Resolving Mass Tort Cases under the Companies' Creditors Arrangement Act in Canada: Learning from the United States Experience

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ABSTRACT

This thesis describes, compares and assesses the ways in which mass tort claims are addressed through United States and Canadian insolvency legislative structures. The thesis begins by examining how courts in the United States use the Bankruptcy Code to reorganize companies facing extreme financial strain because of mass tort claims. The areas examined include: the consolidation of claims; the automatic stay; the requirement of insolvency; the various tort claims that are involved in the mass tort case; the plan; and the confirmation of the plan. The thesis then examines how Canadian courts can, and have, used the CCAA to reorganize or restructure companies dealing with mass tort claims. The *Canadian Red Cross* reorganization is used to demonstrate the complexity involved in resolving mass tort cases under Canadian insolvency legislation, specifically focusing on the steps that a company must follow to receive protection and how the plan can deal with tort claims. The issue of insolvency is examined as Canadian courts require a company to be insolvent in order to receive CCAA protection. This thesis argues that a broader definition of insolvency should be adopted. The thesis also addresses the following: how a stay of proceedings is obtained; the appointment of a monitor to oversee the reorganization; the classes; the plan; the sanction (court approval) of the plan; and the types of tort claims that are involved in mass tort insolvency reorganizations.

What makes mass tort insolvency cases so unique and difficult are the tort claimants and how they fit into the reorganization process. The types of claimants that arise are examined in detail and include: claimants with judgments; claimants who have filed actions but have not obtained judgments; claimants whose injuries have manifest themselves but have not yet filed actions; contingent claimants, identified "claimants" who have been exposed to the defective or dangerous product but have not manifested injuries; and future claimants who have been exposed to the defective or dangerous product but who have not been identified at the relevant time. The courts in both countries have included all claims that have manifested injuries before an application for reorganization and both countries have found ways to include contingent and future claims (unmanifested injuries) by using trusts.

Mass tort case law in both Canada and the United States is examined to show how trusts are established by the courts to allow tort claims, including future unidentified claims, to be included in the plan. The outcome of these cases is examined and assessed. United States case law is used to show how Canada can make mass tort insolvency cases more successful in the future by avoiding the administrative costs of frivolous claims and setting up "best offer/no negotiation schemes" as well as codifying a number of aspects that arise in mass tort cases such as the definition of mass torts, future claims representatives and channeling injunctions to also decrease time and money on arguing to allow these into the CCAA. The purpose of the CCAA is to provide a company with a fresh start while also providing the creditors of the company with the best possible return; mass tort insolvency cases achieve this goal.

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DEDICATION

To my parents, Diamandi and Ioanna.

To my children, Kyra, Gregory and Matteo.

To my husband, Jason.

Thank you!

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CHAPTER 1: INTRODUCTION

Mass tort insolvency is a complex and unique area of law that merges tort law with insolvency law.[1] Mass tort insolvency may involve hundreds or thousands of people having claims against a company for a product that a company made, produced or distributed, that caused serious injuries or even death to those who came in contact with it. As a company defends an increasing number of tort claims, most of the time it begins to experience extreme financial distress. When this occurs companies in the United States and Canada have turned to insolvency legislation to remedy the situation and avoid liquidation. When the *Companies Creditors Arrangement Act*[2] (hereafter, the "CCAA") was enacted in Canada in 1933 and the *United States Bankruptcy Code*[3] (hereafter, the "Bankruptcy Code") was enacted in the United States in 1978, mass tort insolvency did not exist. The purpose of insolvency legislation is to provide a "court-supervised process to facilitate the negotiation of compromises and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors."[4] However, Parliament in Canada and Congress in the United States had not anticipated insolvency legislation being used to resolve mass tort claims, and as such the legislation in both countries does not specifically deal with them. The Bankruptcy Code and the CCAA, however, do contain features that assist companies defending mass tort claims to achieve a global resolution of all of their financial issues, including such claims.

The reason insolvency legislation has become the forum of choice for many companies facing mass torts claims is that the CCAA and the Bankruptcy Code are both very broad and flexible pieces of legislation that allow various claims, procedures and issues to be dealt with in one forum. They also provide a company with the ability to halt all proceedings that exist against it, facilitate a global resolution of most of its liabilities, allow it to use its future earning capacity to compensate its creditors, and find a way for it to survive. Tort claimants also turn to

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[1] In the United States, "mass tort insolvency" is referred to as "mass tort bankruptcy". This is because the term "bankruptcy" in the United States refers to both liquidation and reorganization. However, in Canada the term "bankruptcy" is used to refer to liquidation only and the term "insolvency" is used to refer to reorganization. For the purposes of this thesis, the term "mass tort insolvency" will be referred to unless the American system is specifically being dealt with, and then it will be referred to as "mass tort bankruptcy".

[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended [hereinafter CCAA].

[3] 11 U.S.C. (United States Code, Title 11) [hereinafter Bankruptcy Code].

[4] Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thompson Carswell, 2007) at 1.

the Bankruptcy Code and the CCAA to resolve their claims, as the statutes treat tort claimants that are similarly situated equally, regardless of where the claimants reside or if they are creditors with knowledge of the system or have means to retain lawyers. The legislation also allows for a pooling of the company's funds in order to provide the greatest return to the tort claimants as possible.

Mass tort insolvency cases are much more common in the United States than they are in Canada. The United States has dealt with a variety of mass tort cases, including breast implants, tobacco litigation and asbestos. In Canada, the most prominent case is *Re Canadian Red Cross,*[5] which dealt with the national distribution of tainted blood. The Red Cross is a non-profit corporation that operated the blood donor system and Canada's national blood system with funding from the federal and provincial governments.[6] The Red Cross provided many services, including the supply of blood and blood products, disaster relief, homemaker services, international relief and crisis intervention. It also employed almost 10 thousand people before it filed for CCAA protection. The Red Cross insolvency began in 1998 when $8 billion in tort claims were filed against it by thousands of Canadians who became ill or were dying from contaminated blood products they received from the Red Cross. The Red Cross was defending itself against over 230 actions and 10 class actions from claimants suffering from Hepatitis C (HCV), human immunodeficiency virus (HIV), and Creutzfeld-Jakob disease (CJD). Hepatitis C is a disease that primarily affects the liver. It can cause cirrhosis, liver failure, liver cancer and gastric esophageal problems. HIV causes progressive failure of a person's immune system allowing life-threatening infections and cancers to thrive. CJD is a type of brain damage disorder that is incurable. The symptoms progress quickly to disability and death within one year after they begin. The cost of defending all of the actions against the Red Cross would have led to the liquidation of the Red Cross, so it applied for CCAA protection to develop a plan to deal with all of its creditors.[7]

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[5] *Canadian Red Cross Society/ Société Canadienne de la Croix-Rouge, Re* (1998), 1998 CarswellOnt 3346, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), additional reasons at (1998), 1998 CarswellOnt 3347, 5 C.B.R. (4th) 319 (Ont. Gen.Div. [Commercial List]), further additional reasons at (1998), 1998 CarswellOnt 3345, 5 C.B.R. (4th) 321 (Ont. Gen. Div [Commercial List]), leave to appeal refused (1998), 1998 CarswellOnt 5967, 32 C.B.R. (4th) 21 (Ont.C.A.) [hereinafter *Red Cross*].

[6] The Red Cross was incorporated under *An Act to incorporate the Canadian Red Cross Society*, S.C. 1909, c. 68.

[7] *Ibid*. *See also*: Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003). Note: The *Red Cross* case also dealt with cross-claims, insurance companies and third-party claims, but this goes beyond the scope of this thesis.

The Red Cross chose to reorganize because the CCAA allows a company to deal with all of its creditors (commercial, trade, tort and employees) in one proceeding and avoid high litigation costs. Generally, this results in more money being available for the claimants. As well, if the reorganization is "successful",[8] the company will continue to run its business and this was important to the Red Cross as it carried on vital functions. Reorganization affects not only the debtor and the creditors but also people who depend on the company's services, those who are employed by the company and the communities where the company is located.

The CCAA and the Bankruptcy Code provide companies facing mass tort claims with a structured system to deal with all of the creditors and issues that arise as well as the opportunity to prepare a reorganization or restructuring plan that allows a company to survive. The Bankruptcy Code and the CCAA are very different acts, with the Bankruptcy Code being much more structured and rule-oriented than the CCAA. They both, however, follow a general pattern and although they are different, Canadian law has treated mass tort cases very similarly to the way the United States law does. For example, they both provide a stay of all proceedings against the company, allowing the company time to prepare a plan. The claims included in the Acts must fall within the definition of "claim" as set out in each Act. Once the types of claims that will be allowed in the reorganization are decided, they are placed into classes. When a plan is formulated and accepted by the classes and the court, the reorganization is complete.

In this thesis the author describes, compares and assesses the ways in which mass tort claims are addressed through United States and Canadian insolvency legislative structures. Chapter 2 contains an examination of how courts in the United States use the Bankruptcy Code to reorganize companies facing extreme financial strain because of mass tort claims. The areas examined include: the consolidation of claims; the automatic stay; the requirement of insolvency; the various tort claims that are involved in the mass tort case and which will be included in the plan; and the confirmation of the plan. Chapter 3 contains an examination of how Canadian courts have used the CCAA to reorganize or restructure companies dealing with mass tort claims. *Red Cross* is used to demonstrate the complexity involved in resolving mass tort cases under insolvency legislation, specifically focusing on the steps that a company must follow to receive protection. The issue of insolvency is examined as Canadian courts require a company to

[8] The company satisfies its creditors and is able to carry on its business with causing the least amount of harm to itself, its creditors, its employees, former employees and communities which it carries on its business (*See Sklar-Peppler Furniture Corp.* v. *Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 213 (Ont. Gen. Div.).

be insolvent in order to receive CCAA protection. The courts are divided on what the definition of "insolvency" is in the CCAA. Some courts have adopted a narrow more liquidation focused definition while others have adopted a broader definition. Both approaches are examined. The chapter also addresses the following: how a stay of proceedings is obtained; the appointment of a monitor to oversee the reorganization; the types of tort claims that are involved in mass tort insolvency reorganizations; the classes; the plan; and the sanction (court approval) of the plan. Both Chapter 2 and Chapter 3 deal with the various types of claimants in mass tort cases: claimants with judgments; claimants who have filed actions but have not obtained judgments; claimants whose injuries have manifest themselves but have not yet filed actions; contingent claimants, identified "claimants" who have been exposed to the defective or dangerous product but have not manifested injuries; and future claimants who have been exposed to the defective or dangerous product but who have not been identified at the relevant time. The courts in both countries have found ways to include all these types of claims in the reorganization by using trusts. Mass tort case law in both Canada and the United States, is examined to show how trusts are established by the courts to allow tort claims, including future unidentified claims, to be included in the plan. In the end, a company that hopes to survive must find a way to deal with current tort claimants, future tort claimants, commercial creditors and all other interested parties and develop a plan that is acceptable to the creditors and the court. Chapter 4 will compare the American and Canadian treatment of mass tort reorganizations and provide some suggestions for possible changes to assist in the Canadian treatment of mass tort reorganizations in the future.

When the United States began dealing with mass torts in bankruptcy over 25 years ago, the initial cases were plagued with problems. The number of claimants and the extent of their injuries were poorly estimated and very high administrative costs all contributed to the delay of paying out claims and the draining of funds. But as more mass tort cases entered insolvency proceedings, the courts found a more efficient and "successful" way of restructuring that could deal with all of the creditors. In Canada, the first mass tort insolvency case, the *Red Cross* case, was also plagued with problems similar to those encountered in the initial American cases. By adopting many aspects of the American approach, Canada may be able to settle mass tort claims more efficiently in the future.

CHAPTER 2: UNITED STATES MASS TORT BANKRUPTCY

2.1 Introduction

Mass tort bankruptcy litigation emerged in American courts over 25 years ago and, as there are no statutes that specifically deal with mass tort bankruptcy, many companies chose to reorganize under Chapter 11 of the Bankruptcy Code. Chapter 11 provides a structured system that allows for the management of multiple liabilities in one forum.[9] When a debtor files for Chapter 11 bankruptcy proceedings, "there are readily recognizable parties, procedures, issues, and information"[10] that generally lead to "a predictable range of outcomes."[11] Chapter 11 proceedings allow companies who are solvent to consolidate claims and stay proceedings. Most importantly, Chapter 11 contains a broad definition of "claim" that allows for most, if not all, of the claims, including future claims against the debtor, to be dealt with in one forum. Under Chapter 11 bankruptcy, the court has the power to tailor proceedings and outcomes to each specific case as it sees fit while taking into account the debtor's financial situation. Once a plan has been agreed upon by creditors, it must be confirmed by the court to ensure fairness. The debtor will then be discharged, subject to it following through with the reorganization plan. The Bankruptcy Code allows companies to achieve a global resolution of their financial difficulties by dealing with most of the issues that arise in mass tort bankruptcy cases.

2.2 Consolidating Claims

In the United States, bankruptcy, which falls under federal jurisdiction, allows for the consolidation of all claims and issues that otherwise would have been dealt with in a number of jurisdictions with a variety of procedural and substantive laws. This consolidation is sanctioned by Chapter 28 of the Bankruptcy Code, section 157(b)(5). Essentially, the bankruptcy court has jurisdiction over the bankruptcy estate wherever the claimants may be located and all claimants, including the tort claimants, must make their claims to the bankruptcy estate. Section 157(b)(5)

[9] Report of the National Bankruptcy Review Commission 315 (1997). In 1994 Congress amended the Bankruptcy Code to include provisions expressly dealing with asbestos chapter 11 cases. In 1997, the National Bankruptcy Review Commission recommended expanded Code treatment of mass tort bankruptcies. To date, these recommendations have not been added to the Bankruptcy Code.
[10] Francis E. McGovern, "A Model State Mass Tort Settlement Statute" (2006) 80 Tul. L. Rev. 1809 at 1815.
[11] *Ibid*.

allows for the centralization of all of the claims against the debtor into the district court where its bankruptcy case is pending, allowing one court to have control over all of the issues that arise. When a company is faced with mass tort liability, it is not only the tort claimants and the company that are affected, but also the company's "creditors, shareholders, employees, customers, suppliers, officers, and directors."[12] Bankruptcy brings all of these claims and interests under one forum for a company that does not have sufficient funds in the corporation to satisfy all of the tort claims.[13] For companies that have sufficient funds to satisfy all tort claims, class actions are commonly used. In many cases, when a product causes injury to a large number of people, class actions are commenced and concluded without a company going into bankruptcy. In some cases if a company is defending a number of tort claims, most of which will be class actions, it may run into financial difficulties and turn to bankruptcy legislation to deal with all of the claims as well as all other commercial creditors that may exist.[14] Solvent companies facing class actions set aside limited funds to pay out class action claims, whereas in bankruptcy, the Bankruptcy Code provides a company with a statutory basis to determine the mass claims through a priority system. In many cases the class actions are included as classes in the reorganization proceeding. Centralizing the claims increases the debtor's chances of developing a reasonable plan of reorganization that will work to rehabilitate the debtor, provide a fair and non-preferential resolution of claims while eliminating the multiplicity of proceedings and the unnecessary use of the debtor's limited funds while allowing for a more consistent and global resolution. [15]

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[12] S. Elizabeth Gibson, "A Response to Professor Resnick: Will this Vehicle Pass Inspection?" (2000) 148 University of Pennsylvania Law Review 2095 at 2099.

[13] *Ibid*.

[14] Greg M. Zipes, "After Amchem and Ahearn: The Rise of Bankruptcy Over the Class Action Option for Resolving Mass Torts on a Nationwide Basis, and the Fall of Finality" (1998) Det. C.L. Rev. 7). Federal Rule 23 (Fed. R. Civ. P. 23) sets out the statutory basis for class action law suits by requiring that one or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable;(2) there are questions of law or fact common to the class;(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and(4) the representative parties will fairly and adequately protect the interests of the class. Once all four of these prerequisites are met, mass tort class action participants must also qualify under one clause of Rule 23(b) in order for a class action to be certified. Mass torts usually qualify under Rule 23(b)(1)(B) which states that resolution of individual law suits would substantially impair other members to protect their interests, or 23(b)(3) which states that the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

[15] *In re Dow Corning Corp*., 86 F.3d 482 at 496-97 (6th Cir. 1996).

2.3 Automatic Stay

Once a debtor has filed for bankruptcy, the court orders an automatic stay under section 362 that halts "all pending and future litigation against the debtor."[16] The automatic stay prevents the continuation or commencement of any actions pending in any state or federal courts as well as any collection efforts. All creditors must then file a proof of claim with the bankruptcy court. The Bankruptcy Code also allows a court to expand the automatic stay to protect related parties such as officers, shareholders, parent companies and insurers who have not filed for bankruptcy but could be parties the claimants may also turn to for compensation.[17]

The stay provides debtors with relief from the economic pressures that caused their bankruptcy filing and gives them the opportunity to create a plan to deal with all of their creditors. The stay also protects the creditors by promoting equal treatment to similarly situated creditors. It prevents the debtor's assets from becoming depleted by people who file a claim before others have had a chance to file their claims. The automatic stay also assists the bankruptcy court in developing a global resolution by allowing all claims to be filed before a plan is established.

2.4 Requirement of Good Faith

The Bankruptcy Code does not require a debtor to be insolvent in order to receive bankruptcy protection;[18] the 1978 Bankruptcy Code removed the requirement.[19] A solvent debtor can file a petition on the condition that it subjects its assets to administration under the bankruptcy law. A case cannot be dismissed on the basis that a debtor is able to pay its debts in whole or in part until a plan is proposed. Although a debtor does not need to be insolvent before filing a bankruptcy petition, it must be experiencing "some type of financial distress."[20]

However, there is a court-imposed requirement that the petitioner must be acting in good faith.[21] Section 1112(b) permits conversion or dismissal of a Chapter 11 case "for cause". Many

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[16] *"Mass Tort Litigation and Bankruptcy"* 2003 Third Circuit Judicial Conference at 2.
[17] Bankruptcy courts routinely use their power under Bankruptcy Code, s. 105(a), to extend the automatic stay under Bankruptcy Code s. 362(a) to a non-debtor if they foresee an adverse economic consequence that would negatively impact the debtor's ability to reorganize if the relief were not granted.
[18] Bankruptcy Code, s.109(d).
[19] *Supra* note 14 at 50.
[20] *In re Integrated Telecom Express, Inc*., 384 F.3d 108 at 122 (3rd Cir. 2004) [hereinafter *Integrated Telecom*].
[21] *In re Panache Dev. Co.,* 123 B.R. 929, 932 (Bankr. S.D. Fla. 1991).

courts have concluded that a lack of good faith is "cause" that would warrant dismissal.[22] Courts decide on a case-by-case basis if a lack of good faith exists. Various courts have defined it in different ways. For example, in *Integrated Telecom Express Inc*.,[23] the court held that "good faith necessarily requires some degree of financial distress on the part of the debtor."[24] In other cases, the timing of when the petition was filed, the motive of the debtor, accuracies and inaccuracies in the debtor's petition, whether the reorganization is aimed at frustrating the creditors, whether the creditor has an ongoing business to protect, and the reasonable probability of a plan being proposed and confirmed, have all been used to determine if good faith exists.[25] By removing the insolvency requirement, companies receive protection before they "face a financially hopeless situation"[26] and their businesses are otherwise damaged and their trade credit and capital markets disappear.[27] American courts have found it futile to begin a reorganization process with a company that cannot financially survive it.

2.5 Claims

One of the most difficult issues in mass tort bankruptcy cases is determining which claims will be included in the plan. A "claim" is defined very broadly in section 101(5) of the Bankruptcy Code to mean:

> (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
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.[28]

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[22] *In the Matter of Mountcastle*, 68 B.R. 305 (M.D. Fla. 1986); *In re Muralo Co*., 301 BR 690 (Bankr. D. N.J., 2003); *Little Creek Dev. Co.* 779 F 2d. 1068 (5th Cir. 1986); the historical development of the good faith doctrine set out in *In re Victory Constr. Co.*, 9 B.R. 549 (Bank. C.D. Cal. 1981); *In re Kerr*, 908 F 2d. 400, 404 18th Cir, 1991; *see also* Carlos J. Cuervas, "Good Faith and Chapter 11: Standard That Should Be Employed to Dismiss Bad Faith Chapter 11 Cases" 60 Tenn L. Rev. 525.

[23] *Supra* note 20.

[24] *Ibid*. at 121.

[25] See *In re Harvey Probber, Inc*., 44 BR 647 (D. Mass. 1984); *In re Block K Associates*, 55 BR 630 (D. Col. 1985); *In re Cooper Properties Liquidating Trust*, 61 BR 531 (WD Tenn. 1986).

[26] *Supra* note 20 at 122.

[27] Alan N. Resnick, "Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability" (2000)148 U. Pa. L. Rev. 2045 at 2055.

[28] Bankruptcy Code, section 101(5).

When the legislation was originally enacted, the term "claim" included "all legal obligations of the debtor no matter how remote or contingent".[29] This broad definition of claim is intended to include all claims that exist against the debtor, providing the claimant with the opportunity to vote on the plan and receive some part of the distribution of the debtor's assets. Including as many claims as possible in the reorganization allows the discharge of all of the eligible debts and, therefore, increases the chances of a debtor continuing its business and compensating all of its creditors.

Numerous types of claims arise in mass tort cases. Not only are there standard commercial claimants found in bankruptcy cases, such as lending institutions and trade creditors, but there may be hundreds, if not thousands, of tort claims with various injuries at various stages.[30] The most complex part of successfully reorganizing mass tort bankruptcy cases is the tort claims. As injuries may manifest themselves at various times, the claims may be at various stages when a company makes a petition in bankruptcy. In order to determine whether a claim exists in a bankruptcy case, as a general rule, a court will look at whether the claim exists at the date of the bankruptcy petition.[31]

There are six types of personal injury tort claimants that may exist in a bankruptcy case:

1. claimants who have incurred injury, have sued the company and have obtained judgment against the debtor before the petition was filed;
2. claimants whose injuries have manifested and who have filed a suit but have not obtained a judgment by the time the petition was filed;
3. claimants whose injuries have manifested but have not filed any claim against the debtor before the petition was filed;
4. claimants who are known to have been exposed to a product but whose injuries have not manifested as of the petition date;
5. claimants who, unknown to the debtor, have been exposed to the product, and in whom injuries have not manifested as of the date of the petition; and
6. claimants who were exposed after the date of petition.

[29] H.R. Rep. No. 595, 95th Cong., 1st Sess, 309 (1978); S. Rep. No. 989, 95th Cong., 1st Sess. 21 (1978).
[30] The creditors are divided into different categories and each category will be treated differently. Priority is given to creditors who provide the company with funds or goods necessary to keep a company operational during the reorganization (U.S.C. s. 503). Secured creditors have secured the debt by a security interest or collateral (s. 506). Next are the general unsecured claims; this is where the tort claims fit in (s.507).
[31] Bankruptcy Code, section 362 (a)(1994). *See also Supra* note 24.

