IN THE SUPREME COURT OF MICHIGAN

NO. 124213

IN RE PETITION FOR AN ADMINISTRATIVE ORDER

****

REFERENCE MATERIAL SUBMITTED BY

THE COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, MICHIGAN MANUFACTURERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES, MICHIGAN CHAMBER OF COMMERCE, MICHIGAN LUMBER AND BUILDING MATERIALS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, INTERNATIONAL SAFETY EQUIPMENT ASSOCIATION, AND WASHINGTON LEGAL FOUNDATION

IN SUPPORT OF PETITION TO ESTABLISH A COURT RULE OR ADMINISTRATIVE ORDER CREATING A STATEWIDE INACTIVE ASBESTOS DOCKETING SYSTEM

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VOLUME I

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General Background

A. Consequences of the Asbestos Litigation Crisis

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Documented Briefing

Asbestos Litigation Costs and Compensation

An Interim Report

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PREFACE

The RAND Institute for Civil Justice (ICJ) began analyzing asbestos litigation in the early 1980s. That study was the first to examine the costs and compensation paid for asbestos personal injury claims. It was followed by other research that addressed the courts' responses to asbestos litigation and a number of studies of mass tort litigation in general.

In Spring 2001, the ICJ initiated a new study on asbestos litigation, now the longest-running mass tort litigation in U.S. history. In this study, ICJ researchers are revisiting the issues raised in the initial RAND study. How many claims have been filed? For what injuries? How much is being spent on the litigation and what is the balance between the compensation paid claimants and the costs to deliver it? What economic costs does the litigation impose on defendants and on the economy as a whole? What are the future prospects for the litigation? Are there strategies for resolving asbestos suits that would be more efficient and more equitable?

ICJ staff provided preliminary answers to these questions to the staff of the Senate Judiciary Committee and the House Judiciary Committee of the U.S. Congress in briefings on August 13 and 14, 2001. That briefing was documented in *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (RAND DB-362.0-ICJ, August 2001). Since then, ICJ staff have conducted extensive analyses of data, including confidential data provided by various participants in the litigation as well as published data and information gathered from interviews with plaintiff and defense attorneys, insurance-company claims managers, financial analysts, and court-appointed neutrals. This documented briefing builds on the previous briefing and includes the results of more detailed analyses.

The final report on the project will document the analyses we conducted to arrive at the results presented in this briefing. It will also analyze alternatives to the current approach to asbestos litigation in terms of their likely effects on major stakeholders in the litigation. We expect to publish the final report in the next few months.

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THE RAND INSTITUTE FOR CIVIL JUSTICE

The mission of the RAND Institute for Civil Justice is to improve private and public decisionmaking on civil legal issues by supplying policymakers and the public with the results of objective, empirically based, analytic research. The ICJ facilitates change in the civil justice system by analyzing trends and outcomes, identifying and evaluating policy options, and bringing together representatives of different interests to debate alternative solutions to policy problems. The Institute builds on a long tradition of RAND research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

ICJ research is supported by pooled grants from corporations, trade and professional associations, and individuals; by government grants and contracts; and by private foundations. The Institute disseminates its work widely to the legal, business, and research communities, and to the general public. In accordance with RAND policy, all Institute research products are subject to peer review before publication. ICJ publications do not necessarily reflect the opinions or policies of the research sponsors or of the ICJ Board of Overseers.

SUMMARY

BACKGROUND

Asbestos litigation is the longest running mass tort in U. S. history. Within the past few years, there have been sharp increases in the number of asbestos claims filed annually, the number and types of firms named as defendants, and the costs of the litigation to these defendants. These trends have led many people to question whether compensation is being divided among claimants fairly and in proportion to need, and whether responsibility for paying compensation is being allocated among defendants fairly and in proportion to culpability. Moreover, the system is costly to administer, may impose indirect costs on the economy, and may leave little or no funds to pay future asbestos victims.

STUDY PURPOSE AND APPROACH

This study is a comprehensive look at the dimensions of asbestos litigation today: How many claims have been filed? By whom? Against whom? For what kinds of conditions? At what cost? With what economic effects? If current trends continue, what will be the future costs of the litigation? The analysis is intended to provide the best estimates available of present and future consequences of the litigation so that policymakers can address the key question: whether the tort system as it now operates is the best way to resolve asbestos claims.

One of the reasons for such a study is that information on asbestos litigation is highly dispersed and usually confidential. There is no national registry of asbestos claimants. Federal courts collect data on asbestos cases, but most claims are filed in state courts, which do not report such information. Most of the data is gathered by individual defendants and insurers with a stake in the litigation. RAND researchers gained access to a good deal of this data, as well as some proprietary studies, from participants on both sides of the litigation—access that was granted under conditions of utmost confidentiality. The study team also drew upon RAND's previous research on asbestos, other analyses that are publicly available, and extensive interviews with dozens of participants with different perspectives on the litigation. The researchers have synthesized all these sources, acknowledging that they are providing only best estimates because the data are still far from complete. This briefing presents interim research findings.

ORGANIZATION

After an introduction to the study, the briefing describes the history of the litigation in an effort to explain why it has reached the scale it has today, why there are concerns about its future growth, and why it has become a matter of policy concern. It then describes the dimensions of the litigation through the year 2000, including the total number of claims, the changing composition of claims, the number of defendants and the spread of litigation across industries, the total costs of the litigation to insurers and defendants, and the potential effects of the litigation on the U.S. economy today and in the future. Finally, the briefing outlines the policy alternatives to the current litigation regime.

KEY FINDINGS

Claiming behavior:

- Over 600,000 people have filed claims, typically against dozens of defendants, for asbestos-related personal injuries through the end of 2000.
- Annual filings have risen sharply in the last few years.
- Increasing claims for nonmalignant injuries explain the recent growth in the asbestos caseload.
- The number of mesothelioma cases filed annually has been rising slowly over this period, but they represent a tiny fraction of all claims.
- Although available claims data do not distinguish consistently among different kinds of nonmalignant claims, there is widespread agreement that a majority of the claimants without cancer are functionally unimpaired, meaning that their asbestos exposure has not so far affected their ability to perform activities of daily life.
- Cases migrated to different states and venues in the late 1990s. Five states—Mississippi, New York, West Virginia, Ohio, and Texas—which accounted for only 9 percent of the cases filed before 1988 handled 66 percent of filings between 1998 and 2000.

Defendants:

- Over 6,000 companies have been named as defendants.

- The litigation has spread far beyond the asbestos and building products industries. The list of defendants now ranges across 75 out of 83 different types of industries in the U.S. Although only a few firms are involved in certain industries, the litigation has spread to touch almost every type of economic activity in the U.S.
- Bankruptcies are becoming more frequent: a total of 16 bankruptcies were filed in the 1980s, 18 in the 1990s, and 22 between January 2000 and Spring 2002.

Compensation and Costs:

- A total of $54 billion has already been spent on asbestos litigation.
- Transaction costs have consumed more than half of total spending.
- About 65 percent of compensation has gone to nonmalignant claimants.
- Compensation for mesothelioma claims has risen sharply since 1993.
- Estimates of the number of people who will file claims in the future—and the costs of those claims—vary widely, but they are all extremely high. All accounts agree that, at best, only about half the final number of claimants have come forward. At worst, only one-fifth of all claimants have filed claims to date. Estimates of the total costs of all claims range from $200 to $265 billion.

POLICY IMPLICATIONS

For asbestos compensation, the tort system itself is falling short of its principal objectives: to properly compensate injured victims for their losses, to deter defendants from injuring others, and to provide individualized corrective justice. Is there a better way to resolve asbestos claims fairly and efficiently? Despite the criticisms of the current asbestos litigation regime, many argue that it is the best feasible approach to assuring compensation for those injured by asbestos exposure. Under the laws of most jurisdictions, functionally unimpaired claimants who show clinical signs of asbestos exposure have compensable injuries. Whether the system should continue to compensate these claimants is the central issue in the current policy debate over asbestos litigation.

Maintaining the status quo means assigning a substantial compensation role to the bankruptcy trusts. Some view bankruptcy as a viable alternative to the tort system in that it can provide compensation at modest transaction costs. However, these benefits come at a high price for the plaintiffs, who typically receive only a tiny fraction of their claim's value, and for investors whose equity often disappears entirely. Alternatives to the status quo that have been

proposed include changes in substantive doctrines, changes in procedural rules, and creation of an administrative compensation program. We are continuing to analyze options for reform and will present the results in our final report.

Asbestos Litigation Costs and Compensation: An Interim Report

Stephen Carroll, Deborah Hensler, Allan Abrahamse, Jennifer Gross, Michelle White, Scott Ashwood, and Elizabeth Sloss

A3823-1 08/02 RAND

Trends in Asbestos Litigation Are Raising Policy Concerns

- Asbestos litigation began to attract policy attention in the early 1980s
- Settlement agreements in the late 1980s led many to believe litigation was "manageable"
- But rapid increases in the number of claims and costs have reawakened interest
- Litigation appears likely to continue
- Is there a better way of compensating asbestos victims?

A3823-2 08/02 RAND

After the 1973 *Borel* decision (Borel v. Fibreboard, Fifth Circuit, U. S. Court of Appeals, 1973) found asbestos manufacturers strictly liable to workers injured as a result of exposure to their product, increasing numbers of product liability claims against asbestos manufacturers began to flow into the courts. By the early 1980s, well over 20,000 claimants had initiated lawsuits alleging injuries from exposure to asbestos. The growing volume of this type of litigation began to attract the attention of public policymakers.

Many of those involved in asbestos litigation devised procedures to streamline the process and reduce the burdens and costs they faced. Courts developed formal and informal approaches to managing asbestos litigation. A series of court decisions resolved most of the coverage disputes between defendants and insurers. Many defendants chose not to aggressively contest liability and instead negotiated settlements of large numbers of cases with leading plaintiff attorney firms. These agreements typically called for settling hundreds or thousands of cases per year at amounts specified in administrative "schedules" that reflected differences in injury severity and other characteristics deemed to affect the value of cases. Asbestos litigation continued to be a critical concern for the firms frequently named as defendants, but there were only a few dozen firms in this position. Most observers tended to view asbestos litigation as "manageable." Asbestos litigation became a lower priority on the national political agenda.

However, the last few years have seen sharp increases in the number of asbestos claims filed annually, the number of firms named as defendants, and the costs of the litigation to these defendants. These increases have led to growing burdens on the courts, greater costs to the firms named as defendants, and greater numbers of firms filing for bankruptcy. Taken together, these trends raise a number of policy concerns, including whether there will be sufficient funds available to adequately compensate future claimants.

Is there a better way to resolve asbestos claims fairly and efficiently? Many observers are calling for reform, but there is little agreement on how to proceed.

To Address These Concerns, Policymakers Must Know the Dimensions of the Litigation

Claims	• How many claims are there and of what type?
	• Who are the defendants?
Costs	• How much is being spent on litigation?
	• How much of that goes to claimants?
Economic effects	• What is the extent of asbestos bankruptcies?
	• What are the broad economic effects?
Future outlook	• Where is this all headed?

The RAND study is addressing these questions

A3823-4 08/02 RAND

A clear understanding of the dimensions of the litigation is essential to the design of appropriate means for resolving asbestos claims. How many claims are being filed? By whom? Against whom? For what injuries? How much are claimants recovering? How many bankruptcies have been caused by asbestos litigation, and what are the overall economic effects of the litigation? More generally, what does the future hold?

Asbestos litigation poses challenges for plaintiff attorneys seeking compensation for asbestos injury victims, for defendants who must respond to the litigation while protecting shareholders' interests, for insurers who must cover the losses, and for financial institutions attempting to accurately assess the magnitude of current losses and future liabilities. Because of the number of people exposed to asbestos in the U.S., the injuries they have incurred, the financial losses attendant to these injuries and the ensuing litigation, and the potential economic impact of this litigation, asbestos litigation also poses unique challenges for the civil justice system.

This RAND Institute for Civil Justice study is intended to provide objective data and analysis to stakeholders and policymakers so that they can address the key policy questions: How well is the current process working? Can it be improved?

Few Data Are Available

- **No state or national registry of asbestos claims or lawsuits exists**
- **Most claims involve multiple defendants, each of which keeps its own records**
- **Claimants receive money from multiple sources over long periods of time**
- **Many data sources are not public**

A3823-5 08/02 RAND

It is difficult to understand the challenges posed by asbestos litigation and develop appropriate responses to them because so few data are available. There is no national registry of asbestos claimants. Some claims are not filed formally in court as lawsuits. Federal courts report the number of asbestos lawsuits filed, but in recent years most lawsuits have been filed in state courts, which do not routinely identify and report annual asbestos lawsuit filings.

The typical asbestos claimant brings a claim against many defendants—typically several dozen—each of which generally settles claims separately and keeps its own records. Any one defendant knows about the claims against it and its settlements, but it usually does not know how much other defendants are paying on a claim. Claimants may receive money from settlements over a long period of time. They may settle with some defendants today and other defendants next year and still others later on down the line.

Because so many conflicting interests and so much money are involved, almost all the data are viewed as highly sensitive and confidential. So, answers to simple questions such as, How many claims are there? and What does the litigation cost? are not readily available.

The ICJ-Analyzed Asbestos Litigation in 1982

	1982
Number of claimants	21,000
Number of defendants	300
Total costs up to 1982 (nominal $)	$1 B
Bankruptcies	3
Estimated future costs (nominal $)	$38 B

A3823-6 08/02 RAND

Those concerned with asbestos litigation were confronted with a similar problem in the early 1980s. A variety of stakeholders and policymakers had deep concerns about asbestos litigation, but data limitations impeded analysis of the problem. Then, as now, the ICJ was asked to identify the dimensions of the litigation, and it published a series of asbestos studies in the 1980s.

The results were considered shocking. RAND's report on the status of the litigation in 1982 (Kakalik et al., 1983) observed that about $1 billion in compensation and litigation expenses had been spent by the end of 1982 on more than 21,000 open and closed asbestos product liability claims. Three major corporations had filed Chapter 11 bankruptcy petitions, identifying the costs of asbestos litigation as the principal reason for the filing. Respected analysts were predicting that the future costs of asbestos litigation could reach $38 billion.

This Research Seeks to Update the Earlier Study

	1982	Today
Number of claimants	21,000	?
Number of defendants	300	?
Total costs to date (nominal $)	$1 B	?
Bankruptcies	3	?
Estimated future costs (nominal $)	$38 B	?

A3823-7 08/02 RAND

Now we are asking the same questions: How many claims are being filed? By whom? Against whom? For what injuries? How much is all this costing and where is the money going? How many bankruptcies have been caused by asbestos litigation, and what are the overall economic effects of the litigation? More generally, what does the future hold if present trends continue?

How We Dealt with Data Limitations

- Built on our previous asbestos and mass tort research
- Used publicly available data
- Obtained internal reports from investment and insurance analysts
- Acquired confidential data from litigation participants
- Conducted interviews with litigation participants

A3823-8 08/02 RAND

This analysis draws on data obtained from a wide variety of sources. RAND's previous research on asbestos and other mass toxic tort litigation has been widely cited in the public arena (Kakalik et al., 1983; Kakalik et al., 1984; Hensler et al., 1985; Hensler, 1992; Peterson & Selvin, 1991; Hensler & Peterson, 1993; Hensler, 1995; Hensler et al., 2000). We have drawn on the knowledge we acquired in these previous studies to establish historical and interpretative contexts for new information.

The nature of asbestos litigation and the issues it raises have generated considerable public documentation on the course of the litigation. We've collected publicly available data from a variety of sources—ranging from asbestos litigation reporters to corporations' SEC filings. Where we have found inconsistencies, we have either noted them or have not made use of the data. When corporations attribute filing for Chapter 11 to asbestos litigation, they often report the number of asbestos claims filed against them in their bankruptcy petitions. We obtained these data as well. Asbestos bankruptcy trusts—entities that are formed to pay asbestos claims after reorganization—typically report the number of claims filed against them to the court that has jurisdiction over the bankruptcy. All of these records are public, although they are not always easy to locate.

For example, many of the financial analysts and insurance analysts have conducted their own studies of asbestos litigation. If they used proprietary data

in their studies, we asked the analysts to review their analytic methods with us. Most of the analysts we interviewed were willing to discuss their approach with us and show us how they arrived at their results, even if they could not share their data with us. We have relied on only those studies that appeared to be sound in terms of the standards listed above.

We also obtained confidential data from many participants in the litigation. In each instance, we specified the data we sought and conducted sufficient investigation (for example, comparing information from multiple sources) to assure ourselves that the data provided to us were reliable. We used only data that we confirmed with other data or with other participants in the litigation.

We obtained data, on a confidential basis, on each of the claims brought against almost 200 defendants and trusts through 2000. A substantial number of these defendants have been prominent in the litigation and had received claims from tens of thousands, in some cases, hundreds of thousands, of people. Because asbestos claimants typically file claims against multiple defendants, the vast majority of the claimants on the list for one defendant also appeared on the list for another defendant. Accordingly, we could compare the information we obtained for one defendant to the information we obtained for other defendants to determine the reliability of the data. In the analyses reported below, we generally used only those data that proved reliable in the sense that data from different defendants agreed. We combined the data on individual claims.

We also obtained aggregate annual data on indemnity payments and defense costs for a large number of defendants. These data were available for some defendants from the early 1980s. In other cases, we were only able to obtain data for the last few years. In all, the data include more than 60,000 defendant-year observations. Almost all of these defendants had some insurance and insurance policies have coverage limits. Because there is always the possibility that a defendant and insurer can dispute whether a coverage limit has been reached, both defendants and insurers have strong incentives to maintain accurate data on indemnity payments and loss adjustment costs. Accordingly, we believe these data are reasonably accurate.

Finally, we conducted more than 60 interviews with key participants in the litigation, including plaintiff attorneys, corporate counsel, outside defense counsel, insurance company claims managers, investment analysts, and court-appointed neutrals. All of these interviews lasted at least one hour and several took considerably longer. The picture of the current state of asbestos litigation that emerged from these interviews was remarkably consistent. Where interviewees had sharply different views of the litigation than others, they noted that themselves and discussed why their perceptions differed. All of the

Interviews were conducted under promises of confidentiality to encourage candar, and we explained the purposes of the study and our general approach to all of the interviewees.

Outline

- How did we get here?
- Where are we today?
- Is there a better way?

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How Did We Get Here?

- Widespread occupational exposure led to many injuries
- Mass litigation techniques proved successful for plaintiffs
- Efficiency efforts promoted additional litigation
- Global settlements failed
- The litigation became increasingly concentrated in a few law firms
- Over time cases migrated to jurisdictions favorable to plaintiffs

A3823-12 08/02 RAND

Widespread Occupational Exposure

- **Asbestos is abundant, inexpensive, versatile**
- **Failure to warn of its risks and inadequate protection increased exposure**
- **Estimated 27 million U.S. workers in high-risk industries and occupations exposed, 1940-1979**
- **Unknown numbers of workers exposed**
  - **In other industries and occupations**
  - **Since 1979**

A3823-13 08/02 RAND

Asbestos is abundant and inexpensive to mine and process. Because it is strong, durable, and has excellent fire-retardant capability, asbestos was widely used in industrial and other work settings, as well as in residential settings, through the early 1970s. Asbestos consumption in the United States peaked in 1973 and then dropped dramatically over the next several decades (Alleman & Mossman, 1997).

Before the 1970s, large numbers of American workers were exposed to asbestos, some for long periods of time and/or at high levels. With the passage of the Occupational Safety and Health Act (OSHA) in 1970, increasingly strict safety regulations governing workplace exposure to asbestos were put in place. In 1989, the EPA proposed banning all products containing asbestos, but as a result of a decision by the Fifth Circuit Court of Appeals (Corrosion Proof Fittings v. E.P.A., 947 F.2d 1201 [5th Cir. Oct 18, 1991] [No. 89–4596]), opinion clarified (Nov 15, 1991), rehearing denied (Nov 27, 1991), that ban was set aside. After the court overturned the EPA's proposed rule, certain products containing asbestos remained banned and no new uses of asbestos (i.e., in products that had not historically contained asbestos) were permitted. However, some uses of asbestos remain legal in the United States. In material prepared for consumers, the EPA notes: "EPA does NOT track the manufacture, processing or distribution in commerce of asbestos-containing products" (U.S. Environmental Protection Agency [1999]). Exposure to naturally occurring asbestos, which may also cause disease, is generally not regulated (Renner, 2000).

That workplace exposure to asbestos can be dangerous was known well before World War II (Brodeur, 1985; Tweedale, 2000). Some asbestos manufacturers that were aware of the dangers of exposure to asbestos did not warn their employees of the risks of injury that stem from exposure to asbestos fibers, nor did they provide adequate protection for them (Brodeur, 1985; Castleman, 1996). Indeed, some asbestos manufacturers lobbied against stricter regulation of asbestos exposure in the workplace in the 1950s (Brodeur, 1985). It was these failures of public and private policy decades ago that set the stage for the current litigation.

The groundbreaking work on asbestos exposure-induced disease among U.S. workers was conducted by Dr. Irving Selikoff at the Mt. Sinai School of Medicine in New York (Selikoff, Hammond & Churg, 1964; Selikoff, Churg & Hammond, 1965; Selikoff & Lee, 1978). Litigators still use Selikoff and associates' work as the standard references on occupational exposure to asbestos, although the leading reference, Nicholson, Perkel & Selikoff (1982), estimated excess mortality due to asbestos-related disease only for workers exposed through 1979. Few epidemiological studies aimed at projecting total asbestos-related disease have been published since the Nicholson, Perkel & Selikoff study was published in 1982, and most of the more recent studies deal with asbestos exposure outside the United States (e.g., Banaie et al., 2000; Kjaergaard & Andersson, 2000; Magnani et al., 2000; Peto et al., 1999). The more recent epidemiological projections of asbestos-related disease in the United States have been limited to mesothelioma (Price, 1997). Litigation experts have used the Nicholson, Perkel & Selikoff (1982) estimates, more recent studies, and other data to project the number of future asbestos claims (Manville Personal Injury Settlement Trust, 2001; Stallard, 2001).

Nicholson, Perkel & Selikoff identified U.S. industries in which workers were at significant risk of asbestos exposure. These included *primary manufacturing,* including asbestos products (such as friction products, pipe and sheet, asbestos textiles, floor tiles, roofing, insulating and other building materials), gaskets, packing and sealing devices, and building paper and building board mills; *secondary manufacturing*, including heating equipment, boiler shops, industrial furnaces and ovens, and electric housewares and fans; *shipbuilding and repair*; and *construction*, including general contractors in residential and non-residential building construction and water, sewer, pipeline, communication and power line construction. They also identified workers in certain occupations who were at significant risk of asbestos exposure. Those workers included asbestos and insulation workers, automobile body repairers and mechanics, engine room personnel in the maritime industry, maintenance employees in chemical and

petroleum manufacturing and in the railroad industry, stationary engineers, stationary firemen, and power station operators. In all, Nicholson, Perkel & Selikoff they estimated that approximately 27.5 million workers in these industries and occupations had been exposed to asbestos from 1940 to 1979.

In recent years, workers from industries and occupations not included in Nicholson, Perkel & Selikoff's analysis have begun to file claims for asbestos-related injury. The etiology of these claims is sharply disputed. Some litigators on both the plaintiff and defense sides argue that most workers in these industries have not actually suffered significant asbestos exposure or injury and they should not be compensated for asbestos-related injury. Other litigators argue that Nicholson, Perkel & Selikoff simply focused on the potential for asbestos exposure and asbestos-induced disease in high-risk industries and occupations and ignored the risk of exposure in other industries. We have not been able to find any epidemiological study that has systematically investigated asbestos exposure and incidence of asbestos-induced disease that includes all industries and occupations in the U.S., although some analysts have examined patterns of legal claiming by industry (Manville Personal Injury Settlement Trust, 2001). Although some studies project cases of disease, not deaths (e.g., Walker et al. [1983] and Price [1997]), no study has provided a reliable estimate of how many people are sick at a given point in time as a result of occupational exposure to asbestos.

Many Injuries

- **More than 225,000 premature deaths estimated through 2009**
- **Variety of diseases**
  - **Mesothelioma**
  - **Other cancers, particularly lung cancer**
  - **Asbestosis**
  - **Pleural thickening or plaques**

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The widespread exposure to asbestos led to what has been termed "the worst occupational health disaster in U. S. history" (Cauchon, 1999, p. 4). Nicholson, Perkel & Selikoff (1982) estimated that more than 225,000 "excess (i.e., premature) deaths" due to asbestos-related cancers would occur from 1985 through 2009 as a result of exposure to asbestos from 1940 through 1979. This number does not include deaths resulting from severe asbestosis, or from exposure to asbestos in other occupations and industries, or from post-1979 exposure to asbestos. Although Nicholson, Perkel & Selikoff's estimates are widely cited, they were disputed by some epidemiologists at the time of their publication. The Nicholson, Perkel & Selikoff estimates were derived from a study conducted by Irving Selikoff under a contract with the U.S. Department of Labor. A study conducted by Walker et al. (1983) projected many fewer excess cancer deaths due to exposure; it was conducted under contract to the Johns-Manville Corporation and was itself subject to criticism.

