The Denial of Future Tort Claims in *In re Piper Aircraft*: Will the Court's Quick-Fix Solution Keep the Debtor Flying High or Bring It Crashing Down?

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I. INTRODUCTION

When a corporate debtor[1] files for protection from its creditors in the Bankruptcy Court, it seeks to discharge the claims against it and to emerge from the proceedings with a fresh start in the business community. To accommodate this goal, Congress drafted the definition of the term "claim" in section 101(5)[2] of the United States Bankruptcy Code[3] so that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case."[4] Several courts, applying this definition, have permitted future claimants to assert their claims against a Chapter 11 debtor.[5] However, in *In re Piper Aircraft Corp.*,[6] the United States District Court for the

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1. This Article focuses primarily on the effect future claims have on the reorganization of an entity under Chapter 11 of the United States Bankruptcy Code.

2. Section 101(5) defines "claim" as follows:

> (5) "claim" means -
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> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
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> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (1994).

3. 11 U.S.C. §§ 101-1330 (1994).

4. H.R. REP. NO. 595, 95th Cong., 2d Sess. 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6266.

5. *See e.g.*, Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom.* Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988); *In re* Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986).

6. 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub nom.* Epstein v. Official Comm. of

Southern District of Florida reached a different result. The district court refused to apply the broad definition of "claim" commanded by both the statutory language and the legislative history and denied the future claimants the right to participate in Piper's Chapter 11 case.[7]

Several interests compete with one another in the future claimant analysis: the debtor's desire to discharge all of its prepetition liabilities in an effort to receive a fresh start, the creditors' desire to maximize the debtor's estate to increase their return, the community's desire to reorganize the company to salvage both jobs and the local economy, and the future tort victims' interest to reserve a portion of the debtor's assets to compensate them when their injuries occur.[8] The *Piper* court chose to follow a narrow analysis of these interests, focusing primarily on the debtor and the short-term benefits of creditors. Accordingly, the *Piper* decision relieved the debtor of its immediate burden of drafting a plan of reorganization that accounted for the $100,000,000 estimated aggregate claim of the future tort victims.[9] This result not only ignores the immediate and long-term concerns of the future tort victims, but it also fails to consider the long-term effect of the decision on the debtor and its other creditors.

This Article suggests an answer to the future claimant dilemma that satisfies both the underlying purposes of the Bankruptcy Code and the long-term goals of all of the parties affected by the Chapter 11 case. The Article first describes three approaches to determining whether a claim constitutes a "claim" within the meaning of section 101(5) of the Bankruptcy Code and explains the adverse effects of the *Piper* court's application of these approaches.[10] The Article then analyzes this background information under the philosophical theories of Richard Posner, John Rawls, and Robert Nozick.[11] Next, the Article explores

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Unsecured Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995).

7. *Piper*, 168 B.R. at 440.

8. *See* Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common Law Tort System*, 61 TEX. L. REV. 1297, 1298-1307 (1983) (discussing the competing interests at stake in the future claimant situation that existed in the Johns-Manville reorganization); *see also* THOMAS H. HACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 2-5 (1986) (discussing generally the broad array of legal rights affected by bankruptcy law).

9. *Piper*, 168 B.R. at 436, 440.

10. *See infra* part II.

11. *See infra* part III. As the discussion *infra* suggests, each theory approaches the problem from a slightly different angle. Nozick's theory suggests guidelines similar to those established in *Piper*. *See infra* part III.C. Rawls's and Posner's respective theories, however, suggest that justice and fundamental bankruptcy principles are best achieved by allowing future claimants to assert their claims in the bankruptcy case. *See infra* parts III.A.-III.B. As such, the latter two theories provide a more complete and

the feasibility of an approach allowing future claimants to assert their claims in bankruptcy cases.[12] Finally, the Article suggests that one of the principal goals of the Bankruptcy Code, providing the debtor with a fresh start in the community, is best served by allowing such claims.[13]

II. THE HISTORY OF FUTURE CLAIMANTS IN BANKRUPTCY LAW

A. What Constitutes a "Claim" in Bankruptcy

Whether a particular court permits future claimants to assert their claims in a bankruptcy case largely depends on the theory used by the court in determining whether a party holds a "claim" against the debtor under section 101(5) of the Bankruptcy Code. Although all courts agree that Congress intended a broad definition of a "claim,"[14] the courts have been unable to agree on the appropriate test to determine the limits of this definition.[15] As a result, the courts have developed three tests to aid in this determination: the state law test, the conduct test, and the prepetition relationship test.

1. The State Law Test

The state law test is the most restrictive test applied by the courts in determining whether a claim exists against the debtor. Under this test, a party does not hold a claim against the debtor until that claim has accrued under the applicable state law.[16] The majority of courts that have considered the issue have declined to adopt the state law claim test.[17]

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satisfactory analysis of the problem. *See infra* notes 133-143 and accompanying text.

12. *See infra* part IV.

13. *See infra* part V.

14. *See e.g.*, Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (citing the legislative history, the court stated that "it is apparent that Congress desired a broad definition of a 'claim'"); *In re* Chateaugay Corp., 944 F.2d 997, 1003 (2d Cir. 1991) ("Congress unquestionably expected this definition to have wide scope."); *In re* Johns-Manville Corp., 36 B.R. 727, 754-56 n.6 (Bankr. S.D.N.Y. 1984) (stating that "[i]n enacting the Bankruptcy Code, Congress specifically intended to afford the broadest possible scope to the definition of 'claim' so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors.").

15. *See infra* notes 16-28 and accompanying text.

16. *See In re* M. Frenville Co., 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). In *Frenville*, the court held that "the threshold question of when a right to payment arises, absent overriding federal law, 'is to be determined by reference to state law.'" *Id.* at 337 (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946)).

17. *See, e.g., In re* Black, 70 B.R. 645 (Bankr. D. Utah 1986); Acevedo v. Van Dorn Plastic Machinery Co., 68 B.R. 495 (Bankr. E.D.N.Y. 1986); *In re* Yanks, 49 B.R. 56 (Bankr. S.D. Fla. 1985).

These courts criticize the test as construing the term "claim" too narrowly and, thus, ignoring the fundamental principles underlying a Chapter 11 reorganization.[18] For example, in *Piper*, the court stated, "[s]tate or non-bankruptcy law does not and should not override the bankruptcy policies of equitable distribution to creditors and a fresh start to the debtor."[19] Accordingly, the district court in *Piper* dismissed the state law claim test and focused its analysis of the future claimants' status on the remaining two theories.[20]

2. The Conduct Test

The conduct test is another test applied by courts to determine whether a party holds a claim against the debtor. This test, applied mostly in mass tort cases,[21] focuses on "the time when the acts giving rise to the alleged liability were performed."[22] Under this test, the "right to the immediate payment of money on account of a claim" does not have to exist to constitute a section 101(5) claim.[23] Rather, the test is satisfied if "the acts constituting the tort or breach of warranty have occurred prior to the filing of the petition."[24]

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18. *See In re* Piper Aircraft Corp., 162 B.R. 619, 624 (Bankr. S.D. Fla.), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub. nom.* Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995); *In re* Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986); *see also Black*, 70 B.R. 645, 649 (explaining that the state law claim test is inconsistent with the broad definition of "claim" as used by several courts, including the United States Supreme Court in Ohio v. Kovacs, 469 U.S. 274 (1985)); *Acevedo*, 68 B.R. 495 (stating that "the definition of 'claim' is very broad under 11 U.S.C. § 101, and properly includes causes of action for indemnity and contribution.").

19. *Aircraft Corp.*, 162 B.R. at 624.

20. *Piper*, 168 B.R. at 437.

21. *See In re* A.H. Robins Co., 63 B.R. 986, 990-94 (Bankr. E.D. Va 1986) (involving the future tort claims of women who used the Dalkon Shield), *aff'd sub nom.* Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom.* Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988); *Johns-Manville*, 57 B.R. at 686-90 (involving the future tort claims of people who were exposed to asbestos). *But see*, Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 941-44 (3d Cir.) (holding that a claim involving exposure to asbestos does not arise until the injury manifests itself), *cert. denied*, 474 U.S. 864 (1985).

The conduct test has also been applied outside the mass tort context. *See Edge*, 60 B.R. at 701-05 (holding that a claim against a dentist for negligent treatment arose at the time of the treatment and thus, was a prepetition claim).

22. *Johns-Manville*, 57 B.R. at 690.

