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Remembrance of Claims Past: The Due Process Owed to Unknown and Unknowable Future Claimants in Light of Williams v. Placid Oil Co. (In re Placid Oil Co.)

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Remembrance of Claims Past: The Due Process Owed to Unknown and Unknowable Future Claimants in Light of Williams v. Placid Oil Co. (In re Placid Oil Co.)

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I. Introduction
The term “asbestos” refers to crystals of six naturally occurring silicate minerals, often found as fibers themselves composed of countless microscopic fibrils. Inhaled deeply into the lungs, these filaments initially interact with the cells constituting the outer pleura, the mesothelial membrane lining the chest wall. Cycles of tissue damage, repair, and inflammation commence. This process lasts anywhere between twenty to 50 years, with recent studies showing a median of 30 to 45, and culminates in a malignant mesothelioma by means of mechanisms still unknown. Legally, exposure to asbestos engenders a fundamentally uncomplicated tort cause of action, but scientifically, the injury requisite to maintain any such action will manifest at a glacial pace.

For more than two decades, whenever a debtor subject to “mass tort” liability predicated on such latent injuries has filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code (“Code”), courts have struggled to classify such causes of action as “claims” under § 101 and to ensure constitutionally adequate notice to these potential claim holders. In an area of bankruptcy law still influenced by its two earliest cases—In re Johns-Manville Corp. (“Manville”) and In re A. H. Robins Co. (“A.H. Robins”)—debate has centered on three difficult issues: whether such rights to payment, unknown in “number, extent, and specifics,” can constitute “claim[s]” under § 101(5)(A); if so, whether claim status can be achieved before a plan’s confirmation, a condition for its discharge under § 1141(d)(1)(A), when the viability of the underlying causes of action is dependent on a latent harm’s indeterminate post-confirmation manifestation; and whether due process can be satisfied when notice by publication alone is offered to the unknowing and unknown holders of such purported claims (“future claims”). To this day, with no binding precedent or clear statutory direction, the tension between the Code’s broad reach and the practical minimums of due process persists unabated.

The United States Court of Appeals for the Fifth Circuit boldly stepped into this debate in Williams v. Placid Oil Co. (In re Placid Oil Co.) (“Placid Oil”). The bankruptcy court had previously held the asbestosis-related creditors of a previously discharged debtor, Placid Oil Company (“Placid”), had always been future claimants with unknown prepetition “claims” who had received constitutionally adequate notice by publication. Over a forceful dissent, the Fifth Circuit agreed.

This article will use Placid Oil as a platform for discussion of the future claims problem. It begins with a synopsis of the applicable law (Part II) and follows with summaries of the case’s factual background and the legal reasoning in each of the three opinions in Placid Oil (individually, “Placid Opinion,” and collectively, “Placid Opinions”) (Part III). Part IV shows that, in contesting the meaning of “claim” and the parameters of due process, each Placid decision resorts to means statutorily infirm or constitutionally objectionable. Repeatedly, slips in logic plague critical suppositions. Part V briefly addresses the ambivalent gravity of § 524(g). For all the eloquence and analysis in the Placid Opinions, much still remains unresolved that only the Supreme Court can clarify or Congress can fix.
II. Legal Framework: Code and Constitution

The Code’s text is the starting point for the definition of “claim.” Section 101(5)(A) defines “claim” as “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.” As a result of this famously expansive denotation, as a matter of federal bankruptcy law, persons with potential causes of action against a debtor under applicable non-bankruptcy law—whether arising in tort or contract and whether codified in statutory or common law—have always qualified as “creditors” with Code cognizable “claims” so long as successful prosecution may net them some financial recompense. Because the prosecution of a future tort action, unlike the typical tort variant, requires the manifestation of a dormant injury, however, bankruptcy courts have long divided in whether a future tort action can be defined as a Code “claim.”

To many jurists, so long as the relevant contact between the debtor and the creditor predated the petition, a Code “claim” exists prepetition. Others have adopted a pure conduct test: “[B]efore a contingent claim can be discharged, it must result from pre-petition conduct fairly giving rise to that contingent claim.” Yet, having examined the same precedent, other courts have deduced the opposite: “Generally, courts have held that future claims cannot be considered ‘claims’ that are dealt with and discharged by a confirmation plan.” Whatever each side’s merits, scholars and judges concur, the answer to this question is circumscribed solely by the Code, with its capacious definition of “claim” and Congress’ avowed purpose furnishing at least some intimations.

Equally but less clearly, the Code dictates a second query: a claim’s temporal genesis. For a claim to be discharged post-confirmation per § 1141(d)(1)(A) or for its holder to participate in the debtor’s case as “a creditor” per § 101(10)(A), that claim must arise before confirmation or filing, respectively. But, as to this question, the Code proffers no guidance. Indeed, “no indication of what Congress meant by the term ‘arose’ ” can be found in the statutory text or the legislative record. Due to this opacity, in accordance with well-established principles of interpretation, the Code’s context, structure, and purpose must be consulted before this point can be set.

In contrast, the dual mandates of notice and service—that a party receive adequate notice and have an opportunity to be heard when a property interest is at stake—originate not in a statute but in the Fifth Amendment’s Due Process Clause, as construed by Mullane v. Central Hanover Bank & Trust Co. and its progeny. Per Mullane, every future claimant is entitled to “notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The notice itself must be “of such nature as reasonable to convey the required information.” In the absence of such notice, due process of law has been denied, and because the Code cannot “be incompatible with fundamental law,” an improperly noticed claim, whether or not it is a future kind, will escape discharge. Analytically, this constitutional inquiry is distinguishable from any examination of a case’s merits or a party’s statutory standing.

Though they are often merged, in any case involving a “future claim,” two discrete analyses are therefore necessary. A “claim” may exist and may “arise” pre-confirmation in accordance with a meticulously interpreted Code. Due process jurisprudence will itself determine whether a prepetition creditor received constitutionally appropriate notice, as requisite for that claim’s discharge.