Estimating the numbers of asbestos-related deaths and diseases is complicated by the long latency periods associated with asbestos injuries. Generally, 20 to 40 years elapse between first exposure to asbestos and disease manifestation. For example, the Manville Trust found that the average year of first exposure to asbestos by claimants who filed a claim with the Trust during the 1990s was generally more than 40 years earlier (Claims Resolution Management Corporation, 2001, p. 20). Although 20 years of the projection period used by

Selikoff and Walker have elapsed, the projections from these studies are still difficult if not impossible to validate using actual data.

A variety of diseases have been linked to asbestos exposure as described below.

Mesothelioma is a cancer of the lining of the chest or abdomen. Asbestos is the only demonstrated cause of mesothelioma. However, some mesothelioma cases are not traceable to an asbestos exposure. The disease is regarded as inevitably fatal, usually within a year or two of diagnosis. It can occur even with a relatively low level of exposure. The incidence of mesothelioma is tracked in selected areas of the United States by the U.S. Centers for Disease Control (National Cancer Institute), providing a reliable source of information for epidemiological research.

A number of *other cancers* have been linked to asbestos, although they all may have other causes besides asbestos exposure. Aside from mesothelioma, lung cancer is the most frequently claimed malignant disease. There is general agreement that asbestos can cause lung cancer. The risk of lung cancer can be exacerbated by other factors, most notably smoking. There were high rates of smoking in the blue-collar industries where asbestos exposure was particularly high. In lung cancer cases, defendants often dispute plaintiffs' allegations that their cancer is attributable to asbestos exposure, rather than smoking. Other cancers asserted by asbestos claimants include leukemia, and cancers of the bladder, breast, colon, esophagus, kidney, larynx, lip, liver, lymphoid, mouth, pancreas, prostate, rectum, stomach, throat, thyroid, and tongue. The relationship of other cancers to asbestos is a subject of contention; defendants frequently dispute the causality of other cancer claims. No U.S. government agency monitors the incidence of asbestos-related cancers other than mesothelioma.

Asbestosis is a scarring of the lung tissue resulting from the effects of inhaled asbestos fibers. Technically, to meet the criteria for a clinical diagnosis of asbestosis, there must be decreased pulmonary function (American Thoracic Society, 1986). Asbestosis is a chronic disease that can be debilitating and is sometimes, but not usually, fatal. However, asbestosis can be asymptomatic or only mildly impairing. Severe asbestosis requires extensive high-level exposure to asbestos, which has not been prevalent in the U.S. for several decades. The National Institute for Occuptional Safety and Health (NIOSH) publishes limited data on deaths due to asbestosis, but no U.S. government agency monitors the prevalence of asbestosis.

Pleural thickening or *plaques* is a scarring of the pleura, the membrane that lines the inside of the chest wall and covers the outside of the lung. People

exposed to asbestos may have plaques with no indications of diminished pulmonary function and may never suffer any functional impairment as a result of their exposure.

Because asbestos-related diseases have long latency periods, indicators of disease and impairment may not appear for many years. Some people who are first diagnosed with a non-disabling condition may develop more serious diseases some time in the future, but others will never do so.

Controversy over Injury and Impairment

- Many say most recent claimants are "unimpaired"
- Others say relevant issue is whether claimants satisfy legal criteria for injury
- Controversy turns on value judgments and medical criteria
- Studies suggest that most claimants without malignancies are not currently functionally impaired

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One of the most hotly contested issues in asbestos litigation is the extent to which claimants are affected by their exposure: that is, how sick or "impaired" they are. Some commentators say that many claimants are "not sick" and, because the funds available to compensate asbestos claimants are limited, they should not be compensated so that available funds can be directed toward those who "are sick." "[In asbestos litigation,] ... plaintiffs with no physical impairment receive windfall settlements that reduce the amount of funds available to pay the claims of those who are truly sick or who may become truly sick" (Rothstein, 2001, p. 2).

Others strongly disagree with this position, arguing that the law in all 50 states requires that claimants are entitled to compensation only if they have suffered an injury or disease. It follows that, because these claimants have been compensated, they must have been injured, and there is no basis for suggesting that they are not entitled to compensation.

Value judgments are clearly at the heart of this debate. However, the meaning of the word "impaired" is also at issue. The American Medical Association's definition of impairment is synonymous with injury: Impairment is defined as "a loss, loss of use, or derangement of any body part, organ system, or organ function" (American Medical Association, 2001, p. 2). A scar on the lungs, in this sense, is an impairment. Impairment *ratings,* however, as defined by the AMA, measure the functional limitations caused by an injury: impairment ratings reflect "an individual's ability to perform common activities of daily

living, excluding work" (American Medical Association, 2001, p. 4). "For example, an anatomic change such as a circumscribed pleural plaque would be an impairment based on an abnormality in anatomic structure. However, if there were no abnormality in lung function and no decrease in the ability to perform activities of daily living, the individual would be assigned a 0% impairment rating" (American Medical Association, 2001, p. 88). Under the AMA guidelines, a person may be judged functionally impaired, while still being able to hold down a job.

In this report, we use the term unimpaired to refer to an individual who experiences no decrease in the ability to perform the activities of daily life. In other words, he or she would be assigned a 0% impairment rating according to the American Medical Association definition. It is important to note that claimants who are unimpaired in this sense when they file a claim may manifest more critical symptoms after an extended latency period.

Trends and patterns in the severity of nonmalignant claimants' injuries are difficult to identify because there is no database in which claimants' medical data are consistently and reliably entered over time. The only information on this subject comes from special studies in which an analyst draws a sample of individual claims from defendants' files and reviews the medical information provided by the claimants to determine whether the information in the file offers evidence that the claimant was impaired.

In 1995, the Manville Trust implemented an audit program in which independent B-readers reviewed the X-rays submitted by a random sample of claimants. The Trust operates under the supervision of federal district court judge Jack Weinstein. The B-readers were selected in consultation with the plaintiffs bar; none of the B-readers employed in the audit had testified on behalf of an asbestos defendant. The X-ray review process was designed to give the benefit of any doubt to the claimant. A claim was downgraded only if both B-readers independently determined that they saw no indication of even low-level, sub-diagnostic X-ray evidence of interstitial fibrosis. "[O]f the X-rays the Trust actually received, approximately 50% failed independent B-reader review" (Affidavit of Patrica G. Houser, In re: Manville Personal Injury Settlement Trust Medical Audit Procedures Litigation, 98 Civ. 5693, March 13, 1999, p. 9).

Several more recent studies have found fractions of unimpaired claimants ranging from two-thirds to up to 90 percent of all current claimants (Edley & Weiler, 1993; Bernick, 2001a; Rourke, 2001; Chambers, 2002). Because most of these studies were commissioned by defendants and because the issue of impairment is central to the asbestos litigation controversy, their findings are hotly contested.

Judge Charles Weiner, who manages the federal multi-district litigation (MDL) process for asbestos litigation, noted that a large volume of the claims that had been assigned to MDL 875 had been initiated through mass screenings. He ordered that such cases be administratively dismissed without prejudice because "[o]ftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future" (Administrative Order No. 8, In re: Asbestos Products Liability Litigation [No. VI], Civil Action No. MDL 875, E.D.Pa., Jan. 16, 2002, p. 1).

In sum, it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living.

Mass Litigation Dynamics

- Statutes of limitations
- Mass filings
- Mass screenings

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In the early days of asbestos litigation, plaintiffs in some states were barred from filing suits for asbestos-related injuries because courts held that their injuries had occurred many years ago when the workers were first exposed, and therefore the allowable time for filing claims had expired. Later, legislatures adjusted their statutes of limitation so as to require that latent-injury victims file suit within one or two years of when they know or should have known that they were injured (Hensler et al., 1985). Although a person may receive a clinical diagnosis of injury (such as pleural plaques) without suffering any functional impairment, in most instances the law deems that the statutory period for filing starts to run when the plaintiff knows or should have known that he was "injured."

As a result, if a worker learns that he or she has been exposed to asbestos, seeks a medical examination to determine whether there has been a serious health consequence (e.g., cancer), and discovers that he or she has pleural plaques but no other signs of injury or impairment, a legal claim must be filed within a short time in order to protect his or her chance of seeking compensation.

Initially, asbestos manufacturers vigorously defended themselves against workers' claims, raising a host of issues, including the risks of exposure to asbestos, whether the plaintiffs had been exposed to the defendant's products and whether the statute of limitation had run (Hensler et al., 1985). Litigating individual claims against these major corporations was expensive and risky for plaintiff law firms and few were willing to take on asbestos workers' claims

(Brodeur, 1985). By the mid-1980s, however, plaintiff law firms in areas of heavy asbestos exposure (such as jurisdictions with shipyards or petrochemical facilities) had learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group. Often defendants would agree to settle all of the claims that were so grouped, including those claims that were questionable, to reduce their overall costs of litigation. By agreeing to pay questionable smaller-value claims in exchange for also settling stronger and larger-value claims, defendants could also contain their financial risk. Some plaintiffs might receive lower values for claims that were settled as part of a group. But litigating claims en masse lowered the cost and risk per claim for plaintiff law firms (Hensler, 2002).

To identify more potential claimants, plaintiff law firms began to promote mass screenings of asbestos workers at or near their places of employment (Hensler et al., 1985). Plaintiff law firms would bring suit on behalf of all of the workers who showed signs of exposure, sometimes filing hundreds of cases under a single docket number (Hensler et al., 1985). Given the profile of asbestos disease, the majority of plaintiffs had little or no functional impairment at the time of filing, although they met the legal standard for injury.

Some asbestos workers who were part of this group litigation would never develop a malignancy or significant functional impairment as a result of their asbestos exposure. But for those who did, being required to file soon after they were first clinically diagnosed as injured imposed a significant risk. Because most jurisdictions followed a "one injury" rule, these plaintiffs would not be allowed to file a second claim for the later-appearing disease. Settlement amounts could be calculated to take the statistical risk of future disability or early death into account, but those individuals who were unfortunate enough to develop serious disease might be left without sufficient funds to deal with disease-related losses.

To address this issue, some courts established "pleural registries" that enabled plaintiffs to satisfy statutes of limitation by filing their lawsuits, but delayed processing and resolving those lawsuits until the plaintiffs' injuries had progressed further (Schuck, 1992; Rothstein, 2001). In some jurisdictions, plaintiffs could choose whether or not to place their claim on such a registry; in others, claims were removable from an inactive docket (the pleural registry) only if they met pre-specified clinical criteria (e.g. diagnosis of malignancy, certain radiological exam results and pulmonary function test ratings) or were otherwise able to persuade the court that their claims should be activated. States that established pleural registries included Arizona, Connecticut, Hawaii, Illinois, Maryland, and Massachusetts. Although registries preserve plaintiffs' right to pursue compensation in the future, they do not provide present

compensation for whatever losses the plaintiffs might already have suffered or for monitoring their health going forward. Importantly, this means also that plaintiffs' lawyers do not secure fees immediately, making it harder for them to spread the risks of litigating more serious cases and less financially attractive for them to represent asbestos plaintiffs generally. Not surprisingly, most plaintiff attorneys in most jurisdictions are unenthusiastic about pleural registries, and in some jurisdictions (e.g., Baltimore) some plaintiff attorneys have vigorously contested their establishment or requirements. Support for pleural registries may also have waned after many states, including Maryland, Ohio, New Jersey, New York, and Texas—all states with large asbestos caseloads—adopted a "two-disease" rule, allowing plaintiffs who initially had nonmalignant diseases to bring a second lawsuit if and when a malignancy is diagnosed. Some states, such as California, relaxed their statues of limitation for asbestos claims. For example, in California the statutory period does not begin until a plaintiff's ability to work at his or her ordinary occupation is impaired (CA Civ Proc §34.02).

Efficiency Efforts Promoted Additional Litigation

- Judicial case management
- Defendants' settlement programs
- Bankruptcy trust procedures

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As asbestos cases flooded courts in areas of the country where there had been heavy exposure to asbestos, the courts struggled to manage asbestos caseloads more efficiently so as to reduce private and public transaction costs (Hensler et al., 1985; Hensler, 1995; McGovern 1986, 1989, 1997; Peterson & Selvin, 1991; Willging, 1985). The efforts of innovative judges to handle their asbestos caseloads efficiently were widely admired and imitated by fellow federal and state court judges (McGovern, 1995).

Increasingly, defendants chose not to aggressively contest liability but instead negotiated settlements of large numbers of cases with leading plaintiff attorneys' firms. These agreements typically called for settling hundreds or thousands of cases per year at amounts specified in administrative schedules that reflected differences in injury severity and other characteristics deemed to affect the value of cases. Although such strategies made it likely that defendants would pay some claims that would not have succeeded in court, these defendants hoped that by reducing their transaction costs they would minimize their total litigation bill (Hensler et al., 1985; Hensler, 2002). Judges encouraged these large-scale group settlements by consolidating cases for pre-trial processing. Typically, cases were consolidated by law firms representing the plaintiffs or by plaintiffs' place of employment, not by injury severity or strength of the legal claim (Hensler et al., 1985; McGovern, 1986).

Soon, judges and lawyers also began to consider the possibility of consolidating cases for *trial*. In some instances, just a few cases were selected for trial together, with a goal of minimizing duplicative testimony on issues such as general causation (Hensler et al., 1985). In other instances, a small number of cases would be selected from a larger group, with the thought that the verdicts the jury reached in the selected cases would establish the settlement value of the group as a whole (Selvin & Picus, 1987). In a few instances, juries were asked to decide the outcome of thousands of cases that had been consolidated for trial, based on hearing a few cases that had been selected to represent the group. In these consolidated trials, cases of varying severity and strength of legal and factual claims were grouped together (as had become the practice for settlement purposes) and the plaintiffs whose cases were presented to juries were deliberately selected to represent a range of injury severity (Hensler & Peterson, 1993; Saks & Blanck, 1992).

As some corporations emerged from bankruptcy and established trusts to pay claims, the bankruptcy trust administrators also developed claims processing procedures that would minimize transaction costs. Such procedures typically call for minimal information necessary to determine a claimant's eligibility to collect from the trust and to categorize the claim with regard to severity in order to determine the amount of money to be paid (Peterson, 1990; Smith, 1990). As the number of bankruptcy trusts increased, the total amount of money available to claimants and their lawyers in return for minimal claim preparation effort also increased. Although the trusts paid only modest sums to each claimant, the total fees available to law firms for representing large numbers of claimants on their trust filings could be substantial.

Taken together, these efforts by courts, litigators, and bankruptcy trust administrators generally reduced the per-case costs of processing asbestos claims. In this way, asbestos litigation was transformed in fact—although not in form—into a quasi-administrative regime, with some, if not all, of the transaction cost benefits that one would expect as a result of such a transformation.

Importantly, reducing per-case transaction costs made filing small claims financially viable for more people, thereby encouraging mass filings. Typically, most low-value tort claims never enter the court system because the expense of filing them far outweighs the compensation that might be obtained. The evolution of asbestos litigation changed this equation. Although no one knows for sure how many claims would have been filed in the absence of the administrative transformation of the litigation, it is highly likely that the steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.

Global Settlements Failed

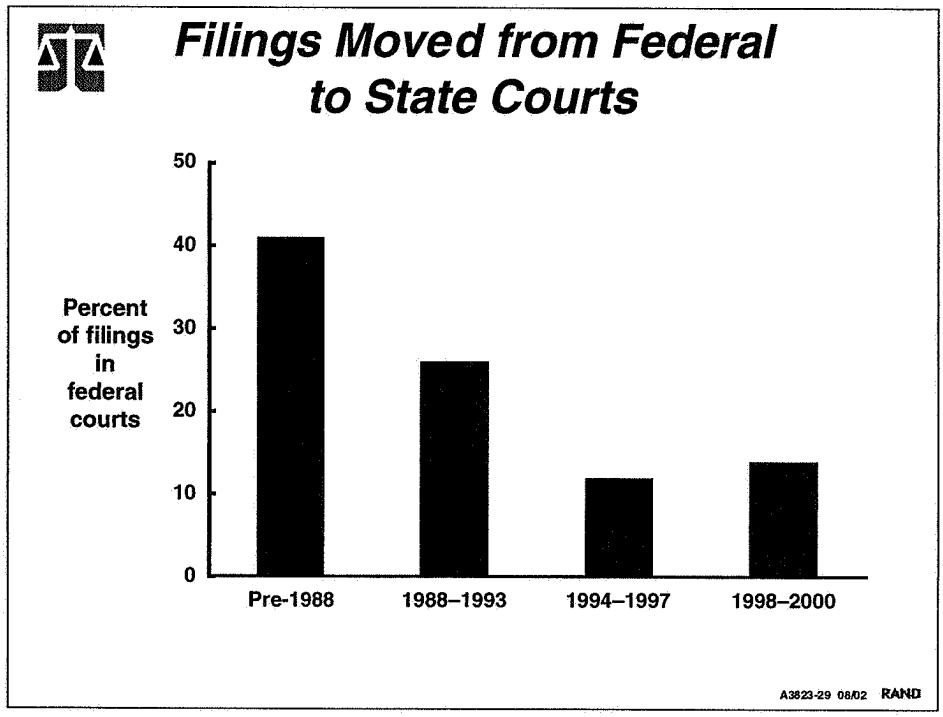
- Multi-district litigation (MDL) did not produce a large-scale settlement
- Class action settlements overturned by U.S. Supreme Court

A3823-27 08/02 RAND

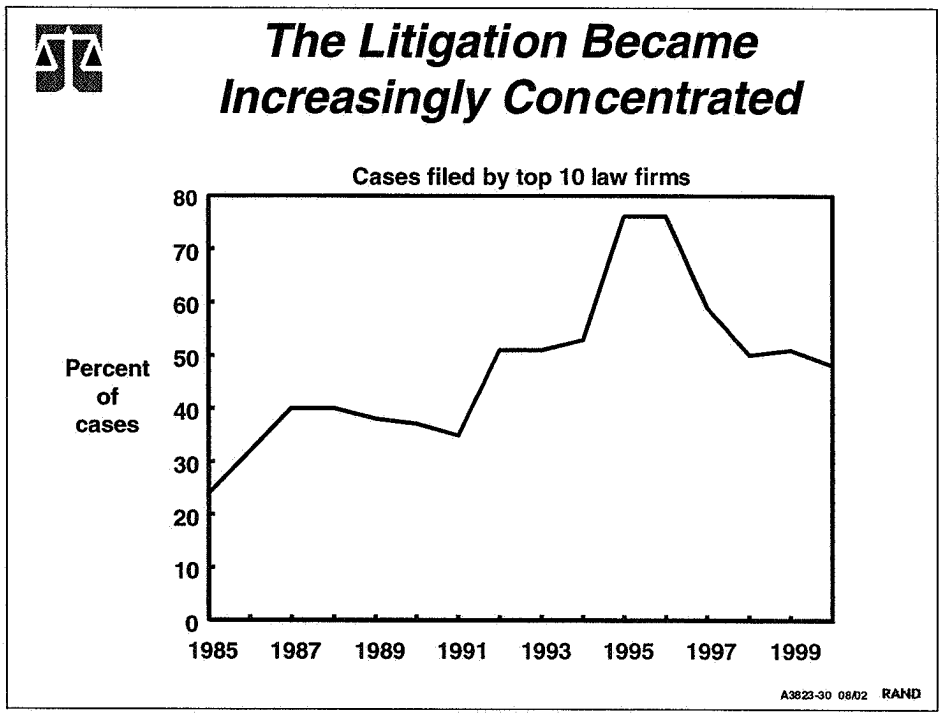
Most mass tort litigation in the United States is resolved through large-scale "global" settlements. Sometimes those settlements take place within the context of class action litigation. Occasionally, they have occurred after the defendant filed for bankruptcy (Sobol, 1991). In many mass personal injury cases, however, global settlements follow on the heels of the transfer of all federal cases arising out of the relevant factual circumstances to a single judge, under the authority provided by 28 U.S.C. §1407 for MDL (Hensler, 2001a; Rheingold, 1996; Weinstein, 1995). The MDL procedure has been extensively used in mass tort litigation, but it was not applied to asbestos litigation until 1991, more than a decade after the litigation's inception. After the cases were transferred, some participants in the litigation anticipated that the judge to whom they were assigned would help parties negotiate a global settlement of all federal cases against all defendants that would in turn provide a model for resolving state cases as well (Hensler, 2002). However, efforts to fashion such a broad settlement among the large number of defendants and plaintiff attorneys involved—with diverse and opposing interests—ultimately failed.

After a number of years, some of the major asbestos defendants negotiated a class action settlement of all *future* claims against them with leading asbestos plaintiff attorneys under the aegis of the MDL court (George v. Amchem

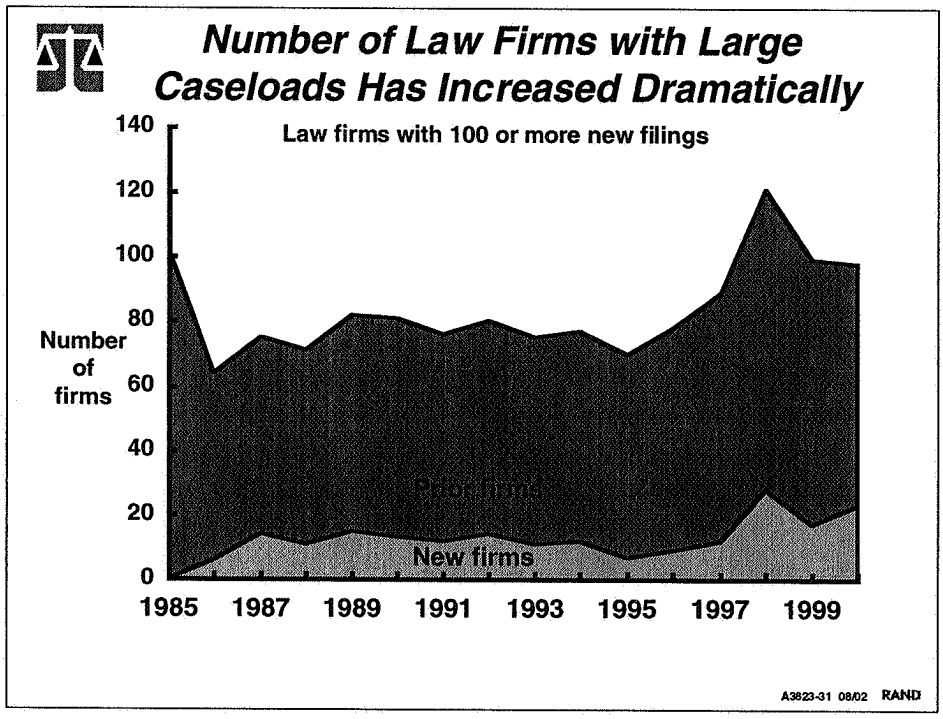
Products, 157 F.R.D. 246 [E.D., Pa., 1994]). That settlement proved highly controversial (Baron, 1993; Hensler, 2002; Symposium, 1995). When the settlement was rejected by the U.S. Supreme Court (Amchem Products v. Windsor, 521 U.S. 591 [1997]), and when the Court subsequently rejected a class settlement of asbestos claims against another major defendant (Ortiz v. Fibreboard Corp., 527 U.S. 815 [1999]), efforts to achieve a global resolution of asbestos litigation through class action litigation collapsed (Cabraser, 1998).