23. *A.H. Robins*, 839 F.2d at 203. Note that at the time of the court's decision in *A.H. Robins*, the text of § 101(5)(A) was found in § 101(4)(A) of the Bankruptcy Code.

24. *Id.* at 203 (discussing whether the future tort victim held a claim for purposes of § 362(a)(1) of the Bankruptcy Code). The court in *A.H. Robins* further explained its holding in light of the legislative history of § 101(5)(A): "[I]t is . . . apparent that Congress has created a contingent right to payment as it has the power to create a

Although prepetition conduct of the debtor satisfies the conduct test, the *Piper* court held that prepetition contact between the debtor and the future claimant must also occur in addition to prepetition conduct.[25] Thus, even though the *Piper* court analyzed both the conduct test and the prepetition relationship test, its interpretation of the two tests, as discussed below, is essentially the same.

3. The Prepetition Relationship Test

To qualify as a claim under the prepetition relationship test, "there must be some prepetition relationship, such as contact, exposure, impact, or privity, between the debtor's prepetition conduct and the claimant."[26] Although some overlap exists between the conduct test and the prepetition relationship test, the prepetition relationship test is more restrictive, requiring some form of prepetition contact between claimant and debtor.[27] The *Piper* court adopted the prepetition relationship test.[28]

B. Piper's Application of the Conduct and Prepetition Relationship Tests

Piper Aircraft Corporation ("Piper") is a general aviation aircraft manufacturer and distributor.[29] Piper commenced operations in 1937 and since that time has been a defendant in several products liability suits related to "its manufacture, design, sale, distribution, and support of aircraft and parts."[30] As a result of the economic strain caused by these lawsuits, Piper filed a Chapter 11 voluntary petition for relief on July 1, 1991.[31]

During the course of its bankruptcy case, Piper entered into negotiations to sell all of its assets to Pilatus Aircraft Limited ("Pilatus"). Pilatus, concerned about potential liability for pending and future products liability cases, requested that the court appoint a legal representative to represent the interests of future claimants.[32] The

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contingent tort or like claim within the protection of § 362(a)(1)." *Id.*

25. *Piper*, 168 B.R. at 438.
26. *Aircraft Corp.*, 162 B.R. at 627.
27. *Id.*
28. *Piper*, 168 B.R. at 440.
29. *Aircraft Corp.*, 162 B.R. at 621.
30. *Id.*
31. *Id.*
32. *Id.* The Bankruptcy Court's order defined "future claimants" as:

> All persons, whether known or unknown, born or unborn, who may, after the date of confirmation of Piper's chapter 11 plan of reorganization, assert a claim or claims for personal injury, property damage, wrongful death,

Bankruptcy Court appointed a representative, who then filed a proof of claim in the amount of approximately $100,000,000 on behalf of all future claimants.[33] Both the unsecured creditors' committee and Piper objected to the proof of claim and asserted that the future claimants did not hold section 101(5) claims in the bankruptcy case.[34] Finding that no prepetition relationship existed between Piper and the future claimants, the Bankruptcy Court sustained the objection and disallowed the claims.[35]

In affirming the Bankruptcy Court's decision, the district court analyzed the claims of the future claimants under both the conduct test and the prepetition relationship test.[36] Although it ultimately declined to apply the conduct test, the court interpreted the test as requiring: (1) a debtor's wrongful prepetition act; (2) the future claimant's prepetition exposure to the defective product; and (3) a resulting postpetition injury.[37] Under this interpretation, the court reasoned that Piper's prepetition manufacturing and design did not satisfy the conduct test.[38]

> damages, contribution and/or indemnification, based in whole or in part upon events occurring or arising after the Confirmation Date, including claims based on the law of product liability, against Piper or its successor arising out of or relating to aircraft or parts manufactured and sold, designed, distributed or supported by Piper prior to the Confirmation Date.

Id. at 621 n.1.

33. *Id.* at 621-22.

34. *Id.* at 622.

35. *Id.* at 629.

36. *Piper*, 168 B.R. at 437-40.

37. *Id.* at 434, 438. The court's interpretation of the conduct test resulted from the distinctions that it drew between cases applying the conduct test and the facts of the case before it. *See, e.g., A.H. Robins*, 839 F.2d at 198; *Johns-Manville*, 57 B.R. at 680. As stated in *A.H. Robins*, 839 F.2d at 200, 203, and *Johns-Manville*, 57 B.R. at 686-87, the purpose underlying the conduct test is to facilitate the broad scope of "claim" under § 101(5) of the Bankruptcy Code. By failing to acknowledge such purpose, the *Piper* court interpreted the conduct test so restrictively that this test is indistinguishable from the prepetition test. Thus, the *Piper* court's conduct test suffers from the same flaw as the prepetition relationship test in that it removes the word "contingent" from the definition of "claim" under §101(5).

38. *Piper*, 168 B.R. at 437-39. This author agrees with the court that the mere manufacturing and design of a product is not sufficient to give rise to a "claim" under § 101(5) of the Bankruptcy Code. However, where there is a defect in the prepetition design or manufacturing process, this tortious act by the debtor gives rise to liability that is "conditioned upon the occurrence of some future event." BLACK'S LAW DICTIONARY 321 (6th ed. 1990) (defining "contingent"). Accordingly, in the latter situation, the future claimant does hold a § 101(5) claim against the debtor. It is important to distinguish a postpetition accident that happens by chance and is not due to any wrongful prepetition conduct of the debtor from a postpetition accident occurring due to the prepetition conduct of the debtor that created a defect in the design or manufacturing process of the product. For further discussion of this distinction, see *infra* part II.C.2.

Although the court rejected the application of the conduct test, the interpretation of the conduct test described by the court is essentially the same as the prepetition relationship test that it ultimately adopted.[39] The court's application of the prepetition relationship test required that "some 'prepetition relationship' between the debtor and the future claimants . . . exist in order for future claimant to have a 'claim' under the Code."[40] The court concluded that because the future claimants' claim did not meet the prepetition relationship requirement, it failed the prepetition relationship test.[41]

C. *The Ramifications of Piper on the Legal Rights of Future Claimants*

1. *Piper* Redefines a "Claim" Under Section 101(5)

During the pendency of the case, the future claimants' legal representative advanced the argument that the prepetition relationship test "effectively disregards and removes the words 'contingent' and 'unmatured' from the statutory definition of 'claim.'"[42] Although the *Piper* court acknowledged this argument, the court never reconciled this argument with its application of the prepetition relationship test.[43] The court's failure to recognize the broad scope of the statutory definition of "claim" caused it to interpret the conduct test and the prepetition relationship test as requiring the same elements. The *Piper* court ignored the fact that the conduct test originated to facilitate the broad statutory definition of "claim" in section 101(5). Indeed, under this original interpretation, a "contingent" claim existed if the claim "depend[ed] upon a future uncertain event."[44] Further, as the court in *Grady v. A.H. Robins* explained:

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39. The *Piper* court acknowledged that "the Prepetition Relationship Test and the Conduct Test are not mutually exclusive." *Piper*, 168 B.R. at 439. However, there is little, if any, distinction between the court's interpretation of the two tests.

40. *Id.*

41. *Id.* at 439-40.

42. *Id.* at 437.

43. *Id.*

44. *A.H. Robins*, 839 F.2d at 202-03. The *A.H. Robins* court focused its formulation of the conduct test on complying with the statutory language and legislative history of § 101(5). *Id.* The court in *A.H. Robins* then applied its definition of contingent under the conduct test to the facts before it and held that "manifestation of injury from the use of the Dalkon Shield" constituted a contingent claim under § 101(5). *Id.* Although the court only discussed the application of its test to the facts of its case, the underlying premise of its theory—that Congress intended contingent claims to come within the bankruptcy case—applies to the analysis of any claim asserted against a debtor. *Id.*

> It is . . . apparent that there can be no right to the immediate payment of money on account of a claim, the existence of which depends upon a future uncertain event. But it is also apparent that Congress has created a contingent right to payment as it has the power to create a contingent tort or like claim . . . .[45]

Under a literal reading of section 101(5) of the Bankruptcy Code, the *Piper* future claimants hold contingent and unmatured claims in the bankruptcy case.[46] The conduct necessary to give rise to their tort claims is "sufficiently rooted in the present"[47] to satisfy the requirements of section 101(5). The *Piper* debtor engaged in a wrongful conduct prepetition, and the future claimants' right to payment "depends upon a future uncertain event,"[48] namely, the injury caused by the defective prepetition product.[49]

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45. *Id.* at 203; *see also supra* notes 21-24 and accompanying text (explaining that the conduct test focuses on "the time when the acts giving rise to the alleged liability were performed.").

