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COMMENTARY ON *THE FUTURES PROBLEM*,
BY GEOFFREY C. HAZARD, JR.

DIANE P. WOOD[†]

It is hard to disagree with Professor Hazard's description of the futures problem as the most difficult one for the field of mass torts. This is so if we accept the background notion that we will continue to use the common law tort system this country inherited from post-feudal England as one tool for addressing certain kinds of common injuries to large numbers of people. Most of my comments today will proceed on the same basis that Professor Hazard uses until he offers his proposal for legislation: that is, I too assume at the outset that the United States is not likely soon to adopt a different mechanism for redressing the injuries suffered by the victims of mass torts, nor is it likely to adopt a different mechanism for allocating the costs of those injuries to the responsible parties or for punishing wrongdoers. The present system is, of course, the tort system, which, albeit imperfectly, tries to accomplish the goals of compensation, allocation of cost, and deterrence. It has been clear for some time that, even if the tort system is fine if Jones has negligently damaged Smith's car, or if Dr. Doe accidentally amputates the wrong leg of Patient Roe, its adaptation to ever more complex litigation leaves a great deal to be desired.

I would like to begin my commentary by looking at the definition of "futures" cases and then by isolating the variables that make them especially intractable. Professor Hazard offers the following definition in his paper: "a 'futures' claim is one where a claimant cannot presently prove a causal connection between an injury and a supposed source of injury, but nevertheless suspects or fears that he or she is suffering injury that has its origin in the suspect source."¹ Phrasing the idea a little differently, we might say that a "futures" claim is one based on an event that has already occurred (such as exposure to a toxic material), but whose consequences will not become clear enough to support a legal claim until some time after the statute of limitations (measured from the date of the event) has expired. In some instances, the event may not yet have inflicted any cognizable

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¹ Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1903 (2000).

injury on the claimant, even though it sets in motion a process that *may* ultimately result in injury, or that definitely *will* one day result in injury; in other instances, the event may already have caused injury, but the fact of that injury will not become ascertainable to the claimant until some time in the future. Further complicating matters is the fact that sometimes, but not always, the putative victims will at least know that the event has occurred—for example, that they were exposed to asbestos, or to HIV-tainted blood, or to Agent Orange—and so the potential victims will be capable of identifying themselves as such. In some cases, however, it will be nearly impossible to distinguish potential victims from members of society at large, and people will have no idea that they have a potential future claim. Who has not breathed in some environmental tobacco smoke? How many millions in America's cities have gone through ozone alert days during the hot summers, when the elderly, the very young, and other vulnerable individuals are warned to stay indoors?

These examples suggest some of the variables that are important to our analysis of futures claims. They also indicate, optimistically, that at least some kinds of futures cases may be amenable to reform efforts without radical change of our existing institutions, even if others are not. The list of variables important in analyzing futures claims includes the following:

1. Claimant
 - a. Presently identifiable
 - b. Identifiable only at a much later time
2. Defendant
 - a. Single
 - b. Multiple
3. Injury-causing event or source
 - a. One-time occurrence
 - b. Repeated occurrences, no definite end
 - c. Repeated occurrences, terminated as of date certain
4. Nature of injury
 - a. Latent
 - b. Manifest
5. Causation (i.e., link between event and harm)

It is easy to see, just by considering the different variations noted here, the ways in which traditional tort litigation is ill-suited to many

futures claims. Statutes of limitations, even with liberal tolling rules, may require a plaintiff to file an action long before she has begun to experience the full consequences of the defendant's action. We should think twice before we implement a system that requires people to rush off and file a claim in court at the first hint of discomfort, on pain of losing the right to sue, even if that twinge never amounts to anything serious. On the other hand, even in the single-event cases, defendants want a way to bring closure to their expected liability, and it is often the case that full closure cannot be achieved without some kind of resolution (either a verdict after trial or a settlement) that resolves the claims of "futures" as well as existing plaintiffs. For underlying liability conduct that stretches over many years and that implicates many potential defendants (as we see, for example, in environmental litigation), it is even harder to identify who may have been affected and who may be responsible. Nonetheless, this is what must be done, if we are to achieve the goal of resolving claims in the present whose scope and character cannot be known until the future. Last, and most difficult from the standpoint of closure, are the claims that the claimants themselves have no reason to suspect exist, even if it is predictable to the company or to a plaintiff's lawyer that statistically speaking it is clear that some number of people will have such claims at some point in the future.