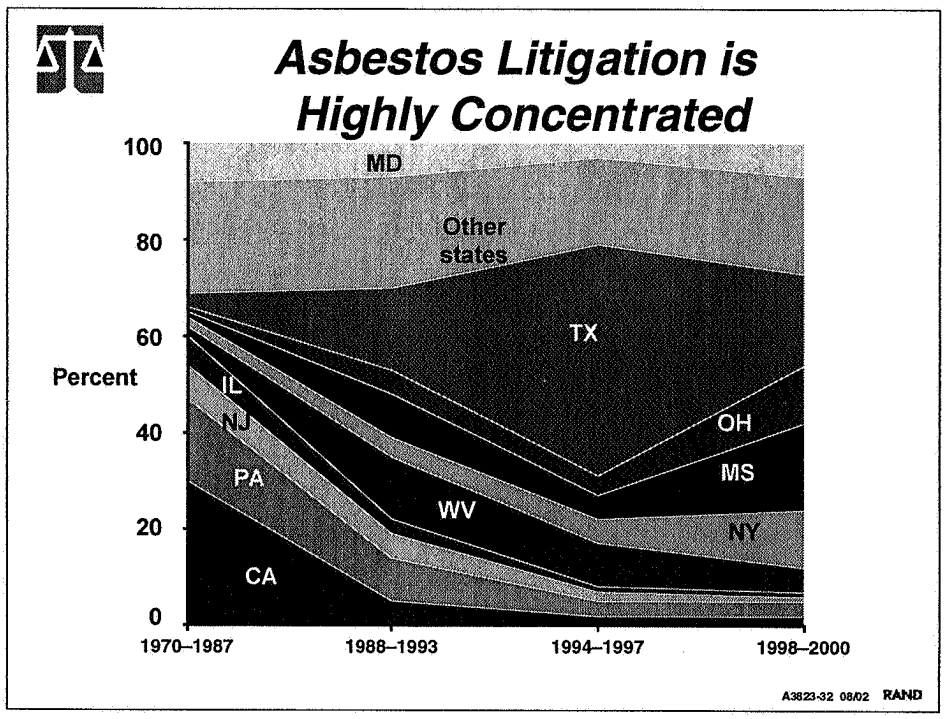
Over time, Judge Charles Weiner, who presides over the federal MDL litigation, had dealt with a substantial number of suits. To date, 95,994 asbestos suits have been transferred to Judge Weiner, in addition to the 7,411 cases that were filed in the Eastern District of Pennsylvania. Of these, about 73,000 cases have been closed; 265 have been remanded to their filing district for trial (communication with Clerk of the Court, Eastern District of Pennsylvania, August 30, 2002). But increasingly, plaintiff attorneys chose to avoid the federal courts and the MDL. Prior to 1988, 41 percent of the cases were filed in federal courts; by 1998, less than 20 percent were being filed in federal courts. With smaller fractions of asbestos lawsuits under the aegis of the MDL judge, the likelihood of achieving a global settlement within the MDL framework faded.



By the early 1990s, asbestos litigation appeared to have stabilized; in the words of a leading commentator, it had become a "mature" litigation (McGovern, 1989). The leading asbestos manufacturers had been sued in tens of thousands or hundreds of thousands of cases and had evolved strategies for managing the litigation. A large fraction of the cases were being filed by a small number of plaintiff law firms (Hensler & Peterson, 1993). Over time, the litigation became more and more concentrated in a small number of firms. By 1992, ten firms represented half the annual filings against the defendants who provided data to us. By 1995, ten firms (many, but not all, of the same firms that had been in the 1992 "top ten") represented *three-quarters* of the annual filings against these defendants, which had themselves grown by a third. The leading firms had standing settlement agreements with the major defendants. Virtually all cases settled. Defendants paid settlement amounts that reflected the characteristics of the case, the reputation of the lawyer, and their own exposure. Lead defendants, mainly asbestos product manufacturers, paid substantial amounts; peripheral defendants—whose connection with asbestos products was attenuated—paid more modest amounts. Defendants did not accept liability, but they had decided that it made financial sense to settle most cases, rather than spend money to litigate aggressively.



After the failure of the Amchem and Ortiz class action settlements in 1997 and 1999, the landscape of asbestos litigation began to change. Filings surged, perhaps as a result of the publicity engendered by the class action notices required by Amchem and Ortiz and the ensuing controversy, which was widely reported in the legal media. The number of law firms filing more than 100 cases annually increased dramatically, and the number of firms that were new to such large-scale filings shot up. A national settlement program that had been trumpeted by Owens-Corning Fiberglass Corporation as a solution to their asbestos litigation exposure collapsed under the weight of an unanticipated flood of claims, and the company petitioned for bankruptcy reorganization. The consortium of defendants that had hoped to contain their asbestos litigation exposure through the Amchem settlement suspended operations (Hensler, 2002), and many of their members also filed for Chapter 11 reorganization. As filings surged, many of the asbestos product manufacturers that plaintiff attorneys had traditionally targeted as lead defendants filed for bankruptcy. Plaintiff attorneys sought out new defendants and pressed defendants that they had heretofore treated as peripheral to the litigation for more money. With new firms engaged in litigating on the plaintiffs' behalf, and new corporations drawn into the litigation or assuming a more central role, the old settlement agreements began to unravel.



Deciding where to file a lawsuit is an important step in all litigation. The U.S. legal system offers litigants considerable flexibility with regard to forum selection. Depending on how they structure the litigation, plaintiffs may be able to choose between federal and state courts, among different state courts, and among different venues within a state. Plaintiffs in civil litigation and prosecutors in criminal litigation get to take the first step by filing in a particular jurisdiction. Civil defendants may contest the plaintiff's choice and, if successful, may remove the lawsuit to another jurisdiction. Criminal defendants may request a change in venue. Both can be hard to obtain.

"Forum shopping" is a term frequently used to refer to parties' strategic efforts to find the most attractive forum to pursue their case. The figure above illustrates the changes over time in the pattern of asbestos filings. In the early days of the litigation (1970–1987), 60 percent of asbestos personal injury cases filed in state courts were filed in four states: California, Pennsylvania, New Jersey, and Illinois. By 1998–2000, however, filings of asbestos cases in these states accounted for only 7 percent of the total. At the other extreme, five states—Mississippi, New York, West Virginia, Ohio, and Texas— that had accounted for 9 percent of the cases filed before 1988 accounted for 66 percent of filings between 1998 and 2000.

As a formal matter, the system frowns on such forum jockeying. The federal judiciary seeks to constrain forum shopping by applying the same procedural rules in all federal courts. But in diversity cases (private suits between parties

from different states), federal courts apply substantive state law. These state laws differ in ways that can determine outcomes of product liability cases such as asbestos lawsuits. Each state's laws also determine whether it is easy or difficult for out-of-state plaintiffs to file there, and how much latitude plaintiffs have for selecting venues within the state. As in the federal system, courts are supposed to apply uniform procedural rules within a state. Most states model their procedural rules upon the federal rules, but there are important differences between federal and state rules and among state rules. Because state substantive law and procedural rules differ—and because, in reality, informal practices differ across state *and* federal courts—our federal system provides strong incentives for plaintiffs to structure their lawsuits in ways that allow them to file in favorable forums. When defendants are able to do so, they in turn attempt to remove cases to forums that are favorable to them.

Cases Migrated to New States

Top five states with most asbestos filings (federal and state cases combined)

Pre-1988	1988–1993	1994–1997	1998–2000
California	Texas	Texas	Texas
Pennsylvania	West Virginia	West Virginia	Mississippi
Maryland	Pennsylvania	Florida	New York
New Jersey	Mississippi	New York	Ohio
Illinois	Maryland	Louisiana	Maryland

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Historically, asbestos litigation has been heavily concentrated in a relatively small number of states. In the early days of the litigation, cases were filed in about a dozen federal and state courts in coastal areas where shipyard workers had been heavily exposed to asbestos and in the gulf states where there had been heavy use of asbestos in petrochemical facilities (Hensler et al., 1985). Just nine states' federal and state courts accounted for three-quarters of the cases filed through 1987.

By the last period available for analysis (when 86 percent of all cases were filed in state courts), ten states accounted for 84 percent of the cases. Five of the original nine leading states—Texas, Mississippi, Maryland, Pennsylvania, and New York—were in the 1998–2000 "top 10." Five states became centers of asbestos litigation later: Florida, Louisiana, Ohio, Virginia, and West Virginia.

Mississippi's liberal joinder rule, which allows plaintiffs from out of state to join a lawsuit filed by in-state plaintiffs against out-of-state defendants, provides one explanation for the concentration of filings there. The result is something akin to a multi-state class action, without the necessity for plaintiffs to meet the class certification requirement (F.R.C.P. 23[b][3]) that common issues predominate and without the protections against intra-class conflicts of interest required by the U.S. Supreme Court in Amchem (521 U.S. 591 [1997]).

In Maryland, Mississippi, and Virginia, trial judges have consolidated thousands of cases for trial. Trying asbestos claims together is not new, nor are consolidated trials unique to these jurisdictions. In 1984, Judge Robert Parker consolidated 30 cases for trial in the Eastern District of Texas (Selvin & Picus, 1987), and judges elsewhere have tried smaller numbers of cases together (Hensler et al., 1985). But trying thousands of cases together raises due process questions for plaintiffs and defendants alike (Trangsrud, 1989). If the jury decides in favor of the defendant, *all* of the plaintiffs, not just those whose cases were presented to the jury, lose—as indeed happened in a trial of 800 cases arising out of the use of Bendectin (Green, 1996). For defendants, the risk of a liability verdict and huge punitive damages, as well as the potential for juries to peg the amount of a compensation award to the most injured plaintiff, however unrepresentative that plaintiff may be, loom large. Defendants have challenged large-scale consolidations for trial of asbestos lawsuits on due process grounds. In 1998, the Fifth Circuit Court of Appeals vacated the results of a consolidated trial in which verdicts for 160 plaintiffs were extrapolated to a class of more than 3,000 plaintiffs (Cimino v. Raymark Indus., 151 F.3d 297 (Fifth Circuit, 1998). The court held that the trial plan violated the Seventh Amendment right to trial. However, the West Virginia Supreme Court has upheld and indeed encouraged mass consolidations in that state (Rothstein, 2001).

In asbestos litigation, experience suggests that consolidation tilts the playing field against defendants, rather than against plaintiffs. As judges who favor mass consolidations as a calendar-clearing mechanism anticipate, defendants faced with a consolidated trial of thousands of cases are likely to settle.

Other procedural rules and practices may attract plaintiffs to certain states or pose special challenges for defendants who are sued there. Many of these rules and practices apply to civil litigation in general but have special "bite" in asbestos cases. Under Mississippi's rules, for example, trial courts lack the authority to order independent medical examinations of plaintiffs (Swan v. IP, Inc. 613 So. Fd 846 [1993]), limiting defendants' ability to challenge asbestos plaintiffs' disease allegations. In Texas, where asbestos cases are dispersed over multiple jurisdictions and there are many different law firms now representing plaintiffs, defendants who are named on thousands of cases may be noticed on the same day for scores of trials in a dozen or more jurisdictions. This creates special settlement pressures for defendants. In California, the Code of Civil Procedure §340.2 gives priority for trial scheduling to all plaintiffs with a terminal illness, allowing plaintiffs with mesothelioma to get to trial quickly. Similarly, New York City has a special expedited trial schedule for asbestos plaintiffs with mesothelioma and other cancers. Elsewhere, plaintiffs with terminal illnesses sometimes die before their cases reach trial.

Cases Concentrated in Venues Favorable to Plaintiffs

Top five state court venues

1970–1987	1988–1993	1994–1997	1998–2000
Los Angeles, CA	Kanawha County, WV	Harris County, TX	Cuyahoga County, OH
San Francisco, CA	Jackson County, MS	Galveston County, TX	Jefferson County, MS
Philadelphia, PA	Baltimore, MD	Jefferson County, TX	New York, NY
Baltimore, MD	Orange County, TX	Monongalia, WV	Baltimore, MD
Alameda, CA	Middlesex County, NJ	New York, NY	Claiborne County, MS

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Within the leading states, plaintiff attorneys favored certain venues. By the mid-1990s, three counties in Texas (Harris [Houston], Galveston, and Jefferson [Beaumont]) accounted for 42 percent of all new filings. In the last several years, two counties in Mississippi (Jefferson [Natchez] and Claiborne [Vicksburg]) joined the list of venues attracting large numbers of claims. In 1998–2000, close to 20,000 cases, 13 percent of the total filed over that period, were filed in these two counties.

Some of the states and venues in which asbestos filings were or are concentrated are areas with high levels of civil litigation generally. In 2000, New York and California led the nation in absolute numbers of civil case filings, with New Jersey in fourth place, and Texas following in eighth position (National Center for State Courts, 2001). Maryland led the nation in per capita civil case filings, with New Jersey and New York following in fifth and sixth places respectively. But the concentration of asbestos filings across states and venues within states primarily reflects the character and history of the litigation, as well as the perceived advantages that different venues offer plaintiffs. Many firms developed asbestos specialty practices because they were located in regions with high asbestos exposure. Not surprisingly, they tended to file cases in states and venues in these regions. Over time, some of these firms developed nationwide practices but continued to file cases in the jurisdictions where they had previously been successful. This partially explains why the Baltimore, Maryland, trial court was among the "top 5" venues in three of the four periods displayed

in the charts and why New York county (Manhattan) was among the leading venues in the two most recent periods. But these historical circumstances do not seem to entirely explain recently emerging patterns of concentration. Whereas case filings in some of the leading venues are distributed over time in the same proportions as total case filings, virtually all of the cases filed in Jefferson and Claiborne Counties were filed in the last few years. Concentrations of filings in some other counties (e.g., Cuyohoga, Ohio, and Erie, New York) also appeared quite recently. While it is possible that workers in these areas were exposed to asbestos more recently than elsewhere (and hence developed signs of disease more recently), it is much more likely that litigation dynamics—such as the establishment of new firms, more aggressive screening practices, or shifts in the perceived attractiveness of these forums—explain these patterns. Defendants assert that two developments have encouraged mass filings: the ability of plaintiff attorneys to choose venues most favorable to them—even if the plaintiffs were exposed to asbestos elsewhere—and trial management practices that defendants view as advantageous to plaintiffs (Rothstein, 2001).

Outline

- How did we get here?
- **Where are we today?**
- Is there a better way?

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Dimensions of the Litigation

- Claims
- Costs and compensation
- Economic effects
- Future outlook

A3823-39 08/02 RAND

Over 600,000 Claimants to Date

- Number of claims filed annually has risen sharply
- Typical claimant files against several dozen defendants
- Average severity of claimed injuries is declining
  - Slow growth in number of seriously ill claimants
  - Very rapid growth in numbers of claims for less serious injuries

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We believe that over 600,000 individuals have brought claims for asbestos-related personal injuries through the end of 2000.

A number of major asbestos defendants and trusts have provided us, on a confidential basis, lists of the claimants who named them in an asbestos lawsuit before 2001. Because claimants typically file claims against multiple defendants, even if complete data on the number of claims filed against all defendants were available (which they are not), we could not simply add up all of these claims to get the total number of claimants. We deleted the observations on each list for which we did not have adequate information to determine whether the claimant was also included on one or more of the other lists. We then compared the lists to identify the total number of unique individuals who had brought a claim against one or more of these entities.

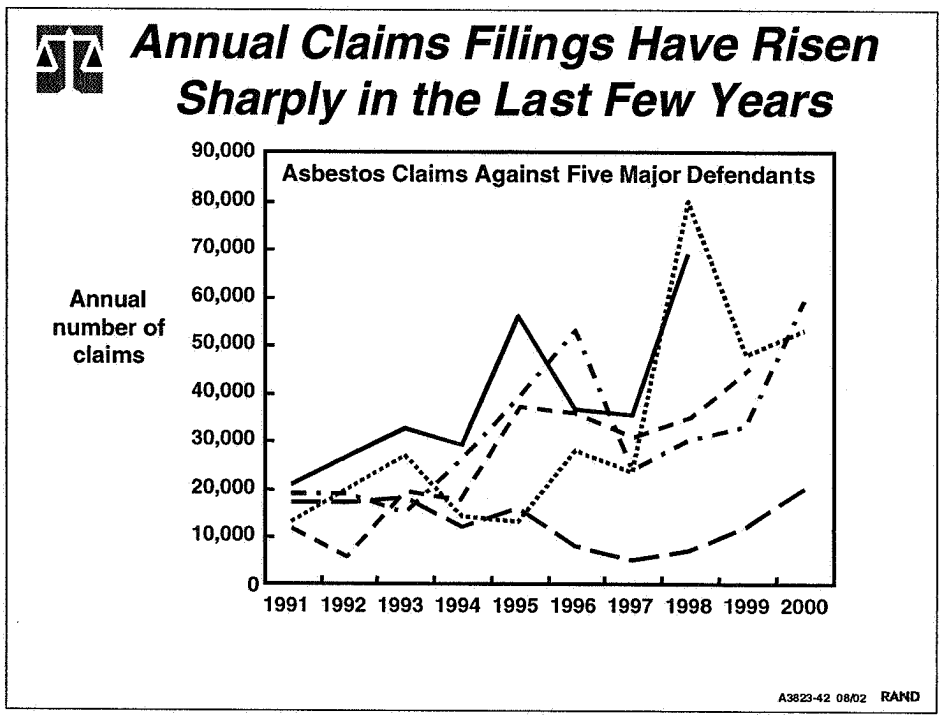
For several reasons, our total of 600,000 claimants to date is probably an underestimate. First, we obtained data on claims submitted through the end of 2000, but a large number of claimants filed claims in 2001. For example, nearly 91,000 claims were filed with the Manville Trust during 2001 (www.mantrust.org). Some of these claimants may have already filed against one of the entities that had provided lists to us, in which case they are included in our count. But many of those who filed with the Manville Trust in 2001 are probably not included in our estimate. Second, there may be individuals who

brought asbestos claims but did not name any of the entities from whom we had obtained data and are therefore not included on any of the lists available to us. Because the entities who provided these lists include many of the defendants and trusts who have been prominent in the litigation, we believe there are few claimants who did not name any of them. Nonetheless, there are probably some claimants who are not included on the various lists provided to us. Third, some of the claimants we deleted from one list because of inadequate identification information may not have been represented on any of our other lists and therefore are not included in our final tally.

Over the last decade, the annual number of claims filed against most defendants increased substantially, with some defendants seeing claims double in a single year. The patterns vary across defendants. In some years, the number of filings against one defendant rose sharply, while claims filed that year against another defendant decreased. Nonetheless, the general pattern shows a dramatic increase in the rate at which claims are entering the system.

Because most claimants file claims against multiple defendants, the magnitude of asbestos litigation is amplified beyond what it would be in more traditional tort litigation that has plaintiffs filing lawsuits against one defendant or a small number of defendants. Furthermore, the number of defendants named by the typical claimant is increasing. In the early 1980s, claimants typically named about 20 different defendants. The data we have now suggests that by the mid-1990s, the typical claimant named 60 to 70 defendants.

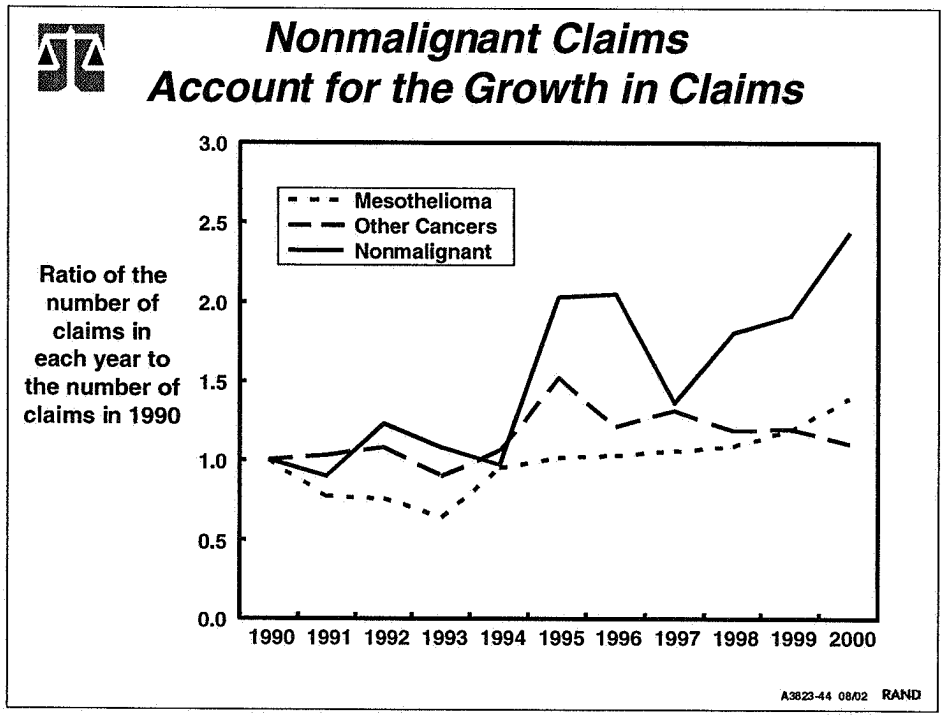
Although the number of claimants is increasing rapidly, the average severity of claims is declining in the sense that a growing fraction of claims are for less severe injuries. While the frequency of claims from people with malignant diseases has been increasing slightly, the frequency of claims from those who are less seriously ill, or asymptomatic, is growing very rapidly. In other words, not only has the number of claims been increasing but also the composition of those claims has been shifting.



This chart shows the number of claims filed each year over the last decade against five major defendants, including a bankruptcy trust, defendants who have entered bankruptcy, and non-bankrupt corporations. We gathered data for three of these defendants from public records. The two other datasets are private but have been shared with other analysts and/or presented elsewhere (see, e.g., Merrill Lynch, 2000). Each of these defendants has a particular posture in the litigation, so we would not expect their experiences to be identical. Nor would we expect their experiences to be representative of all defendants. However, in dozens of interviews we conducted with participants on all sides of the litigation, there has been near universal agreement that these defendants' experiences are broadly representative of the patterns of asbestos claim filings over the 1990s. We include only five defendants on the chart so as not to obscure the details of each defendant's experience.

The sharp year-to-year changes in annual filings against each of these defendants reflect events in the litigation in general or in the circumstances of a particular defendant. The general pattern, however, is the same for all of them: Over the past decade, the number of claims filed annually against each of these defendants increased substantially. Four of them were each receiving 15,000 to 20,000 claims per year at the beginning of the 1990s. That number grew throughout the decade until by the year 2000 it had grown to roughly 50,000 claims per year. The bottom line shows one company that appeared to have the litigation under control in the early 1990s when the annual

number of claims against it was actually drifting downward. But even this company experienced a sharp increase in claims toward the end of the decade Whether these trends will continue into the future is an open question. But it is clear from our interviews that recent changes in filing rates have played an important role in shaping the future expectations of attorneys, parties, and business analysts.



To illustrate trends over time by injury category, we computed the ratio of the number of claimants in each category who filed a claim each year to the number of claimants in that category who filed a claim in 1990. It is clear that the growth in the annual number of claims observed in the earlier chart is almost entirely due to increases in the numbers of nonmalignant claims entering the system.

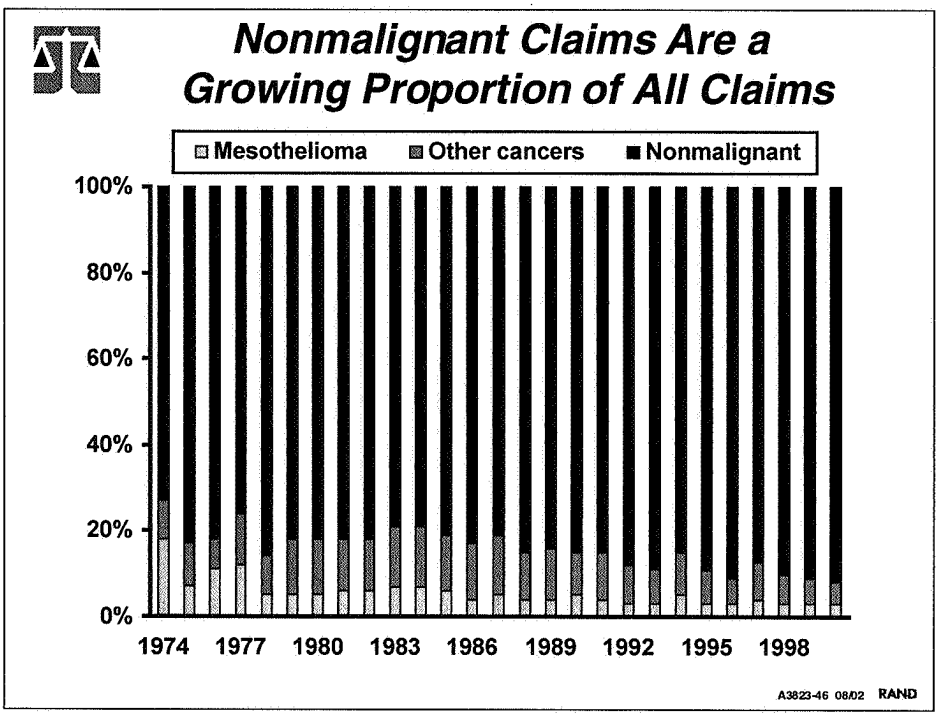
In the early 1990s, the number of mesothelioma claims drifted downward. By 1993, the annual number of mesothelioma claims had fallen by about one-third. But as the chart shows, the number of mesothelioma claims began to climb again in the mid-1990s. By 2000, the annual number of mesothelioma claims entering the system had grown to about one and a half times the 1990 level. Although the annual number of mesothelioma claims grew over the decade, the absolute number of these claims is very small compared to the absolute number of nonmalignant claims. Hence, the growth in the annual number of mesothelioma claims accounted for only a very small part of the growth in the total number of claims entering the system each year. Nonetheless, because these are the most serious, and consequently most costly, some of the attorneys we interviewed cited the growth in the annual number of mesothelioma claims as the most important recent change in the litigation.