2.5.1 Claimants with judgment

Claimants whose injuries have manifested, and have received judgments setting out the amount of the debtor's liability, are considered judgment creditors.[32] Claimants who have obtained judgments prior to the petition of the debtor have valid "claims" under section 101(5)(A) of the Bankruptcy Code, which provides that a judgment is a claim. The validity of the claim is not questioned, the amount of the claim is clear and the claim will be included in the bankruptcy case.[33]

2.5.2 Claimants who have filed suit but have not obtained judgment

Another group of claimants comprises people who have incurred injury from the debtor's product, the injuries have manifested and the claimants have filed a suit prior to the debtor filing a petition. However, liability has not yet been determined and the amount of the damages has not been set. In these types of cases, the claim is considered unliquidated (a claim where a specific value has not been determined) according to section 101(5)(B). Since these types of claimants have not yet obtained judgments, under the definition of "claim" they would be considered claims that may still be disputed. For example, in the case of *re Weinhold*, the Bankruptcy Court, E.D. Wisconsin, held that a cause of action in tort is considered a claim within the meaning of section 101(5).[34]

Once the debtor files a petition in bankruptcy, all of the tort actions are stayed.[35] All claimants (including mass tort claimants) must file proofs of claim allowing the debtor to object to any claims.[36] Bankruptcy judges may hear and determine all cases under Chapter 11 and all core proceedings arising under it. Section 157(b)(2) lists a number of proceedings that are considered to be core proceedings, but is not limiting. Once a claimant has established a legal basis for a claim, if there is any dispute concerning the factual basis for the claim or the amount of damages claimed, a hearing is held to determine the validity and amount of the claim.[37] The court can also estimate claims in order to confirm a plan but cannot liquidate or estimate

[32] *In re Braten*, 74 B.R. 1021 (S.D.N.Y. 1987).
[33] Note: the "claim" if any amount of the claim has been paid out by the debtor, the claim will be reduced by that amount. As well, if any part of the claim was paid out within 90 days prior to the petition, it will be caught by Bankruptcy Code, s.546(b) which deals with preferences.
[34] *In re Weinhold*, 393 BR 623 (E.D. Wisconsin 2008).
[35] 11 USC section 362(a)(1).
[36] Bankruptcy Code, s. 501.
[37] Bankruptcy Code. s. 502 (b).

contingent or unliquidated personal injury tort or wrongful death claims against the estate for distribution under a Chapter 11 case.[38] As well, a debtor may apply for summary judgment on threshold issues that apply to all or some of the claims. For example, in *Dow Corning*[39] the bankruptcy court used summary judgment to get rid of claims that failed to provide evidence that the claimant actually had the autoimmune injury claimed or provided reliable scientific evidence establishing causation of the injury by Dow's product.[40] The Bankruptcy Code does not set out procedures for how courts are to determine the validity and amount of tort claims. This is left to each district court to decide based on the facts of each case.[41] Which district court will deal with these issues is set out under 28 USC section 157(b)(5).

2.5.3 Claimants whose injuries have manifested but have yet to file a suit against the debtor

Claimants with manifested injuries but who have not filed a claim against the debtor are similar to those that have brought actions but do not have a judgment. The claimants' injuries have manifested but the claimants have not taken any action against the debtor prior to bankruptcy proceedings being commenced. As long as the claimants have manifested injuries, they have a claim falling within the definition of that term in section 101(5).[42] Therefore, they have claims, and so long as they file and provide evidence of injury, those claims will be resolved by the district court and will be brought into the insolvency proceedings.[43]

2.5.4 Contingent Claimants

Identified persons who have been exposed to a debtor's faulty product, who have filed claims or who are otherwise known to the debtor but have yet to manifest an injury, are contingent claims. In *All Media Properties, Inc*.,[44] Justice Edward H. Patton of the bankruptcy

[38] Bankruptcy Code s. 157(b)(2)(B).
[39] *In re Dow Corning Corp*., 215 BR 346 at 360 (E.D. Mich. 1997).
[40] Fed. R. Evid. 702 (1999); See also: Douglas G. Smith, "Resolution of Mass Tort Claims in the Bankruptcy System" (2008) 41 U.C. Davis L. Rev. 1613.
[41] 28 U.S.C. section 157(b)(2)(B), 157(b)(5).
[42] According to section 157(b)(5), personal injury tort and wrongful death claims will be tried by the district court where the bankruptcy case is pending or where the claim arose.
[43] 28 U.S.C. s.157(b)(2)(B), 157 (b)(5).
[44] *In re All Media Properties, Inc*., 5 B.R. 126 (S.D. Tex. 1980).

court of Texas, S.D. Houston Division, explained the contingent nature of contract and tort claims as follows:

> The court concludes that claims are contingent as to liability if the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor and if such triggering event or occurrence was reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.
>
> Thus, in the case of the classic contingent liability of a guarantor of a promissory note executed by a third party, both the creditor and guarantor knew there would be liability only if the principal maker defaulted. No obligation arises until such default. In the case of a tort claim for negligence, the parties at the time of the alleged negligent act would be presumed to have contemplated that the alleged tortfeasor would be liable only if it were so established by a competent tribunal. Such a tort claim is contingent as to liability until a final judgment is entered fixing the rights of the parties.[45]

Referring to section 101(5) (then section 101(4)) of the Bankruptcy Code, Justice Patton explained that "Congress has stated that creditors holding, for example, contingent, unliquidated, unmatured, or disputed claims have a right to participate in the bankruptcy process as creditors."[46] The section specifically includes contingent claims and many cases have held that claims whose damages have yet to manifest are included in the bankruptcy case.[47] The Bankruptcy Code also contains provisions to accelerate the maturity of any unmatured claims, as well as allowing for the estimation and classification of them.[48]

These types of claims are often referred to in the case law and the legal literature as "future claims". The term "future claim" is widely used in American courts and literature, but has not been defined in the Bankruptcy Code. Future claimants are generally defined as a class of people who were exposed to the debtor's product prior to the date of petition, but whose injuries have not manifested as of that date.[49] The two main types of future claims that exist in mass tort

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[45] *Ibid*. at 133.
[46] *Ibid*. at 132.
[47] *See*: *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. Court, ED Michigan, 1997) and *Grady* v. *A.H. Robins Co., Inc.*, 839 F.2d 198 (4th Cir. 1988).
[48] Section 502(c)(1) of the Bankruptcy Code. The language of Bankruptcy Code, s. 502(c) is mandatory, not permissive, and imposes upon the court an affirmative duty to estimate any unliquidated claim where the actual liquidation of the claim would unduly delay the closing of the case. See: *In re Curtis*, 40 BR 795 (D. Utah 1984).
[49] *In re Eagle-Picher Indus. Inc*., 134 BR 255 (S.D. Ohio 1991).

cases are those where the claimant is known but has yet to manifest injuries (contingent claims) and those referred to as "classic future claims,"[50] where the identities and number of claimants are unknown and whose injuries have not yet manifested. [51] In the United States, contingent claimants (contingent as to liability) and future claimants (unknown people with unknown injuries), are treated the same under the heading "future claims".

While the general definition of future claims includes claimants who are known but have not experienced injury, there are cases that have made a distinction between the two types. For example, *Dow Corning*[52] dealt with breast implants that ruptured and caused physical complications. Everyone who received the breast implants knew they had them. While some had experienced negative effects, there were some who had filed proofs of claim but had not experienced any symptoms from exposure to the implants. The Bankruptcy Court, E.D. Michigan, N.D. referred to section 101(5) and stated, "[g]iven this broad definition, there is no question that a personal injury claim not yet reduced to judgment falls within its scope."[53] According to the Court, known claimants whose injuries have not manifest are included as claims in a bankruptcy case. A legal representative of future breast implant claimants was appointed and later dismissed as all claimants were present and Dow ceased manufacturing its product. While all the possible claimants were known, there were still claimants whose damages would not be known for a number of years. The trustee in bankruptcy appointed several committees to represent the differing interests of Dow's claimants during the development of its plan of reorganization. Cases dealing with contingent claims are less complicated as estimating the value of claims is not as difficult as estimating the number of possible claims and their value. As well, if a representative is appointed, the claimants can monitor their representative's actions during the process.

A case that did not make the distinction between known and unknown claimants was Grady v. *A.H. Robins Co*.[54] In *A.H. Robins*, the Dalkon Shield, a contraceptive intra-uterine

[50] *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. Court, ED Michigan, 1997) at footnote 55.
[51] In some cases, people who have been exposed to the product post-petition but pre-confirmation are also considered to hold future claims. People who have not been exposed to the debtor's product until after the plan is confirmed but thereafter experience injury because of the debtor's defective product, have in certain courts, also been considered future claimants. *See also*: Richard L. Epling, "Separate Classification of Future Contingent and Unliquidated Claims in Chapter 11", 6 Bankr. Dev. J. 173 (1989).
[52] *Supra* note 50.
[53] *Ibid*. at 560.
[54] *Grady* v. *A.H. Robins Co., Inc.*, 839 F.2d 198 (4th Cir. 1988) [hereinafter A.H. Robins].

device manufactured and marketed by A.H. Robins Co., had been inserted into many women and caused numerous physical injuries. Production of the shield was discontinued because of concerns of its safety. As there were many claims filed against A.H. Robins, it petitioned for reorganization under Chapter 11. The Court of Appeal held that future claimants held claims in bankruptcy on the basis that a claim arises when the acts giving rise to the alleged liability are preformed. Although the order precisely defining what constituted a future claim was not published, the notice the bankruptcy court sent out to possible claimants stated: "[t]hough not aware of any injury, I may have been injured by my use or another's use of the Dalkon Shield".[55] As the Dalkon Shield was only on the market a few years and most of the women who had it inserted were known, the company knew most of its claimants. In determining whether people with unmanifested injuries have a valid claim in bankruptcy, the Court of appeal dealt with the plaintiff, Mrs. Grady, who had the device inserted many years before A.H. Robins had filed for bankruptcy and thought it had fallen out. Almost two months after A.H. Robins had filed for bankruptcy; Mrs. Grady filed a civil action as she had developed pelvic inflammatory disease from using the Dalkon shield. Mrs. Grady filed a motion with the bankruptcy court, seeking a judgment that her claim did not arise before the filing of the petition as the law in California did not allow her to sue until she knew of her injuries. Since she had no pre-petition right to a payment from Robins, the argument was that the stay did not apply. The question the bankruptcy court and the Court of Appeal were to determine was whether the automatic stay barred Mrs. Grady's civil action. Mrs. Grady argued that her cause of action against A.H. Robins did not accrue until after A.H. Robins filed a reorganization petition and therefore the stay did not apply to her. The Court of Appeal noted that the automatic stay only extended to "claims against the debtor that arose prior to the filing of its petition."[56] In order to determine whether the automatic stay applied to Mrs. Grady's claim, it was necessary for the Court to examine the definition of "claim" in the context of the Bankruptcy Code.

The Court of Appeal concluded that Congress intended the definition of "claim" to be as broad as possible. In the Court's opinion, the "Bankruptcy Code is superimposed upon the law of the state which has created the obligation. Congress has the undoubted power under the

[55] *Ibid*. at 202.
[56] *Ibid*. at 200.

bankruptcy article, U.S. Const. Art. I s. 8 cl. 4, to define and classify claims against the estate of a bankruptcy…"[57] The Court went on to state that:

> the legislative history shows that Congress intended that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in bankruptcy. The Code contemplates the broadest possible relief in the bankruptcy court. Also, that history tells us that the automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It provides a breathing spell to the debtor to restructure his affairs, which could hardly be done with hundreds of thousands of creditors persevering in different courts all over the country for a first share of a debtor's assets. Absent a stay of litigation against the debtor, dismemberment rather than reorganization would, in many or even most cases, be the inevitable result.[58]

The Court of Appeal examined section 101(4)(A) (now 101(5)(A)), which provides for a "right to payment" whether or not such right is reduced to judgment or contingent. The court referred to *Black's Law Dictionary*, 5th Ed., 1979 which defined "contingent" as:

> [p]ossible, but not assured; doubtful or uncertain; conditioned upon the occurrence of some future event which is itself uncertain, or questionable. Synonymous with provisional. This term, when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event.[59]

The Court held that Mrs. Grady's claim and whatever rights the other future tort claimants had were "contingent". The Court stated:

> [i]t depends upon a future uncertain event, that event being the manifestation of injury from use of the Dalkon Shield. We do not believe that there must be a right to the immediate payment of money in the case of a tort or alleged breach of warranty or like claim, as present here, when the acts constituting the tort or breach of warranty have occurred prior to the filing of the petition, to constitute a claim under §362(a)(1) [the stay]. It is at once 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

[57] *Ibid*. at 201.
[58] *Ibid*. at 202.
[59] *Ibid*.

> create a contingent tort or like claim within the protection of §362(a)(1). We are of the opinion that it has done so.[60]

The Court based its decision on the literal reading of the statute and the definition of "claim". It held that:

> legislative history contemplates "the broadest possible relief in the bankruptcy court" … If Mrs. Grady and the Future Tort Claimants, who had no right to the immediate payment of money at the time of the filing of the petition, were participants in a Chapter 7 proceeding, the chances are that they would receive nothing, for no compensable result had manifested itself prior to the filing of the petition.[61]

The Court concluded that Mrs. Grady held a pre-petition claim subject to the automatic stay as her claim arose when the events giving rise to the liability occurred. The Court also concluded that Congress has the power to define and classify claims against a bankruptcy estate. Since the definition of "claim" in section 101(4)(A) (now section 101(5)(A)) includes a right to payment that was unliquidated, disputed, unmatured or contingent, the court concluded that future claims were "claims" in bankruptcy. It is important to note that the Court of Appeal did not decide whether the claims of future tort claimants were dischargeable. They specifically dealt with the fact that the Dalkon Shield was inserted in the claimant prior to the filing of the petition and therefore it constituted a "claim" that arose before the commencement of the case and the court included it in the bankruptcy process. Even though A.H. Robins Co. had stopped making and distributing the Dalkon Shields prior to the bankruptcy proceedings, there were still a large number of claimants who had the Dalkon Shield inserted but had yet to manifest symptoms of a disease. Therefore Mrs. Grady's claim and all future claimants who were exposed to the Dalkon Shield before the bankruptcy petition were included in the bankruptcy case.

2.5.5 Future Claims

In most of the American literature, a future claim has been defined as a claim whose existence or amount depends upon some future event which is uncertain either as to its

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[60] *Ibid*. at 203.

[61] *Ibid.* at 203. The case also mentioned that the district court had authority to achieve the same result by staying Mrs. Grady's suit under 11U.S.C. s.105(a) by using its equitable powers. See: *Ohio* v. *Kovacs*, 105 S. Ct. 705 (1985), *In re Kennise Diversified Corp*., 34 B.R. 237 at 244 n. 6 (S.D.N.Y. 1983); *In re Black*, 70 B.R. 645 (D. Utah 1986).

occurrence or as to the time of its occurrence.[62] A true or classic future claim is one where the claimants are unknown and their injuries are unknown. Although the two types have been treated as one, the cases under contingent claims primarily involve known claimants. The following cases have both unknown and known claimants involved in the reorganization, but have a larger number of unknown claimants. In order to determine if unknown claimants should be included in bankruptcy, the courts focus on when the right to payment arises. For example, in *re Eagle-Picher*,[63] the Court held that section 101(5) of the Bankruptcy Code suggests that future claimants "ought to be those who will have a right to payment in the future, but do not have one right now".[64] This definition therefore includes known and unknown claimants whose right to payment does not arise until after the petition date.

All courts examine the claims and determine whether they are in existence as of the petition date. But they take different approaches on when future claims arise. Some courts have held that potential claims are not "claims" for bankruptcy purposes and have left them out of the bankruptcy process because these claims do not arise in bankruptcy until a cause of action has accrued under non-bankruptcy law, which is the date the injury manifests itself.[65] Other courts have held that future claims are valid claims in bankruptcy because they arise at the time of exposure to a product and have included them in the process of preparing a plan as well as setting up trusts for future distributions. In their view, state laws interpret the term claim more narrowly than Congress intended.[66] The two lines of cases will be examined below.

2.5.5.1 Future Claims not a "Claim" in Bankruptcy

A number of cases have used state tort laws to determine whether future claims are valid claims in bankruptcy.[67] State laws dealing with torts provide that potential victims with tort

[62] Collier on Bankruptcy, (15th ed., 1981).
[63] *In re Eagle-Picher Indus. Inc*., 134 BR 255 (S.D. Ohio 1991).
[64] *Ibid*. at 257.
[65] In *re M. Frenville Co*., 744 F 2d 332, 337 (3d Cir. 1984); *Locks* v. *U.S. Trustee* 157 BR 89 (W.D. Pa. 1993).
[66] *Lemelle* v. *Universal Mfg. Corp.*, 18 F. 3d 1268 (5th Cir. 1994).
[67] See: *Locks* v. *U.S. Trustee*, 157 BR 89 (W.D. Pa. 1993). Many states preclude asbestos personal injury claimants from pursuing their claims in state court if they are experiencing non-malignant impairments and cannot produce certain medical evidence. The tort reform statutes preserve a person's cause of action but delay its enforcement until it is a malignant condition or certain medical information is provided. This is not limited to asbestos litigation. In most states the time period begins when the plaintiff discovered or should have discovered his or her injury. In Florida this is known as the "delayed discovery doctrine", which delays the commencement of the statute of

claims have no cause of action under applicable non-bankruptcy law until the victim knows or should have known of the injury. As no cause of action exists under state law, these courts have held that future claimants do not have a claim in bankruptcy law.[68] In *re M. Frenville Co.*,[69] the court dealt with the issue of whether the debtor negligently and recklessly prepared bank statements. In dealing with a claim that arose after the petition under Chapter 11 was filed, the Court stated that although "claim" was defined quite broadly in the Code:

> the Code does not define when a right to payment arises. Thus, while federal laws control which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, is to be determined by reference to state law.[70]

The Court therefore based its decision on New York state law when dealing with future claims and held that "a claim for contribution or indemnification does not accrue at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from the act."[71]

Similarly, in *UNR Indus., Inc.,*[72] the United States District Court, N.D. Illinois, referred to the definition of "creditor" in section 101(9) of the Bankruptcy Code (currently 101(10)(A)), which states that a creditor is a person who "has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."[73] The Court dealt with injuries due to asbestos exposure. Claimants alleged that they contracted diseases as a result of exposure to asbestos manufactured or supplied by the debtor. The Court had to decide whether to appoint a legal representative to represent the interests of an unknown number of individuals who had been exposed to asbestos and who may in the future manifest an asbestos-related disease and claim money from the debtors for their injury. The debtor wanted the representative to be able to bind

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limitations, and therefore the statute runs from when the injury is or should have been discovered. Title VIII, Ch. 95, S.11 (Subs.4).

[68] *Supra* note 44. Tort claim against successor permitted because claim had not arisen until two years after reorganization plan confirmed.

[69] *Matter of M. Frenville Co., Inc*., 744 F. 2d 332 (3rd Cir. 1984), cert. denied, 469 US 1 160 (1985) [hereinafter *Frenville*].

[70] *Ibid*. at 337.

[71] *Ibid*. at 337.; no court outside the Third Circuit has followed the reasoning and holding of *Frenville a*s most cases have declined to follow *Frenville*'s limiting definition of claim. See: *Acevedo v. Van Dorn Plastic Machinery Co.,* 68 B.R. 495 (E.D.N.Y. 1986); *In re Johns-Manville Corp.,* 36 B.R. 727 (S.D. N. Y. 1984); *In re Yanks,* 49 B.R. 56 (S.D.Fla. 1985); *In re Baldwin-United Corp.,* 48 B.R. 901 (S.D.Ohio 1985). See also *In re Baldwin-United Corp. Litigation,* 765 F.2d 343, 348 n. 4 (2d Cir.1985) (in which the court declines to routinely accept *Frenville*); *In re Riso,* 58 B.R. 978 (D.N.H. 1986).

[72] *In re UNR Indus., Inc*., 29 B.R. 741 (D.Ct. N.D. Ill., 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

[73] Bankruptcy Code, s. 101(9).

the future claimants in order to allow for a discharge of the proceedings. The Court stated that "Congress has not given the judiciary authority to adjudicate the claims of future unknown claimants. The statute…does not contemplate the resolution of all problems faced by entities with substantial financial exposure."[74] The Court focused on Illinois state law, which states that a tort claim does not arise until the plaintiff suffers injury. The court concluded that those "who have been exposed to asbestos some time in their lives but do not now have or do not know that they have an asbestos-related disease—have no claims under state law, and therefore do not have claims cognizable under the Code."[75]

In *re Amatex Corp.*,[76] Justice William A. King of the United States Bankruptcy Court, E.D. Pennsylvania, was asked to appoint a guardian to represent prospective asbestos claimants. Amatex manufactured and sold textiles containing asbestos and was named as a defendant in over 9,000 cases. The latency period of asbestosis was between 3 years and 40 years from exposure. The Court examined the issue of whether individuals exposed to asbestos whose symptoms had not yet manifested were entitled to a voice in the reorganization of an asbestos manufacturer. Justice King stated that based on section 1141(d)(1)(A) of the Code, a debtor is only discharged from debts that arose prior to confirmation of the plan.[77] He also stated that asbestos-related injuries do not arise until symptoms appear; therefore future claimants do not hold claims as defined in the Bankruptcy Code. Since no cause of action existed until the symptoms appeared, the debt could not be discharged. Justice King concluded that the future creditors did not hold "claims,"[78] they were not "creditors"[79] and the debtor did not owe them a "debt."[80] It is important to note that the Third Circuit reversed the bankruptcy court's decision and ordered the appointment of a representative. Although the Third Circuit reserved the question of whether future claimants are creditors, it stated that future claimants "are sufficiently affected by the reorganization proceedings to require some voice in them."[81]

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[74] *In re Johns-Manville Corp.,* 36 B.R. 727 (S.D. N. Y. 1984) at 748.
[75] *Ibid*. at 745. See also: *Supra* note 66.
[76] *In re Amatex Corp.*, 30 B.R. 309 (E.D. Pa. 1983), rev'd,755 F.2d 1034 (3rd Cir. 1985).
[77] See section V.5.c(i) of this thesis for a discussion of how claims from people whose injury manifested post-petition but pre-confirmation are treated.
[78] The definition of "claim" prior to amendment, Bankruptcy Code, s. 101(4).
[79] Bankruptcy Code, s. 101(9).
[80] Bankruptcy Code, s. 101(11). This decision was eventually overturned by the Court of Appeal, 755 F.2d 1034 (3rd Cir. 1985).
[81] *Ibid*. at 1042.

According to these decisions, a claim arises only when the injury is detected. The debtor is only liable to the injured party when the party develops an injury. Although there are a few cases that have excluded future claims on this basis, many courts in the United States have declined to follow *Frenville's* definition of claim. As well, the *Amatex* decision was reversed. These cases focused on the fact that future claims cannot be discharged rather than focusing on whether they are actual claims in the Bankruptcy Code.

2.5.5.2 Future Claims included in Bankruptcy

Many courts have recognized that future claimants, both identified and unidentified potential claimants, have valid claims in bankruptcy proceedings even though an injury has not manifested itself at the time of the proceedings as long as at the time of the petition the acts that caused the injury have occurred. The cases that include future claims in the bankruptcy plan do so because "regardless of whether a cause of action has accrued under state law, the right to receive payment at some future time is as much a 'claim' as is an obligation that constitutes a ripe cause of action when the bankruptcy petition is filed."[82] The courts have used section 502(c) of the Bankruptcy Code which allows courts to estimate contingent or unliquidated claims which would delay the administration of the estate. Essentially, what these courts have determined is that bankruptcy accelerates the maturity of all unmatured claims and therefore future claims should be accelerated and included in the bankruptcy case. Estimating future claims benefits both the claimants and the debtor by reducing costs (of litigating early on), speeding up the reorganization and helping the court to determine whether a plan of reorganization is even possible.

The first mass tort case to include future claimants in a bankruptcy plan was *In re Johns-Manville Corp.*[83] *Johns-Manville* used Chapter 11 to resolve thousands of asbestos claims. Johns-Manville was a manufacturer of asbestos products, the exposure to which caused a variety of respiratory diseases, including lung cancer. Johns-Manville began dealing with product liability lawsuits and predicted a larger number was yet to come. It filed for protection under Chapter 11. A motion was put forward to appoint a legal representative for asbestos-exposed future claimants. It was clear that the Johns-Manville reorganization would have to be

[82] *Supra* note 27 at 2057.
[83] *In re Johns-Manville Corp*., 36 B.R. 743 (S.D.N.Y. 1984) [hereinafter *Johns-Manville*].

accountable to future asbestos claimants and, therefore, it needed to safeguard the future claimants' interests and leave a sufficient residue of assets to accommodate a resolution of the Johns-Manville asbestos-related health problem.[84] The United States Bankruptcy Court, S.D. New York, defined "future asbestos health claimants" as people who had been exposed to asbestos or asbestos-containing products that were mined, fabricated, manufactured, supplied or sold by Johns-Manville prior to the petition date but who had not yet manifested injuries or filed claims. A key factor in this case was that the asbestos injuries may have had a latency period of many years. The court acknowledged that if the future claimants were not dealt with in the reorganization, it could potentially force the sale or liquidation of Johns-Manville's assets and the dissolution of its business. Liquidating the company would leave many asbestos claimants uncompensated. In his decision, Justice Lifland stated: "the key aim of Chapter 11 [is] to avoid liquidation at all reasonable costs."[85] If Johns-Manville were to be liquidated it would leave many asbestos claimants uncompensated. As well, Johns-Manville was a large company that employed many people. If the company were subjected to liquidation bankruptcy many jobs would be lost.