III. Placid Oil

A. Factual Background
Once considered the “crown jewel” of H. L. Hunt’s financial empire, 36 Placid filed a voluntary Chapter 11 petition on August 29, 1986, in the United States Bankruptcy Court for the Northern District of Texas. Among its many properties, Placid owned a vast and lucrative natural gas field and processing facility in Black Lake, Louisiana (“Black Lake Facility”). 37 Post-petition, Placid sold the Black Lake Facility to fund its restructuring efforts. 38 On November 19, 1986, the bankruptcy court issued an order setting a bar date of January 31, 1987, for the filing of all potential claims. 39 On January 2, 9, and 16, 1987, Placid published a copy of this order in the Wall Street Journal. 40 Per its lawyers’ later declaration, “[a]t no point did Placid or [its counsel] ever intentionally fail to notify a known creditor of any proceeding or deadline to which known creditor was entitled to notice.” 41 Issued on September 30, 1988, the order confirming Placid’s fourth amended plan provided that all claims that arose on or before September 30, 1988 (“Confirmation Date”), would be “forever discharged except for … [its] obligations under the Plan.” 42 At the time, “no asbestos-related claims had ever been filed against Placid.” 43

On March 15, 2004, the widower and four children of Mrs. Myra Williams (“Tort Claimants”) filed a Petition for Survival and Wrongful Death Damages in Louisiana state court. 44 Beginning in 1966, Mrs. Williams had daily “gathered, handled, and laundered” the asbestos “dust-laden clothing” of her husband, a laborer at the Black Lake Facility. 45 As the Tort Claimants maintained and Placid conceded for the reopened case only, 46 Mrs. Williams’ lethal mesothelioma, first diagnosed in 2003, was caused by this diurnal and indirect contact with “asbestos-containing insulation products that … were in the care, custody, and control of Placid” in the years predating its sale of the Black Lake Facility and the Confirmation Date. 47

In response to the Tort Claimants’ suit, Placid reopened its bankruptcy case. 48 On October 1, 2009, it filed a complaint seeking a judicial determination that the Tort Claimants held prepetition claims “discharged by the Confirmation Order” issued on September 30, 1988, and “forever barred” by the injunction in § 1141(d). 49 Two hundred days later, Placid filed a motion for summary judgment. 50

B. Bankruptcy Court’s Opinion
The bankruptcy court’s opinion embarked upon a two-part analysis and adduced a presumption. In a string of cases, it found a two-part standard necessitating an affirmative answer to one question—does a Code “claim” exist?—before the posing of a second—did this claim holder receive constitutionally sufficient notice? 51 Relying on a widely shared thesis, 52 the bankruptcy court insisted: “[A]n asbestos claim [under § 101(5)(A)] arises when exposure to asbestos occurs.” 53

As the discharge can only affect claims that arose before confirmation of a plan in a Chapter 11 case, 54 for Placid to escape paying the Tort Claimants, the latter must have held a valid Code “claim” as of the Confirmation Date. 55 The bankruptcy court first stressed a commonly observed fact: Congress intended the definition of “claim” in § 101(5)(A) 56 to embrace “all legal obligations of the debtor, no matter how remote or contingent.” 57 To achieve this broad purpose, the Fifth Circuit, according to the bankruptcy court, had adopted the so-called “pre-petition relationship test” for classifying “unaccrued tort liabilit[ies]” in Lemelle v. Universal Manufacturing Corporation. 58 Pursuant to this test, “a claim arises at the time of the debtor’s negligent conduct forming the basis of liability only if the claimant had some type of specific relationship with the debtor at the time.” 59 Examples of such a link between “the debtor’s prepetition conduct and the claimant” include “contact, exposure, impact, or privity.” 60 Because “exposure” appears in this enumerated quartet, 61 the bankruptcy court cited its earlier postulate—“an asbestos claim arises when exposure to asbestos occurs”—and held that the Tort Claimants held dischargeable “claims” on the Confirmation Date. 62
This conclusion triggered the second step, a constitutional inquiry governed by the notice criteria in Mullane. Under this case law, “known” creditors or possessors of “known” claims must receive actual notice. “Known” creditors include “both those claimants actually known to the debtor, as well as those whose identities are ‘reasonably ascertainable’” by means of “reasonably diligent efforts.” The requisite search focuses on the debtor’s own books and records, with “[e]fforts beyond a careful examination of these documents … generally not require[d].” “Known” claims include those rights to payment based on causes of action of which the debtor is actually aware or that are “reasonably ascertainable” prior to the petition’s filing or a plan’s confirmation. If a debtor has “in its possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he may be liable,” a “reasonably ascertainable claim” exists. Both “known creditors” and those holding “known” claims warrant “actual notice” under the Constitution. “Unknown” creditors are those whose identities “are not reasonably ascertainable,” and any right to payment that is “merely conceivable, conjectural, or speculative” amounts to an “unknown” claim. For such entities and such claims, constructive notice of the bar date by publication is constitutionally sufficient.

Applying this standard, the bankruptcy court made two determinations. First, both because Placid, an oil company and not a manufacturer of asbestos products, had no reason to suspect its liability for any tort claims predicated on an employee’s asbestos contamination prior to the Confirmation Date and because its books were apparently bereft of any such evidence, the Tort Claimants were members of the “unknown” class during Placid’s bankruptcy case. So classified under the Code, per Mullane, they lacked any right to actual notice pre-confirmation in 1987-88; for purposes of due process, notice by publication would have been enough. Second, since Placid published substantively identical “Notice[s] of Order Fixing Date for Filing Claims” in the Wall Street Journal, described as “a newspaper of national circulation that was available in Louisiana,” on three separate January dates, its efforts met Mullane’s notice requirement.

On the Confirmation Date, the claims of the Tort Claimants—though acknowledged by Placid and the bankruptcy court to have been oblivious to their exposure before September 30, 1988—had therefore been annulled.

The bankruptcy court added two remarks. First, the appointment of a future claims representative (“FCR”), as provided in Federal Rule of Civil Procedure 17, would have been reasonable only if Placid had known “that it … [was] facing significant tort liability due to asbestos exposure” in the years, months, and days preceding the Confirmation Date. It was therefore of dispositive significance that “there had been no prepetition asbestos incidents or events that would even have suggested an awareness by Placid of a potential class of asbestos claimants.” Finally, the bankruptcy court acknowledged the “conflicting policy demands” it was obliged to balance: “[T]he bankruptcy policy goal of providing debtors with fresh starts and resolving claims arising from their pre-bankruptcy conduct” and “the due process rights of potential creditors who may have been damaged by a debtor’s pre-petition conduct, but who may have been unaware of the harm or potential harm.”