Claims for other cancers grew during the first half of the 1990s, then gradually declined. The annual number of claims for cancers other than mesothelioma

ended the decade at a level roughly ten percent greater than had been experienced at the outset of the decade.

Claims for nonmalignant injuries grew sharply through the the last half of the decade. Almost all the growth in the asbestos caseload can be attributed to the growth in the number of these claims, which include claims from people with little or no current functional impairment. Many of the participants we interviewed, including those involved on behalf of both plaintiffs and defendants, cited the rapid growth in the annual number of claims for nonmalignant conditions as the most important recent trend in the litigation.

Defendants do not generally agree on a classification scheme for nonmalignant injuries. For example, one defendant who provided information to us classified all nonmalignant claims into five categories. Another defendant divided them into 28 different categories, none of which matched any of the five categories used by the first defendant. Further, several defendants told us that they had changed the systems they used to classify claims over time. In these cases, we cannot even consistently classify nonmalignant claims by categories over time for the same defendant, let alone merge its claims data with the data provided by other defendants and trusts. Therefore, we have not been able to break down nonmalignant claims into finer categories.



The rapid growth in the annual number of claims filed for nonmalignant conditions has profoundly affected the overall distribution of claims entering the system. This chart shows the changing composition of claims by type.

Mesothelioma claims are shown at the bottom. Although the annual number of mesothelioma claims has been increasing in recent years, the number of all claims has been increasing much faster. Therefore, mesothelioma claims are decreasing as a proportion of the whole. Mesothelioma claims accounted for over ten percent of all claims in the 1970s, but fell as a percentage of total claims in the late 1970s, accounting for roughly five to seven percent of claims through most of the 1980s. In the late 1980s, the mesothelioma share of the claims entering the system each year fell further, to three to four percent of all claims, and remained at that level through the 1990s.

Other cancer claims, shown in the segment just above mesothelioma, show a similar picture. They accounted for 11–14 percent of annual total claims through the 1970s and most of the 1980s. The other cancer share of claims declined slowly in the late 1980s and 1990s to a relatively small proportion, about five percent of the whole, in 2000.

The top segment of each bar shows the proportion of claims that are for nonmalignant injuries. Nonmalignant claims accounted for roughly 80 percent of all claims entering the system through the mid 1980s. The fraction of claims that asserted nonmalignant conditions grew through the late 1980s and early 1990s, finally stabilizing at about 90 percent of annual claims in the late 1990s.

Claims from Workers in Nontraditional Industries Are Growing Most Rapidly

	1999	2000	2001	% increase 1999–2000	% increase 2000–2001
Traditional	16,997	31,496	43,397	85	54
Nontraditional*	11,420	23,582	40,453	107	71

*Food and beverage, textiles, paper, glass, iron/steel/nonferrous, durable (metal) goods, etc.

Source: Claims Resolution Management Corporation, 2001.

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Another emerging trend is an increasing volume of claims by workers who were exposed to asbestos in nontraditional industries. Thus far, most of the asbestos claims have been brought by people who came into contact with asbestos in the course of their work. People have been exposed to asbestos in other ways and some claims do arise from other kinds of asbestos exposure. But most claims are based exposure to asbestos in a workplace.

In the initial phase of the litigation, most claimants came from industries in which workers physically manipulated asbestos or products containing asbestos and typically inhaled large amounts of asbestos fibers on an everyday basis. Nicholson and his colleagues focused on the industries in which occupational exposure to asbestos was substantial: asbestos mining, manufacture, or installation, shipyards, railroad and automobile maintenance, construction, chemical, and utilities. Because workers in these industries were so heavily exposed to asbestos and, consequently, accounted for the large majority of claimants in the early days of the litigation, these industries are often termed the "traditional" industries. More recently, however, there has been rapid growth in the numbers of claims brought by people who were exposed to asbestos while working at a job site where asbestos was present in the atmosphere but not to the degree typical of the traditional industries. For example, large numbers of claims have recently been brought by workers in the textile industry. Textile workers sometimes work with machines run by motors with gaskets that contain

asbestos or in facilities ventilated by ducts lined with asbestos. Some asbestos fibers may have been released into the air and, consequently, workers may breathe some amount of asbestos. But they are unlikely to handle it or inhale as much of it as the shipyard workers (who were working in enclosed, tight quarters, in an atmosphere thick with asbestos fibers) or asbestos installers. In fact, the growth rate in the annual number of claims from individuals who were exposed in these nontraditional industries is now significantly higher than growth rate in the annual number of claims from those in traditional industries. The number of claims per year from individuals who were exposed while working in the nontraditional industries is now about the same as the annual number of claims filed by workers from the traditional industries.

The growing proportion of claims from workers who were exposed to asbestos in the nontraditional industries implies that an increasing proportion of claims are being brought by people whose exposure to asbestos has been less severe than it was in the past. Because the severity of asbestosis is related to dose, the growth in the fraction of claims brought by people whose exposure to asbestos was less severe would imply a commensurate decline in the severity of claimed conditions.

The Number and Range of Defendants Have Also Increased Sharply

- Our list of defendants includes more than 6,000 firms
  - Increasing number of defendants outside the asbestos and building products industry
  - Both large and small businesses
- At least one company in nearly every U.S. industry (at the two-digit SIC level), now involved in litigation
- By 1998, nontraditional defendants account for more than 60% of asbestos expenditures (confidential study)

A3823-49 08/02 RAND

Because most of the traditional defendants are in bankruptcy and are not making payments any more, the litigation has moved on to a wide variety of new defendants. The number of defendants typically named in claims is growing as well.

The initial RAND study of asbestos costs and compensation (Kakalik et al., 1983) found the list of defendants named on asbestos claims included approximately 300 firms. As the litigation has continued, the number of companies named by asbestos claimants has grown dramatically. A number of defendants, insurers, and plaintiff and defense attorneys have provided lists of asbestos defendants to us on a confidential basis. We have worked through the lists provided us to combine related corporate entities—subsidiaries, branches, divisions, and so on. To date, we have identified over 6,000 entirely independent entities that have been named as defendants on an asbestos personal injury claim.

Asbestos defendants span the full range of American business. Many are large corporations with thousands of employees and billions in revenues. Others are firms with as few as 20 employees and just a few million dollars in annual revenues.

The litigation has spread to virtually all parts of the U. S. economy. The U. S. Department of Commerce uses the Standard Industrial Classification (SIC) system to categorize economic activity for statistical purposes. The SIC system is hierarchical. All types of economic activity are divided into a small number

of very broad categories with narrower subdivisions. Every business in the United States is assigned an SIC code according to its primary activity. The firms on our current list of defendants fall into 75 different SIC categories at the 2-digit level. The SIC system divides the entire U. S. economy into 83 industries at this level. In other words, this litigation has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy. The incidence of litigation is very spotty in some areas—with only a handful of defendants in some codes—and heavy in others. But the point is that the litigation has spread well beyond the asbestos-related manufacturing and installation industries where it first began.

Nontraditional defendants are also paying an increasing share of the costs to resolve asbestos injury claims. A confidential study of asbestos costs reports that, by the late 1990s, nontraditional defendants accounted for about 60 percent of asbestos expenditures. In contrast, according to this report, in the early 1980s, traditional defendants accounted for about three-quarters of expenditures. This study was performed for a private client by a respected analyst who has had extensive experience in the asbestos area, and whose work was cited to us by plaintiff and defense attorneys alike. We discussed both the analysis and the data on which it was based with the analyst and determined that the work was analytically sound.

Given the number of major defendants that have filed for bankruptcy since 1998, it seems likely that the nontraditional defendants' share of the costs to resolve asbestos injury claims is substantially higher today.

What's Going on Today?

	1982	Today
Number of claimants	21,000	600,000
Number of defendants	300	6,000
Total costs to date (nominal $)	$1 B	?
Bankruptcies	3	?
Estimated future costs (nominal $)	$38 B	?

A3823-51 08/02 RAND

In 1982, people were shocked to learn that over 21,000 claimants had filed claims for asbestos-related injuries and that the litigation had spread to about 300 defendants. Today, we believe that through the year 2000 over 600,000 claimants had filed against about 6,000 defendants.

Dimensions of the Litigation

- Claims
- → Costs and compensation
- Economic effects
- Future outlook

A3823-52 08/02 RAND

Estimated Total Costs of Resolving Asbestos Claims Through 2000: $54 B

- Publicly available data are very limited
- We estimate total outlays of $54 B through 2000
  - U.S. insurers $22 B
  - Insurers outside U.S. $8–$12 B
  - Defendants $20–$24 B
- At least 5 major companies have each spent more than $1 B on asbestos litigation

A3823-53 08/02 RAND

There are no publicly available estimates of the total amount spent on asbestos litigation, and the data needed to develop an estimate are not publicly available. We obtained confidential data and the results of proprietary studies from a variety of sources. Based on these data and analyses, we estimate that approximately $54 billion has been spent on asbestos litigation through 2000. That includes what defendants have spent compensating claimants and paying their loss adjustment expenses, i.e., their transaction costs.

As noted earlier, we combined data provided on a confidential basis from a large number of defendants and trusts to estimate the number of claims for each type of claim (mesothelioma, other cancer, or nonmalignant) filed in each year through 2000. We used these data to estimate the distribution of time-to-disposition for all defendants combined for each type of claim. The defendants and trusts who provided these data to us generally told us they believe they do not systematically settle claims against them faster, or slower, on average, than other defendants. In our interviews with other participants in the litigation, we asked if they could suggest defendants or trusts who they thought were particularly quick, or slow, to settle claims. While a variety of entities were discussed in these conversations, the defendants and trusts in our database were not often mentioned. We assume these distributions are representative of the distribution of time-to-disposition by type of claim for all defendants and trusts. We multiplied our estimates of the numbers of claims filed each year for each type of claim by our estimates of the distributions of time-to-disposition for

each type of claim. The resulting estimates are equivalent to estimates of the numbers of claims of each type settled each year.

We then estimated the total costs of claims of each type in each year. Total costs include both the amounts paid a claimant of each type by all defendants combined and defendants' transaction costs. We began with RAND's estimates of the average costs per claim in 1982 by type of claim (Kakalik, 1983). We then estimated the corresponding total costs per claim by type in 2000. (We received assistance from analysts at Tillinghast-Towers Perrin, a leading actuarial consulting firm, in estimating the year 2000 total costs.) We computed the average annual rate of increase in costs per claim for each type of claim between these two estimates and used these rates to estimate the cost trends from 1982 through 2000. We have no reason to believe that the costs of claims for each type of claim grew smoothly over that period. Costs undoubtedly grew more rapidly in some years than in others. However, the average of the estimates of costs by year we developed by smooth interpolation between 1982 and 2000 should be close to the average of the true costs over that period.

We multiplied our estimate of the number of claims by type of claim filed in each year over the period 1982–2000 by the corresponding estimates of ultimate costs per claim by disease type and year and the distribution of time-to-disposition. The result is an estimate of the total costs defendants incurred in each year on the claims of each type filed in each year. We added these estimates for the years 1983 through 2000 to the RAND estimate of total costs of asbestos litigation through 1982 to obtain an estimate of the total costs of asbestos litigation through 2000. Our estimate is $54 billion.

Analysts at Milliman USA, another leading actuarial consulting firm, have independently developed estimates of the total costs of asbestos litigation through 2000. They have told us our estimates were consistent with theirs. We also discussed our estimate with representatives of several major reinsurance companies. None of those we interviewed expressed strong reservations about our results. Some thought we might be somewhat high; others thought we were somewhat low. But none thought our estimate was very far off.

U.S. insurance companies are required to list their cumulative net paid losses, including loss adjustment expenses, in their annual statements. A. M. Best has collected and collated these data. They report that U. S. insurers have spent about $21.6 billion on asbestos claims through 2000 (Altonji, Horvath & Simpson, 2001).

Based on conversations with both U. S. and foreign insurance companies, we believe foreign insurers have spent $8 to 12 billion through 2000, over half of which has been assumed by London. Milliman estimates that foreign insurers have spent $7 to 10 billion on asbestos litigation to date (Bhagavatula, Moody & Russ, 2001, p. 86).

U.S. defendants have spent from $20 billion to $24 billion on asbestos litigation through 2000. In their bankruptcy filings and related documents, corporations filing for bankruptcy have reported expenditures (including costs recovered from insurance) ranging from $450 million to $5 billion. We are aware of at least five defendants who have each spent more than a billion dollars apiece. Out of more than 6,000 defendants, only a relatively small number have spent such large amounts. A very much larger group of defendants has spent relatively small amounts, but in the aggregate they add up to several billions of dollars.

Verdicts Are Infrequent but Attract Great Attention

- Since 1993, out of hundreds of thousands of claims, few have been tried to verdict
  - 527 trial verdicts
  - 1,598 plaintiffs reaching verdict
- Plaintiffs won two-thirds of the time
  - Mesothelioma plaintiffs were most successful
- Most claims were tried in groups
  - In most trials, juries heard a small number of claims

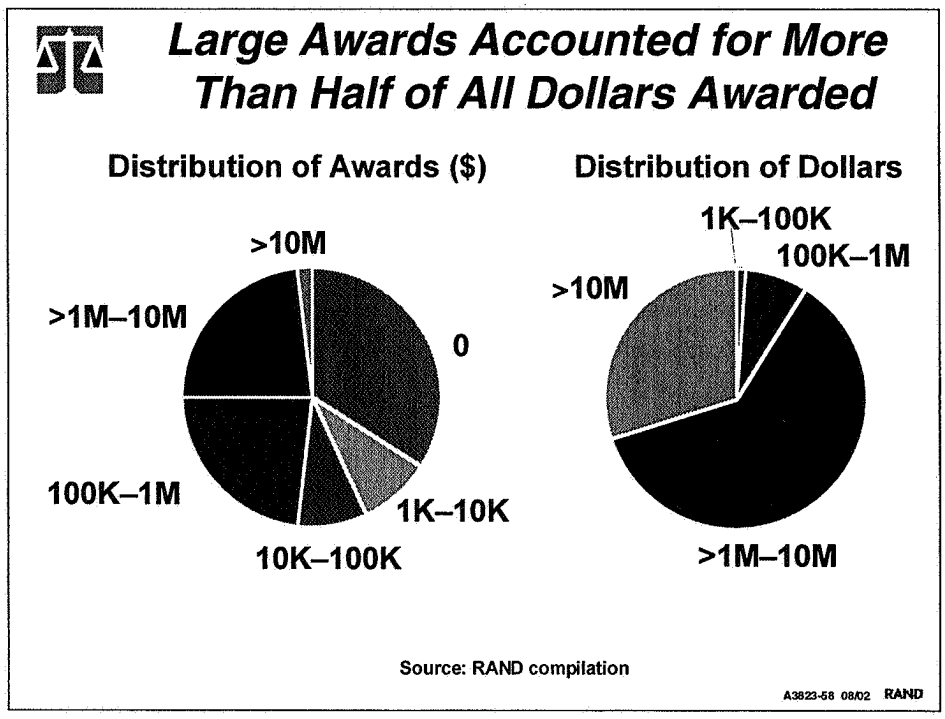
A3823-56 08/02 RAND

Using Mealey's Litigation Report on asbestos, we have identified all trial verdicts from 1993 to 2001. During that time, relatively few asbestos cases have reached verdict: there have been 527 trial verdicts involving 1598 plaintiffs. (There are more plaintiffs reaching verdict than trials because many trials involve multiple claims.) Although civil trial verdicts are becoming increasingly rare nationwide, the asbestos trial rate seems substantially lower than the norm. (Calculating a trial rate for asbestos suits is complicated because most claims are brought against scores of defendants, some of whom may settle and some of whom will contest cases up to verdict. Moreover, different defendants will settle at different times.)

The number of plaintiffs whose cases have been tried to verdict has decreased dramatically since 1993, from almost 500 to just over 150 in 2001. Mesothelioma and other cancer claims were more likely to reach trial than claims for nonmalignant diseases. However, 62 percent of all claims tried to verdict were for nonmalignant diseases.

About two-thirds of plaintiffs whose claims reached verdict from 1993 to 2001 won an award, somewhat higher than the rate of plaintiff success nationally in all tort suits and substantially higher than the rate of plaintiff success in product liability suits in many metropolitan jurisdictions (Moller, 1996). Mesothelioma plaintiffs were most likely to be successful (75 percent won an award), but more than half of claims for conditions other than cancer and asbestosis were also successful.

Across the period, about half the plaintiffs' claims that reached verdicts were tried together with other claims, some in groups of two to five but a significant fraction in groups of six or more. In about 10 percent of all the trials that went to verdict, a single jury heard a dozen or more plaintiffs' claims. Moreover, the liability decisions reached in some group trials, including trials where juries heard a smaller number of claims, applied to hundreds, or thousands, of other claims. The prevalence of multi-plaintiff trials is highly unusual for product liability cases.

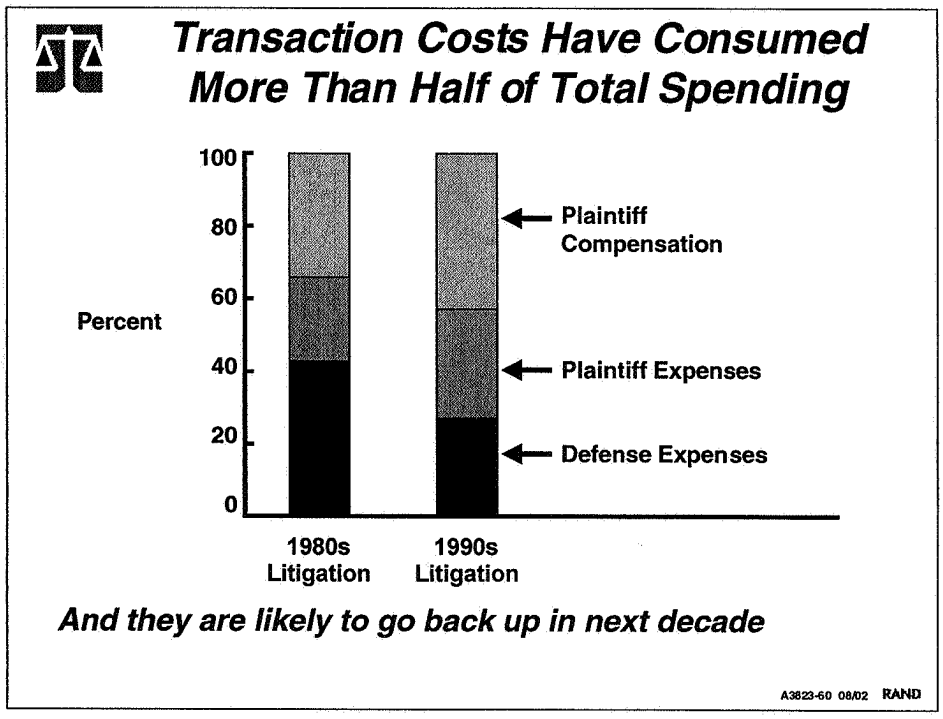


The mean verdict for successful plaintiff claims over the period was about $1.8 million. During this period, mean product liability awards in some jurisdictions were considerably higher, while some were considerably lower (Moller, 1996). But mean awards varied substantially by disease category, from $3.8 million for mesothelioma claims (higher than mean product liability awards in many metropolitan jurisdictions) to $322 thousand for nonmalignant diseases other than asbestosis. The mean award for successful asbestosis claims topped $1.6 million. The mean award for successful mesothelioma claims rose dramatically from about $2 million in 1998 to upwards of $6 million in 2001, while the mean award for successful asbestosis claims increased five-fold, from $1 million in 1999 to $5 million in 2001.

Just over half the plaintiffs whose claims reached verdict were awarded several hundred thousand dollars or more. About one-quarter of the successful plaintiffs were awarded in excess of a million dollars. As in most tort litigation, very large awards account for the lion's share of all the money awarded.

Not surprisingly, very large awards attract considerable attention. In August 2001, in what was described as the "largest asbestos verdict to date," a jury in El Paso, Texas awarded $55.5 million, including $15 million in punitive damages, against Kelly-Moore Paint Company to a mesothelioma victim and his family.

In September, a jury in Orange, Texas, awarded five workers with claims ranging from lung cancer to asbestosis $130 million, including $60 million punitive damages. In October, a Mississippi jury awarded $150 million to six workers with asbestosis claims. Local media reported that "none [of the six plaintiffs] actually has asbestosis." Even though very large awards may be reduced by remittitur or appeal, they reverberate through settlement negotiations and, importantly, through the stock market and investment analyst community.



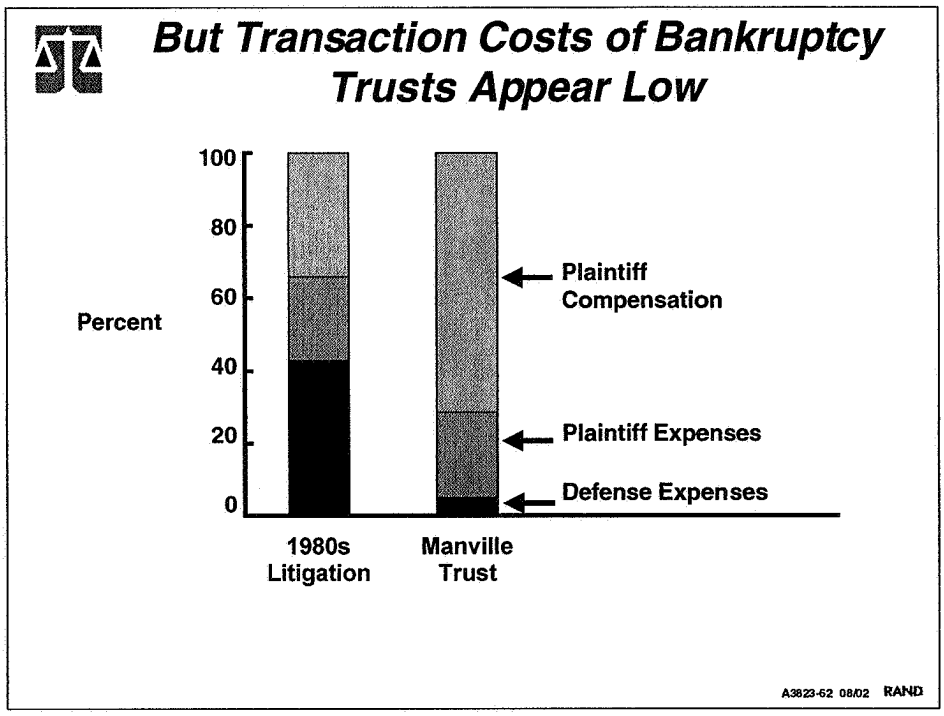
How much of the money that has been paid out in asbestos litigation was consumed by transaction costs—defense loss adjustment costs and plaintiffs' attorney fees and expenses—and how much went to injured parties? The earlier RAND study (Kakalik et al., 1983) concluded that injured parties ended up with 37 cents of every dollar spent in asbestos litigation.

However, the transactions costs associated with asbestos litigation soon grew as a fraction of total asbestos spending. The asbestos environment in the 1980s was highly litigious: Defendants disputed among themselves regarding responsibility for the asbestos at a site; defendants and insurers disputed over a host of coverage issues; and plaintiffs, defendants, and insurers vigorously disputed issues of causality, illness, etc. As a result, defense transactions costs increased and the share of total spending that claimants recovered net of their legal fees and expenses fell to about 34 percent of the total.

A number of these issues were essentially worked out in the late 1980s and early 1990s in the form of formal judicial decisions, agreements among defendants and insurers regarding joint defense efforts and coverage issues, and agreements between some plaintiffs' attorneys and defendants to settle claims according to a schedule of payments by claim type. These arrangements led to reduced defense litigation costs.

Using the same methods Kakalik et al. (1983) used in the earlier RAND study, we examined the data we obtained from defendants. We found that in the 1990s, a smaller fraction of what defendants spent on asbestos litigation went to defendants' and insurers' loss adjustment expenses. But the proportion of the money paid claimants that went to plaintiffs' attorneys remained the same. (Many of the people we interviewed said they had not seen any evidence that plaintiff attorneys' fees were reduced.) Consequently, the fraction of the dollars spent on asbestos litigation paid to claimants net of their legal fees and expenses increased in the 1990s, but claimants' net recovery of about 43 percent of total asbestos spending was still less than half the total.