Although the Court did not specifically deal with the definition of "claim," it focused on section 1109(b) of the Bankruptcy Code, which states that any "party in interest" may appear and be heard. The section specifically states:

> Any party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, an equity holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.[86]

"Party in interest" is not defined in the Code. The Court stated that this term should be construed broadly, that its predecessor section, section 206, "represented an effort to encourage and promote individual participation in reorganization cases by creditors and stockholders and to foster democratization of such cases."[87] The Court stated that section 1109(b) continues broadening the concept of "party in interest." The Court appointed a legal guardian for the future claimants on the reasoning that even if future claimants did not have claims under then section 101(4) of the Code they were at least "parties in interest" under section 1109(b) and therefore

[84] *Ibid*.
[85] *Ibid.* at 746.
[86] Bankruptcy Code, s.1109(b).
[87] *Supra* note 83 at 747.

had a right to be heard in the proceedings. The Court went on to state that the list in section 1109(b) was not meant to exclude any parties, as "including" is defined in section 102(3) was not limiting. The Court held that section 1109(b) was broad enough to "embrace the interests of future claimants as affected parties."[88] The Court concluded that:

> Future claimants are undeniably parties in interest to these reorganization proceedings pursuant to the broad, flexible definition of that term…The drafting of "party in interest" as an elastic concept was designed for just this kind of situation…..future claimants are indeed the central focus of the entire reorganization. Any plan not dealing with their interests precludes a meaningful and effective reorganization and thus inures to the detriment of the reorganization body politic. Any meaningful plan will either provide funding for future claimants directly or provide for the continuation of some form of responsive, ongoing entity post-confirmation, from which to glean assets with which to pay them. If they are denied standing as parties in interest, they will be denied all opportunity either to help design the ship that sails away from these reorganization proceedings with their cargo on board or to assert their interests during a pre-launching distribution….In either event, the direct impact on these claimants will be enormous …..any plan of reorganization must necessarily balance the rights and needs of prepetition creditors against the anticipated rights and needs of postpetition creditors with Manville's purportedly limited assets and further economic prospects apportioned accordingly."[89]

The future claimants were not given "claim" status and did not obtain all the entitlements associated with this status. The Court appointed a legal representative to participate on behalf of unidentified future claimants and allowed people who claimed to have been exposed to participate in the proceedings even though they had yet to develop any illness. The Court declared that it is "the unprecedented, extraordinary nature of these proceedings that mandates a declaration that these claimants are parties in interest under Code Section 1109(b) and in need of a legal representative to act independently and impartially where appropriate in the case."[90] The Court referred to its equitable powers from section 1481 of Title 28, U.S. Code and section 105(a) of the Bankruptcy Code that allows the court to "enable it to respond to extraordinary equitable problems in estate administration consistent with the statutory goals of Chapter 11 of Title 11 U.S.C."[91]

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[88] *Ibid.* at 748.
[89] *Ibid.* at 749.
[90] *Ibid.* at 757.
[91] *Ibid.* at 758. The court *In re Amatex Corp*., *Supra* note 54, came to a similar conclusion.

The definition of "claim" in an asbestos mass tort case was also dealt with by the New York bankruptcy court in *Quigley Co., Inc.*[92] Quigley was in the business of developing, producing and marketing a number of products, some of which contained asbestos. As of the petition date, it was established that 212,000 asbestos personal injury claims were pending or would be asserted against it. The Court examined the issue of whether a person whose right to payment is not enforceable under state law can have a "claim" in bankruptcy and be entitled to a vote. The Court held that the definition of "claim" in the Bankruptcy Code is very broad and was "intended to reach all legal obligations, no matter how remote, and deal with them in the bankruptcy case."[93] The Court also stated that: "bankruptcy only discharges 'claims' and a narrow definition of 'claim' would undercut the 'fresh start' policy so important to bankruptcy law."[94] The Court held that the broad definition of "claim," "can encompass a right to payment that is not enforceable under state law."[95] The Court stated that a personal injury claimant's pre-petition:

> exposure to asbestos gave rise to a "claim", regardless of whether the law of any particular state renders the cause of action unenforceable until some future contingency occurs. If the Asbestosis PI Claimant was exposed to asbestos before the Quigley petition date, he or she holds a "claim".[96]

Therefore, claimants' status in bankruptcy does not depend on the manifestation of an injury or "on a state or court made rule that delays enforcement of the cause of action unless and until the injury becomes manifest."[97] It depends on when a person was exposed to the product. The Court estimated the future claims for voting purposes only.

As a safeguard, when a company is reorganizing under Chapter 11, unsecured creditors are represented by a committee of creditors selected by the trustee.[98] The committees may retain lawyers, accountants and investment advisors to assist them (with court approval). Bankruptcy courts have appointed legal representation for classes of future claimants although it is not expressly provided for in the Bankruptcy Code. Whether or not a court has held that the future

[92] *In re Quigley Co., Inc.*, 383 BR 19 (S.D.N.Y. 2008) [hereinafter *Quigley*].
[93] *Ibid*. at 25.
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*. at 27.
[97] *Ibid*.
[98] Bankruptcy Code, s. 1102(1)(b).

claimants hold a valid "claim" or are a "party in interest", they are all provided with representation and included in the bankruptcy case.[99]

2.5.5.3 Summary of United States position on Unmanifested Claims

Although many state laws preclude causes of action based on personal injury until the injury manifests itself, the Bankruptcy Code does not preclude individuals from being included in a bankruptcy debtor's plan since such individuals hold an interest or claim in the debtors' estate.[100] Bankruptcy courts estimate mass tort personal injury claims to determine the feasibility of a plan of reorganization as this estimation provides a mechanism to quantify the extent of the debtor's liability to the holders of mass tort claims. Estimating claims helps to define the amount of money that will be required to be paid out in order to determine if a possible consensual resolution of the mass tort claims is possible.[101] This estimation, according to section 1129 of the Bankruptcy Code, shall set a fixed outer limit on the amount a debtor will pay for contingent tort claims.[102] Typically in the United States, mass tort cases address claims by establishing either or both a claims resolution facility and a claimants' trust as demonstrated in the *A.H. Robins* and *Quigley* cases. These cases focused on the intention of the Bankruptcy Code to provide the debtor with a fresh start while attempting to balance the needs of claimants who have yet to suffer the full extent of their injuries.

The way in which mass tort claims are treated in the United States varies among courts and cases but the legislation is broad enough for the inclusion of future claims under a Chapter 11 application. Two different sections of the Bankruptcy Code have been used to include future mass torts in bankruptcy reorganizations. Some courts have held that victims whose disease has not yet manifest itself were parties in interest under 11 U.S.C. section 1109 and allowed the claimant to take part in the bankruptcy proceedings.[103] While other courts have included future claims as "claims" under 11 U.S.C. section 101(5), basing their decision on the fact that the definition of claim is broad enough to include these types of claims. A "claim" therefore exists

[99] Bankruptcy Code, s. 1102(a)(2) states that a party-in-interest may request and the court may order additional committees of creditors or equity security holders to assure adequate representation of them. Section 1109(b) is the statutory authority for parties-in-interest to raise, appear and be heard on any issue regarding the case.
[100] *Supra* note 54.
[101] Barbara J. Houser, "Chapter 11 As a Mass Tort Solution" (1998) 31 Loy. L.A. L. Rev. 451 at 471.
[102] See also: *In re A.H. Robins Co., Inc*., 880 F. 2d 709 at 720 (4th Cir. 1989) (describes necessity of setting outer limit on debtor's liability).
[103] *Supra* note 83.

when a claimant's exposure to a product gave rise to the "claim." Therefore, many cases have held that the Bankruptcy Code's broad definition of "claim" and its estimation provisions provide for a future right to payment because of the debtors pre-bankruptcy conduct, even if it will never ripen into a cause of action by the manifestation of an injury.[104] Whatever section the court uses to include future claims, the general consensus is that if a claimant was exposed pre-petition and he or she developed symptoms or died pre-petition, their claims would clearly be included in the bankruptcy case. If the claimant was exposed pre-petition but developed no symptoms until post-petition (for example, future claimant) the case law concludes the claim is a pre-petition one. By accepting future claimants as "parties in interest" or "claims", bankruptcy courts dealing with mass torts have allowed future claimants to take part in or benefit from the reorganization. Although contingent claims and classic future claims have been treated as one in American courts, there is an important difference. The possible error in estimation is greatly reduced when only the estimation of the damages is required rather than the number of claimants. In the *Johns-Manville* case, the number of claimants was underestimated and, as a result, the entire plan was overhauled. In *A.H. Robins,* there was much less error as the number of claimants was known. As well, even though representatives are appointed to represent all future claims, those who are known can monitor their representative's actions whereas claimants who are unknown cannot monitor their representative in bankruptcy negotiations.

2.5.6 Post-petition Exposure Claims

Claimants whose exposure to the faulty product occurs after the petition has been filed (post-petition) can be divided into two categories, (i) exposure post-petition but before confirmation of a plan (pre-confirmation) and (ii) exposure that occurs after confirmation of a plan (post-confirmation).

2.5.6.1 Post-Petition but Pre-Confirmation Exposure

If a claimant is exposed to a product post-petition but pre-confirmation, the claim is categorized as an "administrative expense". No matter what definition of "claim" a court may use to determine the validity of a claim in bankruptcy, when a victim is not exposed to the toxic

[104] *Supra* note 27 at 2058.

substance until after bankruptcy proceedings have begun, he or she is not considered to be a claimant. Neither the courts that use the state laws of discoverability nor the courts that use the more expanded definition of "claim" accept post-petition exposure as claims.

Section 101(10) of the Bankruptcy Code defines "creditor" as an entity that arises prior to the date of petition, while section 1141(d)(1)(A) states that claims that can be discharged are those that arose prior to confirmation of a plan. Section 503 of the Bankruptcy Code, the "administrative expenses" section, deals with the gap between the petition date and the confirmation date and has been used to include claimants who are exposed to the product post-petition but pre-confirmation in the bankruptcy case. Section 503(b)(1)(A) states that "administrative expenses" are those that:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (1) (A) the actual, necessary costs and expenses of preserving the estate including—
>
> (i) wages, salaries, and commissions for services rendered after the commencement of the case; and...

The word, "including" does not limit administrative expenses to only those listed in the section. Although the Bankruptcy Code does not define an "administrative expense", it does state that the term includes debts other than those deemed to arise prior to the petition date that are incurred after the commencement of the case in order to preserve the estate.[105] The words, "necessary costs and expenses of preserving the estate" in section 503(b)(1)(A), have been examined by the courts. The Supreme Court held in *Reading v. Brown,*[106] that post-petition tort claims arising against a Chapter 11 estate from the continued operation of a bankrupt business should be treated as administrative claims, and that tort claims are "costs ordinarily incident to [the] operation of a business".[107] A similar conclusion was reached in *re Alan Wood Steel Co.,*[108] in which the court held that torts arising post-petition are administrative expenses regardless of

[105] Bankruptcy Code, s.503(b)(1)(A).
[106] *Reading Co.* v. *Brown*, 391 U.S. 471 (Supreme Court 1968).
[107] *Ibid*. at 483.
[108] *In re Alan Wood Steel Co*., 2 B.R.161, 163 (E.D. Pa. 1980)

whether they result from a receivers efforts to preserve the estate. By labeling post-petition but pre-confirmation exposure claims as "administrative expenses" the bankruptcy courts have been able to include them in the mass tort bankruptcy case.

2.5.6.2 Post-Confirmation Exposure

If a pre-petition relationship does not exist between the victim and the debtor or its product, and the victim is only exposed to the toxic product after a plan of reorganization has been confirmed, the victim has a post-confirmation claim. These claims are neither subject to the automatic stay nor to the bankruptcy discharge. All cases have held that a pre-petition relationship must exist between the debtor and the future claimants, be it contact or exposure in order for them to be included in the bankruptcy case. For example, in *re Piper Aircraft Corp.*,[109] the court dealt with a debtor company, Piper, that had designed, manufactured and sold general aviation aircraft and spare parts. Piper was reorganizing under Chapter 11. Thereafter, there were thousands of planes still operational in the United States and there were thousands of lawsuits based on its manufacture and design of aircraft parts. It was known that some of the planes will crash, injuring or killing people in the planes. The court examined whether future claimants, in the context of people who were exposed to the products post-confirmation, could hold claims in the bankruptcy case. The court stated that it is impossible to determine who will belong to the class of creditors and whether any prepetition relationship to the debtor will give rise to their potential future cause of action. The court stated that:

> The concept of "claim" cannot be extended to include unidentified and presently unidentifiable potential claimants against the Debtor, claimants whose rights depend entirely on the fortuity of future occurrences and not on any prepetition relationship to the Debtor. Congress may have intended the broadest possible definition of claim, but that definition still has limits. One such limit is present here.[110]

Many courts have followed the *Piper* decision and have excluded post-confirmation exposure claims from the bankruptcy case.

[109] *In re Piper Aircraft Corp.*, 162 B.R. 619 (S.D. FL 1994).
[110] *Ibid*. at 623.

2.6 Classes

Once all of the types of claims have been identified, Chapter 11 requires all of the claims against the debtor to be placed into classes.[111] The only restriction is that all claims or interests in each class are substantially similar to the other claims or interests in that class. The Bankruptcy Code focuses on group rights rather than individual ones. The classes are set up primarily on the basis of how they will be treated, for example, if they are to share in the distribution *pro rata* or receive the full amount of their claim. Once the classes are established, according to section 1123(b)(1), a Chapter 11 plan "may impair, or leave unimpaired, any class of claims, secured or unsecured interests."[112] This forces everyone with a financial interest in the debtor to come to the bargaining table. If a debtor is facing mass tort liability and the company may be subject to liquidation because of all of the lawsuits that are being filed against it, the only feasible solution may be to pay all claimants, including present and future claimants, less than what they would have received from individual litigation. Having all of the various creditors, commercial and tort, sharing in the corporation's financial difficulties provides the court with the ability to impair several classes, as "the bankruptcy system provides a unique mechanism for spreading the loss faced by mass tort liability among all creditor and shareholder groups."[113]

2.7 The Plan

Section 1123 of The Bankruptcy Code deals with what must be included in the plan. Section 1123(a) lists the mandatory provisions of the plan while section 1123(b) lists the discretionary provisions.[114] Although section 1123 contains many provisions dealing with what

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[111] Bankruptcy Code, s. 1122(a).
[112] Bankruptcy Code, s. 1123 (b)(1).
[113] *Supra* note 27 at 2061.
[114] Section 1123 states that:

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall -
(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;
(2) specify any class of claims or interests that is not impaired under the plan;
(3) specify the treatment of any class of claims or interests that is impaired under the plan;
(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
(5) provide adequate means for the plan's implementation, such as—
(A) retention by the debtor of all or any part of the property of the estate;
(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

must and may be included in the plan, the requirements are very general and broad, which allow companies to structure the plan and include a variety of claims in the plan. Thus a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."[115] The courts dealing with mass tort cases have found that the Bankruptcy Code allows them to create trusts for the tort victims and impose injunctions on the victims, ensuring they

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(C) merger or consolidation of the debtor with one or more persons;
(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;
(E) satisfaction or modification of any lien;
(F) cancellation or modification of any indenture or similar instrument;
(G) curing or waiving of any default;
(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;
(I) amendment of the debtor's charter; or
(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;
(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and
(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—
(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
(3) provide for—
(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.
(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

[115] Bankruptcy Code, s.1123(b)(6).

turn to the trust when their injuries manifest themselves as opposed to the reorganized company for compensation. The trusts may be funded by payments from the debtor, co-defendants, insurance settlement proceeds, stock in the company, bonds as well as a percentage of a company's profits.[116]

Setting up trusts does not contradict the Bankruptcy Code. Section 157(b)(2)(B), which deals with the core proceedings that are to be included in the plan, states:

> (2) Core proceedings include, but are not limited to-
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11…but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11…[117]

Thus, the court has the authority to estimate personal injury or wrongful death claims in order for the claimants and creditors to vote on a plan and to determine its feasibility.[118] This is simply an estimation, not the amount a claimant will receive; it is only a step in developing a plan that will successfully restructure the debtor while at the same time determine the system for compensating future victims.

Two goals of Chapter 11 are to provide a fresh start for the debtor and to ensure equal treatment of all of the creditors involved. Bankruptcy courts "must balance the policy of the debtor's right to a 'fresh start' against the fundamental fairness and due process rights of future claimants."[119] The use of the broadest definition of "claim" provides for the best possible outcome for the debtor by ensuring its reorganization will end all claims arising pre-petition. By including future tort claimants in the plan, American courts attempt to balance future tort claimants who at the time of the petition are unidentified or extent of whose injuries are unknown, with present claimants whose injuries have at the time of the plan manifest themselves. When preparing the reorganization plan, the debtor estimates how many future claims exist and how much it will cost a company. A difficulty associated with including future claimants in the plan is determining what funds should be put aside into trusts for them, how

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[116] Macchiarola, Frank J., "The Manville Personal Injury Settlement Trust: Lessons for the Future", 17 Cardozo L. Rev. 583 (1995-1996).
[117] 28 U.S.C. 157(b)(2)(B).
[118] *Supra* note 101 at 468.
[119] *Ibid*. at 462.

much is to be paid out to current claimants and what resources must be left to the company to allow it to continue. If a plan reserves too much money for future claimants, current creditors will receive less. If the plan does not deal with future claimants at all, current creditors will deplete the fund and future claimants will not receive anything under the plan; their claims will not be discharged but they will have to sue the debtor and go through the courts. This could result in unequal treatment of creditors because future claimants may receive much less than current ones if funds are not available after a plan has been approved. In some situations, they may receive much more. As well, not including future claimants in a plan can affect the debtor's ability to obtain future financing. The existence of many outstanding claims could drive the debtor into liquidation as it will have to continue to defend or pay all outstanding undischarged claims.[120] Should this occur, the future claimants would receive nothing. Many mass tort cases have gone through the bankruptcy courts since 1982 and have all dealt with mass tort claims in their own way. A few of the more prominent cases and their plans are summarized below.

2.7.1 Johns Manville Corporation

Johns Manville was the first company to use Chapter 11 of the Bankruptcy Code to resolve thousands of asbestos claims. It took more than four years of negotiations to develop a plan that all parties involved in the reorganization could accept. The plan established an Asbestos Health Trust. The trust dealt with current personal injury claimants as well as future claims. The Court issued an injunction channeling all asbestos-related personal injury claims, both present and future, to the trust to protect Johns-Manville from lawsuits that could endanger the reorganization.[121] *Johns-Manville* set a precedent for channeling all of the claims to a post-confirmation trust.

The trust arrangement sets out a number of procedures. First, the claimants had to attempt to settle their claims with trust representatives. Second, if they could not reach a settlement, the claimants could choose to go to mediation, binding arbitration or traditional tort litigation. If they chose to go through traditional tort litigation, they would be given the full amount of

[120] *Ibid.*
[121] *See*: Anand, Katherine M., "Demanding Due Process: The Constitutionality of the §524 Channelling Injunction and Trust Mechanisms that Effectively Discharge Asbestos Claims in Chapter 11 Reorganization" 80 Notre Dame L. Rev. 1187 (2004-2005). *See also*: Macchiarola, Frank J., "The Manville Personal Injury Settlement Trust: Lessons for the Future", 17 Cardozo L. Rev. 583 (1995-1996).

damages they were awarded as compensation, but were not to receive punitive damages. Unfortunately, there were major flaws in the plan. The numbers of claims was underestimated and the administrative costs were very high. The result was that the plan had to be overhauled in 1991. As of March 30, 1990 the trust had received more than 150,000 claims, which was 50 percent more than the highest number estimated when the plan was approved. As well, the costs used to satisfy the claims were also almost twice the predicted average. By the spring of 1990, the trust was out of money.[122] Payments out of the revised trust did not begin until 1995.

2.7.2 A.H. Robins Co.

The reorganization of *A.H. Robins*,[123] also known as the Dalkon Shield case, dealt with thousands of women who had used the Dalkon Shield intrauterine device and claimed that it caused a number of injuries that included birth defects, infant death, ectopic pregnancies, septic abortions, non-surgical infertility, pelvic inflammatory disease and uncontrolled bleeding. Prior to establishing a plan, the bankruptcy court carried out a detailed process to estimate how much money would be needed to satisfy all of the current and future claims. The Dalkon Shield Claimants Trust was established to deal with all of the tort claims against the debtor.

The plan set up a Claims Resolution Facility (CRF), which was to be run by five court-appointed independent trustees to resolve the personal injury claims. The CRF provided general guidelines for settling all of the claims and based them on three principles: the "fairness principle", the "efficiency principle" and the "settlement principle."[124] In general the trustees attempted to treat all claimants equally and fairly by focusing on the claimants as a group rather than individually. They also tried to keep the administrative expenses low and encouraged settlement and timely payment of claims instead of turning to arbitration and litigation.[125] The application process the trustees chose was set up so people could enter claims without the need of legal representation. They attempted to create an equal playing field for both the defendant and plaintiffs as opposed to the adversarial model which often results in unequal justice weighted heavily in favour of the powerful companies.

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[122] *In re Joint E. & S. Dist. Asbestos Litig*., 120 B.R. 648. *See also*: *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710.
[123] *A.H. Robins Co*. v. *Piccinin*, 788 F. 2d 994 (4th Cir. 1986).
[124] Georgene M. Vairo, "The Dalkon Shield Claimants Trust and the Rhetoric of Mass Tort Claims Resolution" (1997-1998) 31 Loy. L. A. L. Rev. 79 at 130-131.
[125] *Ibid*.

The CRF provided "a best and final offer/no negotiation"[126] approach to control the amount of compensation offered to the claimants based on the specific injuries that were received by the claimants. As well, it promoted and encouraged everyone to settle by providing each claimant as high an offer as possible for the injuries they received without depleting the fund. The amount of compensation the debtor offered each claimant was based on medical evidence that the claimant provided. The plan provided each claimant with three different avenues for entering a claim. Each option was made available for the various types of claimants who could choose which procedure worked best for them. Also each option had a payment schedule for each type of injury.

Option 1 provided a quick payment scheme which was ideal for people who either did not have good medical proof that the Dalkon Shield caused their injuries or that their injuries were extensive. The claimant had to execute an affidavit that she used the Dalkon Shield and was injured, or believed she was injured, by the use of it. Plaintiffs who chose this option were offered $725.[127]

Option 2 was for claimants with valid proof that they had used the Dalkon Shield and medical proof that it was associated with the injury that they were suffering but that they also had serious alternative medical causation issues. Claimants usually received a higher payment than under option one as long as they produced more evidence. The payments ranged from $400 to $5,500 depending on the severity of the claimants injury.

Option 3 was to provide settlement offers "based on the pre-petition historical settlement amounts for claimants with serious and provable Dalkon Shield injuries."[128] Each claim in this class was given an individualized review. Claimants who rejected the settlement offer were given the option to attend a settlement conference. The settlement conference was not a negotiation, it was simply a forum for the trustees to point out the weaknesses of the plaintiff's claim. If the claimant did not accept the settlement offer after the conference, she could elect to proceed to binding arbitration or trial. The amount paid out ranged from $125 to over $2 million per claim. In order to keep costs down, the trustees provided an alternative dispute resolution (ADR) process to quickly deal with these cases. Of the cases that did go to trial, the outcomes

[126] *Ibid.* at 132.
[127] *Ibid.*
[128] *Ibid.* at 136.

were very close to what the claimants were offered initially.[129] The court also set deadlines requiring the plaintiffs who had elected trial to go to trial and have their claims heard by a certain date. If they could not be completed by that date they were to go to arbitration.

The A.H. Robins trust also had provisions to distribute the remaining funds on a pro rata basis to all tort claimants, after the last claim was paid out. The trust was completed at the end of 1998. It took a total of nine years to resolve all of the claims against the defendants, which was half of the time they expected to have all of the claims completed. In terms of a mass tort case, the time it took to complete this case is considered a successful reorganization as the company continued its business and the claimants/creditors were all paid out.