46. When interpreting a statute, great weight is usually accorded the plain meaning of the statutory language and the legislative intent supporting such an interpretation. *See* Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50 (1993) (arguing that courts properly use literal meanings of words to interpret statutory language). Further, under the canons of statutory construction and, more specifically, the whole act rule, a statute is to be interpreted so as to give every word meaning and to avoid surplusage. *See* Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (stating that "courts should disfavor interpretations of statutes that render language superfluous . . . .").

The *Piper* court fails to adhere to any of these common notions of statutory construction. Rather, the court essentially rewrites the statutory definition of "claim" and excludes a contingent and unmatured claim, both of which are currently covered by the plain language of § 101(5) of the Bankruptcy Code.

47. *Piper*, 168 B.R. at 439. In stating this proposition, the *Piper* court cites *In re* UNR Industries, 20 F.3d 766 (7th Cir.), *cert. denied*, 115 S. Ct. 509 (1994), and recites the following quote: "Bankruptcy separates the past and future of an enterprise, satisfying claims attributable to yesterday's activities out of existing assets . . . ." *Id.* at 771. Although the court cites this quote to support its application of the prepetition relationship test, the quoted words of the *UNR Industries* court support the application of the *A.H. Robins'* conduct test to the *Piper* future claimants. In the case at hand, Piper created the defective condition of its product prepetition and, accordingly, any liability for this prepetition activity should come out of existing corporate assets to ensure the future tort victims some recovery and to allow Piper's reorganized successor a true fresh start. *See infra* part II.C. If the existing assets of the debtor cannot cover the liabilities that it has created, this may serve as a signal to the Bankruptcy Court that either reorganization is not feasible and liquidation should be pursued or that the circumstances require it to use its equitable powers under § 105 of the Bankruptcy Code and permit reorganization while preserving the future tort victims' claims against the successor company. *Id.*

48. *A.H. Robins*, 839 F.2d at 203.

49. *Id.* Such a result also accords with the legislative history of § 101(5) that "contemplates 'the broadest possible relief in the bankruptcy court.'" *Id.* at 203; *see*

2. The *Piper* Court Ignored the Nature of the Debtor's Prepetition Conduct

In rejecting the conduct test, the Bankruptcy Court in *Piper* relied upon the following hypothetical formulated by the Second Circuit in *In re Chateaugay Corp.*[50] to demonstrate the problems it saw with the conduct test:

> Is there a 'claim' on behalf of the 10 people who will be killed when they drive across the bridge that will fall someday in the future? If the only test is whether the ultimate right to payment will arise out of the debtor's prepetition conduct, the future victims have a 'claim.' Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be set on that one bridge when it crashes.[51]

Although the hypothetical states a persuasive argument for where the definitional limits of "claim" should fall, it does not address the situation in *Piper.*

Unlike the *Chateaugay* hypothetical, in *Piper*, several products liability suits existed prepetition.[52] Furthermore, the court appointed a legal representative to represent the interests of individuals likely to be injured postpetition by prepetition conduct similar to that asserted in the pending products liability suits.[53] These future tort claimants are not the victims of "sheer fortuity" as if the planes were simply predicted to crash due to normal wear and tear on the product, as in the bridge hypothetical. Rather, Piper's tortious prepetition conduct is predicted to cause the future injuries. Thus, Piper is held liable for the defective design and manufacturing of its product, and the wrongful conduct giving rise to the contingent claim for products liability should be viewed as prepetition activity.

3. *Piper* Frustrates the Policy Goals of Bankruptcy and Tort Law

The *Piper* decision thwarts congressional intent to apply a broad

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also supra notes 4, 21-24, and accompanying text (discussing § 101(5) of the Bankruptcy Code).

50. 944 F.2d 997 (2d Cir. 1991).

51. *In re* Piper Aircraft Corp., 162 B.R. 619, 626-27 (Bankr. S.D. Fla. 1994) (citing *Chateaugay Corp.*, 944 F.2d at 1003).

52. *Id.* at 620.

53. *See id.*; *see also supra* notes 29-35 and accompanying text (detailing the specific facts of *Piper*).

reading of the term "claim" under section 101(5).[54] This, in turn, frustrates the fundamental bankruptcy principle of providing the debtor with a fresh start.[55] Furthermore, the decision frustrates the goals of tort law to compensate victims and to deter future harmful conduct.[56]

Several concerns arise from the *Piper* decision. First, the decision may hamper a sale of the debtor's assets by allowing potential successor liability to depreciate the value of the debtor's assets. Whether this concern becomes a reality for a potential purchaser, however, largely depends upon the successor liability test employed by the court. In determining such liability, courts generally apply one of three tests: the traditional successor liability test;[57] the product line test;[58] or the continuity of enterprise test.[59] The most recent trend in products liability cases holds that the successor corporation can be held liable for the bankrupt's post-confirmation claims.[60] Therefore,

54. *See, e.g.*, Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (explaining that there is no indication that there is a claim unless there is a contractual arrangement).

55. *See generally* MARTIN J. BIENENSTOCK, BANKRUPTCY REORGANIZATION (1987) (discussing the policy goals underlying the bankruptcy system); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993) (discussing the policy goals underlying the bankruptcy system).

56. *See generally* Steven J. Parent, Comment, *Judicial Creativity in Dealing with Mass Torts in Bankruptcy*, 13 GEO. MASON U. L. REV. 381 (1990) (explaining in a general discussion the policy goals of the tort system).

57. The traditional test for successor liability holds that a purchaser of all of another corporation's assets is not liable for the debts and liabilities of the selling corporation, subject to four exceptions: (1) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the corporations; (3) the purchaser is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability for such debts and liabilities. *See, e.g*, Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir. 1988) (explaining the four prongs of the traditional test for successor liability).

58. The product line test holds a successor corporation liable if that corporation continues to manufacture the same product line as the predecessor corporation, under the same name and with no outward indication of a change of ownership. *See, e.g.*, Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977) (justifying placing the burden of the cost of paying for injuries caused by product of a previous corporation on the successor corporation via the product line test); Ramirez v. Amsted Indus., Inc., 431 A.2d 811 (N.J. 1981) (reinforcing the theory behind the product line test); Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 109 (Pa. Super. 1981) (explaining the use of the product line test); Martin v. Abbott Lab., Inc., 689 P.2d 368 (Wash. 1984) (using the product line test to find for the plaintiff).

59. The continuity of enterprise test holds a successor corporation liable if: (1) the purchaser retains the predecessor's general operations; (2) the predecessor dissolves; (3) the purchaser assumes the normal business obligations of the predecessor; and (4) the purchaser holds itself out as a continuation of the predecessor. *See, e.g.*, Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 881-83 (Mich. 1976) (explaining the continuity of enterprise test).

60. *See* Mooney Aircraft, Inc. v. Foster, 730 F.2d 367, 375 (5th Cir. 1984);

regardless of which test the court uses, a purchaser, such as Pilatus in *Piper,* may be exposed to costly liability for assets purchased from a bankrupt entity.

Similar issues arise for a reorganized debtor. For example, if subsequent to reorganization the debtor faces multiple lawsuits for claims not asserted in and, thus, not discharged by the bankruptcy case, the reorganized debtor is potentially liable as a continuation of the prepetition debtor. Under either the product line or continuity of enterprise theories of successor liability,[61] such liability will likely force the reorganized company to file once again for the protection of the Bankruptcy Court.[62] Thus, by not allowing claims for the debtor's wrongful prepetition activity to be handled in the initial bankruptcy case, the *Piper* decision places the debtor, creditors, and tort victims in a worse position with assets of diminished value and more creditors to satisfy.

Finally, by excluding claims rooted in prepetition conduct from a bankruptcy case, the risk exists that compensational resources for future claimants will dry up by the time the claimants assert their claims against the reorganized debtor or successor corporation.[63] Also, allowing the debtor to escape liability for wrongful prepetition conduct frustrates the goal of deterring such wrongful conduct by the debtor and others in the future.[64] Under *Piper*, a tortfeasor may escape financial responsibility by simply filing for the protection of the bankruptcy court. While a claimant can still assert a claim at a later time, the successor and debtor company may be two different entities. Therefore, the true wrongdoer may avoid financial punishment.[65]

Renkiewicz v. Allied Prod. Corp., 492 N.W.2d 820, 823 (Mich. Ct. App. 1992), *appeal denied*, 505 N.W.2d 579 (Mich.), *cert. denied,* 114 S. Ct. 601 (1993).