Virtually all of our interview respondents discussed what they see as new instabilities in asbestos litigation. Many interviewees noted that the Center for Claims Resolution (CCR), the leading example of asbestos defendant cooperation, has ceased settling claims against its members. At the same time, interviewees told us, many defendants' agreements with plaintiff law firms were under reconsideration or being renegotiated. In particular, we have been told that a number of defendants are moving away from block settlements of large groups of claims and looking in more detail at individual claims on their merits. Plaintiff firms were said to be pursuing more adversarial strategies. And a number of those we interviewed believe that in response to the changing dynamics, there will be new insurance coverage battles. No one we interviewed offered us qualitative or quantitative information about changes in transaction costs resulting from these new sources of instability. But all of these factors have significant potential to influence transaction costs, and it seems likely that they will increase, at least temporarily, as a result. Because some of these issues may take several years to resolve, such a period of higher costs could be relatively long.



Once an asbestos defendant corporation is reorganized and a trust is established to assume its liabilities, claims processing procedures are largely administrative rather than adversarial. This should lead to dramatically lower transaction costs, and, in the case of the Manville Trust, experience confirms this intuition. From 1994 to 2000, the Manville Trust reported annual average operating expenses (not including special expenses associated with tobacco litigation) of about $10 million, about 5 percent of the total dollars paid out to asbestos claimants plus expenses during this period. The Manville Trust also requires that attorneys representing claimants who file claims against it charge a fee of no more than 25 percent. Our interviewees report that attorneys generally adhere to that requirement. Assuming these expense ratios are correct, people who file claims against the Manville Trust receive about 70 percent of the total dollars spent by the Trust. However, it must be noted that the funds available to these trusts are limited. The money may be being paid in a much more efficient way, but the amount paid to any particular claimant is much less than would have been paid in litigation, given what other claimants are being paid for the same kinds of claims. Moreover, most trusts do not limit attorneys' fees.

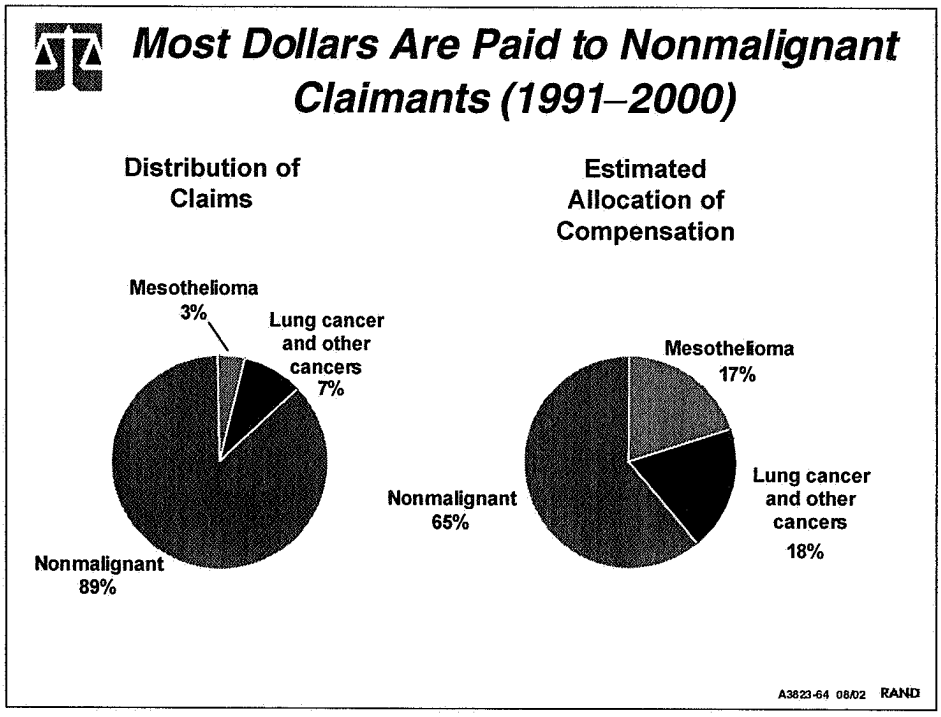
It Is Difficult to Determine What an Individual Claimant Receives

- **Only plaintiffs and their attorneys know how much claimants receive (net)**
  - **Claimants receive money from multiple sources over long time periods**
  - **Defendants pay different amounts for same injuries**
  - **There are wide variations by jurisdiction**
  - **Most of the data are not public**
- **But some aggregate distributional data are available**

A3823-63 08/02 RAND

As noted above, we estimate that total spending on asbestos personal injury claims through 2000 was about $54 billion. About $33 billion, or 61 percent of the total, has been spent on defense and claimants' transactions costs. Claimants' net recovery has been about $21 billion.

At this point we do not know what individual claimants receive, net of their attorneys' fees. Nor do we know how a claimant's net compensation varies with claimed injury. We have begun a follow-on study in which we will survey the defendants' and plaintiffs' attorneys for a sample of individual claimants to determine what the individual claimants actually received after paying their legal bills.



As noted earlier, we combined the data we obtained from a number of major defendants to estimate the distribution of diseases among claimants. Because one or another of these defendants is named on the vast majority of asbestos claims, the distribution of claims by type against them is generally representative of the distribution of claims among all asbestos claimants. The pie chart on the left shows the distribution of claims by type over the period from 1991 to 2000.

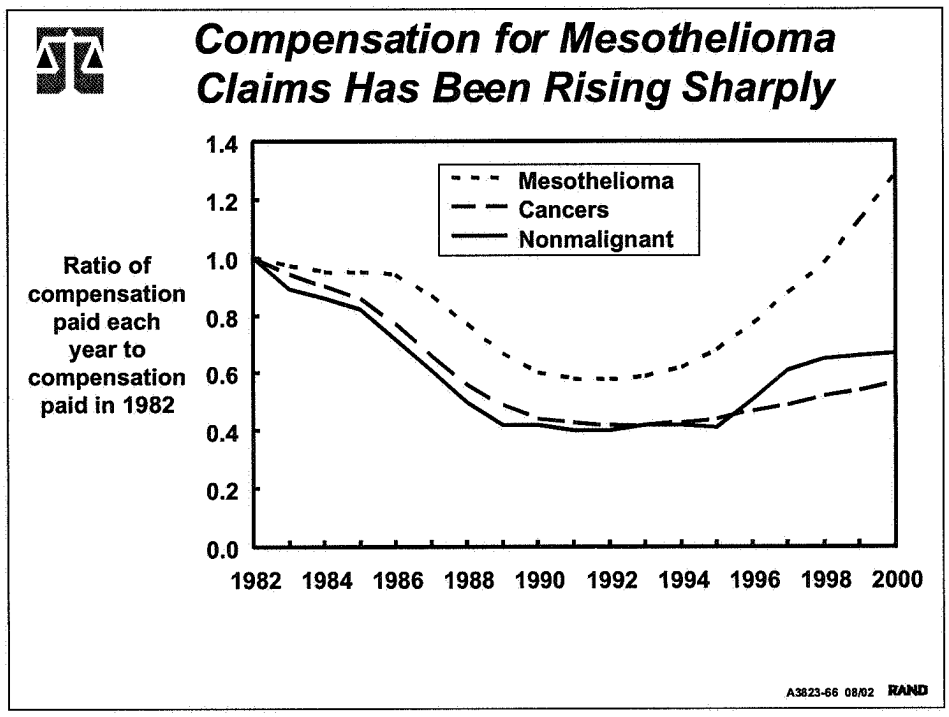
Generally, mesothelioma claims are paid the most, other malignancy claims an intermediate amount, and nonmalignant claims the least. For example, a defendant might pay three times as much for a mesothelioma claim as for a claim for another cancer and ten times as much for a mesothelioma claim as for a nonmalignant claim. The ratio of claim values by type apparently reflects perceptions of the relative trial values of such cases. The exact value paid for a particular case may also be influenced by the plaintiff's attorney (e.g., perceived litigation competence, risk aversion), the defendant (e.g., insurance availability, cash flow limits), and the jurisdiction of the case.

At a meeting of casualty actuaries in May 2001, analysts from Tillinghast-Towers Perrin presented estimates of the relative average compensation provided claimants across the country for mesothelioma, other cancer, and all nonmalignant claims combined from 1991 to 2000 (Angelina and Biggs, 2001). The estimates were developed using a sophisticated model for projecting potential asbestos bodily injury liabilities developed by Cross and Doucette (1997). Tillinghast-Towers Perrin provides actuarial services to a number of

clients regarding their potential asbestos liabilities. In the course of this work, they had access to sufficient data to estimate the ratios of claims payments by disease category. We applied their estimates of the relative compensation provided claimants with different conditions to the distribution of claimants by category (shown in the pie chart on the left) to estimate how the total amount provided to asbestos claimants to date has been divided among the categories. The results of these calculations are shown in the pie chart on the right

Mesothelioma claims accounted for about three percent of total claims and received about 17 percent of the dollars. About seven percent of claims over this period were for cancers other than mesothelioma; these claimants received about 19 percent of the dollars. Nonmalignant claims accounted for about 89 percent of claims and 65 percent of the dollars. These are averages over a nine-year period.

The Claims Resolution Management Corporation recently published the distribution of the Manville Trust's claims payments by disease category from 1995 through 2001. (Austern, 2002) Their experience over the last seven years has been almost identical to the results we obtained. Mesothelioma claims accounted for about four percent of the total claims paid by the Trust over that period. About 20 percent of the dollars paid by the Trust over that period went to Mesothelioma claimants. About eight percent of the Trust's claims over this period were for cancers other than mesothelioma; these claimants received about 16 percent of the dollars. Nonmalignant claims accounted for about 88 percent of claims and 64 percent of the dollars.



This chart shows the average amount that the defendants who provided data to us paid in compensation for each type of disease. Note that it shows what individual defendants paid in nominal dollars, on average, in each year relative to what they paid in 1982. The total amount any claimant received depends on the number of defendants who paid compensation to that claimant.

Defendants' average compensation payments for all types of claims declined through the 1980s, bottomed out in the early 1990s, and increased into the late 1990s. The amounts paid to mesothelioma claimants grew dramatically through the 1990s.

These results were confirmed in our interviews with participants in the litigation, including both plaintiff and defense attorneys. They told us that the ratio between mesothelioma and other injury claims for non-bankrupt defendants has widened considerably in the past few years. Moreover, some interviewees said that settlement values have increased substantially in particular jurisdictions, and they suggested that filing patterns have shifted over time, in part because of this trend. Taken together, these comments suggest that the relative sizes of different portions of the pie chart shown on the right in the previous slide could change substantially over time.

Bankruptcies Affect Patterns of Compensation

- Current claimants lose
  - Many get tiny fraction of agreed-upon losses
  - May take years for them to receive payments
- Future claimants may gain
  - Bankruptcy trusts have fiduciary responsibility to pay future claimants
- Non-bankrupt firms become target of more litigation

A3823-67 08/02 RAND

Bankruptcy has a decided effect on compensation patterns. During the bankruptcy process, claimants are not paid. And once a corporation emerges from bankruptcy reorganized and a trust established, significantly fewer dollars are available for claims and thus claimants are paid less. Because illness from asbestos exposure is characterized by long latency periods, it is likely that claimants will continue to come forward years into the future. The trusts are required to provide for future claimants and, consequently, are generally concerned about being sure there will be money for future claimants. The fact that many of the trusts pay only pennies on the dollar is one of the reasons why the litigation is spreading to greater numbers of defendants. If claimants cannot get adequate compensation from the former deep pockets, they must look for greater compensation from other defendants or pursue additional defendants.

The costs of bankruptcy for current claimants can be easily inferred from bankruptcy reorganization plans. These plans establish the amount due a claimant—in bankruptcy parlance, the "full liquidated value" of a claim—for each type of injury and then agree to pay some fraction of that value on each claim, typically a tiny fraction of its liquidated value. For example, the Manville Trust announced in July 2001 that in order to preserve the Trust's resources to pay future claims, it would reduce the fraction of liquidated claim value it pays to 5 percent (Austern, 2001). Previously, the Trust had been paying claims at 10 percent of their liquidated value. Trusts typically pay lower than liquidated value on current claims in order to preserve funds for paying future claims.

We have collected information on the length of time from bankruptcy petition to confirmation of the reorganization plan for 11 major asbestos defendant bankruptcies. The average length of time from petition to confirmation for these 11 bankruptcies is six years, but three bankruptcies (National Gypsum, Keene, Rock Wool) took only three years and one (48 Insulations) took 10 years. However, these numbers do not accurately portray the length of time it has taken some corporations to move from bankruptcy petition to paying claimants. Johns-Manville filed its petition in 1982, which was finally approved six years later, in 1988 (Matter of Johns-Manville Corp., 68 B.R. 618 [Bankr. S.D.N.Y. 1986], aff'd in part, rev'd in part, Kane v. Johns-Manville Corp., 843 F.2d 636 [2nd Cir. 1988]). Payments began then but were suspended in 1990 (Smith, 1990) and did not resume again until 1995, 13 years after Manville's initial filing (in re Joint Eastern and Southern Districts Asbestos Litigation, 878 F. Supp. 473 [E.D.N.Y. 1995, aff'd in part, vacated in part, 78 F.3d 764] [1996]). The Amatex reorganization plan was confirmed eight years after filing of the petition, but the Amatex Trust did not become operational until six years after that, or 14 years from the time the petition was first filed.

Because bankruptcy stays litigation against the bankrupt corporation and many corporations have recently entered bankruptcy, a considerable sum of money for paying current asbestos claims has been "taken off the table." In response, plaintiff attorneys told us that they are asking non-bankrupt defendants to pay more money on claims filed against them than previously negotiated. In addition, some plaintiff attorneys are identifying new defendants in industries where workers have not previously come forward in great numbers to claim compensation for asbestos injuries. Some plaintiff attorneys are also developing new legal theories on which to base claims against defendants who may not have been sued previously for asbestos injuries. Defense counsel told us that their clients were faced with higher costs to resolve asbestos claims than they had anticipated. As a result, they said, some defendants would abandon previous settlement practices intended to avoid litigation costs and pursue more aggressive—and more expensive—litigation strategies.

What's Going on Today?

	1982	Today
Number of claimants	21,000	600,000
Number of defendants	300	6,000
Total costs to date (nominal $)	$1 B	$54 B
Bankruptcies	3	?
Estimated future costs (nominal $)	$38 B	?

A3823-69 08/02 RAND

Dimensions of the Litigation

- Claims
- Costs and compensation
- → Economic effects
- Future outlook

A3823-70 08/02 RAND

Bankruptcies Are Becoming More Frequent

- First three bankruptcies occurred in 1982
- 13 more in the rest of the 1980s
- 9 in the first half of the the 1990s
- 9 in the second half of the 1990s
- 22 since January 1, 2000
- 4 dates to be determined

A3823-71 08/02 RAND

The present and prospective future costs of asbestos litigation have led a substantial number of firms to file for bankruptcy. Sixteen corporations entered Chapter 11 because of asbestos litigation in the 1980s. Three of them filed in one year, 1982. The 1990s saw approximately the same number of Chapter 11 filings, 18, evenly spread over the decade in the sense that half occurred between 1990 and 1994 and the other half between 1995 and 1999. But asbestos bankruptcies then accelerated: There have been more filings since 2000, at least 22 through July 2002, than there were in either of the prior two decades. We are aware of another four asbestos-related bankruptcies for which we have not yet been able to identify the filing date.

Because corporations file petitions for bankruptcy and include their reasons for filing in these petitions, it is possible to determine the number of bankruptcies associated with asbestos litigation from public records. But published counts of the number of companies that have filed for bankruptcy as a result of asbestos litigation vary somewhat. A bankruptcy can involve a parent company and one or more of its subsidiaries, and some analysts count each entity separately in their total. Our tally, however, counts a parent and any of its subsidiaries as one bankruptcy. Furthermore, because the litigation has touched so many companies, there are asbestos defendant companies that have filed for bankruptcy for reasons unrelated to asbestos litigation. To the best of our knowledge, our tally includes only those companies for which asbestos litigation was the primary reason for filing.

Costs of Bankruptcy Can Be Substantial

- **Transaction costs of bankruptcy reorganization are generally about 3% of firm value**
- **Bankruptcy imposes other costs**
  - **Disrupts relationships with suppliers and customers**
  - **Impairs (or eliminates) access to credit**
  - **Distracts managers' attention**
- **After reorganization, the bankruptcy trust may hold all or most of the firm's equity**

A3823-72 08/02 RAND

There has been considerable previous research on the costs of bankruptcy reorganization (Franks and Touros, 1989; Weiss, 1990; White, 1996). This literature shows that the cost is equal to about three percent of a firm's value (defined as book value of debt plus market value of equity). But to date, no one has studied the costs of asbestos bankruptcy reorganization. The bankruptcies that have been studied involved large publicly traded corporations comparable in size to large asbestos defendant corporations. But reorganization costs for asbestos defendants may be higher than the three percent of firm value reported in these earlier studies because none of the studied bankruptcies included massive numbers of tort creditors.

Various other bankruptcy-related costs also impinge on a firm's ability to do business.

Finally, as noted earlier, those companies that have emerged from bankruptcy have emerged in the form of a reorganized company and a trust, the latter generally using essentially all of shareholders' value to pay off future claims. Bankruptcy is a very expensive proposition for shareholders.

And Bankruptcy Is Only Part of the Story

- Defendants' net payments to asbestos claimants weaken their financial position, cost jobs
- Upper-bound estimates of effects on defendants:

	Today	Eventually
Reduced level of investment	$10 B	$33 B
Jobs not created	138,000	423,000

- However, other firms' reactions may offset the overall effects on the economy

A3823-73 08/02 RAND

Moreover, bankruptcy is not the only economic effect of asbestos litigation. Some defendants that have not filed for bankruptcy have said that asbestos litigation has been a major drain on their resources. To finance investments in new plant and equipment, most firms first use their retained earnings. Only when firms have more good investment opportunities than they can finance from retained earnings do they turn to external sources of finance, such as loans or new equity issues. For asbestos defendants, each dollar paid out in defense costs and damage awards or settlements reduces retained earnings. As a result, these firms have fewer internal dollars available to finance investment. They may respond by reducing their investment levels, either limiting investment to what can be financed using retained earnings or, if they borrow externally, eliminating investments that are unattractive because of the higher cost of capital. Reductions in investment levels, in turn, can lead to reductions in the creation of new jobs. The point is that bankruptcy *per se* is not the only effect of asbestos litigation costs on the financial condition of defendant firms.

We can estimate the effects of asbestos litigation costs on defendant firms. These estimates are upper bounds of the effects on all firms; the true figures could be substantially lower. We earlier observed that we believe defendants have spent approximately $23 billion on asbestos litigation. According to Fazzari, Hubbard & Petersen (1988), a $1 dollar reduction in a firm's retained earnings will, on average, lead to a reduction of 42 cents in its investments. By this estimate, a reduction of $23 billion in retained earnings would have caused these firms to

reduce their investment levels by up to $10 billion. Tillinghast-Towers Perrin analysts have estimated that the total costs of asbestos litigation will eventually reach $200 billion, of which asbestos defendants will pay 39 percent or $78 billion (Angelina and Biggs, 2001). The Fazzari, et al. approach predicts a reduction in investment by asbestos defendants that will eventually amount to $33 billion.

We can convert these predicted figures into estimates of the number of jobs asbestos defendant firms would have created had they not reduced their investments. The average capital-to-labor ratio in U.S. durable goods manufacturing is $78,000. (This estimate is based on the value of the capital stock in durable goods manufacturing, which was $861 billion in 1998, and the labor force in durable goods industries, which was 10,985,000 in 1999. The figure of $78,000 for the average capital-to-labor ratio in durable goods manufacturing is the quotient (U.S. Department of the Census, 2000, Tables 684 and 888). If, on average, one less job is created each time a firm reduces its investment levels by $78,000, the number of jobs not created because asbestos defendants spent $10 billion less on investment up to the year 2000 would be approximately 128,000. Also, the number of jobs that defendants would have created if they had not had to reduce their capital investments by $33 billion is estimated to be 423,000.

The money paid to asbestos claimants and attorneys does not disappear. They will likely save some of those funds. Their savings, in turn, will enter capital markets and become available to firms seeking investment funds. Thus, some of the funds removed from capital markets when retained earnings are used to compensate asbestos claimants return to those markets. Similarly, the number of jobs lost to the economy as a whole as a result of the adverse effect of asbestos litigation on defendants' investments could be at least partially offset by jobs created by firms that are able to make investments they could only afford because claimants and their attorneys saved some of the funds they obtained from defendants. Because it seems unlikely that claimants and attorneys will save or invest 42 percent of what they obtain from asbestos litigation, it would seem that the litigation will result in some reduction in investments and job creation. But we lack the data needed to estimate the impact of the litigation on the economy as a whole.

What's Going on Today?

	1982	Today
Number of claimants	21,000	600,000
Number of defendants	300	6,000
Total costs to date (nominal $)	$1 B	$54 B
Bankruptcies	3	60
Estimated future costs (nominal $)	$38 B	?

A3823-75 08/02 RAND

Dimensions of the Litigation

- Claims
- Costs and compensation
- Economic effects
- → Future outlook

A3623-76 08/02 RAND

The Future Course of Litigation Is Uncertain

- Analysts' projections of total claimants and costs vary dramatically
  - Total claimants: 1 million to 3 million
  - Total costs: $200 billion to $265 billion
- Whether there will be money left to pay future claimants—and who will pay —remain open questions

A3823-77 08/02 RAND

What might the future hold? The history of asbestos litigation has been characterized by failures to estimate its magnitude, scope, and evolution with any accuracy. For example, as noted above, RAND's report on the status of the litigation in 1982 (Kakalik, et al., 1983) observed that respected analysts were predicting that the future costs of asbestos litigation could reach $38 billion. Among the participants in the litigation whom we have interviewed to date—most of whom have been involved in the litigation for more than a decade—there is no agreement about whether the litigation is approaching its end or will continue to grow or change in character.

Analysts' projections of the numbers of future claims and their likely costs also vary dramatically. Analysts at Tillinghast-Towers Perrin project an ultimate total of 1 million claims, costing defendants and insurers $200 billion (Angelina and Biggs, 2001). Analysts at Milliman project a total of 1.1 million claims, but they estimate that the total costs of asbestos personal injury claims will reach $265 billion (Bhagavatula, Moody & Russ, 2001).

The Manville Trust commissioned a deliberately high-side estimate designed to set an upper boundary on what would happen if everything turned out to be as bad as it could get. The estimate was 3 million total claimants, which means the process is only about one-fifth finished (Austern, June 21, 2001). The Trust did not attempt to estimate what the high estimate of the number of claimants would imply for the total costs of asbestos litigation.

The large variation in the projections of future claims and costs reflects recent changes in the litigation: sharp increases in both the numbers of claims filed and in the fraction of new claims submitted for nonmalignant conditions, particularly by unimpaired claimants, and rapidly rising costs of settling mesothelioma claims. There has also been a dramatic increase in the number of firms filing for Chapter 11. Analysts differ in their assumptions about the implications of these changes for the future course of the litigation.

However, the differences among these projections and the question of which is more likely to be accurate is not the important issue. The projections vary, but they do agree that the litigation is far from over. It is possible that millions of claims have yet to be made. We estimate that defendants and insurers have spent $54 billion through the end of 2000 to compensate the 600,000 claimants who have come forward. Thus, these projections imply that we have seen only about half of the claims and roughly one-fourth to one-fifth of the eventual costs. Regardless of the differences among the various projections, they all suggest that, at best, only about half the final number of claimants have come forward and, possibly, only a fifth. As for total costs, the estimates suggest they will eventually amount to three to four times the money that has already been spent on the litigation. That is a staggering figure—$145 to $210 billion—and it raises the fundamental question of whether there is going to be enough money to pay future claims.

Will There Be Enough Money for Future Claimants?

Example of Johns-Manville raises doubts		Compensation as percent of liquidated value
1988	Trust payments began	100%
1990	Payments suspended	(Only exigent cases paid)
1995	Payments resumed	10%
2001	Payment plan revised	5%

A3823-79 08/02 RAND

Increases in claim filings and the recent surge of bankruptcies, combined with the failure of efforts to attain "global" settlements in the courts, have heightened some plaintiff attorneys' concerns about the compensation prospects for future asbestos injury victims. In our interviews, attorneys who represent mesothelioma and other cancer victims were most prone to raise these concerns. The history of the litigation against the Johns-Manville Corporation and the Trust that was established as a result of its reorganization starkly illustrates the basis for this concern.