C. Fifth Circuit’s Ruling

On May 27, 2014, a divided Fifth Circuit panel affirmed the bankruptcy court’s decision. By then, whether purposely or inadvertently, the Tort Claimants had already made a pivotal concession, for their appeal focused not on the bankruptcy court’s first finding—that they had possessed a dischargeable “claim” on the Confirmation Date—but on whether “the method and substance of Placid’s notice were insufficient on due process grounds.” In a notable aside, the Fifth Circuit’s majority raised doubts about the bankruptcy court’s invocation of the prepetition relationship test construed by many as circuit law after Lemelle, as Lemelle “post-dated Placid’s bankruptcy,” and “retroactive application of current law” is usually improper. More significantly, the majority conceded that a future panel “may well opt to narrow Lemelle” by making it “inapplicable to latent disease-related claims.” Though wholly in dicta, the majority thereby planted doubts about the prepetition relationship test’s viability in Louisiana, Mississippi, and Texas.
Circuit Judge Emilio M. Garza, joined by Judge William E. Davis, then clarified the definition of “known” and “unknown” creditors first articulated in *Mullane* and later construed by the Fifth Circuit in *Louisiana Department of Environmental Quality v. Crystal Oil Co. (In re Crystal Oil Co.)*. 86 For a claimant to fall into the former category, “a court must determine that, at minimum, a debtor has ‘specific information’ related to an actual injury suffered by the creditor.” 87 Otherwise, the relevant interests are “conjunctural or future,” ones that “although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]” and “those that arise too far in the future.” 88 Though the majority conceded that Placid was “aware, generally, of the hazards of asbestos exposure and, specifically, of Mr. Williams’s exposure in the course of employment,” only “[s]pecific information about an “actual,” “actualized,” or “manifested” injury would have made such claims and creditors “known”; 89 “[i]nformation, however specific, that makes a claim only foreseeable or conjectural is insufficient” could not have done so. 90 Under this formulation, the Tort Claimants could only be “unknown” creditors. Accordingly, the majority held that Placid’s published bar notices were constitutionally adequate for purposes of due process. 91

**D. Fifth Circuit’s Dissent**

The dissent, written by Circuit Judge James L. Dennis, began with an accusation: By neglecting to review the bankruptcy court’s use of the *Piper* prepetition relationship test, 92 the majority had failed in its “duty to oversee the development of our jurisprudence, and a duty to the future victims of mesothelioma and other latent diseases, to acknowledge and correct … errors plainly evident.” 93 To fulfill this perceived duty, the dissent propounded an interpretation of *Lemelle* decidedly “[c]ontrary to the bankruptcy court’s reading.” 94 Arguing that *Lemelle* neither “address[ed] whether an unknown, future claim … was dischargeable in bankruptcy” nor “adopted the pre-petition test for application in bankruptcy cases involving asbestos-related injuries,” 95 the dissent distinguished the facts in *Lemelle* from Placid’s circumstances in two ways. First, no temporal gap between exposure (“the injury”) and its detection, as evidenced by some diagnosable malady (“the manifestation of that injury”), was present in *Lemelle*; second, the creditor’s exposure in *Lemelle* did not predate either the petition or the confirmation date. 96 For these reasons, “even if there had been some relationship prepetition,” the *Lemelle* court did not “decid[e] that the plaintiff would necessarily have had a ‘claim,’” 97 and the opinion itself could not be reasonably construed as endorsing “a definitive test for defining a ‘claim’ for purposes of § 101(5)(A).” 98 Thereafter, the dissent delved into “the underlying legal issue”: whether a wrongful-death claim could be constitutionally noticed and therefore discharged fifteen years before the decedent “developed or was aware of any symptom” 99 of a most rare and aggressive cancer. 100

Offering a resounding negative, the dissent took issue with the majority’s construction of *Mullane* and analogized to what the Supreme Court did in *Amchem Products, Inc. v. Windsor*. 101 The dissent read *Mullane* to express no opinion, much less to establish, whether the term “claim,” as later used in the Code, included “unknown claimants … with latent disease damage that is as yet unknown to those future claims” at the time of the relevant proceeding. 102 Outside the purview of *Mullane* lay persons like the Tort Claimants, “claimants who are not only unknown but ‘unselfconscious and amorphous,’” plagued by diseases both “latent” and “unknown” both pre- petition and pre-confirmation. 103 *Amchem* underscores the “grave problems” that any tribunal would encounter in attempting to catalogue such persons as Code creditors. 104 In *Amchem*, the Supreme Court wondered “whether class action notice sufficient under the Constitution … could ever be given to legions so unselfconscious and amorphous” as those who either “know nothing of their exposure, or realize the extent of the harm they may incur” or would not “be alerted to their class membership” from reading a notice they lack “the information or foresight needed” to understand. 105 Such persons are clearly “unknown” to court and debtor, as the bankruptcy court and the majority recognized, but they are also themselves “unknowing,” holders of “unknowable” and “unperceivable” claims when seen from any plausible party’s ken. 106 Unable to recognize that they may even own a Code “claim,” these creditors are “functionally or constructively
incompetent for purposes of the bankruptcy case.” 107 Constructive notice to such persons, even if probabilistically “futile” communication with unknown creditors normally comports with Mullane, 108 “is effectively no notice at all.” 109

In such cases, the “elementary and fundamental requirement of due process in any proceeding which is to be accorded finality” 110 —notice 111 —demanded the application not of Mullane’s exact rule 112 but of “a context-specific approach.” 113 In the dissent’s view, as to “exposure-only individuals who may be unaware of their exposure, unaware of the severe harm that may ultimately result, and unable to recognize that their rights may be effected in bankruptcy,” 114 only notice to a FCR in Placid’s bankruptcy case would have satisfied the twin prescriptions of due process. With no such representative having been appointed prior to the Confirmation Date, the Tort Claimants still held undischargeable claims on March 15, 2004.