Before turning to his more ambitious legislative solution, Professor Hazard has reviewed a number of solutions to these problems that have been tried in the past. These include (1) medical monitoring of people who know that they are possible victims of a wrongdoer's tortious actions, (2) the bankruptcy or reorganization solution, which attempts to use classic common law in rem ideas to ensure that all interested parties are literally or figuratively before the court, and (3) ordinary civil procedures, such as class actions, bills of peace, and similar writs.² This tour of the horizon leaves Hazard in despair, when he concludes that "if individual claims cannot be specified, in terms of the identity of claimants and the factual basis of their claims, then there is simply no basis for 'adjudication,'" because no basis for adjudicating unknown claims on behalf of unknown claimants exists.³ Particularly in light of the Supreme Court's decisions in *Amchem*⁴ and *Ortiz*,⁵ the task of *conclusively* adjudicating the *potential* claims of

² See *id.* at 1902-10 (discussing various potential solutions to the futures problem).

³ *Id.* at 1910.

⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

⁵ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999).

hypothetical claimants in a *present* proceeding appears to be beyond human capability.

It is at this point, after reviewing the proposed settlements in *Amchem* and *Ortiz* and the aftermath of the Supreme Court's decisions, that the paper begins to have a distinctly pessimistic tone.⁶ Nothing will really work, we are told, for *any* kind of futures case. A solution based on bankruptcy is doomed because of the difficulty in measuring liabilities, at least where it is impossible to ascertain at the time of filing either the number of future claimants or the average size of their claims.⁷ (Indeed, he might have added that the future claimants of concern to us here are not even describable in the same way that potential heirs are in a probate proceeding, which offers another model of an off-the-shelf in rem mechanism that is designed to bring closure to contested legal rights in defined property, where future or unknown claimants may be a problem.) And the problem with bankruptcy is not limited to the difficulties Hazard mentions of estimating the number of claims or their average amounts. The critical prerequisite to a valid discharge in bankruptcy is a complete and honest schedule of debts, which is then followed by constitutionally adequate notice furnished to all creditors.

Even notice by publication, imperfect as it is, will work insofar as it is logical to expect that a creditor knows who it is—a diligent creditor will know that the debtor owes it some money, and it can be expected to act as soon as notice reaches it. Bankruptcy in that sense simply does not face the severe variant of the futures problem before us today. One would have to imagine a recipient of notice in a bankruptcy proceeding looking at it and thinking, “even though Debtor X does not owe me anything today, X might owe me something in 15 years,” and on that basis deciding whether to try to reserve part of the bankruptcy estate for the potential future debt, before we could create an accurate analogy to the mass tort futures problem. In the end, therefore, I agree with Professor Hazard that, for the subset of futures cases where (1) the identity of the claimant is not presently ascertainable, (2) repeated occurrences with no end in sight are involved, and (3) the injury is latent, bankruptcy procedures are not the answer.

When he turns to Rule 23 class actions, Professor Hazard is similarly gloomy. It is interesting that one of the common problems he sees between bankruptcy and class actions is an institution of Ameri-

⁶ See Hazard, *supra* note 1, at 1912-15 (expressing skepticism regarding the possibility of solving the futures problem in mass torts cases).

⁷ See *id.* at 1907-08.

can civil justice toward which he has some antipathy—the jury.⁸ I take issue with the suggestion that the use of juries as factfinders in “legal” civil actions has anything important to do with either the existence of the futures problem or the menu of solutions we should be considering. Instead, as his paper recognizes, the critical point revolves around the scope of the individual’s due process right to his or her day in court. This, not the specific procedures that apply to a given case, is what has occupied the Supreme Court’s attention. And the Court has been solicitous of this right. Particularly where there is or may be a conflict between the interests of those before the court and the absentees, which the Court found in both *Amchem* and *Ortiz*,⁹ due process at the very least requires scrupulous attention to this individual right.