Johns-Manville filed for Chapter 11 in 1982. Its reorganization plan created a trust that would pay future claimants the compensation due them from the Johns-Manville Corporation (Matter of Johns-Manville Corp., 68 B.R. 618 [Bankr. S.D.N.Y. 1986], aff'd in part, rev'd in part, Kane v. Johns-Manville Corp., 843 F.2d 636 [2nd Cir. 1988]). The amount due a claimant, or its liquidated value, was determined by an administrative schedule (termed a "matrix") established when the bankruptcy reorganization plan was approved. Under the reorganization plan, the Trust was to compensate all future claimants for 100 percent of the liquidated value of their claims against Johns-Manville. The Trust began to pay claims in 1988.

Within two years the Trust had paid out so much money that there were serious doubts about its future solvency (Smith, 1990). In 1990, Judge Jack Weinstein

ordered the Trust to cease payments to all but exigent cases, pending a review of its financial prospects. After extensive expert analyses, a new plan was drawn up under which the Trust was to pay all claims against Manville expected to arise thereafter, but at the much reduced rate of 10 cents on the dollar. In 1995, a new reorganization plan was approved by Judge Weinstein (in re Joint Eastern and Southern Districts Asbestos Litigation, 878 F. Supp. 473 [E.D.N.Y. 1995], aff'd in part, vacated in part, 78 F.3d 764 [1996]). Although appeals were pending, the Trust resumed payments to claimants at a rate of 10 percent of the liquidated value of the claims. Payments continued at this rate for six years.

Claims filed with the Manville Trust soared in the last half of 2000 and into the first half of 2001. As a result, demands on the Trust exceeded expectations and again threatened its long-term fiscal prospects. The Trust commissioned several different projections of likely future claim filings. Different consultants, each of whom has extensive previous experience in the asbestos arena, examined the trends in claims filings and the available epidemiological models. In a letter to Manville Trust claimants, the Trust's CEO noted that the consultants now predict that the Trust will receive 1.5 million additional claims and could possibly see as many as 2.5 million additional claims (Austern, 2001a). In July, 2001, after analyses of these recent filing trends, the CEO of the Trust announced that, pending resolution of any controversy concerning the amount of the pro rata share, the Trust would henceforth pay claims at the rate of 5 cents on the dollar (Austern, 2001b).

The Manville Trust's experience has been replicated in the other trusts established to provide asbestos claimants the compensation due them from a defendant who filed for bankruptcy. In 2001, the Eagle-Pitcher Trust paid claimants 15.5 percent of the liquidated value of their claims. The corresponding pro-rata payment ratios for the Celotex and UNR Trusts were 10 percent and 7.5 percent, respectively (Claims Resolution Management Corporation, 2001, p. 26).

What's Going on Today?

	1982	Today
Number of claimants	21,000	600,000
Number of defendants	300	6,000
Total costs to date (nominal $)	$1 B	$54 B
Bankruptcies	3	60
Estimated future costs (nominal $)	$38 B	$145–$210 B

A3823-81 08/02 RAND

Outline

- How did we get here?
- Where are we today?
- Is there a better way?

A3823-82 08/02 RAND

With the rapid growth in asbestos filings and costs, asbestos litigation has become a pressing policy concern. Many people question whether compensation is being divided among claimants fairly and in proportion to need, and whether responsibility for paying compensation is being allocated among defendants fairly and in proportion to culpability. Moreover, the current system is costly to administer, imposes substantial indirect costs on the economy, and may leave little or no funds available to pay future asbestos victims. Are there alternative strategies for compensating victims of asbestos disease that would be more effective, efficient, and equitable for all involved?

Tort System Has Three Major Objectives

- Compensation
- Deterrence
- Individualized justice

A3823-83 08/02 RAND

As a background for considering alternatives to the current asbestos litigation regime, we need to consider the theoretical rationale for continuing to rely on the tort liability system and empirical research on the tort liability process and outcomes. Traditionally, the tort system in the United States has been viewed as having three objectives: compensation, deterrence, and individualized corrective justice (e.g., Schwartz, 1997; Keating, 2000). In theory, the system properly calibrates defendants' incentives to avoid injuring others, properly compensates injury victims for their losses, and provides a sense that "justice has been done" through individualized consideration of each plaintiff's and defendant's situation.

However, empirical studies conducted by RAND and others over the past several decades have shown that the tort system often falls short of these goals (Hensler et al., 1991; Kakalik & Pace, 1986; Shanley & Peterson, 1983). It is often difficult for individuals with meritorious claims for minor injuries to find representation because their cases require a significant investment of time and expense and offer limited potential damages in return. Although plaintiffs with substantial injuries and viable claims are likely to find legal representation, their compensation may be limited by a variety of factors, including the defendant's ability to pay and both the plantiff's and plaintiff attorney's risk aversion.

When cases are pursued to trial, juries may award damages that reflect their perceptions of defendants' resources in addition to their assessment of

defendants' culpability, or they may make judgments about causation that are scientifically questionable (Chin & Peterson, 1985; Ostrom et al., 1992 and 1996; Diamond, Saks & Landsman, 1998). And most litigants find little in the way of individualized treatment or procedure (Hensler, 1998).

How Does Asbestos Compensation System Measure up?

Compensation

- Provides access to all claimants without regard to whether they are currently impaired
- *But*
  - Dilutes resources available to pay the most seriously impaired
  - Jeopardizes compensation of those who become impaired in the future

A3823-85 08/02 RAND

Ordinarily, only a small fraction of all those who are injured seek compensation from the courts (Hensler et al., 1991). Typically, the high costs of tort litigation screen out of the system the majority of claims for minor injuries and modest losses. In asbestos litigation, however, mass litigation strategies have effectively opened the courts to everyone who alleges that they were exposed to asbestos and incurred some injury, without regard to whether and to what degree they are functionally impaired and sometimes without much attention to the strength of their evidence of exposure.

Questions about the equity of the allocation of damages to different categories of asbestos claimants abound. It is widely asserted that plaintiff attorneys who represent plaintiffs with different levels of injury negotiate settlement agreements that "discount" the value of the most serious injury claims in exchange for receiving modest payments for large numbers of non-impaired plaintiffs with no functional impairments (Hensler et al., 1985). These practices were sharply criticized in the controversy over the proposed class settlements of future claims (Amchem v. Windsor, 521 U.S. 591 [1997]; Ortiz v. Fibreboard Corp. 527 U.S. 815 [1999]; Symposium, [1995]). Jury verdicts for cancer victims have risen sharply in the last few years, and attorney interview data suggest that settlement values for these most serious injury claims have increased in response. But aggregative practices continue (Hensler, 2002).

How to deal with future claimants has challenged litigators and jurists alike (Cole, 1999). Some believe that provisions should be made for those who will

come forward in the future with very serious asbestos injury claims by limiting payment to current claimants with legally cognizable injuries but no functional impairment. Others argue that it would be inappropriate to modify traditional tort doctrine for asbestos victims. With increasing numbers of bankruptcies, bankruptcy trusts have proliferated. Under a special provision of bankruptcy law (11 U.S.C. § 524[g]), the trusts deal with the issue of future claimants by paying everyone who files a claim the same proportion of their liquidated claim value, without regard to injury severity. As a result, those with the largest losses receive the same fractional compensation as those with very modest losses. As claims against the trusts mount, in some instances that fraction has become vanishingly small.

How Does the Asbestos Compensation System Measure up?

Deterrence

- Forces culpable companies to pay large damages to injured workers
- *But*
  - As litigation spreads, less culpable companies are drawn into process

A3823-87 08/02 RAND

The historical case against asbestos manufacturers has been widely discussed in articles and books about the inception of the litigation (Brodeur, 1985; Castleman, 1996). Companies like Johns-Manville were central to this history, as were some of the other asbestos product manufacturers that were the prime targets of litigation through the 1980s. But as the litigation has spread to companies outside the asbestos and building products industries, the culpability of the defendants called upon to pay asbestos victims is in more dispute.

In this context, the issue is not *whether* asbestos victims should be able to receive compensation from some entity, but rather *what entity* should fairly be called upon to shoulder the financial burden. Requiring companies that played a relatively small role in exposing workers to asbestos to bear substantial costs of compensating for asbestos injuries not only raises fundamental questions of fairness but undercuts the deterrence objectives of the tort system. If business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure.

How Does the Asbestos Compensation System Measure up?

Individualized Justice

- **In theory, provides individualized process through the tort system**
- ***But***
  - **In practice, mass processing allows little or no individual treatment**
    - **in court processes**
    - **in bankruptcy claims processes**

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In principle, the tort system promises individualized justice to plaintiffs and defendants. Empirical research suggests that individualized treatment satisfies people's desire for procedural fairness, which in turn leads to trust in the justice system (Tyler, 1990). In practice, tort litigation often offers little individualized treatment in ordinary or mass litigation (Hensler, 1995 and 1998). In asbestos litigation, individualized process is a chimera.

Policy Alternatives

- Maintain status quo
- Rely on bankruptcy system to deliver compensation and accept limits on payments
- Change substantive doctrine
  - Redefine "injury" to require some functional impairment
  - Limit liability in some circumstances
- Create administrative compensation program

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Notwithstanding the criticisms of our current asbestos litigation regime, many argue that it is the best feasible approach to assuring compensation for the thousands of workers who were injured as a result of exposure to asbestos. These supporters of the status quo argue that there are no other sources of compensation for injured workers on the horizon and that the corporations that are shouldering the financial burden of compensation benefited (along with their shareholders) from their past activities and are now properly called upon to pay the costs of those activities. Moreover, they say, changing substantive tort doctrine and procedural rules for asbestos injuries would be unfair to workers exposed to asbestos and set an unwise precedent for tort compensation generally.

Experience suggests that maintaining the status quo means assigning a substantial compensation role to bankruptcy trusts.The bankruptcy statute now provides for payment of future claimants under bankruptcy reorganization plans (11 U.S.C.§ 524[g]), and the allocation of funds between current and future claimants is hotly negotiated during the bankruptcy reorganization process. Some commentators have suggested that policymakers should look to bankruptcy reorganization as the *main* vehicle for compensation for mass torts generally, and for asbestos in particular. By adopting streamlined claims processing procedures and, in some instances, limiting attorney fees, bankruptcy trusts have substantially reduced transaction costs for resolving asbestos claims. But these benefits come at a high price for asbestos plaintiffs, who typically

receive only a tiny fraction of their claim's litigation value and for investors whose equity often disappears entirely as a result of bankruptcy reorganization.

Critics of the current asbestos litigation regime have proposed a variety of changes in substantive doctrine and procedural rules to limit or reallocate compensation among injury victims or limit costs to defendants. For example, there have been proposals to limit compensation to those who currently demonstrate a significant functional impairment (while preserving others' right to sue in the future), to cap successor liability, to restrict the application of joint and several liability, and to cap punitive damages. There have also been proposals to eliminate or limit trial consolidations. All of these proposals implicate important normative values and many raise federalism questions.

Although the U.S. relies heavily on the tort liability system to compensate victims of accidental injury and disease, on several occasions Congress has adopted an administrative system to substitute for or supplement tort liability. The most recent example is the federal Victims' Compensation Fund for families of those killed in the September 11 terrorist attacks. Over the past several decades, numerous proposals to establish administrative schemes for asbestos victims have been introduced in Congress but none has garnered substantial support. We are continuing to analyze the various options for reform and will present the results of our analysis in our final report.

Next Steps

- **Complete/publish final report**
  - **Document analyses**
  - **Analyze policy alternatives**
- **Estimate individual claimants' recoveries**

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The next step in the research is to complete and publish the final report on the project. Completion of the work will entail documenting in some detail the analyses we conducted to arrive at the results presented in this briefing. We will also analyze the policy alternatives listed in the previous box in terms of their likely effects on major stakeholders in the litigation.

We currently expect to complete the draft and submit it to reviewers before the end of the year. The published report will be distributed in early 2003.

We have already begun work on a follow-on study. We are developing estimates of the amounts individual claimants recover from all defendants. We will examine trends and patterns in claimants' recoveries according to their claimed injuries and the jurisdictions in which they pursued their claims.

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Public Policy Monograph

December 2001

Overview of Asbestos Issues and Trends

AMERICAN ACADEMY *of* ACTUARIES

Overview of Asbestos Issues and Trends

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Executive Summary

The asbestos problem, initially recognized decades ago, is not going away. Recently, asbestos litigation has been described by the U.S. Supreme Court as an "elephantine mass[1]" and by A.M. Best as a "tidal surge.[2]" Litigation that most thought would decline by the end of the 20th century is accelerating. The number of annual claim filings is increasing. The size of awards made to settle claims is also increasing. Two recent estimates from actuarial consulting firms long-involved in such work indicate that the ultimate costs arising from U.S. exposure to asbestos could range from $200 to $275 billion. Approximately 2,000 people per year are dying from mesothelioma, a signature disease of asbestos. However, many defendants assert that the majority of claimants filing claims and receiving awards are not impaired. The mass and cost of the litigation are forcing otherwise healthy companies to file for bankruptcy.[3] As the initial targets in the litigation have become unable to pay their share of damages, plaintiffs attorneys have named additional peripheral defendants (who did not manufacture asbestos and thus contend that they were generally less likely to have known of its dangers to human health) in the lawsuits. Many defendant companies believe they are not getting a fair legal evaluation of their cases in court, and the Supreme Court has twice overturned efforts to resolve the litigation through class action settlements. While Congress has been called upon to act, no major legislative action has yet occurred.

Introduction

This monograph has been written by the American Academy of Actuaries — Mass Torts Work Group. Its purpose is to provide a brief history of personal injury claims arising out of asbestos exposure to aid in understanding current issues arising out of these claims. The intended audience includes those who may become involved with proposed public policy responses to these issues.

This paper is organized into the following sections:

- History of Asbestos Usage
- Health Risks Associated with Asbestos Exposure
- Current Personal Injury Claim Situation
- Concerns of Major Parties Involved in Asbestos (Personal Injury) Litigation
- Prior Efforts to Solve the Asbestos Problem
- Summary and Conclusions

History of Asbestos Usage

Asbestos was once considered a "miracle mineral[4]." This naturally occurring silicate has six varieties[5] and many favorable characteristics, including resistance to fire, heat, and corrosion. It is strong, durable, and flexible - its fibers can be woven into cloth. Asbestos is inexpensive because it is available in abundant quantities. Its versatility has led to its use as a component of numerous products in numerous industries (e.g., building materials such as insulation, roofing, and flooring, brake and boiler linings, wire insulation, gaskets, and ship building - especially during World War II). In fact, asbestos was classified as a strategic material during World War II.[6]

It has been estimated that more than 100 million[7] people in the United States were occupationally exposed to asbestos during the 20th century. This is significantly higher than the 27.5 million Americans previously estimated to be exposed to asbestos between 1940 and 1980 in a 1982 Mt. Sinai School of Medicine study conducted by Dr. William Nicholson, Dr. Irving Selikoff, and George Perkel.[8]

Asbestos use in the United States has been curtailed significantly since its peak of nearly 1 million tons in 1973.[9] After Congress passed the Occupational Safety and Health Act (OSHA) in 1970, increasingly strict standards were imposed to enforce safety precautions in the workplace. However, these workplace safety standards do not protect end-users of asbestos-containing products.

There were approximately 3,500 products in U.S. commerce that contained asbestos when the U.S. Environmental Protection Agency (EPA) attempted to place a complete ban on asbestos in 1989. The EPA's ban was successfully challenged before the 5th U.S. Circuit Court of Appeals in 1991. The case was remanded to the trial court, which left very few portions of the ban intact.[10] Thus, asbestos-containing products are still legal in the United States today. Approximately 600,000 to 700,000 tons of asbestos were imported into the United States during the past ten years and used in various industries; however, the end uses are not tracked effectively, and warning label requirements are vague. Therefore, there remains ongoing exposure to asbestos in the United States today.

Asbestos use continues at significantly higher levels abroad, especially in developing nations. Due to the immediate benefits of some asbestos products (e.g., inexpensive cement pipes to transport clean drinking water or to dispose of sewage), its use is widespread. Unfortunately, in many nations, few safety precautions are being taken, and there is a large number of individuals who may potentially contract future asbestos-related diseases.

Even if asbestos usage in products ceased immediately throughout the world, potential individual exposure to asbestos fibers would continue, perhaps indefinitely. This residual exposure would be caused by:

- Previously manufactured products containing asbestos that have not been replaced or discarded;
- Dust or other waste remaining in the environment from previous use or incomplete disposal of those products;
- Erosion of naturally occurring deposits in asbestos-bearing rocks.[11, 12]

Health Risks Associated With Asbestos Exposure

Several diseases have been linked to asbestos exposure, including mesothelioma, lung cancer, other cancers, asbestosis, and pleural injuries. A long latency period from initial exposure to disease manifestation resulted in delayed recognition of its health hazards. This contributed to the unrestricted (or minimally restricted) use of asbestos until OSHA standards were implemented in the 1970s.

Asbestos Diseases

Disease	Injury[13]	Average[14] Latency
Mesothelioma[15]	■ A malignant tumor arising in the pleura[16] membranes (of the lungs or diaphragm) and pericardial membrane of the heart. ■ Symptoms may be vague, including chest pain, shortness of breath, weakness, and weight loss. Diagnosis may be suspected by chest X-ray, but a full pathologist's microscopic exam is needed. ■ Fatal within 1 - 2 years.	30-40 years
Lung Cancer	■ A malignant tumor of the bronchi[17] covering that grows to surrounding tissue. ■ Symptoms include chest pains, cough, weakness, and shortness of breath. Chest X-rays may detect the cancer, but a pathologist's microscopic exam is needed. ■ Often fatal.	20-30 years
Possibly Other Cancers[18]	■ Tumors of the throat, larynx, esophagus, stomach, colon, lymphoid. ■ X-rays may detect the cancer, but a pathologist's microscopic exam is needed. ■ Often fatal.	20-30 years
Asbestosis	■ A pulmonary insufficiency caused by scarring near alveoli. (As the body tries to dissolve asbestos fibers trapped in lung tissue, it produces an acid that does little damage to the fibers, but may cause severe scarring in the surrounding tissue.[19]) ■ Diagnosis through physical signs, history of exposure, pulmonary functioning test, CT scan/radiological findings. Some appreciable level of exposure over 10 years is likely required before a detectable significant amount of functioning is lost. ■ Slowly progressive, potentially fatal.	10-20 years[20]
Pleural Injuries	■ Generally nonimpairing fibrosis or scarring of pleura tissue over the chest wall or diaphragm. ■ Evidenced by effusion, thickening, plaque, or calcification. ■ Do not appear to be pre-cancerous, but may increase risk of developing lung cancer in the future.	20-30 years

Current Personal Injury Claim Situation

There have been many epidemiological studies regarding the population exposed to asbestos in various industries, the latency and incidence of disease, and the resulting projections of individuals expected to file asbestos-related claims (see Reference List 1). These projections have varied widely. However, by June 2001, Johns-Manville, the most prominent early defendant in asbestos litigation, had already received more than 500,000 personal injury claims. The Manville Trust (finally approved in 1988 after Johns-Manville declared bankruptcy in 1982) now expects that it will eventually receive about 2 million total claims.[21]

It is estimated that there are currently at least 200,000[22] asbestos bodily injury (BI) cases pending in state and federal courts. About 60,000 new claimants filed lawsuits during 2000[23]. This figure is significantly higher than the average of approximately 20,000 per year experienced by several major defendants in the early 1990s. The increase was not expected based on the epidemiological studies performed in the 1980s and 1990s, partly because these studies underestimated the exposed population. Other reasons for the increased filing rate include:

- The greater propensity of claimants to sue in response to the aggressiveness of some plaintiffs attorneys;[24]
- A "catch-up" of filings after an attempted class action settlement[25] was overturned;
- The need to file claims by a certain date in order to get on the creditor list in a bankruptcy, coupled with the recent bankruptcies of several companies that produced asbestos products;
- Expedited action on the part of the claimants anticipating possible legal reform efforts.

A disproportionate percentage of the claims are filed in state courts in perceived pro-plaintiff jurisdictions, clear evidence some say, of "forum shopping" on the part of plaintiffs attorneys. For example, while Mississippi[26] has only 1 percent of the U.S. population, approximately 20 percent of the pending cases were filed in this state. Similar disproportionately large percentages of cases were filed in Texas, with the number decreasing somewhat after the state enacted tort reform in 1997.

There are currently about 2,000 new mesothelioma cases filed each year.[27] There are another 2,000 to 3,000 cancer cases that are likely attributable (at least in part) to asbestos. There are a smaller number of serious asbestosis cases. The remaining cases are either pleural injuries or claimants who do not currently exhibit signs of injury.[28] It is estimated that more than 90 percent (or more than 54,000 claims filed during 2000) are for claimants alleging nonmalignant injuries. There is significant concern that the awards paid for nonmalignant claims will exhaust funds that would otherwise be available to compensate individuals who will suffer from the more serious asbestos-related diseases.

Many workers with asbestos-related injuries were employed in union trades (such as installers and electricians) and worked at a large number of sites with asbestos-containing products over their careers. Some of these job sites had numerous asbestos-containing products. As a result, many of these workers name a large number of defendants in their lawsuits.

Plaintiffs attorneys typically join several plaintiffs in a group to file claims against multiple defendants. The plaintiffs' injuries are often quite dissimilar, ranging from those who are not currently impaired or who have nonmalignant injuries to those suffering from cancer and mesothelioma. This grouping of claims, defendant companies assert, has forced them to make payments on claims of perceived questionable merit in order to avoid facing the mesothelioma cases in court in front of a sympathetic jury with the potential for substantial punitive damages.

The involvement of multiple plaintiffs and multiple defendants results in a more complicated and expensive process for resolving asbestos claims than for typical tort claims (see Exhibit 1).

As a result of asbestos litigation, many companies, including nearly all of the major asbestos manufacturers, have declared bankruptcy (see Reference List 2). As the financial stability of these major players has become impaired and they have been unable to pay their share of damages, the share of awards that must be satisfied by the remaining major defendants has increased, and plaintiffs have named additional peripheral defendants in the lawsuits. While approximately 300 companies were targeted by plaintiffs in the 1980s, more than 2,000 companies have been named as defendants in asbestos litigation today.[29]

The activities that have resulted in asbestos lawsuits include those of the major defendants, such as producers of raw asbestos, installers, and insulators, as well as the activities of the peripheral defendants, who manufactured products where asbestos was encapsulated, were distributors of products containing asbestos, or were owners of premises that contained asbestos. The connection of older peripheral defendants to asbestos is clear (e.g., use of asbestos as an insulating material by boiler manufacturers). However, the connection of some of the newer peripheral defendants to asbestos is not obvious (e.g., Campbell's Soup, Gerber (baby food), and Sears Roebuck.)[30]

The potential culpability of many peripheral defendants is clearly different from that of the major manufacturers (e.g., Johns-Manville), and thus many believe that expecting these peripheral defendants to warn of the dangers of asbestos is unreasonable. Nonetheless, in the current legal system (where the plaintiff's burden of proof as to their injury and its connection to a peripheral defendant's product has sometimes been relaxed for the sake of administrative efficiency), these peripheral defendants are often held jointly and severally liable[31] with the major producers[32]. They are now bearing a substantial portion of the costs of awards relating to decades of asbestos use.