IV. Placid Oil Errata
The Placid Opinions join a legion of decisions that posed the same questions and reached inconsistent conclusions. As one bankruptcy court noted on January 7, 2015, the dissent in Placid Oil, along with the 1986 bankruptcy court decision in In re Waterman S.S. Corp., 115 “stand for the proposition that publication is insufficient to provide adequate notice and, thus, due process, to claimants whose injuries and associated claims have not manifested as of the bar date.” 116 Within this subset of cases, both representation by a FCR and a trust mechanism—akin to the one created in Manville and presently authorized by § 524(g) for asbestos-only manufacturers, 117 —have emerged as “the keys to satisfying due process concerns.” 118 Conversely, per the Fifth Circuit’s majority and another recent district court opinion, Gabauer v. Chemtura Corp. (In re Chemtura Corp.), 119 “such claims may be discharged, provided that notice is adequate,” with “the weight of the developing authority hold[ing] that publication notice may be sufficient to satisfy due process.” 120 Because Placid Oil well evinces many of this jurisprudence’s recurrent errors, this Part sets forth some of those more patent faults.

A. Fifth Circuit’s Majority and Dissent
The dissent and the majority in Placid Oil share at least one flaw. The majority, of course, expressly declined to dissect the expansive definition of “claim” delimitated by the prepetition relationship test and treated as circuit law by the bankruptcy court. By virtue of this evasion, however, the majority ignored a principle implicit in Mullane: “the just and reasonable character” of the constitutional requirements must reflect “due regard for the practicalities and peculiarities of the case” and “have[ing] reference to the subject with which the statute deals.” 121 When this observation is coupled with two others facts significant in Mullane—its “unknown” beneficiaries were statutorily defined as having interests “identical” with known claimants, and a guardian bound to receive actual notice had been appointed 122 —it is clear the Placid Oil majority skipped over one of this “principal” 123 case’s imports. To wit, prior to any notice analysis in a Chapter 11 case, a court should first ascertain whether any “unknown” person actually falls within a statutorily circumscribed class for Chapter 11 purposes: “creditors” as well as other “interested parties.” 124 Only if a court does so can it properly assess “the nature of the interests involved” and “the likelihood that others similarly situated will protect a property owner’s interest.” 125 Pursuant to Mullane’s logic, then, in the absence of a Code cognizable “claim,” no balance between the Code’s ends and the Constitution’s minimums can be properly struck, and no constitutional exegesis is advisable. The majority, however, performed the latter only.

The dissent similarly stumbles. Although it criticizes the bankruptcy court’s Lemelle interpretation, it too launches into a constitutional explication without positing a definition of “claim” under § 101(5)(A). It instead chooses to focus on the “underlying legal issue”: the constitutionality of notice by publication to owners of future claims. 126

In their failure to first undertake any statutory dissection, both appellate opinions do more than evade consideration of a factor implicit in Mullane, for they also ride roughshod over several canons of interpretation. Most obviously, they overlook the Last Resort Rule and the Doctrine of Constitutional Avoidance. 127 They concurrently short the Court’s expressed preference for
resolving a merits question rather than a constitutional one if possible and miss the need to focus on “logically antecedent” issues, as the meaning of “claim” would have been in *Placid Oil*.

**B. Bankruptcy Court and Fifth Circuit Majority**

Moving beyond the constitutional oversight, at least two objections can be lodged to the key hypothesis embraced by the bankruptcy court—that an asbestos injury occurs for purposes of “claims” in bankruptcy upon exposure, however unknowing—as a result of a recent scientific shift. Over the last decade, the factual basis of this “any exposure” theory has received growing scientific criticism, prompting many courts to deride it as “unscientific under a *Daubert*/*Frye* analysis or as insufficient to support causation.” In fact, much scientific research backs this new reluctance: “Given the multi-factorial genesis of most diseases that can be ascribed to epigenetic harm, conceptually it is difficult to imagine more than fifty percent of the blame being assigned to a single agent,” with “the causal chain” invariably “very attenuated and indirect compared to typical toxic tort claims.”

Due to this emerging consensus, from *Placid Oil*’s prospective application illogic may ultimately spring. Increasingly, the substantive non-bankruptcy law from which a creditor’s relevant right to payment is derived will no longer recognize the existence of a valid cause of action. Applying the *Placid Oil* majority decision, bankruptcy courts in the Fifth Circuit will nonetheless insist that the derivative “right to payment”—and hence a Code “claim”—actually does exist. If courts continue to regard the present right to bring a cause of action for a future asbestos-induced injury as a currently dischargeable “claim,” they will have to discount the claimants’ likely lack of standing to pursue this action in any other tribunal. As a growing body of case law intones, prior to any diagnosable manifestation of harm, these creditors lack an injury “actual or imminent,” the two essential requirements for showing the kind of injury-in-fact “the constitutional minimum of standing” demands.

In short, the exposure theory upon which the bankruptcy court relied in its application of the prepetition relationship test may eventually require a court to pretend the underlying cause of action can in fact be maintained. Even if compelled by statute and advisable as a matter of bankruptcy policy, this incipient discordance should not have gone unmentioned.

These probabilities also indicate precisely why the Tort Claimant may not be easily fitted into *Mullane*’s constitutional dichotomy. If a Code “creditor” holds a Code “claim” no other court would identify as a legally protectable property interest, it becomes much harder to posit that notice by publication will convey any sort of meaningful information to these nebulous creditors. Holding no more than bare legal rights which subsist only for purposes of a debtor’s reorganization under federal bankruptcy law, few such “unknown” creditors presented with bar notices similar to that in *Placid Oil* could be expected to make the assumption implicit in *Mullane*: if the published notices were to be perused by one of these reasonable and interested creditors, he, she, or it would be able to appreciate the dangers posed to their own legal interests.

Already regarded as an “[un]reliable means of acquainting interested parties of the fact that their rights are before the court,” *Mullane* suggests that notice by publication cannot be theoretically effective, as it requires, when the right to payment is itself so tenuous that no affected reader would apprehend itself to be both a potential victim and a Code claimant upon the most industrious scrutiny. Quite simply, *Mullane* can be utilized both to justify noticing such unknowing claimants by publication and to attack such attempts’ constitutionality, the owners of future claims not easily classified within its rubric.