2.7.3 Dow Corning

The Dow Corning Corporation produced silicone gel breast implants and provided raw materials to other manufacturers of silicone breast implants. It was later discovered that silicone breast implants were causing various autoimmune injuries. During the early 1990s, Dow Corning was being sued by tens of thousands of claimants. On May 15, 1995 it filed for bankruptcy. In 1996 Dow Corning filed a plan but it was not until 1998 that all parties came to an agreement. Dow Corning proposed a $4.4 billion reorganization plan; approximately $3.2 billion was set aside for the claimants. All of the tort claimants, both present and future, were channeled to the trust funds. The plan provided for two trusts into which the funds would be paid. The first was the Settlement Trust. It channeled all claims into a settlement facility where claimants were to prove their injuries. A payment schedule was set out based on the severity of injuries and the proof provided. Settlement levels ranged from expedited payments of $2000 to $300,000 for most severe injuries. The second trust was the Litigation Trust Fund. Claimants who opted to apply under this fund were entitled to jury trials and could possibly receive larger settlements. The settlement process began in 2003. The settlement facility began making payments to claimants on June 1, 2004 and as of July 31, 2012, payments were still being made.[130] Similar to *A.H. Robins*, *Dow Corning* would be considered a successful reorganization as payments are being made to claimants, and continue to do so as new claims arise. The trust is

[129] *Ibid.*
[130] http://www.sfdct.com/_sfdct/index.cfm

well funded by Dow and insurance proceeds. As well, Dow provides a predetermined amount into the trust on a yearly basis.

All of the above cases demonstrate that every plan is based on the facts of the case and the types of claims and injuries involved. Cases that expedite claims with minor injuries or insufficient proof of causation allow for a shorter reorganization process and they involve fewer funds for administrative expenses. All of the cases funnelled present and future claims tort claims into trust funds systems. This approach allowed the companies to survive and successfully reorganize while at the same time providing creditors with compensation. As these cases demonstrate, taking a decade or more to pay out claims is quite common. These cases have "long tails" but do eventually pay out all of the claims and continue their business, which helps fund the trusts.

2.8 Confirmation of Plan

Once a plan has been developed, the claimants vote whether to accept or reject it. For a class of creditors to accept a plan,[131] it must be accepted by creditors that hold at least two-thirds in dollar amount and more than one-half of the number of claims in each class. A class that is not impaired by a plan is presumed to have accepted the plan[132] and a class is deemed not to have accepted a plan if the plan provides that the claimants are not entitle to receive or retain any property under the plan.[133] A future claimants' representative (FRC) is empowered to accept or reject a plan on behalf of the claimants. The FRC serves as a fiduciary to future claimants. [134] The FCR negotiates on the future claimants behalf and also votes on the plan. Bankruptcy Code section 524(g) specifically deals with the appointment of a future claims representative for asbestos cases only. Section 524(g) allows the court to direct future claimants to assert their claims against a trust established through the bankruptcy. Section 524(g) does not specify the FCR's role, but according to *Johns-Manville,* the FCR is meant to have a fiduciary role with

[131] Bankruptcy Code, s. 1126(c).
[132] Bankruptcy Code, s. 1126(f).
[133] Bankruptcy Code, s. 1126(g).
[134] Bartell, Laura B., "Due Process for the Unknown Future Claim in Bankruptcy – Is this Notice Really Necessary" 78 Am. Bankr. L.J 339 (2004). *See also*: S. Elizabeth Gibson, "A Response to Professor Resnick: Will this Vehicle Pass Inspection? 148 U. Pa. L. Rev. 2095 (1999-2000).

respect to negotiating a possible plan and in representing future claimants' interests in the course of the bankruptcy case.[135]

Cases that do not involve asbestos have also involved appointed FCRs. In *A.H. Robins* the Court appointed an FCR as one of the official committees appointed in the case.[136] In *UNR Indus*., the Court approved the appointment of someone to represent the interests of people exposed to asbestos but who had yet to manifest symptoms. The representative was given powers of an official creditors committee under section 1103 of the Bankruptcy Code. Section 1103 provides the FCR the ability to consult with the trustee with respect to the administration of the estate, participate in the formation of a plan and file with the court whether the plan is accepted or rejected.[137] Similarly, in *Dow*, the Court appointed several committees to represent different interests of the various claimants.

Once the plan has been accepted by the claimants, it must be confirmed by the bankruptcy court before it has legal effect and, thereby bind all of the parties included in the plan. Section 1129 provides specific requirements that must be met for a plan to be confirmed. These provisions are intended to protect creditor and equity interest holder rights. Section 1129(a)(7), also known as the "best interest of creditors test," provides that every impaired class of claims must accept the plan or receive at least the liquidation value of its claim. If a creditor does not receive at least its liquidation value, that individual creditor may, by voting against the plan, prevent it from being confirmed, no matter how small or large the amount of this creditor's claim is. Section 1129(a)(11) allows a court to confirm a plan even though not all classes accepted it as long as the court finds that the company will not go into liquidation or require further reorganization. This is also known as the "feasibility standard" and provides some assurance that the plan will likely work. Even if a class rejects the plan, a court, under section 1129(b) can still confirm it. This is known as the "cram down" provision and is only to be used at the request of a proponent of the plan. The court will confirm the plan only if "the plan does not

[135] M.D. Plevin, L.A. Epley and C.S.Elgarten, "The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts" 62 N.Y.U. Ann. Surv. Am. L. 271 (2006-2007).

[136] In re A.H. Robins Co. 88 B.R. 742 (Bankr. E.D. Va. 1988) at 744. See also Re UNR Indus., Inc. 46 B.R. 671 (Bankr. N.D. Ill. 1985) at 674.

[137] Some courts have an FCR representing known and unknown claimants. By having separate representatives for each type of claim provides better representation for each class as each class has different needs. This will lead to a more successful reorganization. See *In re H.K. Porter Co.*, 156 B.R. 16 (Bankr. W.D. Pa. 1993).

discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan".[138]

Once a plan of reorganization is confirmed, it becomes binding on all creditors and equity interest holders, on the debtor and any entity receiving property or issuing securities under the plan as well as binding on any creditor whether or not its claim is impaired under the plan or whether they voted to accept it.[139] There is no way for an objecting shareholder to opt out of the plan. It is also very difficult to get revocation of an order confirming a plan.[140] This broad ability to discharge most, if not all, of the claims against the debtor make Chapter 11 an attractive option for companies looking for a global and final resolution of its financial issues.[141]

Bankruptcy courts may enter injunctions discharging all claims against the debtor[142] and channel any future claims to a post-confirmation trust.[143] According to section 523 of the Bankruptcy Code, a general negligence claim against the debtor is dischargeable. All tort claims that have been reduced to judgment or have a clear debt owed will be discharged. It can be argued that future claims not reduced to judgment may be discharged (subject to the plan) because section 1141(d)(1)(A) states that confirmation of a plan discharges the debtor from any debt that arose before the date of confirmation whether the claim is allowed or slated to receive any distributions under the plan unless the plan provides otherwise with respect to any debt that arose before the plan was confirmed.[144] But according to section 157(b)(2)(B), future claims cannot be discharged, until the claim has been reduced to judgment. Future claims will not be reduced to judgment until they manifest and a claim proving damages is submitted. Channeling future claims into trusts allows the plan to be accepted, the reorganization to be completed and the future claims will then be dealt with by the trusts.[145]

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[138] Bankruptcy Code, s. 1129(b)(1).
[139] Bankruptcy Code, s. 1141(a).
[140] One of the only ways to do this is by arguing and proving fraud. There are strict time limits on filing proof of the plan being acquired through fraud.(Bankruptcy Code, s. 1144)
[141] *Supra* note 27 at 2067.
[142] Bankruptcy Code, s. 1141(a) (2000).
[143] Bankruptcy Code, s.105(2000).
[144] Bankruptcy Code, s. 1141(d)(2); "Debt" is defined in Bankruptcy Code, s. 101(12) as "liability on a claim," without any limitation as to when the liability arises.
[145] *Supra* note 101 at 472.

2.9 Conclusion

Chapter 11 bankruptcy has become the forum of choice for many American companies facing mass tort claims. The traditional tort system and other non-bankruptcy collective proceedings (including class actions) do not take into consideration the overall financial condition of the defendant. Judges and juries determine compensatory damages based solely on the defendant's ability to pay the present claimants' award and do not consider its ability to pay others who may still have claims in the future. In Chapter 11 bankruptcy reorganizations, although claims are fixed or estimated without regard to the debtor's financial condition, when the actual distribution scheme is being determined the debtor's financial ability is used to determine the amount that will actually be paid to each creditor based on a priority scheme.[146] One of the main goals of the reorganization process is to protect the business enterprise by "preserving its going concern value" [147] in order to provide the maximum value possible for distribution to its creditors.[148] It has been stated that:

> [i]n theory, incorporating all claimants into the collective bankruptcy process should be workable and universally beneficial: mass future claimants would benefit from the segregation of assets on their behalf, which otherwise will be exhausted long before they would be entitled to collect, while present creditors would benefit by the enhancement in the debtor's going concern value and the company's rejuvenated ability to attract new capital that will accompany a global resolution to the company's massive liability problems.[149]

The Bankruptcy Code provides a broad definition of "claim" and "debtor" to allow everyone involved with the company or who may have a claim against it to be dealt with under one forum; and when the process is complete, it provides for a global resolution and discharge of all debts except as provided for in the reorganization plan.[150]

While not a perfect system, as it may take years to resolve a particular case — it took the *Johns-Manville* case over a decade to conclude — it is the only system that allows for all of the issues that a company faces in a mass tort case to be dealt with in one forum. Chapter 11 contains provisions for consolidating the great bulk of claims against the debtor into a single forum. It provides a bankruptcy court with the power to stop all individual collection efforts and

[146] Bankruptcy Code, s. 507.
[147] *Supra* note 27 at 2050.
[148] *Ibid*.
[149] *Supra* note 8.
[150] Third Circuit Judicial Conference, "Mass Tort Litigation and Bankruptcy" (2003) at 2.

to oversee the orderly reorganization of the debtor rather than driving the debtor into bankruptcy. The Bankruptcy Code includes most of the claims that arise in mass tort cases while providing procedural safeguards for both creditors and debtors. Since the debtor is able to continue its business, the trusts can be well funded providing compensation to more than just the first people who filed claims before a company went bankrupt.

CHAPTER 3: MASS TORT INSOLVENCY IN CANADA

3.1 Introduction

Companies facing mass tort claims and experiencing financial distress in Canada currently have two statutes they can turn to: the *Bankruptcy and Insolvency Act* (BIA)[151] and the *Companies' Creditors Arrangement Act* (CCAA). Neither statute is specifically designed to deal with mass tort issues. If a company is unable to pay all of the claims filed against it, it may choose to make an assignment in bankruptcy under the BIA with the result that all of its property will be liquidated and distributed to its creditors. The second option is to attempt to reorganize the debtor company under the CCAA. This allows a company to deal with all of its creditors including tort claimants, avoid bankruptcy, and possibly, restructure its financial affairs. Choosing to use the CCAA is especially important if a company wants to continue to exist. An example of the complexity involved in these cases is the most notable Canadian mass tort case, the Canadian Red Cross Reorganization.

The *Red Cross*[152] case was the first case in Canada to include tort claimants as key creditors in the CCAA process.[153] There were $8 billion in tort claims from thousands of people who alleged that they had received contaminated blood products from the Red Cross as a result of inadequate testing and screening of the blood.[154] These people had contracted one of three deadly illnesses: HIV, HCV and CJD.[155] In his judgment, Justice Blair of the Ontario Court of Justice, General Division summarized the complexity and effect of the *Red Cross* reorganization as:

> [a]ll insolvency re-organizations involve unfortunate situations, both from personal and monetary perspectives. Many which make their way through the courts have implications beyond simply the resolution of the debt structure between corporate debtor and creditors. They touch the lives of employees. They have an impact on the continued success of others who do business with the debtor company. Occasionally, they affect the fabric of a community itself. None, however, has been

[151] R.S.C. 1985, c. B-3 [hereinafter BIA].
[152] *Supra* note 4.
[153] Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003).
[154] *Supra* note 4.
[155] *See* page 2 of this thesis.

> characterized by the deep human and, indeed, institutional tragedy which has given rise to the restructuring of the Canadian Red Cross.[156]

The Red Cross was not only in charge of the blood services for Canada, it also dealt with disaster relief, homemaker services and international relief and crisis intervention. The tort claimants were not the only claimants involved in the reorganization. There were many trade creditors and almost ten thousand employees who also had claims against the Red Cross. The courts had to balance the various interests of the creditors involved with the Red Cross while attempting to compensate victims and their families for the "deep human" tragedies that occurred. They also had to try to find a way to have the company survive and successfully continue for the employees and all of the people who depended on the Red Cross's services. The CCAA allowed the court to look at all of the interests involved and attempt to find a global solution that dealt with all of the creditors and tort claimants while finding a way for the company to survive and continue to assist those who depended on the Red Cross.

Once a company applies for CCAA protection, a court will determine if a company is eligible for such protection by examining the issue of insolvency. If it is eligible for protection the court will stay proceedings against the company. The types of claims that are included in the CCAA range from ordinary commercial creditors to tort claimants.[157] Once the court determines what claims will be allowed in the reorganization, a Plan is developed and the creditors and the court must then approve it. In the following paragraphs, the *Red Cross* case is used as an example of how Canadian courts deal with mass tort claims. The background to the case and the various aspects of the CCAA proceedings are addressed.

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[156] *Supra* note 4 at para 2.

[157] The CCAA divides claimants up into secured and unsecured creditors. Section 11.2 of the CCAA now provides for super-priority creditors, where the court may approve "interim financing" also known as debtor-in-possession financing (DIP). In this type of claim, the court approves an amount to be borrowed and gives the lender security or a charge on the debtor's property ranking in priority to any existing security. Also included in these types of creditors are "critical suppliers" where the court declares certain suppliers as "critical" and they must continue to supply goods or services specified by the court. The supplier is granted a security or charge by the court over all the property of the debtor. There are also secured claims involved in the reorganization, such as lending institutions that have secured their debts, they will be in a separate class. Tort claims are included in the unsecured creditors class.

3.2 History of the CCAA

The CCAA was enacted in 1933,[158] during the worst period of the Great Depression, to assist in the restructuring of large public corporations with complicated public debt structures. Prior to its enactment, companies in financial trouble could only turn to the *Bankruptcy Act* of 1919.[159] The *Bankruptcy Act*, however, did not apply to secured creditors and the debtor had to be bankrupt. Furthermore, the Act did not allow for a stay of proceedings before a proposal was filed.[160] These were the primary reasons for enacting the CCAA in 1933. Parliament recognized that the requirement that a company must be bankrupt before it can make a proposal was very harsh, particularly during the Depression. As the Honourable Charles H. Cahan pointed out in the *House of Commons*:

> At the present time, some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby compromises might be carried into effect under the supervision of the courts without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets. [161]

In 1953 amendments were made to the CCAA through *An Act to amend the Companies' Creditors Arrangement Act 1933*.[162] These amendments emphasized the importance of the CCAA being a statute for large corporations only and added a provision restricting its use to debtors having issued bonds or debentures under a trust deed. [163] Not only did this provision ensure that only large corporations with complex financial structures could apply under the CCAA, but it also more adequately protected unsecured creditors. The requirement of a trust deed provided for a trustee of the creditors who looked after their interests.[164] The need to protect unsecured creditors arose because between 1933 and 1953 many debtors were using false or misleading statements to induce unsecured creditors to accept arrangements. Equally as

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[158] *An Act to Facilitate Compromises and Arrangements between Companies and Their Creditors*, S.C. 1933, c.36, 23-24 George V., Royal Assent May 23, 1933.
[159] *Bankruptcy Act* , S.C. 1919, c.36, 9-10 George V., Royal Assent July 1, 1920.
[160] A.J. Duggan et al., *Canadian Bankruptcy and Insolvency Law Case, Text and Materials*, 2d ed. (Toronto: Edmond Montgomery Publications Limited, 2009).
[161] *House of Commons Debates* (April 20, 1933), at 4091.
[162] S.C. 1952-53, c.3.
[163] *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163 [hereinafter *ATB Financial*].
[164] *House of Commons Debates* (January 23, 1953), at 1269 (Stuart S. Garson).

important was the fact that the amendments kept the CCAA at only 22 sections, allowing courts to customize reorganizations to each proceeding and adapt to a variety of economic situations.

In the years following the enactment of the 1953 amendments, the CCAA was used less often; receivership and liquidation were used much more than reorganization. In the late 1980s, however, the CCAA was rediscovered by the legal community. Another recession had hit Canada and counsel for debtor companies once again turned to the CCAA to avoid having their clients enter bankruptcy.[165] In 1990, the Ontario Court of Appeal allowed a debtor to issue "instant" bonds or debentures and appoint a nominal trustee to satisfy the statutory requirements.[166]

The skeletal nature of the CCAA allowed courts to interpret the legislation liberally and progressively,[167] which the legal community preferred over the rule-driven BIA.[168] The courts began by applying the idea of inherent jurisdiction to invoke remedies under the CCAA, such as extending the stay of proceedings, to allow companies more time to reorganize their company. However, many years later, the Supreme Court of Canada held that judicial authority was better explained on the basis of statutory interpretation and gap-filling.[169] By the late 1990s a number

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[165] *Supra* note 160.
[166] *Elan Corp*. v. *Comiskey (Trustee of),* [1990] O.J. No 2180, 1 C.B.R. (3d) 101 (Ont.C.A.).
[167] *Hongkong Bank of Canada* v. *Chef Ready Foods Ltd*., [1990] B.C.J. No. 2384, [1991] 2 W.W.R. 136 (B.C.C.A.).
[168] *The Bankruptcy Act* of 1919 was renamed the *Bankruptcy and Insolvency Act* in 1992 (S.C. 1992, c. 27).
[169] See: G.R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J.P. Sarra ed., *Annual Review of Insolvency Law 2007* (2008), 41 at p. 42 states that when given a purposive and liberal interpretation, the CCAA will in most instances confer the authority on the court to grant an application. Statutory interpretation allows for the determination of the extent of judicial authority and provides for the basis of exercising judicial discretion to decide a case or grant a remedy. The Supreme Court of Canada, in *Century Services* v. *Canada* [2010] 3 SCR 379 (SCC), agreeing with Justice Georgina R. Jackson and Professor Sarra, held that when interpreting the provisions of the CCAA, the courts should use a hierarchical approach by first relying on an interpretation of the provisions of the CCAA text before turning to inherent jurisdiction. In most cases a broad interpretation of the CCAA provides authority on the court to grant an application. Section 11 of the CCAA provides the court with broad judicial discretion allowing a court to grant an order within its general power that would be fair and reasonable in the circumstances. In many cases courts have stated that they have used inherent jurisdiction to make certain orders. The doctrine of inherent jurisdiction is a difficult concept to define, but the definition that many judges and commentators have used is found in *Halisbury's Laws of England* which states that inherent jurisdiction is "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."(G. Sanan, Halisbury's Laws of England, 4th ed. (London: Butterworths). It is a doctrine that is to be used sparingly and cannot be exercised so as to conflict with a statute or rule and only to be used in cases where the evidence is such that by exercising its jurisdiction, the benefits outweigh the potential prejudice to individual creditors. It is generally used to fill in gaps where the legislation does not specify what is to occur in certain circumstances. It is the court exercising its general powers as the superior court of the province or territory. According to Justice Jackson and Professor Sarra, "only after exhausting this statutory interpretive function should the court consider whether it is appropriate to

of factors, including another economic recession and pressure from the legal community, led to further amendments to the Act. In 1997, *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act* was passed.[170] A monetary threshold had become necessary as many small companies were issuing instant trust deeds in order to qualify for CCAA protection.[171] Parliament removed the requirement for a trust deed and instead established a monetary threshold such that the total claims against the debtor must exceed five million dollars.[172] Justice Farley commented on the threshold criterion of five million dollars, and stated that:

> [w]hile this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under *BIA* where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under [the] CCAA, the length is in the discretion of the court, judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.[173]

Other amendments included the introduction of a court-appointed monitor to oversee the business and financial affairs of the company,[174] a provision that allows the debtor to compromise claims against directors that arose prior to the commencement of proceedings,[175] a provision limiting the court's initial stay order to thirty days and requiring a hearing to extend that time,[176] and the enactment of international insolvency provisions.[177]

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assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[170] S.C. 1997, c.12

[171] *Supra* note 166.

[172] CCAA s.3(1).

[173] *Stelco Inc., Re*, 2004 CarswellOnt 1211 at para 19, 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List], leave to appeal refused (2004), 2004 CarswellOnt 2936 (Ont.C.A.), leave to appeal refused (2004), 2004 CarswellOnt 5200 (S.C.C.) [hereinafter *Stelco*].

[174] CCAA s. 11.7(1).

[175] CCAA s. 5.1.

[176] CCAA s. 11(3).

[177] CCAA s. 18.6.

The most recent set of amendments to the CCAA came into force on September 18, 2009.[178] The new provisions were made in order to expand the CCAA and bring it more in line with the BIA, the United States Bankruptcy Code, Chapter 11 and the UNCITRAL Model Law on Cross-Border Insolvency and court decisions. Among some of the more important additions is section 11, which provides the court with the jurisdiction to grant priority charges. This allows debtors to borrow funds to restructure and to secure those loans with priority charges over existing security on their assets. This type of financing is known in the United States as "debtor-in-possession" or "DIP" lending and had previously been used in CCAA proceedings although there was no statutory authority for it. As well, section 11.4 gives the court the ability to declare certain suppliers as "critical suppliers". The court must be satisfied that the supplier is critical to the company's continuing operations.[179] In addition to these sections, sections 44 to 55 of the CCAA were enacted to deal with international insolvencies.[180] The CCAA is an evolving statute that often changes when major changes occur in the economy, and has adapted over time to deal with contemporary conditions. Although more sections and guidance were added to the CCAA in 2009, it remains a very flexible piece of legislation that can be used in a variety of situations including mass tort insolvency restructuring.

[178] These changes are the combined result of the following two pieces of legislation that the Canadian government enacted in 2005 and 2007: (i) Chapter 47 of the *Statues of Canada, 2005*: "An Act to establish the *Wage Earner Protection Program Act*, to amend the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* and to make consequential Amendments to other Acts" (previously Bill C-55); and (ii) Chapter 36 of the *Statues of Canada, 2007*: "An Act to amend the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act*, the *Wage Earner Protection Program Act* and Chapter 47 of the *Statues of Canada, 2005*" (previously Bill C-12). After years of debate, on July 30, 2009 the Governor General in Council announced that the amendments were to come into force on September 18, 2009. Certain amendments, specifically those with respect to the *Wage Earner Protection Program Act*, 2005, c. 47, s.1, were proclaimed in force on July 7, 2008.

[179] This was also borrowed from Chapter 11 of the Bankruptcy Code, although section 11.4 of the CCAA does not state that the critical supplier can be paid their pre-filing claim as a condition of them supplying goods post-filing, like the Bankruptcy Code does.

[180] Canada implemented parts of the UNCITRAL Model Law provisions, but not all. More rules have been put in place such as section 11.7 of the CCAA that requires monitors to be licensed bankruptcy trustees, so they have a duty to the company and the court.

3.3 Insolvency under the CCAA

3.3.1 Requirement of Insolvency

To qualify for CCAA protection, a company must be a "debtor company" as defined in the Act and have in excess of $5 million in claims against it.[181] Section 2(1) of the CCAA defines a "debtor company" as any company that:

> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
>
> (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

According to this section, a company must be bankrupt or insolvent in order to be able to use the CCAA.[182] The CCAA, however, does not define "insolvent". This deficiency has resulted in the development of inconsistent jurisprudence.