61. *See Renkiewicz*, 492 N.W.2d at 823 (addressing the possibility of successor liability attaching to a claim arising one month after the confirmation of the debtor's plan of reorganization).

62. While § 350(b) permits the Bankruptcy Court to reopen a bankruptcy case for cause, it is an extremely difficult motion to make and the courts have not received such motions favorably in the products liability area. *See, e.g.*, Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161-64 (7th Cir. 1994); *Mooney Aircraft*, 730 F.2d at 373, 375 (remanding the case to be dismissed for lack of jurisdiction); *In re* Yoder Co., 158 B.R. 99, 100 (Bankr. N.D. Ohio 1993) (denying the motion to reopen a bankruptcy case after assets had been sold due to a lack of justification).

63. *See In re* Johns-Manville, 36 B.R. 743, 745-75 (Bankr. S.D.N.Y. 1984) (granting "future claimants" the right to be heard at a bankruptcy proceeding). The *Johns-Manville* court discusses similar concerns regarding limited compensational resources in the asbestos context. *Id.*

64. *See* WILLIAM L. PROSSER, THE LAW OF TORTS 23 (1971) (explaining the prevention of similar future harm as one incentive underlying tort liability).

65. Even if the debtor and the successor corporation are the same entity, a strong

III. WHAT "SHOULD" THE ANSWER TO THE FUTURE CLAIMANT PROBLEM BE?

Whether a future claimant holds a cognizable claim against a debtor is a complex question. Several factors need consideration, including the interests of various parties affected by the answer to this question. Therefore, in attempting to formulate an answer, this part analyzes the future claimant problem under various economic and legal theories. This analysis is not meant to produce a clear-cut rule, but merely to set forth guidelines for courts to follow.

A. Posner's Wealth Maximization Theory

Courts and commentators often use economic theories as analytical tools to explain various legal rules.[66] Richard Posner is a leading figure in such positive applications of economic analysis and a driving force behind the normative approach to economics that provides "an ethical basis for the organization and operation of social institutions."[67] Posner's normative approach "takes the positive analysis one step further, arguing that economic analysis explains not only the way the law does work, but also the way the law should work."[68]

1. The Principles of Wealth Maximization

Under Posner's theory of wealth maximization, an institution or legal rule is just if it maximizes the aggregate wealth of society.[69] Posner defines wealth as "the value in dollars or dollar equivalents . . . of everything in society,"[70] and measures wealth by "what people are

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likelihood exists that the corporation's resources will diminish by the time it is finally held liable for its prepetition conduct. Thus, the debtor can still escape full liability and the tort victims will not be fully compensated for their losses.

66. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (3d ed. 1986) (explaining the law in economic terms); Whitney Cunningham, Note, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L.J. 141 (1992); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (explaining the economic rationale behind the law).

67. Richard Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal*, 83 COLUM. L. REV. 488, 488 (1983).

68. *Id.* at 491.

69. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 61 (1981) [hereinafter POSNER]; *see also* Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1, 6-7; Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 86-89 (1985) [hereinafter Posner, *Wealth Maximization*]; Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119-20 (1979) [hereinafter Posner, *Utilitarianism*]; Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter Posner, *Efficiency Norm*].

70. Posner, *Utilitarianism*, *supra* note 69, at 119.

willing to pay for something or, if they already own it, what they demand in money to give it up."[71] Although these economic justifications may not appear to explain a concept of justice, Posner argues that such notions do lead to a just society because if the institutions and legal rules were viewed from an *ex ante* position, rational individuals would choose those institutions and legal rules that maximize society's wealth.[72]

In measuring societal wealth, the only preferences accounted for are those "that are backed up by money, that is, that are registered in a market."[73] This measurement does not need to be based upon an actual national market, for it is clearly impossible to measure societal values such as family and entertainment in such a manner. Rather, such activities are valued according to a hypothetical market.[74] Posner's theory uses this hypothetical market analysis to evaluate several situations in which either no explicit market exists, or the transaction costs are prohibitive, as in the typical accident case.[75] Accordingly, one should posit any analysis of the *Piper* decision under the wealth maximization theory as a hypothetical market transaction.

In *Piper*, the rights of the future claimants to remain free from injury and Piper's right to conduct its business affairs profitably compete with one another.[76] The value of the future claimants' rights equals the

71. *Id.*

72. POSNER, *supra* note 69, at 94-101.

73. *Id.* at 61.

74. *Id.* at 61-63; *see also* Posner, *Utilitarianism, supra* note 69, at 119-20 (explaining how the market influences every decision and behavior).

75. POSNER, *supra* note 69, at 61-62, 79-81; *see also* Posner, *Utilitarianism, supra* note 69, at 119-20. Posner believes that in cases where the transaction costs are high, i.e., an involuntary transaction, the court can formulate "a reasonably accurate guess as to the allocation of resources that would maximize wealth." POSNER, *supra* note 69, at 62; *see also* Posner, *Wealth Maximization, supra* note 69, at 91 (explaining further this model of economics and behavior). This function of the court is consistent with the underlying assumption of Posner's economic theories of the law that courts work to allocate resources efficiently. *See* Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 775-76 (1981) [hereinafter Posner, *Reply*].

76. The wealth-maximization analysis of *Piper* proceeds based upon the rights as they are initially allocated among the parties. Because *Piper* involves an involuntary transaction, the principles of wealth maximization redistribute wealth to some extent. *See supra* notes 69-75 and accompanying text; Posner, *Wealth Maximization, supra* note 69, at 104. However, the determinacy of initial allocation of rights in voluntary transactions under wealth maximization has been criticized as circular. *See, e.g.*, Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 525-26 (1980); Dworkin, *supra* note 66, at 207; Schmalbeck, *supra* note 67, at 499-501. For Posner's view of this criticism of circularity, *see* Posner, *Reply, supra* note 75, at 786-87.

price which they would accept in exchange for their right to remain free from injury, and the value that Piper places on the future claimants's rights equals the price which it would pay to purchase the rights.[77] If these were the only factors to consider in the equation, having Piper purchase the right to invade the rights of the future claimants would only be efficient if Piper paid more than the asking price of the future claimants. However, this transaction is not voluntary, and the fact that Piper violates the rights of the future claimants through allegedly tortious conduct must enter the equation.[78]

Wealth maximization encompasses notions of corrective justice and, thus, once unjust acts occur, "a failure to rectify such acts would reduce the wealth of society by making such acts more common."[79] Further, wealth-maximization principles support a rule of strict liability both when the injurer can best avoid the accident, and when the injured party can do nothing to prevent the injury.[80] These principles accord with the notions of products liability law that apply to the *Piper* analysis. Under products liability law, once a defect in product design or manufacture is established, a party is strictly liable for harm caused by the defective product.[81] In determining whether such a defect exists, the courts utilize a cost-benefit analysis.[82] Thus, when the expected accident costs exceed the costs of avoiding a product defect, a product is defective and such a defect constitutes an act of injustice because, as illustrated by the cost-benefit analysis defining the defect, the act "reduces the wealth of society."[83]

Applying these corrective justice notions of wealth maximization in the future claimant context, it appears that the optimal result is reached only by allowing the claims of the future claimants. The assertion of a

77. *See* Posner, *Utilitarianism, supra* note 69, at 119 (explaining basic value principles of wealth maximization); *see also* Cunningham, *supra* note 66, at 143-44 (discussing the measurement of value by the "willingness and ability to pay").

78. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 29-31 (1987) (discussing liability rules and their efficiency under a wealth-maximization system); Posner, *Utilitarianism, supra* note 69, at 127 (discussing the application of tort law under a wealth maximization theory).

79. POSNER, *supra* note 69, at 74. Posner defines an "act of injustice" as that which "reduces the wealth of society." *Id.* The lack of deterrence that may flow from the *Piper* decision is discussed *supra* note 56 and accompanying text.

80. LANDES & POSNER, *supra* note 78, at 37-39; *see also* POSNER, *supra* note 69, at 192-99 (explaining the economic reasoning of wealth maximization and promoting strict liability to protect the public).