This fact strengthens the dissent’s final constitutional argument. When creditors must first discern the certainty of their exposure and recognize the existence of a Code “claim” so as to protect their otherwise dormant rights, they “cannot be expected to understanding the meaning of any … [notice] communication.” Notice by publication to such functionally incompetent persons, particularly in the absence of any guardian, cannot measure up to the requirements of due process. Not even at its broadest can *Mullane* be so construed, for its “unknown” beneficiaries, if presented with the notices actually published, would have been able to ascertain their role as claimants. If one opts for this reading of *Mullane*, constitutional legitimacy cannot be extended to the notices Placid provided to the Tort Claimants and similarly placed persons in the winter of 1988.
C. Fifth Circuit’s Dissent

The dissent, meanwhile, offers its own problematic litany.

First, the dissent indulges in an unusually rigid construction of *Mullane*. While *Mullane* does not expressly establish the proper classification of the Tort Claimants, it does differentiate between “known” and “unknown” creditors for constitutional purposes, adopting a strict, binary divide. The Tort Claimants may not be the typical unknown creditor. Yet, as *Mullane*’s progeny firmly establish, they can still be placed within that specific category. Indisputably, they are owners of the “speculative” and “conjectural” claims, their precise identities neither “known” nor “reasonably ascertainable” pre-petition. Equally surely, any search of Placid’s books in 1987-88 would not have suddenly divulged its certain liability and these creditors’ foreseeable existence, the longstanding distinction between “known” and “unknown” creditors. Furthermore, *Mullane* commands extensive efforts to inform “incompetent” persons only “when there is some likelihood that they would be more effective than the procedures actually used” to provide the notice given. Here, since no means of notice as to unknown claimants better than publication in a national newspaper can be reasonably posited, the likelihood of another similarly efficacious method was almost surely speculative. As such, if one utilizes only *Mullane*’s bare rudiments, the Tort Claimants were “unknown creditors” entitled to no more than notice by publication.

Second, *Mullane* neither authorizes notice by publication in a vacuum nor accepts its suitability in all cases. Instead, it defines such notice as constitutionally sufficient only if a full weighing of “the practicalities and peculiarities” of a case shows it to be the best among “likely futile” methods. Thus, to divine what notice may have been proper, a court needs to view the matter from the perspectives of Placid, its creditors, and its claimants, known and unknown, on the eve of its final plan’s confirmation.

At that time, as a gas and oil company, Placid’s knowledge of its workers’ exposure to asbestos was theoretical, while the urgency of its reorganization, essential for both enhancing the return to the greatest number of creditors and ensuring its long-term survival, was paramount. To its known creditors, Placid provided actual notice; to its unknown creditors, it resorted to the only means of notice—publication—found suitable for reaching the unidentifiable in a rather sprawling body of law. True, some judges may have appointed a FCR in similar cases, as the court in *Manville* did. Still, this response had not yet elicited unanimous approval in 1987, and the *Manville* trust would soon be famously exhausted. Just as importantly, neither *Manville* nor *A.H. Robins* would have alerted either court or party to Placid’s asbestos liability for one patent reason: Placid was not an asbestos manufacturer or distributor who had reason to know both that it had exposed its workers to more than the typical dangers particular to its industry—oil and gas manufacturing—and that these employees’ environmental contact with exposure on Placid property had created either cognizable “causes of action” or recognizable Code “claims.” That certain readers of Placid’s notice both did not know of their exposure and could not reasonably intuit their potential status as creditors is an unfortunate aspect of any latent tort, but this objection differs only in degree from what the Court has itself admitted even when authorizing notice by publication: “Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice.” Here, when this case is viewed from the vantage point of September 30, 1988, Placid resorted to “a customary substitute … where it [was] … not reasonably possible or practicable to give more adequate warning.”

At the same time, Placid simultaneously achieved the well-known objectives of the Code’s eleventh chapter: a debtor’s rehabilitation, as discharge can “preserve the going concern of a business” potentially subject to “debilitating tort litigation,” and equal treatment of similar classes of known creditors. As now seems painfully patent, future claimants received no benefit from such a discharge; this is the corollary of a hindsight unmoored to real-world circumstances. However, when three other facts—first, as many have argued, “future claims” can be fitted into the § 101(5)(A); second, no court or party could have been confident of its ability to estimate rationally the number and value of all future claims; and third, *Mullane* established a pragmatic standard attuned to the peculiarities of the relevant statutory regime and thus a debtor’s real-world constraints—are also weighed, notice by publication as to these unknown beneficiaries was most likely “all that the situation...
permit[ted].” 155 So understood, Mullane would favor the approach ratified by the majority and the bankruptcy court, as it afforded all creditors the constitutional minimum and made more likely the achievement of Chapter 11’s ends. 156 Only notice by publication to the Tort Claimants, who could be no other type of beneficiary but “unknown,” increased Placid’s aggregate value and assured its survival for the multitude’s greater benefit. 157 Based on the facts, cumulatively considered, due process arguably called for no more than such vain means, their deleterious effects here regretfully heightened by the bankruptcy system’s own imperfections. 158

Finally, the dissent places undue emphasis on Amchem. Undeniably, Amchem’s dicta raise valid concerns about notice by publication to a nebulous set of persons. Even so, Amchem focused on Federal Rule of Civil Procedure 23 159 and not on a statutory scheme whose procedural rules already authorize nationwide service of process, 160 a Code feature that supports a generous construal of Mullane. Additionally, in Amchem, the Court did not actually abandon this venerable opinion. Nor did it cast doubt on the courts’ expansive understanding of its extent. Instead, it merely “recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselﬁsh and amorphous.” 161 Amchem acknowledges a difﬁculty, it does not vitiates a creed. 162

V. The Mystery of Section 524’s Paragraph G
In any discourse centered on “future claims,” although § 524(g) post-dates Placid’s discharge and cannot resolve the due process issues raised by these claims, 163 it does merit some consideration. “[M]odeled on the trust/injunction in the Johns-Manville case,” Congress intended § 524(g) to codify that case’s approach to “future claimants” of an identiﬁable “asbestos manufacturer” and for use “by any asbestos company facing a similarly overwhelming liability.” 164 This legislative history deﬁnes “future claimants” as “those who were not yet before the court, because their disease had not yet manifested itself” and “who, by deﬁnition, do not have their own voice.” 165 The enacted text differentiates between a “claim,” “action,” and “a demand for payment, present or future, that—was not a claim during the proceedings leading to the conﬁrmation of a plan of reorganization.” 166 This ﬁnal term appears nowhere else in the Code; accordingly, its holder cannot receive the usual protections afforded to claims under the Code. 167 As a statutory matter, § 524(g) is “limited to debtors that are defendants in asbestos-related actions” at the time of ﬁling. 168