Workers suffering from asbestos-related injuries were originally compensated through the workers' compensation system, subject to statutory benefit limits then in effect. However, in 1973, the plaintiffs in the landmark case of *Borel v. Fibreboard* were successful in holding asbestos manufacturers strictly liable for the failure to warn of an unreasonably dangerous product. Tort theory involved in asbestos litigation has continued to evolve over the years. The sheer number of asbestos claims has severely challenged the court system. Some feel that, in attempting to mitigate this problem, courts often choose not to apply typical negligence-based theories regarding product liability in asbestos cases. Awards for mesothelioma cases typically exceed $1 million, with compensation for cancer and nonmalignant claims being lower. However, a significant portion of the dollars paid by defendants have not reached those who were injured, due to high transaction costs.[33] As the perception of asbestos litigation as a highly lucrative practice area has increased, so has the number of law firms specializing in this work.[34]

Estimates of ultimate personal injury - related costs from exposure of the U.S. population to asbestos range from $200 to $275 billion.[35] Much uncertainty surrounds these estimates due to possible variations in disease emergence and incidence rates and legal costs. There is additional uncertainty as to who will ultimately pay these costs (e.g., whether it is the remaining viable defendants, their insurers, or some other source). Currently it is estimated that $60 to $70 billion of the costs will be borne by the U.S. property/casualty insurance market.[36] As of year-end 2000, U.S. insurers and reinsurers[37] had paid approximately $22 billion and held approximately $10 billion in reserves to pay future claims, as disclosed in their Annual Statements filed with state insurance departments.[38]

Evolving Legal Theory

Date	Case	Significance
1973	Borel v. Fibreboard ■ Fifth Circuit U.S. Court of Appeals	■ Shifted asbestos awards from the workers' compensation system to the court system. ■ Six manufacturers held jointly & severally liable using theory of strict liability for failure to warn. • Joint & Several Liability — adopted by several states. Premise: insulation workers were exposed to products of many manufacturers. Not possible to determine source of asbestos fibers causing injury, and typically, none of the manufacturers provided warnings regarding the dangers of asbestos. • Strict Liability — Restatement of Torts, Section 402A — adopted by the American Law Institute in 1965. States: "One who sells any product in a defective condition unreasonably dangerous to the consumer ... is subject to liability for physical harm thereby caused to the ultimate user or consumer." ■ Court said danger of asbestos was recognized in the 1920s, 1930s.
1982	Beshada v. Johns-Manville ■ N.J. Supreme Court 90 N.J. 191, 447 A.2d 539 (1982)	Superstrict Liability — holds asbestos defendents liable due to failure to warn even if the defendant did not know/would not have known of asbestos risk.
1986	Halphen v. Johns-Manville ■ L.A. Supreme Court 484 So. 2d 110 (L.A. 1986) p. 4022 3/28/1986	
1993	Daubert v. Merrell Dow ■ No. 92-102, U.S. Supreme Court	U.S. Supreme Court directed lower federal courts to act as "gatekeepers" to ensure that "new" scientific evidence is relevant and reliable.
1997	Metro North v. Buckley ■ No. 96-320, U.S. Supreme Court	U.S. Supreme Court decided it was inappropriate to render awards for emotional harm and medical monitoring. One of the reasons for the decision was that payments to people who are not ill would facilitate bankruptcy among defendants and would be at the expense of those who have been harmed.

Concerns of Major Parties Involved in Asbestos (Personal Injury) Litigation

There are many groups involved in asbestos litigation. Some of the concerns of these groups are outlined below.

Seriously Injured Claimants This group contains those whose injuries are detectable and indisputable (e.g., mesothelioma, some cancers, serious asbestosis). There is generally agreement that these individuals deserve to be compensated in some form for the injuries they have suffered.

- Due to the short life expectancy of the claimants, this group places high importance on resolving their claims quickly, which often does not take place in the current legal environment.

- Compensation systems with high transaction costs diminish funds available to meet this group's greater needs.
- Those who will develop serious illnesses in future years face another risk - that the companies that made the products that led to their injuries may become bankrupt and therefore will be unable to compensate them.

Nonseriously Injured and Unimpaired Claimants The majority of the claimants in this group are presently unimpaired, although they may have an x-ray that shows some type of thickening or scarring of the lungs.

- One concern of those with a pleural condition is that if they do not proceed with a lawsuit today, a statute of limitations issue may prevent them from being eligible to recover damages for more serious conditions they may develop in the future. This concern has been addressed in some states (e.g., Massachusetts) through an inactive docket/pleural registry.[39]
- Another concern of this group is that if they do not proceed with a lawsuit now, money may not be available if they develop a serious injury later. For example, awards of punitive damages to today's seriously injured claimants may reduce funds available to pay for the same type of injuries that plaintiffs who currently have less serious injuries may develop in the future.
- Additionally, this group faces future health uncertainty, including the need for ongoing medical monitoring.

Plaintiffs Attorneys The issues for the plaintiffs attorneys generally match those of their clients as described above, and also encompass the desire for compensation and reward for the cost of acquiring and developing these cases.

Judges Two main concerns of this group are trial docket pressures and fairness of results. These concerns have been voiced as far back as the 1980s and relate to the volume of asbestos lawsuits. It is felt by some that trial docket pressures force actions which speed up the trial process and produce potentially less equitable results, such as where the claims of those with significantly different injuries are consolidated and the periods of time in which to conduct discovery are shortened.

Major Asbestos Defendants These are the companies that made asbestos-containing products and have been involved in asbestos litigation since the 1980s. Many of them have filed for Chapter 11 protection.

- For the most part, these defendants have stated that they cannot get a fair trial in state court. This is illustrated in the Babcock & Wilcox and W.R. Grace bankruptcy filings, where the companies are attempting to have their liability determined under federal bankruptcy rules, which require objective medical criteria.
- Another related concern is that the grouping of seriously injured and nonseriously injured claimants may, as a consequence of the "piggyback effect" of juror sympathy, result in awards that are too high for the nonseriously injured.
- This group is concerned that it is paying awards that should be funded (at least in part) by other parties.[40] For several asbestos diseases, there is a material synergistic effect between exposure to asbestos and smoking. To date, however, asbestos company suits against the tobacco industry have been unsuccessful.[41]
- This group is concerned that uninjured plaintiffs are being compensated.

- This group is concerned that the current system for compensating asbestos-related injury victims is expensive.
- This group wants to achieve finality - by being able to put the consequences of past business judgments behind them.

Peripheral Defendants An increasing number of these companies (that had asbestos encapsulated in their products or had asbestos on their premises) have been sued in asbestos litigation. There has been an increase in the profile of these defendants largely due to the bankruptcy of the initial asbestos product manufacturers.

- Some members of this group believe that they should not be held liable for asbestos-related injuries, because asbestos in their product was encapsulated and should not have contributed to the injury.
- This group is concerned that it will take on a share of liability that was previously borne by the bankrupt asbestos manufacturers.
- The peripheral defendants say it is unfair to hold them accountable for the same knowledge of health risks as the major defendants in the same lawsuit. This group is also concerned that the vast majority of cases are being brought to trial in venues they perceive to be favorable to plaintiffs. For example, only 2 percent of the original plaintiffs in the Cosey litigation in Mississippi were from the county in which the lawsuit was filed.[42]
- This group also contends that courts too often fail to require the use of objective evidence to evaluate whether claimants are injured. This issue was raised as far back as 1991 when plaintiffs attorney Ron Motley commented "[t]here are gross abuses in our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent, we have untrammeled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong [and] should be stopped."[43]
- Another concern of these defendants is that they are held responsible for the liability that should be borne by non-U.S. companies. It can be difficult for plaintiffs attorneys to bring suits against non-U.S. companies, and such suits could ultimately be resolved in federal court. Due to the potential difficulty in bringing suits and since plaintiffs attorneys typically prefer to try cases in state rather than federal court, some U.S. defendants contend that the effort to pursue foreign defendants will rarely be made.
- Defense expenses relative to plaintiffs' awards are considerably higher for peripheral defendants. This is due in part to the fact that a peripheral defendant may be easily named in a suit. However, because discovery often takes place very close to trial, the peripheral defendant may find it nearly impossible to obtain dismissal from the case before incurring significant costs. Peripheral defendants often pay to settle lawsuits even when they do not believe they have liability, because the risk of trying a suit when nearly everyone else has settled is extremely high due to the setoff rules that apply in many states.
- Similar to the major defendants, this group wants to achieve finality and be able to put the consequences of past business judgments behind them.

Insurers and Reinsurers The concerns of this group are generally the same as for their policyholders, the major and peripheral defendants, plus:

- This group is concerned with the interpretation of contracts and the possible liabilities that may be imputed to them, which they never intended to insure.

- There is increased concern among this group regarding settlements with claimants who currently have no clearly-identifiable injury, and with policyholders making (small) payments to claimants who may not be able to establish product identification. This concern has been publicly voiced by Equitas, the UK insurer, which on June 1, 2001, began to require more disclosure of this type of information before settling claims.
- This group wants predictability of financial results and finality with respect to quantifying their ultimate liabilities.

Prior Efforts to Solve the Asbestos Problem

Asbestos defendants and their insurers/reinsurers have attempted to create various solutions to the asbestos problem over the years (see Exhibit 2). These efforts include the Wellington Agreement between asbestos producers and their insurers in 1985, the formation of the Center for Claims Resolution (CCR) in 1988, the CCR Futures Deal in 1993 (i.e., the Georgine Settlement), the Fibreboard Settlement in 1993, and the Owens Corning Fiberglas National Settlement Program in 1998. There have been repeated cries for legislative reform, especially after unsuccessful attempts to settle claims on a class action basis (i.e., Georgine and Fibreboard) (see Exhibit 3).

Congress has also been involved in the search for solutions. A federally administered central fund was proposed as early as 1977. However, none of the bills proposed gained adequate support.

More recently, the Fairness in Compensation Act of 1999 (H.R. 1283) was proposed to establish the Asbestos Resolution Corporation. This bill would have used an alternative dispute resolution (ADR) process to reduce lawsuits in the court system. Claimants would have been required to prove medical eligibility for compensation. Awards for pain and suffering, emotional distress, and loss of consortium would have been allowed, but punitive damage awards would have been barred. The bill would have created a pleural registry (inactive docket) for unimpaired claimants. Costs would have been funded by the defendant companies, rather than through tax revenue.

Currently, retroactive tax relief for asbestos manufacturers is being considered (H.R. 1412). This legislation would allow a company to carry back asbestos losses to the taxable years in which the taxpayer was first involved in the production or distribution of asbestos products to reduce income tax payments made in these prior years.

Summary and Conclusions

Exposure to disease-causing asbestos fibers in the United States and the world has been widespread. Though on the decline, such exposure has not ended and may never totally cease. In the United States, this has resulted in a significant number of personal injury claims against defendants over the past 20 years.

Rather than gradually decreasing over time, the pace of these claim filings has been increasing, for multiple reasons. Several attempts have been made to comprehensively address this situation, but all have failed to date. It has been argued that some attempts to address parts of the problem may have even exacerbated it, by expanding the number of involved parties to include claimants with questionable injuries and minimally or nonliable peripheral defendants.

The size and growth of the problem has led to numerous bankruptcies and calls for a comprehensive legislative response, as many believe that the current legal system is ill-suited to handle asbestos personal injury claims. While several legislative proposals have been discussed over the years, enactment of such solutions does not appear imminent.

Historical Legislative Involvement

Date	Effort	Details	Status
1977	Bill sponsored by Rep. M. Fenwick (R-N.J.) — district included location of Johns-Manville.	The bill would compensate asbestos victims through a federally administered central fund.	Reintroduced in 1981; did not pass.
1980	Asbestos Health Hazards Compensation Act[44] introduced by Senator Gary Hart (D-Co.).	The bill: ■ Barred the victims of asbestos disease from filing suits under the tort system; ■ Left the administration of asbestos-compensation claims with the states; ■ Called for the establishment of federal minimum standards for compensating asbestos workers.	Reintroduced in 1981; did not pass.
1994	Bankruptcy Reform Bill of 1994	■ Sec. 524g enables debtor in Chapter 11 reorganization to establish a "trust toward which the debtor may channel future asbestos related liability ... to provide explicit legislative guidance to ensure the equitable treatment of mass future asbestos claimants." ■ Creditors obtain at least 50 percent of the value of the company if it emerges from bankruptcy. ■ Bankruptcy allows: • a stay on claims; • requirement of medical criteria; • appointment of a representative for future claimants; • estimations/provisions for the liquidation of claims.	Enacted January 25, 1994. The Babcock & Wilcox Chapter 11 Informational Brief stated that "Congress has provided a mechanism for resolution of asbestos mass-tort claims within the bankruptcy system."
1999-2000	H.R. 1283 - Fairness in Compensation Act of 1999	The bill would : ■ establish Asbestos Resolution Corporation; ■ Set up Office of Asbestos Compensation; ■ Create ADR process; ■ Require proof of medical eligibility; ■ Not impose a statute of limitations; ■ Permit full compensatory awards (including pain & suffering, emotional distress, loss of consortium); ■ Bar punitive damages; ■ Receive funding from defendant companies, not through tax revenue.	Passed out of the Judiciary Committee, but never considered by the full House of Representatives; not reintroduced in 107th Congress.
2001	H.R. 1412 - Retroactive Tax Relief	■ Amends Internal Revenue Code 468B(b) to provide that no tax be imposed on any settlement fund to resolve present and future asbestos claims. ■ Amends Section 172(f) to provide that the portion of any specified loss attributable to asbestos may be carried back to the taxable years in which the taxpayer was first involved in the production/distribution of asbestos products to reduce income tax payments in prior years.	Introduced and referred to the Ways and Means Committee; has not moved. Proponents: Say the bill would ensure that victims get just compensation and help prevent further bankruptcies. Opponents: Describe the bill as an "industry bailout" and an asbestos "feeding frenzy" for the bar because attorneys will get most of the $300-$500 million that it will cost taxpayers over the next 10 years.

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The Asbestos Tort Claim Process **Exhibit 1**

	Typical Tort Claim	Asbestos Tort Claim
Plaintiff	One injured party	Blocks of claims: ■ filed by same attorney on same date ■ have common connection (e.g., same labor union, location, or one-time place of employment) ■ involved dissimilar degree of injury/disease suffered
Defendant	One clearly identified party	Multiple defendants and complications including: ■ long latency ■ pervasiveness of use throughout various industries ■ many different asbestos products present at some work sites ■ efficiencies of plaintiffs' bar
Event	Single event causing injury with definable time, location	Multiple years (e.g., each exposure to asbestos fiber is an event, plus fibers are in the lungs causing damage) Multiple locations (e.g., every location over multiple years where asbestos was present)
Claim Filing	Short lag between event and filing (a few months to a few years)	Lag up to 40-50 years
Forum	Clear, undisputed location - where event occurred	Broad discretion for plaintiff to file claim in forum of choice
Discovery	Focused	Complicated/expensive ■ multiple parties claiming injuries ■ dissimilar injuries ■ multiple exposures — name and organizational changes ■ long time lag — lost records
Claim Resolution	Relatively timely (several months to a few years)	Long process due to: ■ multiple plaintiffs with varying levels of exposure and medical conditions ■ multiple defendants with varying levels of exposure and legal strategies ■ "events" over many years at many locations
Who Pays?	The defendant or a single insurance policy	The defendants and multiple insurers/reinsurers on multiple policies due to: ■ multiple contract wordings ■ multiple jurisdictions ■ large limits of coverage ■ multiple reinsurers ■ insolvencies

Prior Efforts to Solve the Asbestos Problem

Effort	Stakeholders	Purpose
Wellington Agreement signed June 19, 1985	■ 34 asbestos producers ■ 16 insurers	■ Create the Asbestos Claims Facility (ACF) ■ Provide claimants with an efficient and more equitable alternative to the tort system ■ Reduce legal costs for plaintiffs and defendants ■ End disputes over insurance coverage
Center for Claims Resolution (CCR) - Formed October 12, 1988	■ Originally 21 asbestos producers	■ Successor organization to the ACF ■ Resolve claims for a fair value
CCR Futures Deal - 1993	■ 20 asbestos producers	■ CCR's proposed settlement to the Georgine class action[50]
Fibreboard[52] (1993 class action settlement)	■ A single asbestos defendant	■ Global settlement of 186,000 pending plus future personal injury claims
Owens Corning Fiberglas (OCF) National Settlement Program (NSP) - December 1998	■ Initially one asbestos defendant, OCF ■ Later applied to Fibreboard after it was acquired by OCF	■ To resolve OCF (and later Fibreboard) claims

Exhibit 2

Features/Operation	Outcome
■ Costs shared among the members using a formula based on each producer's previous litigation experience. ■ Each member paid percent share, regardless of whether: • The producer was named in the suit; • The claimant could prove that the injury was caused by that producer's product.[45] ■ Claimants required to show an asbestos-related impairment. ■ Claims evaluated based on employment, medical and compensation history. ■ Claimant could receive a noncash "settlement" if there were no disease (tolled the statute of limitations). ■ Claimant could return to the tort system if not satisfied with the ACF's settlement offer. ■ The ACF did not pay punitive damages.	■ The ACF was dissolved October 3, 1998, after withdrawal of the seven largest producer members. ■ Resulted largely from disputes among producers over their allocated shares of costs. ■ Insurance coverage agreements resolved by the Wellington Agreement remained in place when the ACF was dissolved.
■ CCR was more aggressive than the ACF in settling claims.[46]	■ After the CCR Futures Deal was overturned, the CCR continued to negotiate and settle claims on behalf of its members. It settled 350,000 claims and paid over $5 billion from 1988 to 2000. ■ On February 1, 2001, the CCR announced it was "changing its method of operation to allow members more flexibility and customized representation in handling their individual asbestos liability.[47]" ■ As of August 1, 2001 CCR will stop settling new asbestos claims on behalf of its remaining 14 members.[48] ■ Currently involved in litigation among its remaining members and their insurers relating to settlements agreed to during 2000.[49]
■ Claimant had to provide sworn proof of exposure to an asbestos-containing product of at least one CCR member. ■ Claimant had to satisfy certain medical, exposure, and latency criteria. ■ Case flow caps (maximum annual claim filings) were specified for the next 10 years. ■ Ranges of settlements by disease category were set for the next 10 years, and the increase in average claim amounts for the second 10-year period was limited to 20 percent above the initial levels.	■ Class decertified[51] because the disparity among the claimants' illnesses was found to be greater than their commonality. ■ The Supreme Court observed that "the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." ■ The reversal resulted in a flood of new claims against CCR member companies.
■ Class did not allow opt-outs due to its limited fund rationale. ■ There was also a "Trilateral Agreement" back-up plan for $2 billion funded by two of Fibreboard's insurers — Continental Casualty and Pacific Indemnity — in case the global settlement was not approved.	■ Settlement rejected by the U.S. Supreme Court in 1999 because: • It excluded some potential plaintiffs; • There were questions about the fairness of the distribution[53]; • There were conflicting interests within the class; • The Supreme Court held that more consideration should have been given to Fibreboard's financial condition.[54]
■ Initially resolved 90 percent of OCF's pending claims. ■ Established fixed payments for future claims without litigation. ■ Private agreement between OCF and plaintiff's counsel did not require court approval.	■ Originally the NSP was well accepted. ■ OCF underestimated the size of its liability[55] and the NSP accelerated the timing of payments. ■ OCF filed for bankruptcy protection on October 5, 2000.

Calls for Legislative Action **Exhibit 3**

Date	Source	Comment
1990	U.S. Supreme Court Panel (led by Chief Justice Rehnquist)	1991 report said "situation has reached critical dimensions and is getting worse;" and the courts were "ill-equipped to address the mass of claims in an effective manner."[56]
1996	State v. MacQueen 479 S.E. 2d, 300, 304 (W. Va. 1996)	"Congress, by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative, and often nontraditional judicial management techniques to reduce the burden of asbestos litigation that seems to be paralyzing the active dockets."[57]
1997	Amchem v. Windsor U.S. Supreme Court No. 96-270, June 25, 1997	The Court observed that "the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution."[58]
1999	Ortiz v. Fibreboard U.S. Supreme Court No. 97-1704, June 23, 1999	Supreme Court again calls on Congress, says existing asbestos litigation is an "elephantine mass ... that calls for national legislation."
1999	The Fairness in Compensation Act of 1999: Legislative Hearing on H.R. 1283	"The victims of [the asbestos litigation] crisis are most injured plaintiffs, especially future plaintiffs, who don't get as much as they should; defendants who are bankrupted way out of proportion to harm they caused; jurors and judges whose judgment is skewed by natural human reactions to the cases before them; and society itself, which is paying grotesque sums of money to lawyers and uninjured persons, when that money should be going to the most-injured and to medical research."[59]

Various Epidemiological Studies **Reference List 1**

Year	Source	Study
1980	Higginson	Proportion of Cancers Due to Occupation, Preventive Medicine
1980	Hogan & Hoel	Estimating Cancer Risk Associated with Occupational Asbestos Exposure Risk Analysis
1981	Enterline	Proportion of Cancer Due to Exposure to Asbestos, Banbury Report 9: Quantification of Occupational Cancer
1981	McDonald	Mesothelioma as an Index of Asbestos Impact, Banbury Report 9: Quantification of Occupational Cancer
1981	Peto, Henderson, Pike	Trends in Mesothelioma Incidence in the U.S. and the Forensic Epidemic Due to Asbestos Exposure During World War II, Banbury Report 9: Quantification of Occupational Cancer
1982	Irving Selikoff (Mt. Sinai School of Medicine)	Disability Compensation for Asbestos-Associated Disease in the United States.
1982	William Nicholson, George Perkel, Irving Selikoff	Occupational Exposure to Asbestos: Population at Risk and Projected Mortality — 1980-2030
January 1982	Paul MacAvoy (Yale)	The Economic Consequences of Asbestos-Related Disease
August 2, 1982	Alexander Walker (Statistics and Epidemiology Research Corporation)	Projections of Asbestos-Related Disease 1980-2009
September 1982	Conning & Company	The Potential Impact of Asbestos on the Insurance Industry
July 1983	Kakalik, Ebener, Felstiner, Shanley (RAND — The Institute for Civil Justice)	Costs of Asbestos Litigation
September 15, 1983	Kenneth Manton (Congressional Research Service The Library of Congress)	An Evaluation of Strategies for Forecasting the Implications of Occupational Exposure to Asbestos
June 1986	William Nicholson	Airborne Asbestos Health Assessment Update
1988	British Journal of Industrial Medicine	Projection of Asbestos Related Diseases in the United States, 1985-2009
January 20, 1992	Shearson Lehman Brothers	Charting the Asbestos Minefield: An Investor's Guide

Various Epidemiological Studies **Reference List 1 (cont.)**

Year	Source	Study
July 1992	Federick Dunbar, National Economic Research Associates, Inc. (NERA)	Forecast of Asbestos-Related Personal Injury Claims Against National Gypsum Company: Final Report
July 15, 1992	Mark Peterson (Legal Analysis Systems, Inc.)	Findings Re: Liability of National Gypsum for Pending and Future Asbestos Personal Injury Claims
June 1993	Dunbar & Martin (nee Neuman) (NERA)	Estimating Future Asbestos Claims: Lessons from the National Gypsum Litigation
August 13, 1993 DRAFT	Stallard & Manton (Duke University)	Estimates and Projections of Asbestos Related Diseases and Exposures Among Manville Personal Injury Settlement Trust Claimants, 1990-2049
September 23, 1993	Dan Rourke, The Resource Planning Corporation (RPC)	The Manville Personal Injury Settlement Trust Claims Forecast Model
After 1994	William Blot (International Epidemiology Institute, Ltd.)	Trends in Asbestos-Related Diseases
March 8, 1994 DRAFT	Stallard & Manton (Duke University)	Projections of Asbestos Related Personal Injury Claims Against the Manville Personal Injury Settlement Trust, Males 1990-2049, by Occupation, Date of First Exposure, and Type of Claim
March 4, 1995	The Lancet, Vol. 345, No. 8949	Continuing increase in mesothelioma mortality in Britain
1996	The Cologne Re	Asbestos-Related Claims in the USA and Impact on the Reinsurance Industry
1997	Bertram Price	Analysis of Current Trends in United States Mesothelioma Incidents
2001	Mealey's Asbestos Bankruptcy Conference 2001/David T. Austern	The Manville Trust Experience
August 2001	RAND Documented Briefing (DB-362.0-ICJ)	Asbestos Litigation in the U.S.: A New Look at an Old Issue

Asbestos Defendants Declaring Bankruptcy[1]

Reference List 2

Company	Year of Bankruptcy
1. Amatex Corporation	1982
2. American Shipbuilding	1993
3. Armstrong World Industries [2]	2000
4. Atlas Corporation	1998
5. Babcock & Wilcox	2000
6. Baldwin Ehret Hill	1993
7. Brunswick Fabrications	1998
8. Burns & Roe Enterprises	2000
9. Cassiar Mines	1992
10. Celotex [3]	1990
11. Continental Producers Corporation	
12. Delaware Insulations	1989
13. E.J. Bartells	2000
14. Eagle Picher Industries	1991
15. Eastco Industrial Safety Corporation	2001
16. Federal Mogul	2001
17. Forty-Eight Insulations	1985
18. Fuller-Austin Insulation	1998
19. G-I Holdings	2001
20. Gatke Corp.	1987
21. Hillsborough Holdings	1989
22. H.K. Porter Co. [4]	1991
23. Johns-Manville	1982
24. Joy Technologies [5]	1999
25. Keene Corp.	1993
26. Kentile Floors	1992
27. Lykes Brothers Steamship	1995
28. M.H. Detrick	1998
29. National Gypsum	1990
30. Nicolet	1987
31. North American Asbestos Corporation	1976
32. Owens Corning Fiberglas	2000
33. Pacor	1986
34. Pittsburgh Corning	2000
35. Powhatan Mining Company	
36. Prudential Lines	1986
37. Raytech Corporation [6]	1989
38. Rock Wool Manufacturing	1996
39. Rutland Fire & Clay	1999
40. SGL Carbon	1998
41. Skinner Engine Company	2001
42. Standard Asbestos Manuf. & Insulation	1990
43. Standard Insulations Inc.	1986
44. Todd Shipyards	1987
45. United States Lines [7]	1986
46. UNR Industries [8]	1982
47. U.S. Gypsum	2001
48. U.S. Mineral	2001
49. Wallace & Gale	1984
50. Washington Group International	2001
51. Waterman Steamship Corp.	1983
52. W.R. Grace	2001

[1] Most (but potentially not all) of these asbestos defendants filed bankruptcy as a result of asbestos. We have attempted to include each corporation once (rather than counting multiple subsidiaries).
[2] Including subsidiaries Desseaux Corporation and Nitram Liquidators, Inc.
[3] Including Carey Canada, Panacon, Philip Carey Company, and Smith & Kanzler.
[4] Including Southern Asbestos Company and Southern Textile.
[5] Including Harnischfeger and Ecolaire.
[6] Including Raymark Industries and Raymark Corp.
[7] Including McLean Industries and First Colony Farms.
[8] Including Union Asbestos & Rubber (Unarco).