I have no reason to doubt that the eventual solutions in *Amchem* and *Ortiz* themselves were flawed, as Professor Hazard notes, nor do I doubt that the current system imposes shockingly high transaction costs on injured parties. Nevertheless, I think it an overreaction to suppose that we are condemned to the worst of the present world, and that things may just go downhill from here. I do not read those two decisions as spelling the demise of Rule 23 class suits (which I would regard as a distinct change for the worse), not only for mass tort cases that include “futures” claimants, but perhaps also across the board. I specifically disagree with two of the paper’s more apocalyptic predictions.

First, Professor Hazard interprets Justice Souter’s comment in *Ortiz* that the certification of a mandatory settlement class for damages compromises the Seventh Amendment rights of absentee members as a Supreme Court hint that all judgments under Rule 23 are invalid.¹⁰ Not at all. The *Beacon Theatres* line of cases, to which he refers,¹¹ has never suggested that there is a right to a jury trial in equity. No such right existed in 1791, and to the eternal amusement of our English

⁸ See, for example, the approach to the civil jury that Professor Hazard, as co-reporter, has recommended in the ALI’s draft transnational rules of civil procedure, which jettisons the civil jury for transnational cases. See *Draft ALI Transnational Rules of Civil Procedure*, Rule 4 cmt. 4.3 (Jan. 14 1999) <<http://www.ali.org/ali/commentary.htm#>>.

⁹ See *Ortiz*, 119 S. Ct. at 2319-20 (discussing conflicts within the certified class); *Amchem*, 521 U.S. at 625-28 (same).

¹⁰ See Hazard, *supra* note 1, at 1914 (arguing that “[i]f the denial of a jury trial is a reason for invalidating a money settlement in a Rule 23 class suit, it would seem no less a reason for invalidating any class-wide judgment under Rule 23”).

¹¹ See *id.*

brethren, English practice in that year remains the touchstone for interpreting the reach of today's Seventh Amendment. In fact, cases like *Parklane Hosiery*, which permitted issue preclusion from earlier concluded non-jury adjudication to apply in a later jury case,¹² imply that the distinction between law and equity is still alive, even if it is not as robust as it was before Justice Black launched his *Beacon Theatres/Dairy Queen*¹³ campaign. Courts still certify classes under Rule 23(b)(2) when equitable relief is the only kind sought, and no one thinks that juries have any role to play in those cases. Granted, litigants cannot play games with labels and evade juries by characterizing monetary damages as some form of equitable restitution.¹⁴ Particularly given the direction that the Court's Eleventh Amendment jurisprudence has taken in recent years, in cases like *Seminole Tribe*,¹⁵ *Florida Prepaid Postsecondary Education*,¹⁶ and *Alden v. Maine*,¹⁷ and the advent of statutes like the Prison Litigation Reform Act of 1996,¹⁸ which severely limits damages in some kinds of prisoner litigation, we are likely to see more, not fewer, institutional suits that are limited to equitable relief.

The second point with which I take issue is the idea that the concept of an individual's *right* to a day in court precludes the use of a

¹² *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979).

¹³ *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 479 (1962) (noting that the holding of *Beacon Theatres* "requires that any legal issues for which a trial by jury is timely and properly demanded [must] be submitted to a jury," and proceeding to find that a pending action contains legal issues and must therefore be tried to a jury); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 502-12 (1959) (discussing the applicability of the right to a jury trial in an action seeking both legal and equitable relief).

¹⁴ *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (holding that neither of two remedies provided by Resource Conservation and Recovery Act of 1976 "contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'"); *see also Dairy Queen*, 369 U.S. at 477-78 ("[T]he Constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.").

¹⁵ *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that the Indian Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, does not authorize Congress to abrogate the Eleventh Amendment immunity of the states).

¹⁶ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 2233 (1999) (holding that "the sovereign immunity of the State of Florida was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce").

¹⁷ 527 U.S. 706, 119 S. Ct. 2240, 2246 (1999) (holding that "the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts.").

¹⁸ Prison Litigation Reform Act, § 803, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 42 U.S.C. § 1997e (Supp. III 1997)); *id.* § 806 (codified at 28 U.S.C. § 1346(b)(2) (Supp. III 1997)).

class suit for any purpose. Again, this goes much too far. Years ago I wrote two articles in which I suggested that there are class suits, and then there are *class suits*.¹⁹ The important question distinguishing the two for present purposes is whether the class action is operating merely as an elaborate joinder device, or if it is permitting pursuit of truly representational litigation. Today, some fifteen years after I wrote those articles, I still see nothing in the Supreme Court's decisions to suggest that *all* class actions fall on the "joinder" side of that divide. Instead, more modestly, the Court has held at least since *Shutts* that many do.²⁰ Not only does the congruity of interests between the named representatives and the absentees matter, but also the procedure by which the named representatives acquired that status and, in some cases, the willingness of the absentees to be legally bound by another's decisions make a difference. I see nothing wrong with a rule of law that insists on a very tight alignment of interests before one person will be empowered to bargain away the rights of another, and I think that is all the Court has done.