As drafted and parsed, § 524 provokes further confusion regarding the Code status and rights of future claimants. 169 As the House Report deﬁnes “future claimant” as a victim with “not yet manifested” injury, it implies that a victim is still a creditor, the holder of a dischargeable “claim,” regardless of whether asbestos-related disease had become known to debtor and creditor alike. 170 Moreover, although the enacted text differentiates between future “claims” and “demands,” 171 it also hints that both must arise from prepetition conduct. 172 If so, the existence of a prepetition relationship cannot itself be the distinction between a dischargeable “claim” and a non-dischargeable “demand.” Or “future claims,” as that term has been utilized in many opinions, must be classiﬁed as “future demands,” 173 their dischargeability now even more doubtful. Finally, even as § 524(g) authorizes the issuance of an injunction to funnel claims to a judicially created trust, the text encodes an express prerequisite for its creation: that, “at the time of entry of the order for relief,” the debtor “has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.” 174 If this text is to be accorded its ordinary meaning, not even a “demand,” whether or not that term is coterminous with “claim,” 175 can arise unless an asbestos-based suit has already been ﬁled against an asbestos manufacturer, a very limited subset of debtors potentially subject to mass tort suits.

VI. Conclusion
In many ways, the Placid Opinions are not unique. No grand doctrinal innovation graces those pages, and no truly novel argument is penned. Even so, in their back-and-forth, three old dilemmas—whether a future claim is truly a “claim” under § 101(5)(A); if so, when does it arise?; and regardless, what does due process compel?—are revisited. That all three decisions suffer some particular imperfection is not surprising, as this area of law abounds with ambiguity. Eventually, however, the tension between Mullane, strictly understood, and the Code’s “claim,” broadly delimitated, will have to be resolved by some uniformly binding juridical or legislative act. Otherwise, no debtor will be able to depart the confines of Chapter 11 without fear of an unknown creditor’s later emergence, imperiling numberless confirmed reorganizations. This danger is the clarion call of the Placid Opinions.

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Footnotes


5 Michele Carbone, Joseph R. Testa & Haining Yang, Mesothelioma Epidemiology, Carcinogenesis, and Pathogenesis, 9 Current Treatment Options in Oncology 147, 150 (2008).


8 See, e.g., Oppenheim, Appel, Dixon & Co. v. Bullock (In re Robintech, Inc.), 863 F.2d 393, 395-96 (5th Cir.) (holding that “[a] creditor’s claim can be barred for untimeliness only upon a showing that it received reasonable notice,” as defined by Mullane and its heirs), cert. denied, 493 U.S. 811, 110 S. Ct. 55, 77 L. Ed. 2d 145 (1989); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620, 623 (10th Cir. 1984) (“The discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution.”).


Williams v. Placid Oil Co., 753 F.3d 151 (5th Cir. 2014).


Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft (In re Piper), 58 F.3d 1573, 1577 (11th Cir. 1995).

United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1005 (2d Cir. 1991) (internal quotation marks omitted) (citing LTV Corp. v. Chateaugay Corp. (In re Chateaugay Corp.), 112 B.R. 513, 521 (S.D.N.Y. 1990)).


See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2073, 182 L. Ed. 2d 967 (2012) (“[I]t is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.”); Robinson v. Shell Oil Co., 519 U. S. 337, 341, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); Dole v. United Steelworkers of Am., 494 U.S. 26, 110 S. Ct. 929, 934, 108 L. Ed. 2d 23 (1990) (“[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”) (internal quotation marks omitted) (citing Massachusetts v. Morash, 490 U.S. 107, 115, 109 S. Ct. 1668, 1673, 104 L. Ed. 2d 98 (1989)).


Kesner, supra note 17, at 167.

Johnson, 501 U.S. at 81; United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010) (citing Miller v. Amusement Enters., Inc., 395 F.2d 342, 350 (5th Cir. 1968)).


Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); see Heidt, supra note 7, at 127; Mabey & Gavrin, supra note 11, at 779-80.


32 Mullane, 339 U.S. at 314.


34 Laura B. Bartell, Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?, 78 Am. Bankr. L.J. 339, 346 & n.27 (2004). This article figured prominently in the Placid Oil dissent. Placid Oil, 753 F.3d at 160, 161, 162 (Dennis, J., dissenting).


38 In re Placid Oil Co., 463 B.R. at 808.

39 In re Placid Oil Co., 463 B.R. at 807.

40 In re Placid Oil Co., 463 B.R. at 807-08. Copies of these bar notices were appended to Placid’s Motion for Summary Judgment. Doc. No. 28-6 at 7, 9, 11, Case No. 3:09-ap-03356-sgj.

41 Doc. No. 28-6 at 3, ¶6, Case No. 3:09-ap-03356-sgj-11

42 In re Placid Oil Co., 463 B.R. at 808.

43 In re Placid Oil Co., 463 B.R. at 808.

44 In re Placid Oil Co., 463 B.R. at 809.

45 In re Placid Oil Co., 463 B.R. at 809.

46 Doc. No. 26, at 3 n.1, Case No. 3:09-ap-03356-sgj-11.

47 In re Placid Oil Co., 463 B.R. at 810; Doc. No. 26, at 5, Case No. 3:09-ap-03356.

48 In re Placid Oil Co., 463 B.R. at 810.

49 In re Placid Oil Co., 463 B.R. at 810; Doc. No. 1, Case No. 3:09-ap-03356.


51 In re Placid Oil Co., 463 B.R. at 815.


54 11 U.S.C.A. §§ 524(a), 1141(d).

55 In re Placid Oil Co., 463 B.R. at 812, 808.

In re Placid Oil Co., 463 B.R. at 812, 808 (citing, among other sources, H.R. Rep. No. 95-595, at 162 (1977)).