81. ARTHUR W. MURPHY, ET. AL., THE LAW OF PRODUCT LIABILITY, PROBLEMS, AND POLICIES 21-26 (1982).

82. LANDES & POSNER, *supra* note 78, at 291-92.

83. POSNER, *supra* note 69, at 74.

product defect, even if the claimants have not yet suffered injuries by the product, gives rise to strict liability so long as the defects exist.[84] Thus, in the *Piper* situation, were the future claimants given the opportunity, they could have established that their claim, valued at $100,000,000, exceeded what it would have cost Piper to avoid the product defect.[85]

Once future claimants demonstrate the tortfeasor's act of injustice, the courts should allow their claims in the bankruptcy case thereby holding the injurer accountable for its acts.[86] Such accountability prevents the injurer's acts from further decreasing the wealth of society, because it deters potential injurers from committing similar acts of injustice.[87]

Not only does the application of wealth-maximization principles justify the above result, but long-term policy considerations under the wealth-maximization theory also support this result. As previously noted, wealth maximization focuses on the aggregate wealth of society, not of the individual.[88] Accordingly, if the initial bankruptcy case does not account for the acts of injustice committed by the injurer, the lack of significant deterrence and the future acts of the tortfeasor threaten the wealth of society.[89]

Having escaped liability once, the tortfeasor has no incentive to correct the existing defect or to work to prevent future defects in other products.[90] Consequently, this lack of incentive provides a likelihood

84. *See supra* notes 75-78 and accompanying text.

85. Having the future claimants produce such evidence further strengthens the assertion that the prepetition conduct of the debtor suffices to support their claim under § 101(5) because it establishes that the cause of their future injuries is sufficiently rooted in the present (i.e., the debtor's wrongful prepetition conduct). For a discussion of these concerns regarding § 101(5) in *Piper*, see *supra* notes 27, 37-41, 44-49 and accompanying text.

Further, under the wealth-maximization theory, the fact that the claimants' injuries have not yet occurred is not a significant factor in the analysis, because the theory focuses on maximizing societal and not individual wealth. *See supra* note 69 and accompanying text. Thus, once a product defect is established, the injurer is strictly liable for the decrease in societal wealth that it has created.

86. Such a result accords with Posner's view that corrective justice notions under a wealth-maximization theory should correct market failures such as externalities. POSNER, *supra* note 69, at 103. Accordingly, wealth maximization requires that a party internalize the costs of doing business, which includes the cost of correcting its defective products.

87. *See id.* at 74; *supra* notes 79-83 and accompanying text.

88. *See supra* notes 69-70, 79 and accompanying text.

89. *See supra* notes 76-78 and accompanying text.

90. Wealth maximization achieves the desired social behavior that maximizes societal wealth by altering incentives. *See* POSNER, *supra* note 69, at 75.

that the tortfeasor will further decrease the wealth of society by repeating its tortious acts. Eventually, this may cause the tortfeasor to financially fail for a second time.[91] Thus, under the principles of wealth maximization, holding the producer of a defective product responsible for its wrongful conduct by allowing the claims of future claimants will protect the aggregate wealth of society.

B. Rawls's "Justice as Fairness" Theory

John Rawls's theory of social justice focuses on the "basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[92] Rawls developed normative principles which may guide the direction of bankruptcy law.[93] Indeed, Rawls's concern that rights and duties are fairly distributed throughout society corresponds with the traditional goals of bankruptcy laws.[94]

1. The Principles of Justice

For Rawls, principles of justice encompass those ideas that equally-situated, free and rational individuals would select to govern their association.[95] To formulate such principles, Rawls analyzes society from what he terms the "original position."[96] In the original position, all members of society are placed on an equal level and no one receives

91. For a discussion of this concern in the context of the *Piper* decision, see *supra* note 47 and accompanying text.

92. JOHN RAWLS, A THEORY OF JUSTICE 7 (1971) [hereinafter RAWLS, THEORY OF JUSTICE]; *See also* JOHN RAWLS, POLITICAL LIBERALISM 5, 35 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980).

93. For an illustration of how Rawls's principles of justice apply to a general analysis and evaluation of the bankruptcy system, see Rasmussen, *supra* note 69; Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993).

94. *See* Rasmussen, *supra* note 69, at 5 ("Generally, [the] goals of bankruptcy law include saving jobs, assessing the needs of the surrounding community, treating creditors equally, and assuring compensation for tort victims.").

95. *See* RAWLS, THEORY OF JUSTICE, *supra* note 92, at 4, 12-16.

96. *See id.* at 12, 17-21. Rawls explains that the purpose of the original position is "to set up a fair procedure so that any principles agreed to will be just." *Id.* at 136; *see also* REX MARTIN, RAWLS AND RIGHTS 15-19 (1985) (characterizing the Rawlsian theory called the "original position" as a framework for other philosophical approaches to social and economic justice); Michael D. Weiss, *A Jurisprudence of Blindness: Rawls' Justice and Legal Theory*, 42 DRAKE L. REV. 565, 569-72 (1993) (reconsidering the construction of the original position, particularly the role of the theoretically defined individuals who are to reason to the principles of justice).

advantages or disadvantages due to natural endowments.[97] In order to formulate the ideal system of justice, individuals in the original position are situated behind a "veil of ignorance," oblivious to their position in society.[98] As a result, individuals behind the veil of ignorance cannot mold principles to the specificity of their own situation.[99]

As applied under Rawls's theory, individuals behind the veil of ignorance select the following two principles of justice to evaluate the rules and institutions of society: (1) "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others";[100] and (2) "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."[101] The first principle seeks to ensure the protection of the individual's rights through the creation of a just constitution and the second principle "dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under

97. *See* RAWLS, THEORY OF JUSTICE, *supra* note 92.

98. *See id.* at 136-41 ("As far as possible, then, the only particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies."); *see also* RAWLS, POLITICAL LIBERALISM, *supra* note 92, at 24 n.27, 305 (illustrating how participants behind the veil of ignorance reason to the principles of justice); Rasmussen, *supra* note 69, at 11-13 (stating that although persons in the original position do not know their status in society, they are "moral persons" in that they establish an individual sense of morality that enables them to understand and conform to selected principles of justice).

For criticisms of the feasibility of such a veil of ignorance in the original position, see Louis Katzner, *The Original Position and the Veil of Ignorance, in* RAWLS, THEORY OF JUSTICE , supra note 92, at 42; Weiss, *supra* note 96.

99. RAWLS, THEORY OF JUSTICE, *supra* note 92, at 18; *see also* John Rawls, *Distributive Justice, in* PHILOSOPHY, POLITICS, AND SOCIETY 58 (Peter Laslett & W.G. Runciman eds., 3d ed. 1967).

100. RAWLS, THEORY OF JUSTICE, *supra* note 92, at 60. Since the publication of *A Theory of Justice,* Rawls has modified this first principle of justice. *See* John Rawls, *The Basic Liberties and Their Priority, in* 3 THE TANNER LECTURES ON HUMAN VALUES 5, 46-55 (Sterling M. McMurrin ed., 1982) (replacing "most extensive total system" with "a fully adequate scheme" because the basic liberties scheme was not created to maximize liberties but rather to guarantee the social conditions needed for the development and exercise of these liberties). As presented in Rawls's latest work, the first principle states: "Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value." RAWLS, POLITICAL LIBERALISM, *supra* note 92, at 5.

This modification of the first principle of justice does not affect the analysis of the future claimants' dilemma under Rawls's *Theory of Justice*, as the future claimant analysis focuses on the "maximum" concept articulated in general analysis of bankruptcy law. *See* Rasmussen, *supra* note 69, at 14 n.48, 16-17.

101. RAWLS, THEORY OF JUSTICE, *supra* note 92, at 60.

conditions of fair equality of opportunity, subject to the equal liberties being maintained."[102] The latter application of the second principle is referred to as the "maximin" or "difference principle."[103]

2. The Principles of Justice and the Future Claimant Dilemma

In order to evaluate the status of future claimants under Rawls's theory of social justice, it is necessary to analyze the competing interests of the parties involved from behind the veil of ignorance in the original position.[104] The veil of ignorance removes the labels of the parties, ensuring that the decisions made are not at the expense of the least-advantaged group of individuals.[105]

Considering the facts of *Piper* from behind the veil of ignorance, the group of individuals exposed to the greatest amount of risk, and accordingly the least-advantaged group, is the class of future tort claimants. Not only do future tort claimants risk the uncertainties faced by the average tort victim in a bankruptcy case, those of undercompensation due to the depletion of assets,[106] but future tort victims also face the possibility of no redress for their harm, as the wrongdoer's assets may become uncollectible in the near future.[107] Thus, in comparison to the other parties involved in *Piper*,[108] the future tort

102. *Id.* at 199.