Where does all of this leave us? Like Professor Hazard, I believe that it pushes us to consider substantive solutions. The optional workers' compensation model he suggests is an interesting possibility with real potential. It has the virtues of assuring some level of compensation that can be paid relatively promptly to injured parties (at least if the causation rules do not spin out of control and lead to inordinate delays), and its financial responsibility provisions would force producers of goods and services to internalize the costs of the harms their activities inflict. With respect to the details of the proposal, I see little gain in the coverage rules from limiting it to "distributors of products or services attended by some risk of causing multiple personal injuries."²¹ First, it is hard to imagine producers or distributors whose products or services have *no* risk of causing multiple personal injuries, if they are selling to more than one person. Second, and more importantly, it may be preferable for the system to be open to all and to allow market participants to self-select into it. They will do so when they think it advantageous, and their guess about their liability risks is bound to be at least as good as a legislative drafter's. Regard-

¹⁹ See Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459 (distinguishing the two uses); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 599 (1987) ("Class actions can be divided conceptually into two groups: those following a joinder approach, and those following a representational approach.").

²⁰ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

²¹ Hazard, *supra* note 1, at 1917.

ing the registration system, I agree that the elective procedure is prudent, but once again, this might not be problem-free. First, thanks to diversity jurisdiction, the federal courts continue to see countless workplace accident cases—the very kind of case that “ought” to be under workers’ compensation and out of the litigation mill. But plaintiffs usually just find defendants other than the employer who might be liable, and the employer (at least in Illinois) finds its way back into court via the back door when the other defendants seek contribution from it up to the limits of the employer’s workers’ compensation limit. So a workers’ compensation-like scheme might not squeeze as much litigation out of the courts as one might think or hope. Second, as I understand the proposal, it would create a huge, nationally managed insurance pool, under the supervision of something like the Department of Commerce. The recent debates over Social Security and Medicare, which have included the question whether those funds should be privatized, should give us pause before we create a new federally sponsored insurance system. No one wants to solve one big problem by creating another bigger one.

Because the insurance word has come up, however, let me end on a comparative note. Some time in the mid to late 1980s, a visiting professor from Germany gave a “work-in-progress” luncheon talk at the University of Chicago Law School. He commented in the course of that talk that many of the problems in tort law that bedevil the United States do not arise at all in Europe, and other problems are far less pressing, for the simple reason that the European countries have national health insurance systems, as well as other national “safety net” payments. The individual who needs sustained medical care because of asbestos-caused emphysema, or exposure to HIV-tainted blood, or anything else, will get it from the state; the need to find someone else to foot crushing hospital and doctor’s bills is different by orders of magnitude. Without a doubt, there are problems in these countries too, ranging from the cost of their generous social programs—a matter over which they are all struggling right now—to the quality of care furnished, to the need to find a substitute incentive that forces companies to take optimal safety precautions with their products. But if we thought that our first priority in these cases is to make sure a system is in place that addresses the injuries suffered by the victims of mass torts, whatever those injuries were and whenever they manifest themselves, then I suggest it would be wise to keep one eye on the still-raging debate over our national health care policy. The argument for a general solution to the problem, that cuts across product lines, iden-

tity of distributors, and specific plaintiff characteristics, becomes stronger the more we realize we are looking at Professor Hazard's hypothetical claimant with a potential claim against one or more partially responsible defendants. There is a line between future plaintiffs who know who they are *today* and who can therefore knowingly settle a claim, agree to medical monitoring, or in some other intelligent way participate in a suit designed to resolve definitively claims relating to past behavior that will not recur, and other future plaintiffs who cannot intelligently participate in present litigation for various reasons. Once we cross that line, it may be that there is nothing more we can do than tend to the needy, and find other disincentives to deter mass torts.

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