3.3.2 Definition of Insolvency in the Context of the CCAA

In many situations, proving insolvency is relatively simple. All a company needs to do is show proof of contractual obligations in excess of $5 million that it is unable to pay. When dealing with mass torts, proving insolvency is much more difficult. If most of the claims against the company are personal injuries that the company has allegedly caused because of negligent design, distribution, manufacture or failure to warn of their faulty product, many claims will not be reduced to judgment or may not have manifest themselves as of the date of the debtor's

[181] CCAA s. 3(1).
[182] Definition of "debtor company" in section 2(1) of the CCAA and *Reference Re Companies' Creditors Arrangement Act (Canada)* (1934), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75.

application Since "insolvent" is not defined in the CCAA, the BIA definition of "insolvent person" has commonly been used by courts.[183] Section 2 of the BIA states that "insolvent person":

> means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

Subsection 2(1)(a) of the CCAA defines "debtor company" as any company that is "bankrupt or insolvent." It does not specifically refer to the BIA or the *Winding-Up and Restructuring Act*, as (b), (c) and (d) do. According to the Supreme Court of Canada in *Bell Express Vu Limited Partnership* v. *Rex,*[184] when interpreting a statute "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[185] This approach recognizes "the important role that context must inevitably play"[186] when the written words of a statute are interpreted by a court. Any ambiguity must be "real" and "reasonably capable of more than one meaning".[187] The entire context of a provision must be looked at before coming to the conclusion of ambiguity or multiple meanings. The Court goes on to deal with ambiguity and states that:

> ambiguity cannot reside in the mere fact that several courts – or, for that matter, several doctrinal writers – have come to differing conclusions on the interpretation of a given provision...it is necessary for the court

[183] L.W. Houlden, G.B. Morawetz & J.P. Sarra, *The 2011 Annotated Bankruptcy and Insolvency Act* (Toronto: Thompson Reuters 2011) at 1071.
[184] 2002 CarswellBC 851, [2002] 2 S.C.R. 559 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1(SCC) [hereinafter referred to as *Bell*]
[185] *Ibid* at para 26.
[186] *Ibid*. at para 27.
[187] *Ibid* at para 29.

> charged with interpreting a provision to undertake the contextual and purposive approach...to determine if 'the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning'.[188]

The definition of "debtor company," when examined grammatically in its ordinary sense and in its entirety is not ambiguous. Had Parliament intended to have the courts refer to the BIA, it would have specifically stated in subsection (a) that the debtor was to be bankrupt or insolvent within the meaning of the BIA, as it did for section 2(1)(b) and (c). Furthermore, each of the clauses of subsection 2(1) are divided by semicolons and an "or" making it clear that each subsection is separate and distinct. Accordingly, in section 2(1)(a) of the CCAA, "bankrupt or insolvent," is not tied to the definition of insolvency in the BIA.

In order to determine what "insolvent" means in the context of the CCAA, it is necessary to examine the object of the CCAA and the intention of Parliament. According to the preamble of the CCAA, it is "[a]n Act to facilitate compromises and arrangements between companies and their creditor."[189] In *Re Lehndorff General Partner Ltd.*[190] Justice Farley expanded on the intention of Parliament by stating:

> [t]he CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make an order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.[191]

Justice Blair in *Re Canadian Red Cross Society*[192] adopted Justice Farley's explanation of the intention of the CCAA and stated that:

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[188] *Ibid*. at para 30.
[189] Section 13 of the *Interpretation Act* (R.S., 1985, c. I-21) states that: The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.
[190] (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.)
[191] *Ibid.* at 31.
[192] *Supra* note 4.

> [t]he CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex*, supra (p.111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.[193]

According to the Ontario Court of Appeal in *Elan Corp*. v. *Comiskey*[194] "it is well established [that] the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both."[195]

The purpose of the CCAA is vastly different from that of the BIA. The BIA is focused on liquidating all of the assets of a corporation and applying the proceeds to the corporation's debts. The purpose of the CCAA is to maintain the financial viability of the corporation through negotiation and compromise. When it comes to the issue of "insolvency" strong arguments can be made that the BIA definition should not apply. Reorganizations take months if not years to organize and successfully complete. The BIA definition of insolvency requires a company to be on the verge of bankruptcy and a company so close to bankruptcy would not be able to develop a plan and have time to successfully implement it. The legislation itself appears to favour an expanded meaning and unique CCAA-focused definition of "insolvency". Nonetheless, courts have come to two different conclusions on what definition of "insolvency" should be used in the CCAA. There are some cases that favour a more conservative, BIA-focused definition, while others favour a broad and CCAA-focused interpretation of insolvency.

3.3.2.1 Conservative, BIA-focused definition of "insolvency"

Justice Ground in *Enterprise Capital Management Inc*. v. *Semi-Tech Corp*.[196] took a conservative approach in defining insolvency under the CCAA. Enterprise (a creditor of Semi-Tech) applied for an order declaring that Semi-Tech was a corporation to which the CCAA applied. The Court held that section 2 of the BIA was to be used to determine insolvency in the

[193] *Ibid*. at para 46.
[194] *Supra* note 166.
[195] *Ibid*. at para 22.
[196] [1999] O.J. No. 5865, 10 C.B.R. (4th) 133 (Ont. S.C.) [hereinafter *Semi-Tech*].

CCAA and found that Semi-Tech was not 'insolvent' as that term is defined in the BIA.[197] Justice Ground noted that the BIA definition of insolvency applied, but stated that the courts must be aware of the purpose and intent of the CCAA, which was an "alternative to bankruptcy or liquidation of companies in financial difficulties".[198] He went on to state that the CCAA was meant to have a court sanction plans of arrangement between companies and their creditors, thereby permitting "a restructuring and the continued operation of the companies' businesses and continued production and employment by the companies."[199] Although Justice Ground acknowledged that the CCAA was meant to continue businesses rather than end them, he held that Semi-Tech was not "insolvent", but solvent. He took into account only obligations currently payable or properly chargeable in an accounting period, rather than looking further into the future and assessing whether those obligations could be met.

A similar approach was taken in *Re Les Oblats de Marie Immaculee du Manitoba*.[200] The Crown applied to set aside a stay granted to Les Oblats to have the approval of their amended proposed plan postponed until the Supreme Court of Canada decided what they believed to be a related case. The members of Les Oblats were primarily retired priests who were alleged to have abused former students. Justice Schwartz stated that in order for Les Oblats to come within the jurisdiction of the CCAA it must establish that it is a "debtor company" under section 2(1) of the CCAA and the only way to do so was to establish that it was insolvent. The court concluded that the definition of "insolvent person" in the BIA was "not only a useful guide but is the only appropriate definition."[201] The court held that Les Oblats was not insolvent and did not allow them to receive CCAA protection. The claims against Les Oblats were only possible, not probable. In both *Semi-Tech* and *Les Oblats* the courts applied the BIA definition and focused on the obligations that were currently payable and provable.

[197] *Ibid*. at para 18.
[198] *Ibid*. at para 22.
[199] *Ibid*.
[200] 2004 CarswellMan 104, 182 Man. R. (2d) 201, 1 C.B.R. (5th) 279 (Q.B.). [hereinafter *Les Oblats*].
[201] *Ibid*. at para 34.

3.3.2.2 Broad definition of insolvency

In an earlier case, Justice Farley in *Re Inducon Development Corp.*[202] applied a different approach than that in *Semi-Tech* and *Les Oblats*. In this case, a company, Inducon Development Corp. and its subsidiary, applied for approval of a plan under the CCAA. Justice Farley held that they both met the threshold of the CCAA test:

> namely both are insolvent; they have trust deeds with debentures outstanding (while to a degree they may be termed "instant debentures", the subscription money apparently is in the bank accounts of the companies); and there is a general proposal that there would be a compromise or arrangement between the companies and their creditors, including debenture holders, which would involve distress preferred shares and interest deferral.[203]

Although he did not delve into the issue or definition of "insolvent," he stated that the CCAA is "designed to be remedial; it is not, however, designed to be preventative. The CCAA should not be the last gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe".[204] In other words, the company should be in financial distress, but not on the brink of bankruptcy. Justice Farley focused on the intent of the CCAA and applied it to determine insolvency.

The *Red Cross* case arose almost a decade after *Inducon Development Corp*. and although the definition of "insolvent" was not specifically discussed in the Court granted it CCAA protection. Justice Blair said that:

> Recognizing that its potential liabilities far outstripped its assets and abilities to meet those liabilities, and hoping as well to save the important non-blood related aspects of its operations, the Red Cross applied to this Court for protection under the CCAA in July, 1988.[205]

There were approximately $8 billion of tort claims asserted against the Red Cross when it applied for protection. Although the reasoning for finding the Red Cross insolvent was never provided in any reported cases, the Crown in *Les Oblats*, however, stated that the unsecured trade debts of the Red Cross were approximately "$30,000,000.00 combined with its money losing operation[,] while operating the national blood system[,] [is what] brought it to the verge

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[202] 1991 CarswellOnt 219, 8 C.B.R. (3d) 306 (Ont. C.J.G.D.) [hereinafter *Inducon*].
[203] *Ibid.* at para 2.
[204] *Ibid.*
[205] *Supra* note 4 at para 6.

of exhausting its cash flow [and therefore] the motions judge ... conclude[d] it was insolvent."[206] Justice Schwartz in *Les Oblats* stated that the final order in the *Red Cross* case "was arrived at by consensus with no continued objection".[207] When the Court in *Red Cross* was approving the reorganizational Plan, Justice Blair stated, that "the Court has already ruled that the Red Cross is a debtor corporation entitled to the protection of the CCAA, and I am satisfied that all of the statutory requirements of the Act have been complied with."[208] It appears that the tort claims were likely taken into account when determining that the Red Cross was insolvent.

Justice Farley examined the issue of insolvency within the meaning of the CCAA in detail in *Re Stelco Inc.*[209] *Stelco* dealt with a motion, made by the union representing many of Stelco's workers, to have an initial order under the CCAA rescinded on the basis that Stelco was not a "debtor company" under section 2(1) of the CCAA because it was not insolvent. As "insolvent" is not defined in the CCAA, Justice Farley referred to the definition of "insolvent person" in the BIA. According to Justice Farley, CCAA proceedings are much more relaxed than other proceedings and they "are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms".[210] Justice Farley went on to state:

> insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA...[t]he BIA definition would appear to have been historically focused on the question of bankruptcy – and not reorganization...[t]he BIA definition then was essentially useful for being a pre-condition to the "end" situation ...[r]eorganization under a plan or proposal...is with a general objective of the applicant continuing to exist...[211]

Justice Farley concluded that because of the time and steps involved in reorganizing a company, the meaning of insolvency should be expanded under the CCAA in order "to give effect to the rehabilitative goal of the Act".[212] There would be no point in having restructuring legislation if debtor companies had to wait until they were in dire financial difficulties before they could apply for CCAA protection. Such companies would not have the financial resources to successfully

[206] *Supra* note 200 at para 40.
[207] *Ibid*. at para 39.
[208] *Supra* note 4.
[209] *Supra* note 173.
[210] *Ibid*. at para 13.
[211] *Ibid*. at para 24.
[212] *Ibid.*

make it through to the end of the reorganization.[213] Justice Farley stated that the test under the CCAA must be different from that under the BIA in order to "meet the special circumstances and objectives of the CCAA".[214] He held that the CCAA test for insolvency should be the BIA definition of" insolvent person", "... with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[215]

Section 2 of the BIA defines "insolvent person" as someone who is "for any reason unable to meet his obligations as they generally become due".[216] Justice Farley states that this section "speaks in the present and future tenses and not in the past".[217] He concluded that Stelco was an "insolvent person" because "it placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future".[218] He also noted that Stelco would have a liquidity problem in nine or ten months and that there was very little chance that Stelco would receive any further funding. When dealing with the issue of whether using the BIA definition is appropriate he stated:

> It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test clearly for the reasons and analysis, if one looks at the meaning of

[213] *Ibid.* at para 25.
[214] *Ibid.*
[215] *Ibid.* at para 26.
[216] BIA s. 2.
[217] *Supra* note 173 at para 29.
[218] *Ibid.*

> "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.[219]

The Court also found that Stelco failed section 2(c) of the BIA definition of "insolvent person," which is referred to as "an assets compared to obligations test."[220] In order to be considered insolvent under this part of the test, it must be determined that "the aggregate of [a company's] property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all [the company's] obligations, due and accruing."[221] Justice Farley held that "obligations, due and accruing due" include all obligations of whatever nature and kind without leaving anything behind. The union had argued that under the Court's definition many companies would technically be insolvent. The Court pointed out that it has the discretion not to grant CCAA relief or to terminate relief already granted. As Justice Farley explained, if Stelco were to cease paying its pre-filing debts, it would be considered game playing, and in his view Stelco:

> would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.[222]

Applying the test of section 2(c) of the BIA, Farley J. found Stelco insolvent and allowed it to apply for CCAA protection.

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[219] *Ibid*. at para 40.
[220] *Ibid*. at para 41.
[221] BIA s.2(c) In his analysis of this section, Farley J. also dealt with the issue of whether tort claims should be considered claims "due and accruing due" for CCAA purposes. This issue will be discussed in detail when dealing with what constitutes a claim.
[222] *Supra* note 173 at para 8.

Several cases have adopted *Stelco's* expanded definition of insolvent in the CCAA, including *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp*.[223] This case differed from *Stelco* in so far as it was a creditor-driven application under the CCAA, and the creditor argued that the respondents/debtors were insolvent because they were unable to satisfy their liabilities as they became due. When dealing with whether the company was "insolvent", the court accepted the test in *Stelco*, with respect to being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[224] The Court found that, based on the materials filed, the respondents were unable to meet their liabilities and therefore granted CCAA protection.

3.3.2.3 Summary of the CCAA Definition of Insolvency

There is no judicial consensus as to what constitutes "insolvency" in section 2(1)(a) of the CCAA. *Stelco,* and other cases that have followed the *Stelco* decision, have focused on the purpose of the CCAA and have attempted to interpret "insolvent" within the context of the policy basis for the CCAA. Justice Farley in *Stelco* expanded the meaning in order to facilitate a company's reorganization and give effect to the rehabilitative goal of the CCAA. In the BIA, insolvency "is a precondition to the 'end' situation of bankruptcy,"[225] whereas in the CCAA it is "a precondition to entry to a rehabilitative process."[226]

The decision in *Stelco* was appealed to the Supreme Court of Canada and in 2004 the leave to appeal was refused. It cannot be assumed that the *Stelco* approach has been accepted by the Supreme Court of Canada and will be followed by the courts. The Supreme Court has never specifically dealt with the issue of "insolvency" in the context of the CCAA to confirm that this approach should be used in all CCAA filings; it simply denied leave to appeal. The CCAA was amended in September 2009 and Parliament did not expand the meaning of "insolvency" in s. 2(1) of the CCAA. As the Supreme Court of Canada and Parliament have not dealt with this issue, it is necessary to focus on the language of the CCAA which provides a great deal of judicial discretion in each case in order to achieve successful reorganizations. This should be

[223] *Supra* note 163.
[224] *Ibid*. at para 32.
[225] J. Ziegel, "Should Proof of the Debtor's Insolvency be Dispensed with in Voluntary Insolvency Proceedings" (2010) Annual Review of Insolvency Law at 22.
[226] *Ibid.*

paramount in deciding how "insolvent" should be defined. In order to help a company reorganize, the need for flexible legislation is vital to successfully reorganize companies as each company and their financial structures and issues are all unique.

This is not to say that there should not be any parameters to the definition of insolvency in the context of the CCAA or that the necessity of insolvency be eliminated as has been done legislatively in the United States. It is important that the facts of each particular case be examined. In particular a judge needs to determine if the company is experiencing extreme financial distress and currently running out of liquidity, is financially struggling and in the foreseeable future will have very little funds remaining. A company experiencing extreme financial distress will not have enough time to successfully restructure under the CCAA. It could take six months or more to in order to reorganize under the CCAA, depending on the complexity of the case. There is no role for CCAA protection of companies that are not experiencing financial distress. CCAA proceedings are expensive and time consuming and, if a company has enough resources to deal with its financial situation outside of CCAA proceedings, it is in its interest to do so. In any event, it is likely unconstitutional to apply in this situation a federal statutory regime based on the jurisdiction of Parliament over insolvency.[227] If a company's financial situation is a few months away from reaching the critical point and it could make it through reorganization but not survive without CCAA protection, it should be awarded CCAA protection. A company must be experiencing financial difficulty but needs to be able to get through the reorganization. This is where the CCAA's flexibility is important and judicial discretion is required.

Having an expansive meaning of "insolvency" in the CCAA assists companies facing mass tort claims. A company can apply to the CCAA when it is experiencing actual financial difficulties because it is defending itself from numerous claims or class actions but has not run out of liquidity. The expansive definition allows a company to reorganize before it is completely out of funds. A company can therefore pay out many more, if not all, claims that exist, rather than the limited number that would be paid out by liquidation.

[227] *Constitution Act*, 1867, Section 91(21).

3.4 Stay of Proceedings

On July 20, 1998, Justice Blair made an initial order that the Red Cross was a company to which the CCAA applied. Upon so doing, the court ordered a stay of proceedings for one month, staying "any and all proceedings, including, without limitation, suits, actions, extra-judicial proceedings, enforcement processes or other remedies ... commenced, taken or proceeded with or that may be commenced, taken or proceeded with by any of the Applicant's creditors, suppliers, contractors, lenders, customs brokers, landlords..."[228]

Under section 11.02 of the CCAA a court may, upon the initial application of a debtor company, make an order to stay proceedings. The order will stay all proceedings taken, that might be taken and restrain further proceedings in actions proceeding against a company. According to section 11.02(1) of the CCAA the initial order can only be effective for no more than 30 days. The stay can be extended according to section 11.02(2) of the CCAA for as long as a court deems necessary. Unlike in the United States, under the CCAA the stay is not automatic. According to section 11.02(3), the court will not make an order to stay proceedings unless the company satisfies the court that circumstances exist that make the order appropriate. The company must also prove to the court that it has acted, and is acting, in good faith and with due diligence.

The purpose of the stay is to preclude the exercise of collection remedies and other measures against the assets of the company while the company prepares a reorganization proposal. Section 11.02 gives the Court broad powers to not only stay current proceedings, restrain further proceedings (protecting a debtor in the case of defaulting on a contract and accelerating a payment, or preventing a third party from relying on a breach of contract to terminate an arrangement)[229] but it can also prohibit commencement of any other actions or suits, thereby allowing the company to focus on reorganization.[230] Although the stay is not automatic, the court has the power to provide the debtor with the needed protection and the ability to extend it for as long as necessary in order to allow the creditor with the opportunity to develop a plan and present it to the creditors.

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[228] Ontario Court General Division, Court File No. 98-CL-002970.
[229] *Re Doman Industries Ltd*. (2003), 41 C.B.R. (4th) 29 (B.C.S.C).
[230] The CCAA grants protection against class action proceedings see: *Endean* v. *Canadian Red Cross Society* [1999] B.C.J. No 2180 (B.C.S.C.).

3.5 Monitor

Subsection 11.7(1) of the CCAA provides for the appointment of a monitor in every CCAA proceeding. The court must appoint the monitor at the same time the initial order is made. The monitor watches over the business and financial affairs of the company and reports to the court if there are any adverse changes in the debtor's financial status. The monitor's duties and functions are set out in section 23 of the CCAA. The monitor must act honestly and in good faith[231] and must take care in preparing reports. The monitor at no time takes possession of the debtor company or takes over management of the company. According to the 2005 amendments to the CCAA, the monitor must be a licensed trustee and have training in the area and the monitor's conduct is subject to review of the Superintendent of Bankruptcy. Section 11.7(3)(d) of the CCAA provides the court with the powers to order the monitor "to carry out such other functions in relation to the company as the court may direct."[232] Many initial orders have a number of provisions dealing with the power and duties of the monitor.

An example of this is in the *Red Cross* case where, a monitor, Ernst & Young Inc., was appointed when the initial order was made on July 20, 1998. The court gave the monitor access to the debtor`s books, records and assets. The court also gave the monitor additional duties and they were as follows:

> (a) assist the Applicant in the development of the Plan and any amendments to and the implementation of the Plan;
>
> (b) assist the Applicant which the holding including to assist in the development of a Plan and any amendments to and the implementation of it, to assist in holding and administering any meetings for voting on the Plan, and to act as chair to those meetings.
>
> (c) inquire into and report to creditors, at or prior to any meetings to consider the Plan, upon the financial condition and prospects of the Applicant;
>
> (d) be at liberty to engage legal counsel, in the event the Monitor requires independent legal advice concerning a specific issue or issues relating to the exercise of its powers and the discharge of its obligations under this Order, and engage such other agents as the Monitor deems necessary respecting the exercise of its powers and performance of its obligations under this Order;

[231] CCAA s. 25.
[232] CCAA s. 11.7(3)(d).

> (e) report to this Court as the Monitor deems appropriate or as this Court may from time to time direct, in respect of the Plan or the activities or affairs of the Applicant or in respect of such other matters as may be relevant to the proceedings herein;
>
> (f) assist the Applicant in preparing such periodic information for the Bank as may be required from time to time under the Term Sheet; and
>
> (g) perform such other duties as are required by this Order or as may be required by further order of this Court from time to time.[233]

3.6 Claims

It is necessary to examine the CCAA and case law to determine which, if any of the mass tort claims, including ones that have yet to manifest themselves, fall under the definition of "claim" so as to be included in the CCAA reorganization. The CCAA defines "claim" in section 2(1) as meaning "any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*." In section 2 of the BIA a "claim provable in bankruptcy", "provable claim" or "claim provable" is defined as including "any claim or liability provable in proceedings under [the BIA] by a creditor". Section 121 of the BIA states that claims provable are:

> (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> (3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

[233] *Supra* note 228.

The CCAA amendments that came into force on September 18, 2009 included Section 19, which is very similar to s.121 of the BIA, but focuses specifically on claims that may be dealt with by a compromise or arrangement. However, the amendments do not provide a specific definition of the term "claim" but rather prescribe when a claim comes into existence. Section 19 states:

> (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

In *Red Cross*, "claim" was defined in an Order establishing a claims procedure as:

> any right of any Person against the Society in connection with any indebtedness, liability, lien or obligation of the Society, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executor in nature, including without limitation the right or ability of any person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action cause or chose in action.[234]

The *Red Cross* used a very broad, all-encompassing definition of "claim" that allowed it to include as many claims as possible into the reorganization.

There are potentially seven separate types of claims in an application made by a company facing mass tort claims: 1. claims represented by judgments; 2. claims represented by judgments

[234] *Ibid.* at para 1(d).

but where the amount of damage has not yet been determined by a court; 3 claims of an identified group of people with manifest injuries; 4. "claims" of a group of unknown people that have not yet been the basis of an action; 5. contingent claims; 6. future claims; and 7. post-petition claims. Each of these types of claims will be examined in detail on whether or not they are considered valid claims for the purpose of the CCAA.

3.6.1 Claims represented by judgments

In order for claimants with judgment to be allowed to take part in the CCAA process they must have a provable claim[235] and the company must be subject to it on the day on which proceedings were commenced.[236] In this type of claim an injured party has gone through court proceedings, has received a judgment and the court has valued the claim prior to the debtor commencing CCAA proceedings. Claimants with judgments not only have valid proof that they have received an injury due to the company's negligence, but their claims have also been quantified by a court, therefore making them proved claims. As a result of section 2(1) and section 19 of the CCAA, it is clear that a claim represented by a judgment and quantified by a court prior to proceedings being commenced or prior to the compromise or arrangement being sanctioned is a valid claim under CCAA proceedings and will be included in the CCAA process.

3.6.2 Claims represented by judgments where the amount of damage has not been determined by a court.

As in the United States, Canadian law recognizes this category of claims as unliquidated claims. Section 2(1) of the CCAA defines "claim" as including a claim "provable" within the meaning of section 2 of the BIA. Section 2 of the BIA ties in section 121(2) which specifically states that an unliquidated claim is a provable claim. Unliquidated claims occur when the claim exists and is provable but the amount of the claim must still be determined. According to the English High Court in *Re A Debtor,*[237] "[i]f the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere arithmetical

[235] CCAA s.2(1).
[236] CCAA s. 19(1)(a)(i).
[237] (No. 64 of 1992), [1994] 1 W.L.R. 264 (H.C.).

calculation, then the claim is an unliquidated claim".[238] The claim has already been proved and only the valuation of it remains. It was held in *Algoma Steel Corp*. v. *Royal Bank*[239] that an unliquidated claim is provable in bankruptcy and is considered a claim in CCAA proceedings.