103. *See infra* notes 104-12 and accompanying text for a discussion of this principle. *See also* Rasmussen, *supra* note 69, at 14-15 (explaining the maximin principle as a principle that "seeks to maximize the utility of the class in the minimum position, i.e., the class that has the smallest amount of primary goods."); MARTIN, *supra* note 96, at 42-44.

For criticisms of the difference principle, see BRIAN BARRY, THEORIES OF JUSTICE 214 (1989); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 198-203 (1974).

104. Rasmussen argues that the original position and its veil of ignorance are particularly useful in the bankruptcy context, because "[r]ather than artificially narrowing the inquiry solely to a particular firm in distress, or specific creditors of that firm, use of the veil of ignorance permits an examination of a bankruptcy regime's overall effects on the way in which the basic structure distributes society's primary goods." Rasmussen, *supra* note 69, at 12.

105. *See id.* at 14-15.

106. *See id.* at 31-32.

107. For a discussion of this potential risk under the *Piper* decision, see *supra* notes 63-65 and accompanying text.

108. The other parties that factor into this equation are as follows: (1) the debtor, who is not only protected by the Bankruptcy Court but is the wrongdoer in this scenario; (2) the secured creditors, who not only have allowable claims in the bankruptcy case but also collateral from which to collect; and (3) the unsecured creditors, including the tort victims in pending litigation, who also hold claims in the bankruptcy case, even though they stand to lose some upon the inclusion of the future tort victims. This potential loss of the unsecured creditors is not relevant to the analysis under the principles of justice, because the unsecured creditors are not the least-advantaged members. *See* RAWLS, THEORY OF JUSTICE, *supra* note 92, at 66-67, 78-80; *see also* MARTIN, *supra* note 96, at

claimants occupy the position of the least-advantaged group.

Because the individuals behind the veil of ignorance do not know who will be members of the least-advantaged groups—the future tort victims—they would not agree to any rules that adversely affect a given party.[109] The maximin principle requires that any change in the position of the future tort claimants in the bankruptcy case be an improvement; otherwise, such a decision would not be chosen by those behind the veil of ignorance.[110] Accordingly, individuals behind the veil of ignorance would view the slightest prepetition conduct by the debtor as sufficient for bringing a claim. This result accords with Congress' broad definition of the term "claim."[111]

Thus, applying Rawls's principles of justice, wrongful prepetition conduct by the debtor can give rise to a section 101(5) claim in the bankruptcy case. This result is equitable because it is reached through an unbiased procedure.[112] From a societal view, it is also fair because all of the parties who will be adversely affected by the conduct of the debtor are permitted to participate in the bankruptcy case.

C. Nozick's Entitlement Theory

In contrast to the notions of equality underlying Rawls's theory of social justice, Robert Nozick endorses an entitlement theory that espouses individual rights protected by minimal state intervention.[113] As Nozick explains: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."[114] Nozick bases his theory upon three basic concepts: (1) the principle of justice in acquisition; (2) the principle of justice in holdings; and (3)

91-97 (construing the maximin principle as optimality, i.e., you cannot make one person better off at the expense of another, and egalitarianism which Martin described as "minimizing the difference between the expectations of the most-favored representative and the least-advantaged representative.").

109. *See* RAWLS, THEORY OF JUSTICE, *supra* note 92, at 150-60.

110. *See id.* at 136-37, 154.

111. *See supra* notes 4, 18-19, and accompanying text.

112. *See* RAWLS, THEORY OF JUSTICE, *supra* note 92, at 136 ("The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.") For further discussion of Rawls's concept of procedural fairness, see MARTIN, *supra* note 96, at 14-18 & n.25.

113. *See* NOZICK, *supra* note 103, at 120-22, 150-53, 230-31; *see also* Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1006-07 (1990) (discussing Nozick's assertion that "the only justifiable state is the minimal state, protecting its citizens against force and fraud in the form of 'boundary crossings' against existing holdings.").

114. NOZICK, *supra* note 103, at ix.

the rectification of injustice in holdings.[115] The first two principles are evaluated by the history of the particular distribution,[116] while the third principle compensates an individual for any injustices in this history.[117]

Under Nozick's theory, an individual does not become entitled to a greater or lesser share of the distribution because of considerations such as moral merit, usefulness to society, or need.[118] Rather, each individual gets what he or she deserves. Indeed, "historical principles of justice hold that past circumstances or actions of people can create differential entitlement or differential deserts to things."[119]

Once the historical principles are satisfied and a just distribution occurs,[120] the individual can use his or her distributions in any manner that he or she sees fit within his or her personal sphere.[121] While in this personal sphere, the state has a duty to protect the individual. As a result of this protective duty, the state has the power to redistribute assets.[122]

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115. *See id.* at 150-53.

116. *See id.* at 153-55. Nozick asserts that his entitlement theory is historical in principle (i.e., "whether a distribution is just depends upon how it came about") and contrasts this with Rawls's theory, which Nozick believes is an end-result principle (i.e., "justice of a distribution is determined by how things are distributed (who has what) as judged by some *structural* principles of just distribution."). *Id.*

For Nozick's criticism of Rawls's theory as being an end-result principle, see *id.* at 198-204; *see also* John Stick, *Turning Rawls into Nozick and Back Again*, 81 NW. U. L. REV. 363, 376-79 (1987).

117. *See* NOZICK, *supra* note 103, at 152; *see also* RONALD J. MANN, BANKRUPTCY AND DISTRIBUTIVE JUSTICE: WHOSE MONEY IS IT ANYWAY?, (forthcoming 1995).

118. NOZICK, *supra* note 103, at 156.

119. *Id.* at 155 (emphasis omitted).

120. "[T]he holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer [i.e., voluntary exchanges], or by the principle of rectification of injustice (as specified by the first two principles)." *Id.* at 153. Further, "[i]f each person's holdings are just, then the total set (distribution) of holdings is just." *Id.*

For a thorough discussion of the appropriation aspects of Nozick's entitlement theory, see G.A. COHEN, *Self-Ownership, World-Ownership, and Equality*, *in* JUSTICE AND EQUALITY HERE AND NOW 108, 118-26 (Frank L. Lucash ed., 1986).

121. For an explanation of an individual's "moral space," see NOZICK *supra* note 103, at 57-58. *See also* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 789 n.82 (1985) (explaining Nozick's "conception of a private domain" as that "which defines the individual's discretionary space, within which he can work out his conception of happiness") (quoting Fried, *Is Liability Possible?*, *in* 3 THE TANNER LECTURES ON HUMAN VALUES 91, 120-21 (Sterling M. McMurrin ed., 1982)).

122. *See* NOZICK, *supra* note 103, at 78-84; Hirshman, *supra* note 113; Ingber, *supra* note 121.

Nozick also believes that individuals have the right to remain free from physical injury caused by another.[123] The analysis of the future claimant dilemma under Nozick's theory of entitlement begins with the historical principle of this basic right. Such a right that grants the individual control over his or her person carries with it the right to have these liberties protected under the notion of a minimal state.[124] Accordingly, the state should protect future tort claimants from physical violation by others. Then, if a physical violation occurs, the injured party is entitled to compensation.[125]

On the other side of the equation, a corporation has the right to engage in business for profit.[126] The corporation earns such a right from the historical principles of the entitlement theory. However, although this right exists, it does have its limits. For example, when a corporation begins to make a profit at the expense of an individual's right to remain free from invasion within his or her personal sphere, the principle of rectification applies.[127]

Under the rectification principle, the transfer of the individual's right to remain free from injury to the corporation without adequate compensation is an unjust transfer that the state has the authority to rectify.[128] Thus, in *Piper*, the future tort claimants are entitled to the right of nonviolation within their personal sphere and Piper should have to pay compensation for violating their rights. However, Nozick's theory focuses on rectifying past injustices and, because the *Piper* future claimants have not incurred injuries, an unjust transfer of rights has not yet occurred.[129] Until the future tort victims actually suffer a physical harm, Piper has not invaded their personal spheres and need not pay compensation.