In re Placid Oil Co., 463 B.R. at 813 (characterizing Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1275 (5th Cir. 1994)).

Lemelle, 18 F.3d at 1276 (emphasis in original).

In re Placid Oil Co., 463 B.R. at 813-14.


In re Placid Oil Co., 463 B.R. at 815.

In re Placid Oil Co., 463 B.R. at 815-16; Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995).

See supra Part II.


In re Placid Oil Co., 463 B.R. at 816 (internal quotation marks omitted) (relying on La. Dep’t of Envtl. Quality v. Crystal Oil Co. (In re Crystal Oil Co.), 158 F.3d 291, 297 (5th Cir. 1998)); accord, e.g., Tulsa Prof’l Collection Servs., 485 U.S. at 490; Chemetron, 72 F.3d at 346-47.

Chemetron, 72 F.3d at 347.

In re Crystal Oil Co., 158 F.3d at 297.

In re Crystal Oil Co., 158 F.3d at 297.

Although Mullane distinguishes between “claims” and “claimants,” much case law simply (and logically) does not.

In re Crystal Oil Co., 158 F.3d at 297 (relying on City of New York, 344 U.S. at 296).


In re Placid Oil Co., 463 B.R. at 816-17; see also Mullane, 339 U.S. at 316-17.

In re Placid Oil Co., 463 B.R. at 816.

In re Placid Oil Co., 463 B.R. at 817, 807-08.

In re Placid Oil Co., 463 B.R. at 818.


In re A.H. Robins Co., 88 B.R. at 753; In re Johns-Manville Corp., 68 B.R. at 631; see also Houser, supra note 53, at 467-68 (discussing these and other cases). Despite their apparent similarities, the trusts were differently designed. Mabey & Gavrin, supra note 11, at 748-49. Other bankruptcy courts have also appointed legal representatives to represent future claims. See, e.g., In re Eagle-Pitcher Indus., Inc., 203 B.R. 256, 261 (Bankr. S.D. Ohio 1996); In re Forty-Eight Insulations, Inc., 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); Resnick, supra note 20, at 2063 & n.69. Too late for the Tort Claimants’ purposes and worded in such a manner as to likely have precluded its application to Placid in 1987 and 1988, Congress codified this approach in 1994. 11 U.S.C.A. § 524(g); see also infra Part V.

In re Placid Oil Co., 463 B.R. at 817.
In re Placid Oil Co., 463 B.R. at 817.

In re Placid Oil Co., 463 B.R. at 818.

In re Placid Oil Co., 753 F.3d 151 (5th Cir. 2014) (majority opinion).

In re Placid Oil Co., 753 F.3d at 153, 154 n.1.

In re Placid Oil Co., 753 F.3d at 154 n.1. The majority’s characterization may have been far too harsh. Courts concocted the pre-petition relationship test before Lemelle, and the bankruptcy court had legitimately seen Lemelle as endorsing a preexisting juridical predilection.

In re Placid Oil Co., 753 F.3d at 154 n.1.

In re Placid Oil Co., 753 F.3d at 155-56.

In re Placid Oil Co., 753 F.3d at 156 (5th Cir. 2014) (quoting In re Crystal Oil Co., 158 F.3d at 297).

In re Placid Oil Co., 753 F.3d at 156 (quoting Mullane, 339 U.S. at 317).

In re Placid Oil Co., 753 F.3d at 153, 155-56 (alteration in original) (quoting Mullane, 339 U.S. at 317).

In re Placid Oil Co., 753 F.3d at 155-56.

In re Placid Oil Co., 753 F.3d at 157, 158. Beyond just Mullane, the majority found support in several rulings from three other circuits and in “policy concerns specific to bankruptcy.” “Bankruptcy offers the struggling debtor a clean start,” and Crystal Oil’s refinements help achieve a rough balance between “the interests of facilitating this recovery and … [other] due process considerations.” In re Placid Oil Co., 753 F.3d at 155-57. This logic echoes the bankruptcy court’s concluding paragraphs. See supra Part III.B.

In re Placid Oil Co., 753 F.3d at 160 (Dennis, J., dissenting).

In re Placid Oil Co., 753 F.3d at 159.

In re Placid Oil Co., 753 F.3d at 160, 159.

Lemelle, 18 F.3d at 1277 (quoted in In re Placid Oil Co., 753 F.3d at 159 n.2).


In re Placid Oil Co., 753 F.3d at 159 n.2. But see, e.g., Lycoming Engines v. Superior Airs Parts, Inc. (In re Superior Airs Parts Inc.), 486 B.R. 728, 739 (Bankr. N.D. Tex. 2012); Egleston v. Egleston (In re Egleston), 448 F.3d 803, 813 (5th Cir. 2006).

In re Placid Oil Co., 753 F.3d at 159.

Isabelle Opitz, Management of Malignant Pleural Mesothelioma—The European Experience, 6 J. Thoracic Disease S238, S238 (2014).

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). In Amchem, the Court specifically analyzed the adequacy and predominance requirements of Federal Rules of Civil Procedure 23(a)(4) and (b)(3), respectively. Amchem, 521 U.S. at 629. Post-Amchem, others have compared the relative utility of bankruptcy and the class action. See, e.g., Bartell, supra note 34, at 350-51, 357; Zipes, supra note 7, at 42-48.

In re Placid Oil Co., 753 F.3d at 160.

In re Placid Oil Co., 753 F.3d at 160 (quoting Bartell, supra note 34, at 351-52).

In re Placid Oil Co., 753 F.3d at 160-61; see also, e.g., Resnick, supra note 20, at 2079; S. Elizabeth Gibson, A Response to Professor Resnick: Will this Vehicle Pass Inspection?, 148 U. Pa. L. Rev. 2095, 2107, 2115 (2000).
Amchem, 521 U.S. at 628 (citations omitted).

In re Placid Oil Co., 753 F.3d at 161, 163-64 (collecting similar cases).

In re Placid Oil Co., 753 F.3d at 162 (internal quotation marks omitted) (quoting Bartell, supra note 34, at 366).

Mullane, 339 U.S. at 317. Later opinions echoed this sentiment: “Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice.” City of New York, 344 U.S. at 296.

In re Placid Oil Co., 753 F.3d at 164.

Mullane, 339 U.S. at 314.