An unliquidated claim does not need to be reduced to an amount to be considered a valid claim in bankruptcy and therefore will be included in the CCAA as a valid claim. As long as the claim is reduced to a dollar amount prior to distribution, the claim is within the CCAA. Section 20(1)(a)(iii) of the CCAA specifically deals with determining the amount of a claim. If it is not admitted by the company, the amount is to be determined by the court on summary application by the company or the creditor. Section 20(2) of the CCAA allows debtor companies to admit claims for voting purposes but also allows them to reserve the right to contest liability on the claims for the purposes of distribution.

In *Red Cross*, once claimants filed proofs of claim, the claims were examined by the Monitor and the Red Cross and then were either accepted, rejected or modified for voting purposes pursuant to section 20(2) of the CCAA. All tort claimants had to show that they were exposed to the blood and had HIV, CJD or Hepatitis C. The information in the claim was crosschecked with documentation that was available to the Society with respect to the claimant receiving the tainted blood. All claims that were accepted were given the value of $1.00 for voting purposes. If the proof of claim was not filed by the set submission date, or it was rejected, the claimant was not entitled to vote on the Plan but the Court did not take away his or her right to participate pursuant to the Plan. The claimant was still eligible to receive a distribution if the Plan was approved.[240] After the plan has been accepted, a final value will be determined either by agreement between the company and the claimant or by a court through summary application.

3.6.3 Claims of identified claimants whose injuries have manifested but who may or may not have brought action

Another group of claims that may arise in mass tort insolvency cases are those of claimants who have begun actions in court but the action has not been heard or claimants who are known to

[238] *Ibid.*
[239] 1992 CarswellOnt 162, 11 C.B.R. (3d) 1 (Ont. C.J. Gen. Div.). Which held that the contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid should be considered a debt provable in bankruptcy.
[240] Red Cross Order Establishing Claims Procedure, May 5 1999. Court File No. 98-CL-002970.

the company as having suffered an injury but have not commenced an action prior to the date of petition. In general these are claimants with manifested injuries. If these claims are provable, the monitor will value each one of them.[241] In order to determine if these claims constitute a "claim" in the CCAA, the definition of "claim" under section 2 of the CCAA and "claim provable" in the BIA must be examined.[242] The language used in the definition of "claim" in section 2 of the CCAA refers to "any indebtedness, liability or obligation of any kind." The word "debt" has not been defined in either the BIA or the CCAA but it has been examined by the courts and has been defined as "a sum payable in respect of a liquidated money demand, recoverable by action".[243] It has also been defined as "that which is owed by one person to another, and particularly money payable arising from and by reason of a prior promise or contract, but also from and by reason of any other ground of obligation.[244] The word "liability" is also very broad and has been defined as including "all obligations to which the bankrupt is subject on the day on which he or she becomes bankrupt."[245]

The word "obligation" has also been examined by the courts. Justice Judson in *Smith* v. *Canadian Broadcasting Corp.*[246] dealt with the phrase "any obligation incurred" and held that the meaning of the word "obligation" should not be restricted to a duty arising out of contract. He held that the word "obligation" included "a duty or liability arising from an actionable tort".[247] The courts have also dealt with obligations in the context of "due and accruing due". In *Barsi* v. *Farcas*[248] it was held that "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."[249] *Re Stelco Inc*.[250] also dealt with the issue of obligations "due and accruing due". Justice Farley stated: "It seems to me that the intention of 'due and accruing due' was to cover off all obligations of whatever nature or kind

[241] BIA s. 121(2) and 135.
[242] BIA sections 2 and 121.
[243] *Diewold* v. *Diewold* (1940), [1941] 1 D.L.R. 561 (S.C.C.); this definition was cited in *Holden Day Wilson* v. *Ashton* (1993), 104 D.L.R. (4th) 266.
[244] The British Columbia Court of Appeal adopted this definition of "debt" in *Deloitte, Haskins & Sells* v. *P.R.D. Travel Investments Inc.* (1984), 52 C.B.R. (N.S.) 129 (B.C.C.A.) at p. 141 from The Oxford Companion to Law (1980) at p. 340. *Also cited in 63398 Alberta Ltd. v. Saskatchewan Government Insurance* (1995), 1995 CarswellSask 37, 127 SaskR 261 at 273.
[245] *Supra* note 184 at 572.
[246] [1953] 1 D.L.R. 510 (Ont. S.C.H.C.J.).
[247] *Ibid*. at 512.
[248] 1923 CarswellSask 227, 1 D.L.R. 1154 (Sask. C.A.).
[249] *Ibid*. at para 9.
[250] *Supra* note 173.

and leave nothing in limbo."[251] He held "obligations" is a much broader term than debts. According to the foregoing definitions, a claimant who received an injury from a product that the debtor produced or distributed complies with the definition of "claim" in the CCAA. [252]

Next it must be determined if the claim is provable. The BIA and CCAA do not go into detail on what kind of proof is required. The lack of detail is a necessary part of the CCAA process, as every reorganization is unique and the types of claims involved vary considerably. The only limit the CCAA has placed on proving claims is that they must arise prior to the day on which proceedings were commenced. The corporation and the monitor will determine what type of proof is required in each individual case. The corporation will apply to the court for the issuance of a claims procedure order, which establishes the process which will be used to determine creditor claims and how disputed claims will be dealt with. A proof-of-claim package is sent out to the claimants outlining what information the company/monitor requires to be included. Known claimants whose injuries have manifest pre-petition should require some sort of proof of exposure to the debtor's product and that the injury was caused by exposure to the product.[253] As long as the claimant can show a connection between their injuries and the debtor's product, in most cases a doctor's report, the claims will be considered provable claims.

However, in order for a claimant to receive any payment under a proposal, the claim must be valued so as to become a proved claim. Similar to claims under section 2, the amount of damage must still be determined and therefore they are considered to be unliquidated claims. The BIA states that the valuation of an unliquidated claim shall be made in accordance with section 135. Section 135(1.1) states that: "[t]he trustee shall ... value it, and the claim is thereafter, subject to this section...deemed a proved claim to the amount of its valuation." Section 20 of the CCAA deals with how the court is to determine the value of each claim. Section 20(2) states that a company may admit the amount of a claim for voting purposes and reserve a right to contest liability for other purposes. Although the BIA and CCAA sections are similar, the purpose of the CCAA is that the company will continue to exist as opposed to ending it like the BIA. Consequently, under the CCAA the debtor must develop a plan that provides for the payout of creditors and the continuation of its business (the completion of the reorganization may take years). If a debtor/monitor does not accept the claimant's proof for the value of the

[251] *Ibid.* at para 50.
[252] S. 2(1) of the CCAA, s. 2, 121(2) and 135 of the BIA.
[253] CCAA s.19.

claim, according to section 20(1)(iii) of the CCAA the amount will be determined by the court on summary application by the company or the creditor. Once a value is placed on the claim, either by the debtor/monitor or by a court, it is deemed a proved claim to the amount of its valuation.[254]

3.6.4 Unknown Claimants

The circumstances may be such that there are persons, unknown to the company at the date the proceedings are invoked, who have claims. They have suffered injuries but have not filed claims. The court in *Red Cross* allowed these types of claims in the reorganization by including two class action claims in the Plan. One of these class action claims was *Killough* v. *Canadian Red Cross Society*,[255] where a class action was commenced against the Red Cross and the government of British Columbia for damages arising out of the supply of blood and blood products before January 1, 1986 and between July 1, 1990 and September 28, 1998, which was contaminated with the Hepatitis C virus.[256] The class action was certified as a class action on November 24, 1998, but all proceedings against the Red Cross had been stayed by the CCAA order issued on July 29, 1998. Red Cross offered the members of this and the parallel class actions a settlement that was then included in the CCAA Plan.[257] The class was broad and included all people who became infected with the Hepatitis C virus as a result of receiving blood or blood derivatives or blood products collected or supplied by the Red Cross, all people who became infected with the Hepatitis C virus as a result of contact with a person who had Hepatitis C and had received blood from the Red Cross in the prescribed period and all people with derivative claims.[258]

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[254] Courts may allow the claim for voting purposes and then deal with determining its amount after the Plan has been accepted. Refer to discussion on page 78.

[255] 2001 CarswellOnt 2255, 8 C.P.C. (5th) 350, [2001] O.J. No. 2474 (Ont. S.C.J). *Killough* was one of three parallel class actions that were commenced for hemophiliacs who received tainted blood before 1986 and after 1990. *See also McCarthy* v. *Canadian Red Cross Society*, 2001 CarswellOnt 2255, 88 C.P.C. (5th) 350, [2001] O.J. No. 2474, [2001] O.T.C. 470 (Ont. S.C.); *Suprenant* c. *Societé Canadiene de la Croix-Rouge* (October 19, 2001) no. 500-06-000120-002 (Que. S.C.).

[256] The Federal Provincial Territorial Settlement dealt with claims between 1986-1990.

[257] Section 5.05(e) of the Plan.

[258] In order for a class action to be certified, there must be an identifiable class of two or more people, the claims must raise common issues, a class action must be a preferable procedure for resolving the common issues, the representative plaintiff must fairly and adequately represent the interests of the class and not have a conflict on the common issues with other class members as well as have a workable plan for processing the action. *See Class*

3.6.5 Contingent Claims

Claimants who are known to have been exposed to the debtor's product but whose injuries have not manifested as of the petition date are considered to hold contingent claims. A contingent claim is defined as a debt that has not accrued; more specifically, it may or may not ever ripen into a debt and depends on some future event that may or may not happen.[259] Contingent claims can be a large part of mass tort cases if the product involved does not cause an injury upon exposure and has a long latency period. The CCAA does not specifically deal with contingent claims. Therefore the general definition of "claim" must be examined to determine if these claims can be included in the CCAA proceedings.

The general definition of "claim" in CCAA section 2(1), refers to claims as any "indebtedness, liability or obligation of any kind" that would be a claim provable under section 2 of the BIA. Section 121(2) of the BIA specifically deals with contingent claims and states that the trustee shall determine if they are provable. If they are found to be provable, according to section 135 of the BIA, the trustee shall thereafter value them and at that point the claim is deemed a proved claim. Section 19 of the CCAA is similar to section 121 of the BIA and states that claims that relate to debts, "present or future" must come into existence prior to proceedings commencing and section 20 states that the amount of the claim shall be admitted by the company or determined by summary application. Therefore in order for a claim to be provable, it must be in existence at the time or before proceedings were commenced, or the debtor must become subject to it before his discharge by an obligation incurred before the proceedings were commenced.

Even though the CCAA does not refer specifically to contingent claims, section 19 refers to "future liability". It was once believed that contingent claims were not included in the CCAA.[260] The legislation was reworded and cases held that contingent claims were provable

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Proceedings Act, 1992, S.O., ch. 6; *see also Class Proceedings Act*, R.S.B.C. 1996, c.50 and Quebec *Code of Civil Procedure*, R.S.Q., ch C-25, Book IX..

[259] H.C. Black et al., *Black's Law Dictionary*, 6th ed. (St. Paul Minnesota: West Publishing Co., 1990) at 409; *Gardner* v. *Newton* (1916), 29 D.L.R. 276 (K.B.).

[260] *Quebec Steel Products (Industr.) Ltd*. v. *James United Steel Ltd*. [1969] 2. O.R. 349, 5 D.L.R. (3d) 374 (S.C.) that then s. 12 (currently s. 19 which has been renumbered and reworded) that the BIA was only referred to in order to determine the amount of the claim and not to incorporate the BIA definition of claim. This case held that contingent claims were not provable. In 1985, the legislation was amended and *Quintette Coal Ltd*. v. *Nippon Steel Corp*. [1991] B.C.J. No 1049 revisited the issue of contingent claims and held they were provable as the concepts of

under the CCAA. The 2009 amendments to the CCAA codified contingent claims as "provable" claims through section 19 which states that "claims that relate to debts or liabilities, present or future" will be dealt with in a compromise or arrangement but the company must become subject to it on the day proceedings commence or before the arrangement or compromise is sanctioned.[261]

In tort law an "action normally becomes enforceable from the date of injury or loss or when the damage manifests itself or becomes quantifiable as to its extent".[262] Therefore, latent claims are not usually actionable until the injury and the cause have been discovered by the claimant. In order to determine whether contingent tort claims can be included in the CCAA, prior to the manifestation of an injury, section 19 of the CCAA must be examined. Section 19 refers to "debt" and "liability". The word debt is much more narrowly defined than "liability".[263] "Liability" was defined in *Re Laurance*[264] as "primarily referable to the existence of [an] obligation and is not to be confined to the present right to enforce it."[265] Under the CCAA claims become actionable on the date on which the debtor owes the claimant an obligation. Therefore, with respect to tort injuries, in the CCAA the claim will become actionable on the date the claimant purchased or was exposed to the product. It follows that contingent tort claims are included under the CCAA as long as the claimant can establish she or he has a provable claim even though the injury has yet to occur.

There are a number of cases that have held that contingent claims are included in the CCAA. For example, in *Re Air Canada*,[266] Justice Farley dealt with the issue of contingent unliquidated claims under the CCAA. The Court was deciding whether a pay equity claim that was underway before a tribunal was a proved claim. Justice Farley stated that "[c]ontingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise."[267] Some evidence from the claimant, an expert report even in simplified form, to

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claim and amount were no longer tethered together. The court stated that claim included a future debt and therefore allows potential creditors a role in the CCAA proceedings.

[261] CCAA s. 19.

[262] *George A. Demeyere Tobacco Farms Ltd*. v. *Continental Ins. Co*. (1984), 9 D.L.R. (4th) 734 (H.C.S) aff'd 25 D.L.R. (4th) 480n (C.A.)

[263] See discussion on page 78.

[264] [1923-4] 55 O.L.R. 196.

[265] *Ibid.* at 198.

[266] 2004 CarswellOnt 3320, 2 C.B.R. (5th) 23 (Ont. S.C .J.).

[267] *Ibid*. at para 6.

support its claim would have been enough evidence that the company would have to respond. The claims process under the CCAA does not require that the report/proof be precise.

Negus v. *Oakley's General Contracting*[268] dealt with a plaintiff suing the defendant for damages for breach of contract and express warranty arising from the improper construction of his home. The Court held that:

> [t]he claims of the plaintiff for damages are contingent, unliquidated claims or future liabilities to which the defendants might have become subject before their discharge from bankruptcy because of the improper work which they carried out with respect to the plaintiff's home before the date of the bankruptcy. Moreover, they are recoverable by legal process and are not too remote and speculative. Therefore, the claims of the plaintiff are deemed to be claims provable in proceedings under the *Bankruptcy and Insolvency Act.*[269]

As well, the Court in *Menegon* v. *Philip Services Corp*.[270] held that "for the purposes of the CCAA[,] the claim of an unsecured creditor includes a claim in respect of any indebtedness, obligation or liability which would be a claim provable in bankruptcy, and ... includes a contingent claim for unliquidated damages."[271]

Therefore, according to the case law and the legislation, contingent tort claims are included in the CCAA if the claimant can prove exposure to the dangerous product. There are limits. As was held in Claude *Resources Inc. (Trustee of)* v. *Dutton*[272] unsecured contingent claims must be "provable" in order to be considered a valid claim. If there are too many "ifs" to a contingent claim, the claim is too remote: it is not provable. What type of proof is required depends on the product in question.

For example, in *Red Cross*, the majority of the tort claims were contingent. Most of the claimants were known but many of their injuries had yet to manifest. In the Order Establishing a Claims Procedure, "Claim" was defined as including contingent claims.[273] The Order also defined "Proven Claim" as meaning "the amount of the Claim of a Creditor [any person having a claim] against the Society, for voting purposes only, determined in accordance with the provisions....of this Order if a Transfusion Claim, and which has become a Proven Claim

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[268] [1996] N.S.J. No. 217.
[269] *Ibid.* at para 7.
[270] [1999] O.J. No. 4080, 1999 CarswellOnt 3240, 11 C.B.R. (4th) 262, 39 C.P.C. (4th) 287 (Ont. S.C.J)
[271] *Ibid*. at para 40.
[272] 1993 CarswellSask 26, 22 C.B.R. (3d) 56, 115 Sask. R. 35 (Sask. Q.B.).
[273] Order Establishing Claims Procedure – May 5, 1999. Section 1(d).

pursuant to and as defined in the respective Order, thereby entitling the Creditor to vote in respect of the Plan."[274] Proofs of claim were sent out to all known claimants and published in newspapers. The Red Cross with the Monitor reviewed the claims, cross-checked the information available to the Red Cross, and decided whether to allow or disallow a claim for voting purposes. In order to receive the right to vote, every claimant was to fill out a form stating when they received a blood transfusion and which disease they were infected with along with when they were diagnosed and the name of the physician who diagnosed them. All allowed transfusion claims were valued at $1 per claim.[275] If someone had not filed a claim or their claim was disallowed at this stage, the person/claimant could not vote.

Once a claim is found to be provable, the next step is to value it. The difficulty in dealing with contingent tort claims is valuing them. Some Canadian courts have valued contingent claims by determining the likelihood of the contingency happening.[276] If there is almost a complete certainty this claim will arise, they include the full value of the claim; when it is a remote possibility, the value is reduced to zero.[277] In other cases, some courts value the claim based on a greater than fifty percent chance of the claim arising, in which case, they will give it full value. If there is less than fifty percent chance of it arising, no value will be given to it. Another approach is to value a claim according to the percentage of the likelihood it will occur.[278] Valuing claims this way becomes problematic when the amount of the claim is very high but the possibility of it actually occurring is very low. For example, there is a ten percent chance of a $10 million claim arising that would mean they have a claim for $1 million. This would mean most of the assets would go to a claimant whose claim was very unlikely to materialize.[279] It has been decided by many courts that some claims are too remote and

[274] Order Establishing Claims Procedure – May 5, 1999.
[275] Order Establishing Claims Procedure. Section 16.
[276] *Re Wiebe* (1995), 30 C.B.R. (3d) 109 (Ont. Ct. Gen .Div.), *Claude Resources Inc. (Trustee of)* v. *Dutton* (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.) and *Re Confederation Treasury* (1997), 43 C.B.R. (3d) 4 (Ont. C.A.).
[277] *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (BCSC).
[278] Roderick J.Wood, *Bankruptcy and Insolvency Law*, (Toronto: Irwin Law 2009). In *Re Wiebe* (1995), 30 C.B.R. (3d) 109 (Ont. Ct. Gen. Div.), Justice Kozak of the Ontario Court of Justice had to determine whether a contingent claim was provable in bankruptcy and to determine its value. In determining the value of the claim, the court looked at the relevant circumstances and valued the claim at ten percent of its face value. The court held that the BIA was incorporated into the definition of claim only to determine the amount of a claim, and therefore contingent claims were not provable since they did not fit within the ordinary meaning of the term "creditor".
[279] *Ibid*. This issue could be addressed by setting aside a fund for $1 million, with reversion of the money in that fund accruing to the other claimants if the claim does not materialize.

speculative and therefore not provable.[280] The onus is on the creditor to prove a claim. The evidence does not have to be precise but some evidence must be submitted. Similarly, in *Re Galaxy Sports Inc*.[281] the Court held a "trustee should look at what is reasonable in the circumstances and apply an appropriate contingency in determining the amount at which to value the claim."[282] If the valuation occurs before the contingency happens and it is found that the value is too low, the creditor can amend his claim as long as it does not disturb the dividend already paid.[283]

In order to include the contingent tort claimants in the Plan, courts in the United States have estimated the value of the contingent tort claims and established trusts, by channelling all the tort claims to the trust. In *Les Oblats*, the court stated that future liabilities "might be addressed in having the distribution held in trust pending resolution of the claims and then divided in appropriate proportions".[284] The first case to do this in Canada was *Red Cross*. In this case the Court set up trusts that avoided the issue of having to value each claim before the plan was sanctioned while allowing the *Red Cross* to include the tort claims in the reorganization. The CCAA does not forbid the setting up of trusts as it allows companies to determine the best plan to deal with all of their creditors. Companies can include tort claims in the CCAA through section 20(2). This section states that a company may admit the amount of a claim for voting purposes and reserve the right to contest liability for other purposes.

If a claimant had not entered a proof of claim by the claims bar date, they were not entitled to vote on the Plan, although they were not excluded from receiving compensation under the Plan. The Plan specifically contained provisions that included all people who were exposed to the blood products prior to September 28, 1998 and developed an injury one to ten years (depending on the type of injury) after the Plan was approved. These people could file a claim within the time period specified, thereafter have it valued, and then would receive compensation from the trust fund based on the findings of the Trustee. The tort claimants' only recourse was the trust.

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[280] *Claude Resources Inc. (Trustee of)* v. *Dutton* and *Re Confederation Treasury Services Ltd.* (1997), 43 C.B.R. (3d) 4 (Ont. C.A.).
[281] 2003 CarswellBC 734, (2003), 42 C.B.R. (4th) 211, (BCSC).
[282] *Ibid.* at para 18.
[283] *Ellis & Co's Trustee* v. *Dixon Johnson*, [1924] 1 Ch. 524.
[284] *Supra* note 200 at para 60.

Courts have appointed representative counsel in many cases by using inherent jurisdiction under section 11 of the CCAA to appoint representative counsel, to aid in protecting all creditors who cannot represent themselves.[285] It is important to note that there is a difference between representative counsel and representative claims. Representative claims were dealt with in *Muscletech Research & Development Inc.*[286] This case involved product liability claims for the use of the chemical ephedra and prohormones used in dietary supplements that the debtor manufactured and sold. One of the issues the Ontario Superior Court dealt with was whether plaintiffs in an uncertified class action could file claims on behalf of themselves and future unidentified claims of other similarly situated claimants. Justice Mesbur stated that "[t]he CCAA neither expressly permits nor forbids representative claims."[287] Justice Mesbur examined the CCAA and the BIA, and held that the BIA has a mechanism for determining whether a contingent or unliquidated claim is provable, which leaves it to the trustee's discretion to determine. Justice Mesbur concluded that "while it is possible to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed."[288] The claimants involved in the *Muscletech* case could have turned to the CCAA process as the process adequately protected their interests. It is important to note that although the *Red Cross* allowed representation orders for various groups of claimants, they did not allow for the filing of representative proofs of claim.

After determining which groups required representation, the Red Cross estimated the number and amount of damages they would require to put into trust for the tort claimants. Four trusts were established, one for CJD claims, one for HCV claims, one for HIV claims and one for Other Transfusion claims, all with different claims bar dates. The fund for the CJD claims was to be maintained for 10 years from the Plan implementation date or until the funds were

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[285] *Re Nortel Networks Corp*. (2009), 53 CBR (5th) 196 (Ont. S.C.J.); (2009), 55 CBR (5th) 281 (Ont. SCJ); Courts will consider a number of factors when deciding to appoint representative counsel according to *Re Canwest Publishing Inc*. 2010 ONSC 1328 (SCJ) at para 21, the factors are as follows: the vulnerability and resources of the group sought to be represented; any benefit to the companies under CCAA protection; any social benefit to be derived from representation of the group; the facilitation of the administration of the proceedings and efficiency; the avoidance of a multiplicity of legal retainers; the balance of convenience and whether it is fair and just including to the creditors of the Estate; whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and the position of other stakeholders and the Monitor.

[286] (2006) CarswellOnt 4929 (Ont. S.C.J. [Commercial List]).

[287] *Ibid*. at para 27.