Nozick's theory commands such a result because Piper is completely within its individual sphere and historical entitlement when it

123. *See* NOZICK, *supra* note 103, at 27-28, 268-71 (discussing the substantial effects on a person's life that warrant protection under the minimal-state theory); *see also* Charles Taylor, *The Nature and Scope of Distributive Justice, in* JUSTICE AND EQUALITY HERE AND NOW, *supra* note 120 at 34, 37 (discussing Nozick's method of arguing for the application of his theory based upon society's "current conception of individual rights").

124. *See* NOZICK, *supra* note 103, at 26-28, 135-37.

125. *See id.*

126. *See id.* at 153-55.

127. *See id.* at 228-31.

128. *See id.* at 78-84, 152; *see also* Mann, *supra* note 117, at 32.

129. "[C]ompensation is not compelled, [nor] rights protected for forward-looking reasons of the community, but rather just in recognition of those rights." Ingber, *supra* note 121, at 789 n.82 (quoting Fried, *Is Liability Possible?*, in 3 THE TANNER LECTURES ON HUMAN VALUES, *supra* note 121, at 91, 121).

manufactures a product, even if the product is defective.[130] In fact, Piper remains within its individual entitlement even when it places defective products into the stream of commerce, as that is the nature of its business. Piper only oversteps its bounds when its business activities encroach upon another's sphere without just compen-sation.[131] Therefore, until the future tort victims suffer an actual harm, they have no right to compensation. The societal effects of this deprivation are irrelevant as the focal point is what is best for the individual, not for society as a whole.[132]

The theories of Posner, Rawls, and Nozick each approach the future claimant dilemma with a different focus. Posner and Rawls both posit theories which concentrate on the big picture and the achievement of social justice. Posner concludes that social justice is the maximization of societal wealth.[133] Rawls posits that procedural fairness in distribution creates a just society.[134] In contrast to these theories, Nozick's theory has a narrower focus. Under Nozick's theory, justice is the maximization of individual autonomy with minimal state intervention.[135]

The *Piper*[136] decision is most in line with Nozick's theory. The *Piper* court focused on the optimal solution for the debtor, holding that some prepetition contact between the debtor and the future tort claimants[137] was necessary to allow the claim of the future tort claimants.[138] However, neither Nozick's theory nor the *Piper* decision takes into account the interests of the various parties involved in the bankruptcy case, such as the tort victims and the surrounding community.[139] Although the *Piper* court believed that it acted in the best interests of creditors, it nevertheless failed to consider the long-term effects of its decision on these individuals.[140] Because such a narrow analysis of the problem disregards the wide-spread effect of the decision on the fundamental principles underlying bankruptcy

130. *See* NOZICK, *supra* note 103, at 54-84 (discussing when an individual's conduct crosses into another's boundary and thus gives rise to a right of compensation).

131. *See id.*; Hirshman, *supra* note 113, at 1006-07.

132. *See supra* note 113 and accompanying text.

133. *See supra* notes 66-91 and accompanying text.

134. *See supra* notes 92-112 and accompanying text.

135. *See supra* notes 113-32 and accompanying text.

136. *In re* Piper Aircraft Corp., 168 B.R. 434 (S.D. Fla. 1994).

137. *Id.* at 439.

138. *Id.* at 439-40.

139. *See supra* notes 50-53 and accompanying text.

140. For a discussion of the short-sighted nature of the *Piper* decision, see *supra* part II.C.

law,[141] applying the theories of Posner and Rawls may achieve a better result.[142] This approach suggests that the wrongful conduct of the debtor prepetition creates liability on the part of the debtor thereby supporting a contingent and unmatured claim under section 101(5) of the Bankruptcy Code.[143]

IV. IS THE "JUST" SOLUTION TO THE FUTURE CLAIMANT DILEMMA A WORKABLE ONE?

The normative principles established by Posner's theory of wealth maximization and Rawls's theory of social justice demonstrate that the optimal solution to the future claimant dilemma is somewhat broader than that reached by the *Piper* court,[144] yet not without limits.[145] This part suggests that the optimal solution to the future claimant dilemma is achieved by combining the strengths of each theory of justice set forth in part III and analyzing the problem through the following two questions: (1) Do the future claimants hold a section 101(5) claim?; and (2) If a claim exists, how should the claim be treated within the bankruptcy case?

A. Do the Future Claimants Hold a Claim Against the Debtor?

Considering the bankruptcy policies of granting a fresh start to the debtor, providing an equitable distribution to creditors[146] and Congress's desire to define the term "claim" broadly,[147] future claimants should not have difficulty asserting their claims against the debtor in the bankruptcy case when the claims arise out of the debtor's prepetition conduct. This result allows the debtor to account for all of its

141. *See supra* note 89 and accompanying text.

142. Although both Posner's and Rawls's theories achieve the same result of allowing the claims of the future claimants to be asserted in the bankruptcy proceeding, the substantive analysis of each theory differs and may produce different results in particular circumstances. For example, under Posner's theory, the debtor is liable only when the debtor committed wrongful prepetition conduct to decrease the aggregate wealth of society. Whereas, under Rawls's theory, no minimum limit exists and accordingly, the individuals behind the veil of ignorance could formulate a rule that allows future claims to be asserted against the debtor for any prepetition conduct so that they are assured of protection if they ever come into contact with a product of the debtor once the veil is removed. This substantive discrepancy between the two theories suggests that Posner's parameters provide a more feasible analysis.

143. For a detailed discussion of how Posner's and Rawls's theories apply to *Piper*, see *supra* parts III.A.1 and III.B.2 respectively.

144. *In re* Piper Aircraft Corp., 168 B.R. 434, 439-40 (S.D. Fla. 1994).

145. *See supra* note 38 and accompanying text.

146. *See supra* note 19 and accompanying text.

147. *See supra* notes 2-4, 14, and accompanying text.

prepetition activities in the bankruptcy case[148] and, thus, a more realistic plan of reorganization will emerge. Formulating a plan that contemplates, rather than ignores, a contingent liability of the debtor provides more security for the debtor, the creditors, and the future tort victims as a lesser likelihood exists that the occurrence of the future contingency will cause the demise of the entire plan of reorganization.

To achieve this result, the conduct test,[149] as applied by the *Grady v. A.H. Robins* court,[150] provides the most practical approach.[151] Application of the conduct test not only achieves the desired result of allowing the future claimants' claims in the bankruptcy case,[152] but its application also harnesses support from notions of social justice. Posner's wealth maximization theory accords with this test and formulates appropriate boundaries for its application.[153] These boundaries arise because Posner's theory requires that the debtor's prepetition conduct be wrongful[154] thereby creating a basis for the debtor's ultimate liability.[155] Otherwise, the conduct of the debtor would deplete the aggregate wealth of society and liability would not attach.

Additionally, Rawls's theory corresponds with the *A.H. Robins* conduct test.[156] It does not, however, provide the safeguards inherent in Posner's theory. Individuals behind the veil of ignorance may select to apply an expansive interpretation of the conduct test so that any conduct of the debtor creates a claim for the future claimants in the bankruptcy case.[157] The variations possible under Rawls's theory of

148. *See Developments in the Law—Toxic Waste Litigation: VIII. Bankruptcy and Insurance Issues*, 99 HARV. L. REV. 1573, 1587-88 nn. 77-83 (1986) (discussing how automatic stay protects future claimants by allowing debtor to organize its estate).

149. The conduct test evaluates the existence of a claim based upon "the time when the acts giving rise to the alleged liability were performed." *In re* Johns-Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *see also supra* part II.A.2 (discussing how the conduct test is satisfied); *supra* notes 22-24 and accompanying text.

150. Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir.), *cert. denied*, 487 U.S. 1260 (1988).

151. The discussion throughout this Article is focused primarily on the basic question of whether a future claimant's claim should be allowed in the bankruptcy proceeding under § 101(5) of the Bankruptcy Code. Having determined that such claims are allowable, a court may then proceed to handle the claims in several ways. For various examples, see *A.H. Robins*, 839 F.2d at 198 and *Johns-Manville*, 57 B.R. at 680.

152. *See supra* part II.A.2; *supra* notes 44-45 and accompanying text.

153. *See supra* notes 86-91 and accompanying text.

154. *See supra* notes 83-87 and accompanying text.

155. *See supra* part III.A.1.