As a technical matter, both notice and service, even if achieved by identical means, are required by due process.

In re O.P.M. Leasing Servs., Inc., 48 B.R. 824, 831 (Bankr. S.D.N.Y. 1985) (finding “that notice by publication is an adequate form of notice to advise a party of the entry of a bar order” (relying on Mullane, 339 U.S. at 314)); accord Mabey & Gavrin, supra note 11, at 779-81 (collecting cases sustaining the constitutionality of notice by publication as to unknown creditors).

In re Placid Oil Co., 753 F.3d at 164.

In re Placid Oil Co., 753 F.3d at 164 (emphasis added).


See infra Part V.

Heidt, supra note 7, at 144; see also George Vairo, Mass Tort Bankruptcies: The Who, The Why and The How, 78 Am. Bankr. L.J. 93, 99, 134 (2004) (so construing the recommendation of the National Bankruptcy Commission); Ralph R. Mabey & Peter A. Zisser, Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments, 69 Am. Bankr. L.J. 487, 503-04 (1995) (discussing the amendments proposed by the National Bankruptcy Conference, which “would not allow for the discharge of future claims unless the universe of these claims is sufficiently defined by credible evidence to allow them, through a court appointed representative or otherwise, to receive constitutionally adequate notice and an opportunity to be heard”); cf. Gibson, supra note 104, at 2114 (“Experience to date shows that … [FCRs] can provide an independent voice for the interests of the unknown future claimants.”).


Mullane, 339 U.S. at 314 (internal quotation marks omitted) (relying for the second quote on Am. Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S. Ct. 200, 55 L. Ed. 82 (1911)).

Mullane, 339 U.S. at 310, 319.


See Reliable Elec. Co., 726 F.2d at 623 (“[T]he reorganization process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests.”).


In re Placid Oil Co., 753 F.3d at 159.

Steel Co., 523 U.S. at 95-96 (characterizing the cases cited by the dissent as going “to the merits and not to statutory standing,” cases in which the former question “was decided before a question of constitutional standing”). The dissent disagreed and saw those prior cases concerned with statutory standing. Steel Co., 523 U.S. at 114-16 (Stevens, J., dissenting).

See Amchem, 521 U.S. at 612.

In Daubert v Merrell Dow Pharmaceuticals, the Court interpreted Federal Rule of Evidence 702 and crafted a standard for the admission of expert testimony. 509 U.S. 579, 590-95, 113 S. Ct. 2786, 2795-98, 125 L. Ed. 2d 469 (1993). An earlier case, Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), erected a slightly different standard. Daubert, 509 U.S. at 587. While Daubert has replaced Frye at the federal level, many states still adhere to the older Frye.


Fazal Khan, Preserving Human Potential as Freedom: A Framework for Regulating Epigenetic Harms, 20 Health Matrix 259, 280 (2010). The term “epigenetic” refers to the process by which the expression of genetic information is modified on a molecular level without change in the relevant subject’s DNA sequence. Very simply explained, asbestos exposure creates epigenetic alterations, and these alterations have been theorized to be one mechanism affecting the resulting mesothelioma’s progression.

See Mabey & Gavrin, supra note 11, at 778-79.


See, e.g., Livant v. Clifton, 272 F. App’x 113, 116 (2d Cir. 2008); Covey v. Town of Summers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956).


See Mullane, 339 U.S. at 314 (“The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”).


In re Placid Oil, 753 F.3d at 162 (Dennis, J., dissenting) (quoting Bartell, supra note 34, at 366).

Mullane, 339 U.S. at 317.

Tulsa Prof’l Collection Servs., Inc., 485 U.S. at 490.

Chemetron, 72 F.3d at 347.

Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 653 (2d Cir. 1999).

Mullane, 339 U.S. at 314 (internal quotation marks omitted).

See Mabey & Zisser, supra note 118, at 495-96.

City of New York, 344 U.S. at 296.

Mabey & Gavrin, supra note 11, at 752.


See Mabey & Gavrin, supra note 11, at 754 (“Affording a company a fresh start assist future claimants, however, only if they are made aware of the case, provided with an opportunity to participate in it, and allocated their fair share of the estate value.”).

Resnick, supra note 20, at 2058; Heidt, Future Claims, supra note 150, at 522. But see Bartell, supra note 34, at 352-53 (collecting cases).

Resnick, supra note 20, at 2077.

See, e.g., Gentry v. Circuit City, Inc. (In re Circuit City Stores, Inc.), 439 B.R. 652, 660 (E.D. Va. 2010) (“A debtor need only do what is reasonable under the circumstances to provide notice to ascertainable creditors.” (citing In re J.A. Jones, Inc., 492 F.3d at 251)); DePippo v. Kmart Corp., 335 B.R. 290, 296 (S.D.N.Y. 2005) (“However, reasonable diligence does not require impracticable and extended searches … in the name of due process.” (internal quotation marks omitted)); Brooks Fashion Stores Inc. v. Mich. Emp’t Sec. Comm’n (In re Brooks Fashion Stores, Inc.), 124 B.R. 436, 445 (Bankr. S.D.N.Y. 1991) (concluding that noting that “it is not the debtor’s duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it” (internal quotation marks omitted) (citing Charter Crude Oil Co. v. Petroleos Mexicanos (In re Charter Co.), 125 B.R. 650, 655 (M.D. Fla. 1991)).

Mullane, 339 U.S. at 317. But see, e.g., Bartell, supra note 34, at 357; Gavrin & Mabey, supra note 11, at 780.


See Placid Oil, 463 B.R. at 818.

Amchem, 521 U.S. at 628.

Fed. R. Bankr. P. 7004(d), (f). Interestingly, the United States Court of Appeals for the Tenth Circuit has raised questions about whether the national contact test authorized by such provisions as Rule 7004 can satisfy due process. Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1212 (10th Cir. 2006).

Amchem, 521 U.S. at 628.

In re Energy Future Holdings Corp., 520 B.R. at 536 n.76.


Federal Judicial Center, supra note 163, at 69; Mabey & Zisser, supra note 118, at 499.

Mabey & Zisser, supra note 118, at 503.


173 Mabey & Zisser, supra note 118, at 503.


175 Resnick, supra note 20, at 2073.


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