[288] *Ibid*. at para 36.

exhausted, whichever occurred first. During that period any person proving a CJD claim was entitled to $10,000.[289] The HCV trust gave claimants one year from the Plan implementation Date to prove to the trustee their injuries, and therefore entitled to an equal share of the fund to a maximum of $10,000 each. The HIV trust provided claimants with four months following the Plan Implementation Date to determine their damages. Damages were to be calculated and if they exceeded $10 million dollars were to be reduced pro-rata. Claimants who had not filed a claim against the Red Cross by the Plan Implementation Date (October 5, 2001) did not have their claims extinguished according to section 5.13(b) of the Plan; instead their rights were converted into, or replaced by, rights to receive damages from the HIV fund.[290]

3.6.6 Future Claims

Future claims of unidentified people are the most difficult types of claims to deal with in the CCAA. These types of claims involve people who are unknown and whose injury does not manifest until after the plan is sanctioned. The courts in Canada have treated contingent claims and future claims under the heading "future claims" as both types of claims deal with injuries that have not manifest as of the petition date. There is an important difference between the two. When a company is dealing with contingent claims, the claimants are known and only the extent of their injuries is unknown. Whereas in classic future claims, the number of claimants as well as their injury is unknown, therefore making them much more complicated and prone to estimation errors. As stated earlier, tort claims in the CCAA are determined by when exposure to the product took place rather than the manifestation of the injury. Future claimants may be exposed to the product before petition, but will be unknown to the debtor.

In determining whether classic future claims are considered claims in the CCAA, the general definition of "claim" in CCAA section 2(1), refers to claims as any "indebtedness, liability or obligation of any kind" that would be a claim provable under section 2 of the BIA. Section 121(2) of the BIA specifically includes all debts and liabilities, present and future. Section 19 of the CCAA states that the only claims that may be dealt with in a compromise or arrangement are claims that relate to debts of liabilities, present or future. The debtor owes these people who were exposed to its product an obligation, but the CCAA requires claims to be

[289] Section 5.08 of the Plan.
[290] *Canadian Red Cross Society*, 2008 CarswellOnt 6105, 48 C.B.R. (5th) 41(Ont.S.C.J.).

provable. As the number of claimants and their injuries are not known, these claims are usually very remote and speculative.[291]

The CCAA "expresses a public policy favouring compromise and consensual restructuring over piecemeal liquidation".[292] To have a successful restructuring under the CCAA, all claims — secured, under secured, unsecured and contingent — should be dealt with "as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement. As the case law has shown, it is not clear if the CCAA allows claims of unidentified future claimants into the CCAA. If the debtor developed a product that caused injury to people but at the time of the CCAA reorganization, it was not known that the product was faulty, these types of claimants could not be included in the CCAA as claimants. But if the debtor, as in *Red Cross*, knew that the blood products they distributed were tainted prior to its application under the CCAA, the debtor could set up a trust that could deal with potential unknown claimants and include them in the CCAA.

Through the use of trusts and representatives (similar to contingent claimants), courts have included these claims in the reorganization case.[293] Appointing representatives allows the interests of future claimants to be protected as they cannot be present in the proceedings. Then trusts are formed allowing people to file claims against the trust when the claimant becomes known and manifests an injury. Allowing future tort claims in the CCAA is not expressly prohibited by the Act. The *ATB Financial* case[294] focused on the CCAA and held that judicial orders should fit within the framework of the CCAA, and no matter how unique an order is, it can be made as long as it assists in producing a successful reorganization.[295] Including trusts in the CCAA plan is a new, but positive, development because they assist companies facing mass tort future claims successfully reorganize. If future tort claims were not included in the reorganization, the claimants would bring actions against the company after the reorganization was complete. If the company has not sold all of its assets and has continued to do business, it may be forced into bankruptcy by a large number of post-confirmation claims. If the company has sold its assets, the future claimants would have no recourse.

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[291] If valuation is "speculative in the extreme" the claim is not provable under s.121(2). In order to be provable, the claim must not be too remote or speculative.
[292] *Supra* note 163.
[293] *Supra* notes 4 and 200.
[294] *Supra* note 163.
[295] *Ibid*. at para 43.

Although *Red Cross* did not distinguish between contingent and future claims, future claims were included in the Plan through the tort trusts that were set up to channel all tort claims against the Red Cross. The number of possible claims, the value of those claims and the date the claimants should know of their injury were estimated.[296] The *Red Cross* also incorporated class actions that included future claims into the Plan. *Parsons* v. *Canadian Red Cross Society*[297] dealt with a class action settlement on behalf of all people who were infected with HCV between January 1, 1986 - July 1, 1990. This trust was funded by the federal and provincial and territorial governments. The settlement included future claimants by providing 10 years for people to enter claims to receive a fixed payment or "compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical contingent at the time of qualification under the Plan..."[298] While dealing with future tort claims was not intended by Parliament when enacting the CCAA, it has provided a forum to deal with them.[299]

3.6.7 Post-Petition Claims

These types of claimants include people who were exposed to the debtor's product after the debtor made an application to the CCAA. Section 19 of the CCAA specifically states that:

> (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (*a*) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

[296] The Red Cross underestimated all of these see discussion under section3.8 of this thesis.
[297] 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151.
[298] *Ibid* .at para 36.
[299] Class actions have dealt with future claims by allowing class members to apply for future damages and injuries at a later date. In one case, *Pelletier* v. *Baxter (* REJB 1998-05914 (SC)) two funds, the "current claim fund" and the "ongoing claim fund" were established. Funds were reserved for class members who developed symptoms in the future.

> (*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject **before** the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii).

The CCAA is very clear that a claim exists only if the obligation was incurred by the company before CCAA proceedings are commenced. This was not an issue for the *Red Cross* case, as all claims that were included in the Plan were from people who were exposed to the blood products prior to the date of the CCAA application.

3.7 Classes

Under the CCAA, there are only two general classes of creditors, secured and unsecured.[300] Tort claimants are considered unsecured claimants. According to section 22 of the CCAA, the debtor may divide each class of creditors into separate classes and apply to the court for approval of the division before a meeting is held with respect to the plan. The debtor must place creditors whose rights or interests are sufficiently similar and have a "commonality of interest" together in each class. Section 22(2) sets out the factors that a debtor must consider when placing creditors into classes. They are as follows:

> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.[301]

The Red Cross Amended Plan of Compromise and Arrangement, set out the classification the *Red Cross* used to divide its claimants into classes for voting on the Plan. It formed classes "based on the commonality of interest of such Creditors, such that Creditors with essentially similar rights against the Society and which are receiving essentially similar treatment have been

[300] CCAA s. 4 and 5.
[301] CCAA s. 22(2).

grouped together in the following classes for purposes of the Plan".[302] The creditors were divided into four classes: Class 1 - Ordinary Creditors; Class 2 - transfusion claimants; Class 3 - HIV claimants; and Class 4 - the Federal Provincial Territorial Government claims.

3.8 The Plan

Once a debtor receives protection from its creditors, it must create a plan of compromise or arrangement. The debtor must attempt to form a plan that will be acceptable to the requisite portion of its creditors while at the same time keeping enough core assets to continue its business without going into bankruptcy for the benefit of the debtor, creditors, shareholders and everyone else who depends on the debtor continuing business.

To begin the reorganization of the *Red Cross*, the Court had to deal with transferring the blood supply operations to a new authority but it wanted the proceeds from the transfer to be used to satisfy the transfusion claims, allowing the Red Cross to avoid bankruptcy and continue its humanitarian operations. It is common for courts to approve the sale of assets during the reorganization process and prior to a Plan as this may be the only way to deal with all of a company's creditors and allow the company to survive and re-establish itself. This approach was adopted in *Red Cross.*

The Court appointed representative counsel for the tort claimants. The Red Cross entered into negotiations for two years with all of its creditors and on September 12, 2000, it applied for court approval of its Plan, which had already been approved by the majority of the classes of creditors.[303] The Red Cross Plan included a number of class actions from Ontario, Quebec and British Columbia, and the negotiation of a broader settlement between the Federal, Provincial and Territorial (FPT) Governments and Transfusion Claimants infected between 1986 and 1990.[304] As a result of the FPT settlement, the funds from the transfer of the Canadian Blood

[302] Amended Plan of Compromise and Arrangement, Commercial List File No. 98-CL-002970 at page 8.
[303] *Re Canadian Red Cross Society* [2000] O.J. No. 3421.
[304] The FPT Plan had two classes of claimants. The first were those who were infected with HCV for the first time through a blood transfusion received in Canada *during the period from and including 1 January 1986 to and including 1 July 1990*, and secondarily-infected spouses, secondarily-infected children and certain family members. The second class included those who were hemophiliacs and persons with Thalassemia Major, who received or took blood during the period from and including 1 January 1986 to and including 1 July 1990, and who were infected with HCV and secondarily-infected spouses, secondarily-infected children and certain family members. The Plan set out a fixed payment scheme that dealt with the severity of the illness, Loss of Services in the Home, Costs of Care, HCV (Hepatitis C) Drug Therapy, Uninsured Treatment and Medication, Out-of-Pocket Expenses, HIV

Supply to Canadian Blood Services and Héma Québec were primarily used by the Red Cross Plan to meet the claims of the pre-1986/post 1990 Transfusion Claimants, who were not permitted to participate in the Government Settlement.

The class actions that were included in the Plan involved people who received blood containing the Hepatitis C virus and were infected pre-1986 and post-1990. One of the class actions that was included was *McCarthy* v. *Canadian Red Cross Society*.[305] This case deals with a class action that was commenced on March 10, 1998, after rumours that the federal, provincial and territorial governments were considering settling a class proceeding on behalf of people who contracted Hepatitis C between January 1, 1986 and July 1, 1990 without offering compensation to victims outside those timelines.[306] The claimants in the *McCarthy* class action were infected with Hepatitis C by receiving blood or blood products prior to January 1, 1986 or after July 1, 1990 but before September 28, 1998 in all provinces or territories of Canada except British Columbia and Quebec.[307] This class action became part of the CCAA proceedings. As the CCAA proceeding is national, courts having supervision of all class actions in British Columbia, Ontario and Quebec had to approve the settlement.

The test a court will use to determine if a settlement in class proceedings will be approved is "whether or not the settlement is fair, reasonable and in the best interests of the class as a whole."[308] In class proceedings, the court attempts to protect absent class members' interests, as class proceedings involve the issuance of orders or judgments that affect people who are not before the court. The Court certified the class action under section 5(1) of the *Class Proceedings Act*.[309] The Court found there was a cause of action, an identifiable class, common issues arising from the cause of action and the Court held that a class proceeding was the preferable procedure to deal with the common issues. The class action was certified and the class was to receive a settlement through the CCAA trust.[310] The settlement created a fund of approximately $63

Secondarily-Infected Persons, compensation for deceased. This plan was also set up to pay compensation as each person's circumstances change in the future. (www.hepc8690.ca)

[305] 2001 CarswellOnt 2255, 8 C.P.C. (5th) 350, [2001] O.J. No. 2474 (Ont. S.C.J.) [hereinafter *McCarthy*].

[306] *Parsons* v. *Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.).

[307] There were also class actions commenced in British Columbia and Quebec, see *Killough* v. *Canadian Red Cross Society*, 2001 B.C.S.C. 1069, 91 B.C.L.R. (3d) 309 (B.C. S.C.); and *Suprenant* c. *Societeté Canadiene de la Croix-Rouge* (October 19, 2001), no. 500-06-000120-002 (Que. S.C.).

[308] *Supra* note 306 at para 14.

[309] 1992, S.O. 1992, c.6.

[310] The test to determine the reasonableness of a Plan under the CCAA and the approval of a settlement under the CPA are very different. In the CCAA, the court balances the various interests of stakeholders and creditors by using

million for people who were infected directly or indirectly with Hepatitis C as a result of blood received in Canada before 1986 or after July 1, 1990.

A summary of the reorganization Plan is as follows:

(a) Ordinary Creditors with proven claims not exceeding $10,000 will receive 100% of their proven claims;

(b) Ordinary Creditors with proven claims of more than $10,000 will receive 67% of their proven claims;

(c) A Trust is established for Transfusion Claimants, on specific terms described in the Plan, funded with $79 million plus interest already accrued under the Plan, as follows:
   (i) $600,000 for CJD claimants;
   (ii) $1 million for claimants in a class action alleging infection with Hepatitis C from blood obtained from prisons in the United States;
   (iii) $500,000 for claimants with other transfusion claims that are otherwise not provided for;
   (iv) Approximately $63 million for claimants in class actions alleging Hepatitis C infection before 1986 and after June 1990; and,
   (v) Approximately $13.7 million for settlement of HIV claims.[311]

The Plan was funded not only from the funds received from the sale of the Blood assets, but also contributions from co-defendants and insurers. The Plan sets out that the claimants were to apply to the Referee for a determination of the amount of their damages.

People with CJD claims could apply to the CJD trust, which was to be maintained:

> until the earlier of 10 years following the Plan Implementation Date and the date on which the funds are exhausted. During that period any Person proving a CJD Claim to the satisfaction of the Trustee shall be entitled to the sum of $10,000 from this fund, in exchange for delivering a full and

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all of the available resources while attempting to keep the company going after the reorganization is complete. Under the CPA, instead of balancing various interests of the classes of defendants, the court focuses on protecting the interest of absent class members by examining the fairness and reasonableness of the settlement.

[311] *Canadian Red Cross Society* 2000 CarswellOnt 3269.

> final release in favour of the Society and all Plan Participants and an undertaking not to pursue any other party in respect of such claims except on a several basis.....The surplus, if any, remaining in this fund after the expiry of the 10 year period shall be paid by the Trustee to the HCV fund.[312]

With respect to the Prison Blood HCV class, claimants had one year from the Plan Implementation date to prove to the trustee that they were members of that class. Members who qualified were entitled to an equal share of the fund to a maximum of $10,000 each. Any surplus remaining after the expiry of the one (1) year period from the Plan Implementation Date were to be paid by the Trustee to the HCV Fund.[313]

With respect to the HIV claims, the claimants had four months following the Plan Implementation Date for a determination of damages with respect to their respective HIV claim.[314] It was left up to the Referee to decide whether limitation periods had expired prior to July 20, 1998, and if the Referee decided that the limitation period expired, no award or payment would be made to the claimant. If the damage awards with respect to the HIV claims exceeded $10.0 million in the aggregate, payments to the claimants were to be reduced pro-rata so as to not exceed $10.0 million in the aggregate. Any surplus remaining after the disposition of all claims filed within the four month period following Plan Implementation Date were to be paid to the HCV fund.

With respect to the Other Transfusion Claims, the Fund was to be held by the Trustee until the exhaustion of the fund and the expiry of ten years following Plan Implementation Date, for the benefit of people with Other Transfusion Claims. A claimant in this category must have submitted a claim to the Trustee within ten years following the Plan Implementation Date and was entitled to receive a single payment from this fund in an amount not exceeding $10,000 until the fund was exhausted. Any surplus remaining after ten years was to be paid by the Trustee to the HCV fund.

The pre-86/post-90 HCV fund was to be distributed by the Trustee through a single trust account and be administered by a claims administrator designated by the courts hearing the Pre-86/Post-90 HCV class actions in accordance with the Settlement Orders. A single national fund was created in order to provide equal payments to all members of such class actions (who do not

[312] *Supra* note 301 at para 5.08.
[313] *Ibid*. at para 5.09.
[314] *Ibid*. at para 5.10.

opt out) after deduction of any legal and administrative fees permitted by any order of the courts having jurisdiction in the Pre-86/Post-90 HCV Class Actions.

The Plan established procedures under which claimants applied to a Referee[315] for a determination of the amount of their damages. The *Red Cross* Plan dealt with all people who were exposed to the blood pre-1986 and post-1990, which included future claimants as well as current claimants. It channelled all the claims from people exposed during that period to the trust.

3.9 Acceptance of Plan

The debtor company, its creditors or the trustee have the right to file a plan and request that the court order a meeting of the creditors.[316] A majority in number representing two-thirds in value of the creditors present and voting in person or by proxy must approve a plan of arrangement.[317] The plan may be sanctioned by the Court and, if sanctioned, will bind all the creditors (or classes of creditors, where there is more than one class) that have accepted the plan and the company. The court sets a "claim bar process" which prescribes the conditions for filing the claims and administering them, based on defined terms. Under the order the monitor must send a proof of claim form with instructions to every creditor, requesting that it submit proof with sufficient evidence by a certain date, called a "claims bar date". If the agreement is approved by the creditors or altered or modified at the meetings, it will be sanctioned by the court and will be binding on all creditors or the class of creditors, as the case may be, and on any trustee for that class.[318] Once the creditors approve the plan of arrangement in each class, the debtor applies to the court for sanction of the plan. The court will examine three general principles in exercising its discretion when approving the plan: (i) statutory requirements were strictly complied with; (ii) everything that was done was authorized by the CCAA; and (iii) the plan is fair and reasonable. Although this test is not set out in the CCAA, it is used in general by the courts when deciding on whether they will accept a plan.[319]

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[315] The Honourable R.E. Holland, in the case of the HIV Claimants, and the Honourable Peter Cory, in the case of the other Transfusion Claimants.
[316] CCAA sections 4 and 5.
[317] CCAA section 6.
[318] CCAA s.6.
[319] *Re Samni Atlas Inc*. (1998), 3 C.B.R. (4th) 171 at page 173 (Ont. Gen. Div.); *Re Red Cross Society* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.); *Re Northland Properties Ltd*. (1988), 73 C.B.R. (N.S.) 175 (BCSC) aff'd (1989), 73

The *Red Cross* obtained an Order Establishing claims procedure dated May 5, 1999, which stated that all "Transfusion Claims determined to be entitled to a vote shall, for the purposes of calculating approval under the CCAA, be valued at $1.00 per claim."[320] The order established a procedure whereby people with claims against the Society arising directly or indirectly of blood products supplied by the Red Cross could submit their claims to the Society as a precondition to voting on the Plan. The Monitor sent out packages containing a Proof of Claim form to all known persons who were exposed to the blood products in the specified time. There was a date set as to when they were due as well as instructions on how to complete the form. Any transfusion claimants who had not submitted their forms were not entitled to vote in respect of their claim. People who were not entitled to vote were still included in the Plan and eligible to receive a distribution if the Plan was approved.

Justice Blair held that by applying all of the principles to the circumstances of *Red Cross* he had "no hesitation in concluding . . . that the Plan should be sanctioned and approved."[321] The court examined whether the *Red Cross* plan and reorganization process complied with all of the orders and statutory requirements. As well, Justice Blair was satisfied that the Red Cross complied with the substance of all orders that were made. With respect to whether the Plan was fair and reasonable, Justice Blair held that "the Plan is fair to all affected by it, and reasonable in the circumstances. It balances the various competing interests in an equitable fashion."[322] He noted the complexities and difficulties involved in *Red Cross* proceedings and the scope of the negotiations through which these were addressed. He explained that to "be 'fair and reasonable' a proposed Plan does not have to be perfect. No Plan can be. Plans are by nature and definition 'plans of compromise and arrangement'. A Plan should be approved if it is inherently fair, inherently reasonable and inherently equitable".[323] Justice Blair stated that the Plan was overwhelmingly approved by the four classes of creditors. He acknowledged that the Transfusion Claimants were not:

> the type of 'business' creditors normally affected by a CCAA arrangement, they are the ones most touched by the events leading up to these proceedings and by the elements of the Plan. I see no reason why

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C.B.R. (N.S.) 195 (B.C.C.A.); *Olympia & York Developments Ltd.* v. *Royal Trust Co*. (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506.

[320] *Canadian Red Cross Society* – Court File No. 98-CL-002970.

[321] *Supra* note 311.

[322] *Ibid*. at para 20.

[323] *Ibid*. at para 22

> their voting support of the Plan should not receive the same – or more – deference as that normally granted to creditors by the Court in these cases. The fact that the Plan has received such a high level of support weighs very heavily in my consideration of approval. The Plan is the result of negotiations amongst all interested parties – leading to changes and amendments which were made and approved as late as the August 30th meetings. The various groups were all represented by legal and professional advisors, including the Transfusion Claimants who were advised and represented by Representative Counsel."[324]

In accepting the Plan, Justice Blair stated that it equitably balanced the various competing interests and the available resources of the Red Cross. He stated: "the evidence is that creditors — including the Transfusion Claimants — would not receive a better distribution in the event of liquidation of all of the assets of the Society."[325] No one opposed the sanctioning of the Plan; in fact, most supported it. As well Justice Blair noted that the Monitor strongly recommended the Plan and its approval. Justice Blair explained the situation of the Red Cross and its need to implement a Plan as follows:

> [I]t is significant, in my view, that the Plan if implemented will permit the Canadian Red Cross to continue to carry on its non-blood related humanitarian activities. There is a deep-seated anger and bitterness towards the Society amongst many of the victims of these terrible blood diseases. To them, it is not right that thousands of people have been poisoned by tainted blood yet the Society is able to continue on with the other facets of its business. These feelings are understandable. However, the Red Cross currently continues to employ approximately 7,000 Canadians in the other aspects of its work, and it makes valuable contributions to society through these humanitarian efforts. That it will be able to continue those works, if the Plan is implemented, is important.[326]

The Plan stated that it will bind all creditors affected by the Plan.[327] As well the Red Cross asked the Courts of each province to give recognition and assistance to the sanction order and to the implementation of the Plan. In the end, all of the people who had claims against the Red Cross

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[324] *Ibid*. at para 24.
[325] *Ibid*. at para 26.
[326] *Ibid*. at para 28.
[327] In the Amended Plan of Compromise, a "proven claim" was defined as "the amount of the Claim of a Creditor, for voting purposes only, determined in accordance with the provisions of the Claims Order or this Plan, and which has become a Proven Claim pursuant to and as defined in the Claims Order, thereby entitling the Creditor to vote in respect of the Plan and, in the context of distributions to Ordinary Creditors, means the amount of an Ordinary Claim, for distribution purposes, determined in accordance with the provisions of the Ordinary Claims Order and which has become a Proven Claim pursuant to and as defined in the Ordinary Claims Order.

because of tainted blood products they received during the pre-1989, post-1990 period, could only turn to the Plan and its trusts for compensation. The *Red Cross* plan extinguished or converted and "channelled" claims to the HIV fund. Justice Cullity stated that the rights of the HIV Claimants "were, in effect, converted into, or replaced by, rights to receive damages from the HIV Fund".[328]

3.10 Outcome of the Red Cross Reorganization

Unfortunately the first distributions from the HIV trust did not begin until October, 2010. The final distribution was approved in April, 2012 and as of August, 2012 the distribution was completed, fourteen years after the *Red Cross* reorganization began.[329] After the Plan was implemented, many motions were made to the court, primarily with respect to how the Plan was to be interpreted and who should be deemed eligible to receive compensation. Over twenty hearings and appeals occurred from June of 2002 until March of 2007. One of the issues that were dealt with included what law would apply to the Plan, in the end it was determined that Ontario law would apply. Another issue that arose was the need to determine which claimants had signed releases prior to the implementation of the Plan and therefore were not eligible to make a claim against the HIV fund. There were also various proceedings in order to determine how limitation periods would be calculated.[330] In September 2008, the Ontario Superior Court of Justice, dealt with an application requesting a late claim be allowed into the class.[331] In this case, the number of HIV claimants had been underestimated and the trustee was asking whether the court had jurisdiction to extend the deadline or direct that additional late, or irregular applications, should be accepted. Justice Cullity stated that:

> [i]t is tragic that a plan designed to provide compensation for innocent victims should be tied up in disputes over whether all, or only some of them, are to receive it – disputes that many and, perhaps, most of the eligible HIV Claimants must find mystifying, and disheartening. Much of the impetus for the litigation has stemmed from an initial misapprehension that the number of the potential Claimants was significantly less than has since appeared to be the case.[332]

[328] *Supra* note 290.
[329] www.hivfund.ca
[330] *Ibid*. Decision of Referee Montgomery, June 22, 2010.
[331] *Supra* note 290.
[332] *Ibid.* at para 7.