156. *See supra* notes 109-11 and accompanying text.

157. *See supra* note 143 and accompanying text.

social justice makes its application troublesome. However, the underlying principles of Rawls's theory do serve to buttress Posner's approach. Thus, the social concepts of both theories, together with the economic limitations of wealth maximization, make the conduct test a feasible alternative for the courts to apply.

B. What Treatment Should Be Accorded the Future Claimants' Claims?

Having determined that future claimants, such as those in *Piper*, hold section 101(5) claims against the debtor, the question then becomes how to treat these claims in the bankruptcy case. Several courts have attempted to account for the claims of future claimants in the debtor's plan of reorganization by establishing a trust fund or an escrow account.[158] The disadvantage of these arrangements is that a portion of the debtor's assets sits in an account that the debtor cannot access in order to help with the immediate reorganization of the company. Requiring that these assets remain dormant may work to the detriment of all of the parties involved, potentially causing the liquidation of the company.[159] Neither the debtor, the creditors, nor the future tort victims benefit from such an arrangement. Thus, if the future claimants' claims are to be allowed in the bankruptcy case, a more efficient remedy needs to be fashioned—a remedy that supports the reorganization of the debtor, yet does not ignore the claims of the future tort victims.

To formulate such a remedy, it is useful to consider both Nozick's entitlement theory and the *Piper* decision. Although the *Piper* court erred in disallowing the future claimants' claims,[160] the court's

158. For a detailed explanation of the types of trust employed by the courts to accommodate the needs of future claimants, see *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991) (discussing the *Johns-Manville* trust); Susan S. Ford, Note, *Who Will Compensate the Victims of Asbestos-Related Diseases? Manville's Chapter 11 Fuels the Fire*, ENVTL. L. 465 (1984) (discussing the claimants' dilemma in *Johns-Manville*); Steven J. Parent, *Judicial Creativity in Dealing with Mass Torts in Bankruptcy*, 13 GEO. MASON U. L. REV. 381 (1990); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) (discussing the trust established for the Dalkon Shield claimants).

159. *See* Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994) (suggesting a capital markets trust fund which awards shares rather than cash as a possible way to keep firms solvent and still able to compensate future claimants); *see also* Steven L. Schultz, *In re* Joint Eastern & Southern District Asbestos Litigation: *Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553 (1992) (arguing that a federal class action is the best way to protect all claimants).

160. By definition, the future tort victims' claims are contingent and fall within § 101(5) of the Bankruptcy Code. *See* notes 2-4, 19-20, 35 and accompanying text; *see*

concerns regarding the feasibility of accounting for such claims when the injury has not yet occurred, similar to Nozick's rectification principle, suggest a workable alternative to the trust/escrow remedy and recognize the debtor's potential liability, but postpone payment until the time of the injury. Stated in more practical terms, this remedy would allow the future claimants to bring claims in the bankruptcy case, but the claims would receive treatment different than the debtor's other claims. The treatment of the future tort victims' claims should be as follows: (1) If the debtor reorganizes, the claims are declared non-dischargeable so that the debtor, as the reorganized company, remains liable to the future claimants; (2) if the company or substantially all of its assets are sold, the claims are accounted for in the purchase price and the successor corporation remains liable to the future claimants;[161] or (3) if the debtor liquidates, the future claimants receive nothing.

The first step of the proposal attempts to strike a balance between granting the debtor a complete discharge from future liability for pre-petition torts and dissipating assets from the debtor's estate to pay now for harm that may occur in the future. Declaring the claims of the future claimants nondischargeable[162] permits the debtor to use the assets in its estate to facilitate a reorganization,[163] while protecting the future claimants' right to a claim for compensation when, and if, liability arises. Such a result recognizes that the future claimants had contingent and unliquidated claims against the debtor; protects the future claimants from a debtor's defense based upon discharge; and allows the debtor to discharge its current liabilities, reorganize, and

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also discussion *supra* part IV.A (discussing whether the future claimants hold a claim against the debtor).

161. The discount in the purchase price will assist the debtor in marketing the company or its assets and reflects the expressed assumption of liability by the successor corporation.

162. This author recognizes that legislative action may be necessary to enable the courts to declare a debtor's liability for tortious prepetition conduct nondischargeable. On several previous occasions, Congress has recognized exceptions to discharge for individual debtors with respect to various types of tortious conduct. *See* 11 U.S.C. § 523(a)(6)(9). Similar public policy considerations exist for prohibiting either an individual or a corporate debtor operated by individuals to escape liability for its prepetition tortious conduct. *See* Lyle, *supra* note 8, at 1342-44. As such, a similar exception to discharge is appropriate.

163. Preserving the debtor's resources for its reorganization is one of the main advantages that nondischargeability has over the use of a trust fund. However, if the debtor's estate has the capacity to fund a trust fund or escrow account, this remedy, with appropriate safeguards, is also an effective means of protecting the interests of the future claimants. There are several types of safeguards that may be implemented to ensure payment to all members of the class of future claimants such as establishing a cap on the amount that any one future claimant may receive from the fund and requiring the debtor to make annual payments to keep sufficient capital in the fund.

restore its financial health so that it is ready to face any future liability that may arise.

The second step of the proposal addresses the situation that exists when, subsequent to the bankruptcy case, the debtor's business or its product remains in operation under the control of another entity. Although the claims of the future claimants may be deemed nondischargeable, the practical effect of a sale of the debtor's business or substantially all of its assets is a liquidation and dissolution of the corporate debtor. Thus, upon the completion of the sale, the future claimants hold viable claims, but have no viable entity against which to assert such claims.

Accordingly, because the debtor's business, or at least its product, is being continued by another entity, the future claimants should have some recourse against the successor corporation.[164] Such a result is achieved under either the product line or the continuity of enterprise successor liability tests. Moreover, such a result is a fair result. If a successor corporation is going to accept the benefits of the business and product design of the debtor, it should be liable for the burdens as well. Accounting for the risk of liability in the purchase price assists the debtor in marketing the business and allows the successor corporation to plan for any future liability.

Finally, if a debtor liquidates and neither its business nor product continues in operation, the future claimants receive nothing. This result is mandated by the circumstances surrounding a liquidation not accompanied by a sale of the debtor's business or substantially all of its assets. As noted above, if the debtor liquidates and dissolves, there is no entity for the future claimants to proceed against. Further, if neither the debtor's business nor substantially all of its assets are sold, there is no successor corporation for the future claimants to proceed against. Thus, the claims of the future claimants may be deemed nondischargeable, but the future claimants will not receive any return on such claims.

This three-step proposal offers the advantage of providing a sense of certainty to all of the parties involved in the case. Further, it allows the debtor to use all of its current resources to reorganize and pay creditors while also protecting the rights of the future tort victims.[165]

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164. If a debtor could evade a debt deemed nondischargeable by selling its business to another entity, the public policy considerations of deterring harmful product designs and compensating victims are defeated.

165. Preserving the rights of the future claimants also alleviates any concerns regarding issues of notice and due process. For a general discussion of the constitutional issues raised by the future claimant dilemma, see Ralph R. Mabey & Jamie A. Gavrin,

By explicitly recognizing that liability continues to exist for injuries caused by the prepetition product, the reorganized company or successor company can plan to accommodate these liabilities in the future so as to avoid another bankruptcy. In addition, the future tort victims are assured of the right to assert their claims without the complications of successor liability and dischargeability. Thus, this solution provides a feasible alternative satisfying the policies of both bankruptcy and tort law.

V. CONCLUSION

The problem presented in *In re Piper Aircraft Corp.*[166] is a complex dilemma. To accommodate the vast interests and social policies at stake, future claimants should receive special treatment in a bankruptcy case. Courts should apply the conduct test to determine whether the future claimants hold claims against the debtor. If such claims exist, then the claims should be treated as nondischargeable liabilities of the debtor. This treatment provides a comprehensive analysis of the problem and a solution that accords with notions of social justice, the statutory language and legislative history of section 101(5) of the Bankruptcy Code, and the principles underlying bankruptcy law.

Constitutional Limitations on the Discharge of Future Claims in Bankruptcy, 44 S.C. L. REV. 745 (1993). For a general discussion of the procedural problems with notice, see Robert M. Lawless, *Realigning the Theory and Practice of Notice in Bankruptcy Cases*, 29 WAKE FOREST L. REV. 1215 (1994).

166. 168 B.R. 434 (S.D. Fla. 1994).