper* test—should use this approach more widely.

To be clear, appointing an FCR, establishing a trust and obtaining a channeling injunction is not a panacea. Even an established trust is open to the risk of being fully depleted before all claimants have filed for a distribution.[188] Furthermore, the approach is not without its costs. It may very well be the case that for some debtors the going concern value or the expected liabilities are not large enough to justify the added administrative expenses of appointing an FCR and establishing a long-term trust or insurance policy. Still, courts should keep this approach readily available because it provides "*some* measure of recovery to claimants that otherwise would be excluded from the process."[189]

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184 *See id.*

185 *Id.*

186 "A channeling injunction steers claimants toward a trust or pool of assets to compensate claimants as it simultaneously steers those claimants away from the reorganized entity." Commission Report, *supra* note 157, at 345.

187 Green et al., *supra* note 174, at 171–72 (emphasis added); *see also* Commission Report, *supra* note 157, at 345 ("Without explicit statutory authority, but perhaps under the discretionary mandate of section 105(a) of the Bankruptcy Code, some courts have issued channeling injunctions in cases involving mass future claims.").

188 *See* Tuchin & Barash, *supra* note 172.

189 *See id.*

Conclusion

Future claims are here to stay. They have manifested in a multitude of non-asbestos bankruptcies, including those involving "airplane manufacturers, intrauterine contraceptive manufacturers, boiler manufacturers, child sex abuse, claims regarding dental work, toxic torts, other environmental claims, as well as mega cases such as *General Motors Corporation* and *Chrysler, LLC*."[190] Therefore, handling these potential liabilities within the bankruptcy system is of paramount importance.

I have argued that the *Piper* test was once an innovative means to widen the scope of a bankruptcy claim and thus to discharge more liabilities against a DIP in bankruptcy. Since the advent of BAPCPA, however, it has become increasingly less effective. With BAPCPA limiting the *Piper* test's ability to classify a critical mass of § 101(5) claims comes the increased possibility of successful post-confirmation tort suits. Because many circuits have not fully settled upon a consistent way to define a claim,[191] bankruptcy courts should uniformly rely on the conduct test to define bankruptcy claims. The conduct test defines a bankruptcy claim with the widest scope, allowing a court to effectively discharge all past and future liabilities of the DIP upon exiting bankruptcy. Any due process issues that accompany such a wide scope can be dealt with tantamount to the way liability is dealt with in the asbestos bankruptcy context—using an FCR, a compensation mechanism, and a channeling injunction.

Defining § 101(5) claims using the conduct test and using mechanisms like an FCR, a compensatory trust, and a channeling injunction will allow companies like ProductCo to discharge all its liabilities in bankruptcy, leaving it and BuyerCo unscathed by the advent of future, post-confirmation liability. The ultimate solution, however, should be addressed either by Congress through further expansion of § 524, or by the Supreme Court through an ultimate interpretation of a bankruptcy claim and an opinion on the viability of the FCR and channeling injunction in the non-asbestos context.[192]

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[190] Shechtman, *supra* note 168 (internal citations omitted).

[191] *See* Petrie, *supra* note 50, at 605 ("Several Circuits . . . have not expressly adopted any [claim-defining] tests yet.").

[192] *See* Deborah D. Williamson, *Future Claims—Seeking Finality and Discharge: An Impossible Dream?*, 8 J. Bankr. L. & Prac. 163, 176 (1999) ("[U]ntil the Supreme Court addresses the issue or Congress widens the protection found in the 1994 amendments beyond asbestos, uncertainty will continue."); *see also supra* note 176 and accompanying text (noting the lack of explicit endorsement of channeling injunctions by the Supreme Court, but proffering support for channeling injunctions through case law).