The HIV claimants had until February 5, 2002, four months after the Plan Implementation Date, to file a claim. Eighty-nine infected people made timely applications, but thirty-eight did not. Some failed to file claims because of inadequate notice of the HIV fund, others due to misunderstanding of the language of the application and others who did not know that were infected with HIV until after the deadline. The Trustee believed more late claims may arise in the future. Article 5.10 of the Plan extinguished late HIV claims. After the four-month period for filing a claim, any surplus was to be paid to the HCV fund, ignoring any late HIV claims. The Trustee asked the court whether he had jurisdiction to extend or relieve against the effect of the deadline. There were a number of problems with the HIV trust. Initially, the estimate of the amount of funds that would be required for the fund was too low and had been depleted by administration and litigation costs. The number of claimants was also underestimated, and for many people, the latency period for discovering they were infected was not until after the deadline for applications.[333] In the end Justice Cullity allowed late claims to be filed. He based his decision on a number of factors, one of which was:

> the HIV Claimants are very different to those of commercial creditors affected by CCAA proceedings. While, as a general rule, the latter can be presumed to be knowledgeable, and ready and willing to assert their claims, the same cannot be said of the HIV Claimants who did not personally retain lawyers and did not participate in the CCAA proceeding. This was, I believe, reflected in the bar order that disqualified them from voting but did not purport to bar their Claims. Some, and perhaps most of them, prepared applications without professional assistance.[334]

Justice Cullity allowed late claims with the following reasons:

> (a) the structure of the Plan with its provision of a separate Fund for HIV Claimants;
>
> (b) the fact that no distributions from the HIV Fund have yet been made;
>
> (c) the absence of prejudice that would be suffered by the Society and other Claimants;
>
> (d) the uncertainty created by the limitations issues;

[333] *Ibid*. at para 5&7.
[334] *Ibid*. at para 23.

> (e) the circumstances of the Claimants that distinguish them from commercial creditors;
>
> (f) the fact that adequate notice to them was essential if the Plan was to be effective;
> (g) the application forms provided to Claimants did not clearly indicate that they were required to identify each Claimant in a family group that included an infected person. Similarly, I am of the opinion that it was not unreasonable for a Claimant who had filed a Proof of Claim to understand that this would be considered to be a claim against the HIV Fund to which the deadline was said to apply in the notice provided by the Trustee; and
> (h) the selection of appropriate methods of disseminating notice of the deadline for applications may have been affected, and unduly limited, by the misapprehension as to the number of potential Claimants. It appears, also, that, as in the case of those in Nova Scotia, the chosen method may not have been completely successful in reaching Claimants whose identities were ascertainable.

Justice Cullity only allowed claims from claimants who did not receive proper notice. If they had received proper notice they would have a valid claim as of the bar date. He did not allow late claims from those whose injuries were discovered after the bar date. His reasoning was as follows:

> Cases where a Claimant was not diagnosed with HIV until after the deadline are more difficult. The jurisdiction to relieve against untimely applications is, in my opinion, limited to applications by persons who could have established their eligibility within the four months period. It would not apply to persons whose infection was not discovered before the expiration of the period. The intention to withhold damages from such persons is inherent in the imposition of the deadline and is not affected by deficiencies in, and the imperfection of, notice dissemination that, in a case such as this and in class proceedings, underlie the jurisdiction to relieve against untimely applications. The necessity for some cut-off date in respect of the time of a diagnosis is reinforced by the likelihood that the HIV Fund will prove to be inadequate to satisfy all of

> the qualified HIV Claimants, with the result that distributions might need to be deferred until the maximum number of Claimants was ascertained. In my judgment, it is one thing to grant relief to persons who might have — but, for some reason, did not — claim within the four months' period and something fundamentally different to extend the class to persons who would not have been able to establish a claim within the period. The exclusion of the latter should, in my opinion, be considered to be part of the compromise effected by the Plan, and to that extent its provisions are to be respected.[335]

The OTC fund consisted of $500,000 which was to expire at the end of ten years or if it there was surplus it was to go to the HCV fund. The ten years was to expire on October 5, 2011 and by then only two claims had been made against the trust and paid out. General notice of the existence of the fund was not given to potential claimants. In *Re Canadian Red Cross*[336] the Trustee moved for an order amending the Plan to extend the expiry date for the OTC fund by one year, in order to provide proper notice of the existence of the fund and administer and disburse eligible claims. The Monitor's proof of claim form contained an "other" box when claimants were filing their claim and describing the nature of it. The Trustee did not know about the "other" box until 2011. Two hundred and thirteen people filed proof of claim forms that had marked the "other" box. The Trustee applied to the Court to be able to give notice to those who checked the "other" box of the existence of the OTC fund. The Court extended the expiration date by one year to October 5, 2012. Justice Brown stated that:

> In the present circumstances I am persuaded that a one-year extension of the expiration date of the OTC Fund is necessary in order to give effect to the intention of the Plan regarding claimants asserting Other Transfusion Claims. Not to extend the time would impair the effectiveness of the OTC Fund and deny access to that fund to eligible claimants who, through no fault of their own, had no knowledge about the existence of the fund. I see no prejudice to other groups of claimants where an extension would simply bring the existence of the OTC Fund to the attention of those whom the fund was intended to benefit.[337]

Consequently, in *Canadian Red Cross*,[338] Justice Brown had to deal with the HCV Fund because when he extended the OTC Trust by one year it affected the HCV Fund as any

[335] *Canadian Red Cross Society*, 2008 CarswellOnt 6105 at para 40, 48 C.B.R. (5th) 41 (Ont. S.C.J.).
[336] 2011 CarswellOnt 6036, 79 C.B.R. (5th) 258 (Ont. S.C.J.).
[337] *Supra* note 335 at para 15.
[338] *Re Canadian Red Cross* 2011 CarswellOnt 9017, 207 A.C.W.S. (3d) 7 (Ont.S.C.J.).

remaining funds were to go to the HCV Fund and be distributed. A number of HCV Fund claims have been completed and paid. There have been at least two reminders sent out to people who have sent in incomplete claims. The Trustee applied to set an express bar date to ensure the orderly final administration of the HCV Fund. The claims bar date was set for October 5, 2011. There was evidence that 574 accepted claims against the HCV Fund had yet to be paid as there is no money left in the Fund. There will be money also coming in from the CJD Fund and Prison Blood Fund. The claimants have been waiting five years for payment. The bar date was set in order to permit the distribution of funds to the waiting accepted claims. As a number of reminder letters were sent to claimants with incomplete applications, the Court determined the bar date was fair. As of the writing of this thesis, the HCV fund and OTC fund are in the final stages of being completed. Unfortunately, the trusts in the *Red Cross* case were plagued with problems that included lack of proper notice, clarity of how to determine limitation periods and poor estimation of the number and amount of the claims.

CHAPTER 4: CONCLUSION

All mass tort cases have similar features. They all involve a large number of claims that are associated with one product, the various claims have common issues and actors and the value of the claims are interdependent. As well, mass torts are further complicated by a temporal problem as exposure to the product may be years before a disease develops and a geographically claimants may be dispersed across a country or throughout many parts of world.[339] Although the CCAA and Bankruptcy Code were not enacted specifically to deal with mass tort claims, they provide an organized forum where all the issues that arise in a mass tort case can be dealt with. Canada treats mass tort insolvency cases very similar to the United States, even though the Bankruptcy Code and the CCAA are very different.

In the United States insolvency is not a requirement; to receive protection in Canada it is, but a company defending thousands of tort claims can receive CCAA protection if it is experiencing extreme financial distress at the time of its application. The stay order in both countries provides the debtor company with the opportunity to halt all proceedings against it in order to reorganize and restructure without any interference from creditors or other interested parties. This is important to companies facing mass tort claims as the number of people seeking damages is constantly changing. Similar to the U. S. Trustee[340], in Canada a monitor is appointed to watch over the business and financial affairs of the company and report to the court on the debtor's financial affairs. The monitor can be given other functions a court orders including assisting a debtor to develop a plan.[341] In the United States a trustee takes on this role.

The biggest hurdle for companies in both countries is how the various tort claims fit into the insolvency legislation. The Bankruptcy Code and the CCAA both contain very broad

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[339] *In re Dow Corning Corporation*, 211 B.R 545 (1997) USBC, E.D. Michigan, Northern Division.

[340] Every Chapter 11 case is assigned a U.S. Trustee or Bankruptcy Administrator to oversee the operation of the debtor-in-possession. The U.S. trustee plays a major role in monitoring the progress of a Chapter 11 case and supervising its administration. The U.S. trustee monitors the operation of the business and submits operating reports. Additionally, the U.S. trustee monitors applications for compensation, plans and disclosure statements filed with the court and creditors' committees. The U.S. Trustee is not to be confused with a case trustee. A case trustee is appointed under section 1104 of the Bankruptcy Code and is responsible for the management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. In general, a case trustee runs the debtor's business. The appointment of a case trustee is a rarity in a Chapter 11 case. A case trustee is appointed by a court in cases where there is proof of fraud, dishonesty, incompetence, or gross mismanagement of the company by the debtor-in-possession. The U.S. trustee is required to move for the appointment of a case trustee if there are reasonable grounds to believe that any of the parties in control of the debtor "participated in actual fraud, dishonesty or criminal conduct in the management of the debtor or the debtor's financial reporting." (Section 1104(e) of the Bankruptcy Code). *See Dalkon Shield Claimants* v. *A.H. Robins Co.*, 828 F. 2d 239 (1987) Court of Appeals, 4th Cir.

[341] CCAA, s. 11.7(3).

definitions of "claim". The easiest and most straightforward tort claims in reorganizations are claims represented by judgments. In the United States and Canada, these types of claims are included in the insolvency case as the claims and the damages they are claiming are represented by judgments. The second types of claims that may arise in a mass tort insolvency case are those of claimants that have filed suit but have not obtained judgment as of the petition date. These claims are considered unliquidated claims as the amount of their damages has yet to be determined.[342] The United States and Canada include these claims in the insolvency case. In the United States, the bankruptcy court can estimate the amount of the claim to confirm a plan. In Canada, the monitor and the company will determine if an unliquidated claim is provable and will thereafter value it. Canada includes claims where a judgment exists but the damages have not been determined by a court and where a claim has started but the trial has not commenced.

The third type of "claim" is one where the injuries have manifested but in which the claimants have yet to file suit. As long as the injuries have manifested, these claims will be included in a bankruptcy case under the Bankruptcy Code because of the broad wording in section 101(5) and section 157(b)(5,) which deal with procedures that allow the district court to order personal injury tort and wrongful death claims to be tried by the district court. Similarly in the Canadian system, section 2 of the CCAA uses the word obligation which is a broad term that allows for the inclusion of these claims. The first three types of tort claims all include people whose injuries have manifest prior to the debtor applying to the CCAA for protection. These claims are not too different from many of the commercial claimants that companies face in most CCAA proceedings.

Contingent and future tort claimants hold claims where the people have been exposed to the debtor's product but their injuries have not manifested. In the case of contingent claims, the claimants are known, but their injuries are not, whereas for future claimants, the claimants and the injuries are unknown. While both the United States and Canada have dealt with these claims as one under the heading future claims, there is a difference as there is less error in determining only the extent of possible injuries rather than the number of people and their injuries. As well, contingent claimants can take part in the reorganization, not by voting but by having a representative who is representing their interests and can oversee the representative to ensure their interests are properly represented. As future claimants are unknown, their representative

[342] Section 101(5) of the Bankruptcy Code and section 2(1) of the CCAA.

does not receive input from the claimants. This is the most complex issue in mass tort insolvency reorganizations and provides most of the errors, as estimation values can be inaccurate. In the United States, some courts allow these types of claims to be included in the bankruptcy plan while others do not. The courts that have not allowed future claims to be included focused on state law, which holds that a tort claim does not arise until the plaintiff suffers injury. Most of the courts have held that the Bankruptcy Code contains provisions to accelerate the maturity of any contingent or unliquidated claims and allow for the estimation and classification of them. The cases that have included future claims have done so by setting up a trust fund for the future claimants to turn to when their claims arise. An estimation is provided to determine how much money should be put aside for these claimants, and as well, a representative is appointed to represent these claimants' interests. Cases such as *Johns- Manville*, *Dow Corning* and *A.H. Robins* have all included future claims by creating trusts in their plan. The problem with all of these cases is that they then must deal with long tails, as it can take more than a decade to pay out all of the claimants. Still, in the end the debtors have paid out most of their claimants and have continued to run their businesses.

In Canada, the CCAA does not specifically provide that future claims are to be included in the bankruptcy plan. However, the definition of "claim" in section 2(1) of the CCAA refers to "liability", which is defined as all obligations a bankrupt is subject to on the day proceedings commence. This allows claims from people who have been exposed to the debtor's product pre-petition but have yet to manifest injuries. Claims that have yet to manifest themselves are not provable, but the courts have found a way around this as in the *Red Cross* case and *Muscletech*. While the language in the CCAA is broad enough to include future claims the problem is a plan must deal with the claims in order for them to be included in the reorganization. For known claimants, showing exposure to a product would constitute a provable claim, but in order to receive a distribution, the claimant must prove the damages. That can only be provided when the injury manifests itself. For classic future claimants, they do not have a claim in the CCAA, as exposure or injury is not provable. The *Red Cross* and *Muscletech* cases circumvented this issue by setting up trusts. The courts have used their judicial discretion in section 11 to set up these trusts and funnel all of the tort claims towards the trust. Therefore, this allows courts dealing with mass torts to fulfill the intent of the CCAA by providing a global

resolution for all of the debtor's pre-filing debts and provide it with a clean slate to continue business.

Another set of claims that a mass tort insolvency case may encounter is claimants that were exposed post-petition but pre-confirmation. In the United States, these claims to be included in the bankruptcy case under "administrative expenses". In Canada, if a person is exposed to a product post-petition, their claim is not included in the reorganization. Therefore, in the United States, all pre-confirmation claims are included in the reorganization, whereas in Canada, only those that were exposed pre-petition are included. Neither Canada nor the United States allow claims when a person is exposed to the debtor's product post-confirmation. Once the types of claims that will be included in the case are determined, the claims are divided into classes. In both countries, creditors whose rights or interests are sufficiently similar are placed in the same class. In most mass tort cases, the tort claimants are grouped together as one class or separated as in the *Red Cross* by the type of disease they contracted.

Once the classes are created, the debtor then develops a plan. This allows companies to customize plan to deal with the particular issues they are facing. This gives companies dealing with mass tort claims the ability to deal with unmanifested claims. Section 1123(a) of the Bankruptcy Code outlines the mandatory provisions that the plan must contain and section 1123(b) sets out optional provisions. The requirements are very broad, allowing companies to customize plans to the issues and claims they are faced with. The types of plans vary for each case as each situation is unique. The *Johns Manville* case set up trusts to deal with all tort claims as well as its commercial claimants in order to achieve a global resolution. The trust dealt with current as well as future tort claims and channelled all asbestos related personal injury claims to the trust and the plan set out procedures on how the claimants were to apply and receive compensation. The *A.H. Robins* case developed a Claims Resolution Facility and set up payment schedules based on the severity of injury the claimant received and the quality of proof. If the injury was not severe or proof linking the injury to the debtor's product was weak, the claimant could opt for a quick payment scheme that provided a set amount of compensation, but was much lower than that for people with severe injuries and strong proof. If a claimant's injuries were more severe and there was medical evidence directly linking the injury to the use of the Dalkon Shield, each claim would be individually examined and the compensation offered ranged between $125 and $2 million. If the claimant did not accept the settlement he or she could opt to

go to binding arbitration or to trial. *Dow Corning* was very similar to *A.H. Robins* in that it set up a Settlement Trust that channelled all of the tort claims to a settlement facility and set out a payment schedule from expedited payments (fewer injuries or lack of proof) to the most severe and strong proof. Both *A.H. Robins* and the *Dow Corning* cases provided for more expedited payment schemes and used fewer expenses as they avoided a lot of litigation.

In Canada, the CCAA does not set out specific requirements that the compromise or arrangement must include. It is left to the parties to determine what and how the compromise will be set up. *Red Cross* developed a detailed plan of arrangement that was very similar to that of *Johns Manville*. *Red Cross* set up a number of classes of tort claimants, based on the type of injury they received (i.e. HIV, CJD). The claimants, both present and future, were to apply to these trusts for compensation, and a Referee was to determine the amount of damages each claimant was to receive. This allowed the Red Cross to deal with as many claims as possible.

Once a plan is prepared it must be accepted by all of the classes of creditors and then the court will sanction it. Then the court will confirm the plan, as long as certain requirements which look after the claimants as well as debtor's interests are present in the plan. The court will sanction a plan and determine if the statutory requirements were strictly complied with, nothing was been done that the CCAA does not authorize and the plan is fair and reasonable. In both countries, tort claimants who had filed claims voted on the plan. Future claimant's interests were represented by counsel who was appointed by the courts. The representative counsel examined the plan and determined if the plan was fair for future claimants and therefore future claimants were bound by the plan.

Although the Bankruptcy Code is much more detailed than the CCAA, mass tort cases are treated similarly under both Acts. Neither Act specifically deals with mass tort issues, but the courts and parties involved have found both pieces of legislation broad enough to include mass tort issues. In the end, as many claims as possible are included under both reorganizational schemes and have the room to include future claims. The plans that are developed provide the debtor with a clean slate and the ability to continue doing business while compensating the many victims. Although neither the United States nor Canada have found a perfect solution to mass tort claims in bankruptcy, they have managed to find a way to provide a global solution to the mass tort problems and assist companies in avoiding liquidation. The importance of finding ways to avoid liquidation was very evident in the *Red Cross* case. The Red Cross needed to

continue its humanitarian operations and also deal with the tort claimants. The ability of the CCAA to provide compensation to those people the Red Cross injured while continuing to help those in need of its services, fulfills the goals of the CCAA. The Red Cross is an example of how mass tort cases can be dealt within the framework of the CCAA.

Although mass tort cases can be dealt with in the CCAA, there are still a number of problems with dealing with mass torts in commercial law. The *Red Cross* settlement turned out to be very similar to the *Johns Manville* case in that it was plagued with problems and a decade later many claimants have yet to be compensated. Many mistakes were made when preparing the Plan, namely estimating the number of claimants and the latency of certain diseases, specifically the HIV claims and failing to provide specific information on how limitation periods would be calculated. In 2008, the Court dealt with extending the deadline for one more year to allow HIV claimants that were unable to establish their eligibility within the four-month period because of notice deficiencies. People who developed HIV after the four-month period were excluded from applying. It was assumed that all people who had contracted HIV had manifested injuries and therefore people with HIV claims were given four months after the a mass tort insolvency cases to submit claims. Because of this error many tort claimants were excluded from receiving compensation.

While fully addressing the problems relating to future claims is beyond the scope of this thesis, many issues have been exposed. The *Red Cross* and the *Johns Manville* cases are examples that have shown the most challenging area of dealing with tort claims in mass tort insolvency is which is finding a way to properly estimate latent claims in both countries. As Justice Blair stated in the *Red Cross* reorganization mass tort insolvency cases deal with much more than commercial issues, "[m]any have died. Others are dying. The rest live in the shadow of death. Nothing the Court can do will take away these diseases or bring back to life those who have died."[343] The CCAA and the Bankruptcy Code are the only forums where companies can attempt to achieve global resolutions while continuing to provide compensation to future claimants. The tragedy in these cases occurs when, as in the *Red Cross* case, the companies underestimate the number of potential claimants, the extent of their injuries and the amount of time the injury will take to manifest itself. These errors not only affect the future claimants but also the present ones. This is what occurred in the *Red Cross*; claimants were waiting over a

[343] *Supra* note 5 at para 4.

decade to receive compensation and the amount of compensation continually decreased as the trust was depleted by administrative costs and an increasing number of claims. The *Dow Corning* and *A.H. Robins* cases were more successful because the injuries their products caused did not have a long latency period, and the claimants were primarily contingent. Those dealing with unknown tort claimants and long latency periods are left with the question of how to successfully deal with mass torts in bankruptcy.

It is impossible to prove that an injury was caused by the debtor's product if it does not manifest itself until after the bar date.[344] That is why the mass tort insolvency cases have turned to trusts. The problem with trusts arises when people who have not received serious harm claim they have injuries, therefore wasting a company's time and money in order to defend these types of claims. As well, companies who incorrectly estimate the amount required to place into trusts for future claimants cause people to accept plans based on the belief that they will receive a greater amount then they actually do because of poor estimation values. In the United States, *Dow Corning* and *A.H. Robins* had more "successful" restructurings by creating plans where the amount of compensation an injured person was to receive was based on the amount of evidence they had which proved causation and the extent of their injuries. They set up various trust funds not based on the type of injury but based on the evidence they had. The smallest fund was set up for those with little evidence or evidence that was not strong and with little or no injury. These claimants received the smallest amount of damages and also used up the least amount of funds, as very little administrative costs were required to deal with these claims. The second trust was larger than the first, requiring more evidence of causation but provided for a quick and predetermined payment of compensation. For people with severe injuries and strong proof of causation, they could apply under the third trust, which was the largest one, and where a trial would be held to prove their claim and they received the highest amount of compensation (traditional tort).[345] This helped speed up the compensation process and decrease the amount of money that was being used by administrative costs. Both of these cases did not contain injuries with very long tails. Had the *Red Cross* provided for longer bar dates the issue may have been avoided and if they followed a trust scheme, as in *Dow Corning* and *A.H. Robins* where it was a "best offer no negotiation" (which decreased administrative costs), the trust funds may not have

[344] Vern W. DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case" (2008) Ann. Rev. of Insol. L. 355.
[345] *Ibid.*

been depleted. The *Red Cross* could have done what *Johns-Manville* did and overhaul the Plan to include claimants that were inadvertently excluded or find some other funding to create a trust for the latent claims.

It has been argued by Vern DaRe in his article "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", that in cases such as the *Red Cross*:

> compensation may be seen as a public obligation. While the "deep pockets" of government are not limitless, restructuring debtors with broader-based public operations are grounded on a wider notion of community responsibility. Arguably Red Cross had a broader duty to the public including the duty to compensate ineligible HIV claimants who were "forever barred" simply because of long latency periods. Where the debtor under the CCAA has a public mandate, therefore, mass tort claimants may in the future want to be more aggressive in picking these "deep pockets" to avoid this risk.[346]

As well as government, there are usually insurance companies and many other companies involved with the reorganizing company that may be turned to for increasing the amount of funds available to compensate victims. Additionally, another option may be to create trusts into which money is added as more claims arise.

The other option is to codify the treatment of mass torts by adding a definition of mass torts into the CCAA and providing for mass tort representatives. The United States Bankruptcy Reform Commission has recommended that changes be made to the Bankruptcy Code to include mass tort claims to guide the structured treatment of mass future claims in the bankruptcy system.[347] These recommendations would greatly assist the CCAA in dealing with mass tort

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[346] *Ibid.*

[347] http://govinfo.library.unt.edu/nbrc/index.html

Definition of Mass Future Claim

A definition of "mass future claim" should be added as a subset of the definition of "claim" in 11 U.S.C. § 101(5). "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if:

1) the act(s) or omission(s) occurred before or at the time of the order for relief;
2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
5) the amount of such liability is reasonably capable of estimation.

The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim," which would be an entity that holds a mass future claim.

claims and could easily be added to the legislation. The Commission's recommendations include a definition of mass future claim "as arising out of a right to payment, or equitable relief that gives right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor…" As well the Commission recommends that mass future claims representatives shall be appointed and have the ability to file claims, cast votes on behalf of the holders of the claims. It also states that mass future claims should be estimated and that there should be a section providing for a channelling injunction. In order to close the bankruptcy case, the Commission recommends that when the plan has fulfilled the requirements for treating mass future claims that the company be discharged. To date the United States has not added mass torts into its Bankruptcy Code and Canada has not attempted to include mass torts either. Providing more sections that deal with mass torts would assist in a more uniform

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Protecting the Interests of Holders of Mass Future Claims

The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.

The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.

The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed. *Determination of Mass Future Claims*

Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.

Channeling Injunctions

Section 524 should authorize courts to issue channeling injunctions.

Plan Confirmation and Discharge; Successor Liability

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.

inclusion of future mass tort claims in reorganizations. Mass tort insolvency will only become more common as the global marketplace is every increasing.

A large problem in mass tort insolvency cases are the underestimation of future claims. Finding better estimation techniques or creating trust funds where a company would have to funnel money into over a longer period of time may be an option in successfully dealing with latent claims. Some may argue that it would be better for a company to be liquidated, and in some way punished for what the company's negligence did to the tort claimants, but in most cases it is beneficial for the tort claimants to have a company reorganize. This is because they can refuse to accept a plan that does not offer them more compensation than they would receive if the company was liquidated. As well, future claimants would not be able to receive any compensation if a company was dissolved. Ultimately though, the Bankruptcy Code and the CCAA provide a forum for companies and creditors to reach a global resolution to all of the issues that arise in mass tort insolvency cases while including future mass tort claimants.

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