Endnotes

[1] The U.S. Supreme Court referred to asbestos litigation as an "elephantine mass" in *Ortiz v. Fibreboard*, 97 U.S. 1704 (1999).
[2] The insurance rating agency A.M. Best referred to asbestos claims as a "tidal surge" in *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers.* Special Report (7 May 2001), 3.
[3] Fourteen companies filed bankruptcy during 2000 – 2001 as a result of asbestos litigation, including Armstrong World Industries, Babcock & Wilcox, Burns & Roe Enterprises, E.J. Bartells, Eastco Industrial Safety Corp., Federal Mogul, G-I Holdings (GAF), Owens Corning Fiberglas, Pittsburgh Corning, Skinner Engine Co., U.S. Gypsum, U.S. Mineral, Washington Group International, and W.R. Grace.
[4] "Asbestos: A Tiny But Lethal Fiber," at http://www.pilotonline.com/special/asbestos/primer.html (6 May 2001). Also referred to as the "magic mineral" in the *British Journal of Industrial Medicine* 47 (1990), 361.
[5] The six varieties are actinolite, amosite, anthophyllite, crocidolite, tremolite, and chrysotile. According to the July 1977 *Scientific American*, chrysotile once accounted for more than 95 percent of asbestos use worldwide. It has a serpentine structure and is noticeably softer and more flexible than the other types.
[6] "Eliminating Asbestos From Fireproofing Materials," *Chemical Innovation* 30, no. 6 (June 2000), 21-29.
[7] Austern, David, "The Manville Trust Experience," in *Mealey's Asbestos Bankruptcy Conference 2001*, (2001), 118.
[8] Shearson Lehman Brothers, Inc. *Industry Report* (20 January 1992), 6.
[9] Alleman, James E. and Brooke T. Mossman, "Asbestos Revisited," *Scientific American* (July 1997), 74.
[10] Only new product uses, commercial paper, corrugated paper, specialty paper, rollboard, and flooring felt containing asbestos remained banned after the 1991 remand.
[11] "Asbestos," at http://www.epa.gov/ttn/uatw/hlthef/asbestos.html (24 July 2001).
[12] California ambient asbestos white paper at http://www.arb.ca.gov/toxics/asbestos.htm.
[13] Description of the pulmonary function and exposure to asbestos that gives rise to disease: Inhaled air progresses from nose, sinus, pharynx, trachea to the bronchi of air passages within the lungs. Lungs are covered with a thin membrane called pleura. The upper diaphragm (muscle which causes air to be inhaled/exhaled) also has a pleura. Lungs are composed of 200-300 million air sacs, called alveoli, at the ends of bronchi. The gas exchange of oxygen for carbon dioxide happens here. Generally, the body's natural barriers naturally expel most dusts, including asbestos, for years before they become overwhelmed and a clinical problem develops.
[14] Actual latency periods for individuals may be shorter or longer.
[15] Signature disease of asbestos exposure.
[16] The pleural space is the space between the inner and outer lining of the lung. It is normally very thin and lined only with a very small amount of fluid.
[17] Bronchi are one of two primary divisions of the trachea that lead into the right or left lung.
[18] "It is now universally agreed that exposure to asbestos fibers can, in certain circumstances, lead to three diseases: asbestosis, lung cancer and mesothelioma of the lining of the lung (pleura) or stomach (peritoneum). It can also cause a group of benign conditions of the pleura. Controversy remains over whether it may cause a group of other cancers, including cancers of the larynx, gastrointestinal tract and kidney," write Frederick C. Dunbar, Denise Neumann Martin, and Phoebus J. Dhrymes in *Estimating Future Claims, Case Studies from Mass Tort and Product Liability.* (Andrews Professional Books, 1996).
[19] "FAQs, Asbestos Divison," at http://www.okdol.state.ok.us/asbestos/asbestos%20FAQ.htm.
[20] *Ibid.*
[21] Austern, David, "The Manville Trust Experience," in *Mealey's Asbestos Bankruptcy Conference 2001*, (2001), 114.

[22] Babcock & Wilcox Co, *Informational Brief* (2000). See also Christopher Edley Jr., "Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act," prepared for the House Committee on the Judiciary, 106th Cong., 2d sess., 1999, 15.
[23] "Asbestos Companies Report Annual Numbers of Pending Claims, New Filings in 2000," *Mealey's Litigation Report: Asbestos* (18 May 2000), 19-24.
[24] Plaintiff attorney activities include the creation of asbestos litigation specialty firms, union hall x-ray screenings, and Sunday sports page and Internet advertisements. See Richard B. Schmitt, "How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial," *Wall Street Journal* (5 March 2001).
[25] For more information regarding the proposed settlement to the Georgine class action (i.e., the Center for Claims Resolution (CCR) Futures Deal), see Exhibit 2.
[26] "Recently for example, asbestos cases reportedly have "migrat[ed] en masse" to certain counties in Mississippi because of favorable long-arm jurisdictional rules and because '[j]uries in those counties rarely, if ever, rule against plaintiffs in product liability cases, and defendants do not have the right to perform medical exams on any claims.'" Stephen Labaton, "Top Asbestos Makers Agree to Settle 2 Large Lawsuits," *New York Times* (23 January 2000).
[27] Estimate of 2,000 meso cases per year: *Mealey's Asbestos Conference* (1999), Manville table on claims received by year, 47. Bertram Price, "Analysis of Current Trends in United States Mesothelioma Incidence," *American Journal of Epidemiology* 19, no. 3 (1997), 216 (figure 4). Mesothelioma Applied Research Foundation, Legacy http://www.marf.org.
[28] The American Thoracic Society has set a minimum x-ray reading for classifying an individual as "impaired." See Victor E. Schwartz and Leah Lorber, "A Letter to the National's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases," *American Journal of Trial Advocacy* 24, no. 2 (2001), 27. However, there is no broad medical agreement on the definition of pleural plaques.
[29] "Asbestos Continues to Bite Industry," *Business Insurance* (8 January 2001); "Finance and Economics: A Trail of Toxic Torts," *Economist* (27 January 2001). However, a variety of other estimates indicate the number could be much higher than 2,000, perhaps as high as 5,000.
[30] "Still Killing," *Economist* (19 August 2000); *Wall Street Journal* (5 March 2001).
[31] Joint liability imposed on joint tortfeasors that allows enforcement of the entire judgment against any one of the tortfeasors. In some jurisdictions, joint and several liability remains despite adoption of comparative fault, and in others it has been eliminated by comparative fault.
[32] "Companies want to pay what they paid 15 or 20 years ago, and don't want to take into consideration that there might be fewer companies to pay, which means higher shares of liability." Fred Baron, of the Dallas law firm Baron & Budd, as quoted in "Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps," *Wall Street Journal* (12 April 2001).
[33] "[O]f every dollar paid by defendants, over sixty cents goes to the lawyers. Adding the overhead costs of both the judicial and the insurance systems, asbestos litigation consumes two dollars of society's resources in order to deliver a single dollar to people who were exposed." Christopher Edley Jr., "Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act," prepared for the House Committee on the Judiciary, 106th Cong., 2d sess., 1999, 5.
[34] Richard B. Schmitt, "How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial," *Wall Street Journal* (5 March 2001).
[35] Estimates of total ultimate cost from Tillinghast–Towers Perrin and Milliman USA studies.
[36] Estimates of net amount insured by U.S. property/casualty insurers and reinsurers from Tillinghast–Towers Perrin and Milliman USA studies.
[37] A reinsurer provides insurance to direct insurance companies by contracting to accept the transfer, in

whole or in part, of a risk or contingent liability covered under an existing insurance contract.

[38] *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, A.M. Best Special Report (7 May 2001), 1.

[39] "Some courts have adopted mechanisms for separating out claims by individuals who are not sick. For example, in Massachusetts, the judges have an inactive docket which provides a way for plaintiffs with asbestos-related pleural diseases to toll the statute of limitations until such time that they develop asbestosis or some type of malignancy. Cases on the inactive docket are exempt from discovery and can only be removed to the active docket by the filing of a subsequent complaint. A similar inactive docket approach is used by some courts in Maryland." Victor E. Schwartz and Leah Lorber, "A Letter to the National's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases," *American Journal of Trial Advocacy* 24, no. 2 (2001). See also Mark A. Behrens and Monica G. Parham, "Stewardship for the Sick: Preserving Assets for Asbestos Victims through Inactive Docket Programs," *American Journal of Trial Advocacy* 24, no. 2 (2001), 17.

[40] E.g., the tobacco industry and makers of polio vaccines. SV40 (Simian Virus 40) has been found in the cells of certain rare cancers, including mesothelioma. It has been alleged that contamination of early batches of the Salk vaccine and test batches of the Saben vaccine (polio vaccines) cause mesothelioma. However, these findings have not met the Daubert standard for admissibility in court.

[41] The Manville Trust sued the tobacco industry in *Falise*, which ended in a mistrial in January 2001. The suit was later dropped. Additionally, 22 asbestos injury plaintiffs and Owens Corning filed suit against several tobacco companies in 1998, alleging a conspiracy to hide the health risks associated with cigarette smoking and asbestos exposure. The Jefferson County Circuit Court dismissed the suit in May 2001, ruling that Mississippi's law prohibits recovery for an indirect injury. "Updates," *Business Insurance* (28 May 2001).

[42] Henry J. Hyde, "Statement of House Judiciary Committee Chairman Henry J. Hyde, Committee on the Judiciary, Hearing on H.R. 1283, Fairness in Asbestos Compensation Act of 1999," prepared for the House Committee on the Judiciary, 106th Cong., 2d sess., 1999; at http://www.productslaw.com/hr1283.html.

[43] Ronald L. Motley and Susan Nial, " Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?"in *Proceedings of the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims.*

[44] Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (Pantheon, 1985), 195.

[45] "Thus the traditional requirement of product identification and proximate cause was eliminated for the desired common good of reducing litigation expenses, which threatened to exceed the total indemnity paid." *Best's Review* (12 May1993).

[46] As of October 1992 (after four years of operation), the CCR had resolved 115,000 claims and had 55,000 claims pending.

[47] "Today the one-time emissary has been knocked down to clerical assistant, existing, for the most part, to process claims." *Wall Street Journal* (7 February 2001.)

[48] "Updates," *Business Insurance* (25 June 2001).

[49] A Washington state court judge ordered the CCR to pay the full amount of damages agreed to by 17 members during nine different settlement agreements finalized in 2000 prior to the withdrawal of National Gypsum and the bankruptcy of Armstrong World Industries. Remaining CCR members have sued their insurers for failing to pay toward the liabilities of former CCR members, which have subsequently been allocated and billed to the remaining members and then allocated to each insurer.

[50] Also known as *Amchem v. Windsor*; conditional class certification was granted by U.S. District Judge Weiner on February 15, 1993.

[51] The 3rd Circuit U.S. Court of Appeals decertified the class on May 10, 1996, and on June 27, 1996, the

manufacturers' petition for a rehearing was denied. The Supreme Court upheld the lower court's decision (6-2) on June 27, 1997, with Justice Ginsburg stating that the "sprawling class" did not meet the requirements of Rule 23. *Amchem Products, Inc. et al. v. Windsor et al.*, 96 Sup. Ct. 270 (1997).

[52] *Ortiz v. Fibreboard*, also known as Ahearn.

[53] Forty-five thousand pending claims represented by the counsel achieving the class action settlement were settled in a separate agreement for a higher average amount.

[54] Fibreboard was allowed to keep virtually all of its net worth, paying only $500,000, and potential insurance funds were greater than $2 billion.

[55] OCF underestimated the frequency and severity of claims in the National Settlement Program (NSP) as well as the number of opt-outs. "Credit Suisse First Boston," Quarterly Report 28 November 2000, 10.

[56] The six member Rehnquist committee issued its 43-page report, *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2*, at the annual meeting of the Judicial Conference of the United States on March 12, 1991. See *The National Law Journal.* Also see the District of Delaware U.S. Bankruptcy Court. *W.R. Grace Informational Brief* (2001), 15 (footnote 27).

[57] 479 S.E. 2d 300, 304 (W.Va. 1996)

[58] *Amchem Products, Inc. et al. v. Windsor et al.*, 96 Sup. Ct. 270 (1997).

[59] Statement by William N. Eskridge, Jr., as quoted in Babcock & Wilcox Company, *Informational Brief*, (22 February 2000), 37.

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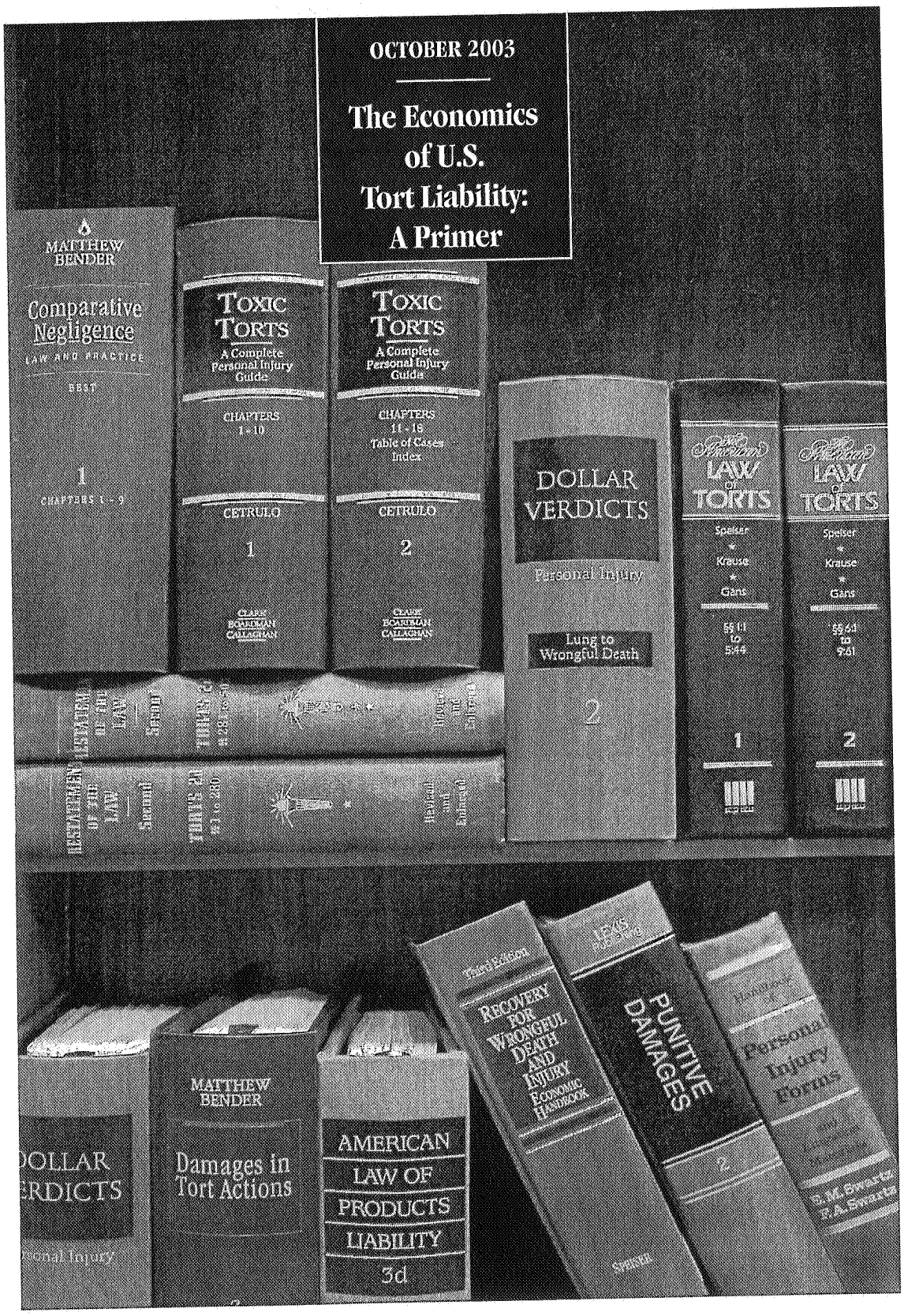
CONGRESS OF THE UNITED STATES
CONGRESSIONAL BUDGET OFFICE

A CBO STUDY

OCTOBER 2003

The Economics of U.S. Tort Liability: A Primer



A

CBO

STUDY

The Economics of U.S. Tort Liability: A Primer

October 2003

The Congress of the United States ■ Congressional Budget Office

PREFACE

Many controversies and policy issues surround the U.S. tort system, which holds parties liable for injuries to people or property. Critics charge that the system is costly and inefficient, arbitrary and open to abuse, and indirectly harmful through its adverse effects on economic vitality and consumers' choices. In contrast, defenders argue that the tort system serves important social objectives, such as compensating injury victims, improving product safety, and punishing egregious behavior. Several bills now before the Congress propose to change the rules that govern tort claims for medical malpractice and asbestos exposure and claims litigated as class actions.

This Congressional Budget Office (CBO) study—prepared at the request of the Senate Budget Committee—attempts to clarify the issues and policy options surrounding the tort system by presenting an economic perspective on tort liability. The study outlines the strengths and weaknesses of tort liability as a tool for promoting economic efficiency and fairness, discusses the available data on the benefits and costs of the tort system, and analyzes in qualitative terms the likely effects of various policy options for altering the system. In keeping with CBO's mandate to provide objective, impartial analysis, this study makes no recommendations.

Perry Beider and Cary Elliott of CBO's Microeconomic and Financial Studies Division wrote the study, under the supervision of David Moore and Roger Hitchner. The authors received valuable comments and assistance from Heywood Fleisig, Stuart Hagen, and Robert Murphy of CBO, as well as from Jeff O'Hara, formerly of CBO; Christopher DeMuth of the American Enterprise Institute; Paul Rubin of Emory University; Alan Sykes of the University of Chicago; and Paula Hannaford-Agor and Neil LaFountain of the National Center for State Courts.

Christian Spoor edited the study, and Christine Bogusz proofread it. Maureen Costantino took the cover photograph and designed the cover. Lenny Skutnik printed the initial copies of the report, and Annette Kalicki prepared the electronic versions for CBO's Web site (www.cbo.gov).

Douglas Holtz-Eakin
Director

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Summary

A "tort" is an injury to someone's person, reputation, or feelings or damage to real or personal property.[1] Under the U.S. system of tort liability, courts can hold injurers liable for many different types of torts, such as automobile accidents, contract fraud, trespass, medical malpractice, and injuries associated with defective products.

Several bills now before the Congress seek to address concerns that critics have raised about the tort system or about certain types of tort cases. Among those concerns are that:

- The "transaction costs" of the system, particularly attorneys' fees, are too high;
- Punitive damages and compensatory damages for pain and suffering are often awarded arbitrarily, with no beneficial effect on safety;
- The class-action mechanism (whereby many claims that cover similar factual ground are combined into a single larger case) is easily abused by plaintiffs' attorneys;
- Medical malpractice lawsuits are driving up the costs of liability insurance for physicians to the point that some of them are restricting their practices or retiring; and
- In suits over exposure to asbestos, too much money and court time are being devoted to people who do not yet show any signs of physical impairment.

Conversely, supporters of the existing tort system argue that it serves important policy goals, such as compensating victims, holding injurers responsible for their actions, and improving safety. Supporters say that critics overstate the extent and severity of the perceived problems with the system. They further argue that many of the proposed changes are too broad and that major problems can be addressed by the courts or through more narrowly targeted legislation, perhaps at the state level, where the vast majority of tort lawsuits are filed.

This primer looks at the current tort system—and various options for changing it—from an economic perspective, focusing on the goals of efficiency (minimizing the system's total cost to the economy) and equity (treating all parties fairly). Data about the overall costs and benefits of tort liability are too scarce to allow economists to judge the efficiency of the current system. However, those data suggest that the system is a relatively expensive way to compensate victims and, thus, that any justifications for it must be based on its effects on deterring injuries, promoting equity, or both.

1. Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999), pp. 1496-1497.

The economic perspective leads to some other general conclusions about tort liability:

- Using the tort system to supplement market forces may improve or reduce efficiency, depending on what incentives the system creates for potential injurers and potential victims and on the interactions between those incentives, government regulations, and private insurance policies;

- Altering the tort system generally involves some trade-offs—in particular, changes that seem likely to improve efficiency may be problematic in terms of equity, or vice versa;

- Federal involvement in what is now mainly a matter of state law might yield more-efficient interstate commerce, but it could limit innovation at the state level (as well as restrict the states' ability to offer contrasting liability regimes to appeal to different residents); and

- The same policies may not be appropriate for all types of tort cases, because efficiency requires minimizing the sum of several kinds of costs, which may vary in their relative importance from one category of tort to another.

Tort Liability in the United States

The U.S. tort system is not centralized, which makes collecting comprehensive data about it difficult. Roughly 95 percent of lawsuits over torts are filed in state courts, rather than federal courts, the Congressional Budget Office (CBO) estimates. Moreover, in the vast majority of cases, plaintiffs and defendants reach out-of-court settlements, whose terms typically remain private. (For example, 97 percent of tort cases that "terminated" in federal district courts in fiscal year 2000 were disposed of before a verdict was reached.)

Data from the Bureau of Justice Statistics that cover 45 of the nation's 75 largest counties indicate that plaintiffs won 48 percent of the cases that reached a verdict in state courts in 1996 (the latest year for which that information is available).[2] In those cases, the average time between filing and completion was 22 months. Automobile-related torts accounted for 49 percent of the cases, followed by premises liability (22 percent) and medical malpractice (12 percent). The median award to successful plaintiffs was $31,000 for all cases, but it varied widely for different categories of torts: from $18,000 in automobile-related cases to $286,000 for medical malpractice and $309,000 in asbestos cases.

Looking at trends over time, data from 16 states tracked consistently by the National Center for State Courts show that the number of tort cases filed each year rose by 70 percent between 1975 and 1990 (its peak) and then fell by 19 percent by 2000. Relative to population, the rate of filings was 8 percent lower in 2000 than in 1975—212 cases per 100,000 residents compared with 230 cases.[3]

Figures that suggest an overall decline in tort cases, however, mask continuing growth in the number or impact of some important categories of torts. For example, the Physician Insurers Association of America reports that median court judgments for medical malpractice rose from $100,000 in 1990 to more than $300,000 in 2001—an increase of 138 percent after correcting for inflation. And researchers at RAND report that the number of claims filed for asbestos exposure nearly tripled in just two years, between 1999 and 2001.

The Basic Economics of Tort Liability

From the economic point of view, the efficiency of the tort system is measured by how well it minimizes the sum of several types of costs:

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2. Department of Justice, Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 1996*, NCJ 179769 (August 2000).

3. See Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project* (Williamsburg, Va.: National Center for State Courts, 2001), with accompanying spreadsheets available at www.ncsconline.org/D_Research/csp/2001_Files/2001_Tort-Contract_Tables.xls.

- The costs of injuries (including medical costs, lost productivity, and pain and suffering);
- The costs of efforts to prevent or avoid injuries (including efforts to make products safer, which tend to raise consumer prices) and the opportunity costs of goods and services that are not provided (such as potential medical drugs that do not reach the market or municipal pools that are closed for fear of lawsuits) or goods and services that are provided but forgone by some risk-averse consumers (such as air travel);
- The costs of administration and implementation (particularly attorneys' fees and the administrative costs of insurance that potential injurers and victims buy to redistribute the risks they face); and
- Indirect costs to the economy (such as the disruption costs of plant closings and bankruptcies).

What constitutes equity in relation to the tort system is ultimately subjective, but there is consensus that compensating victims for their injuries—at least in some cases and to some degree—is equitable.

Tort liability is only one means by which society addresses the efficiency and equity issues posed by injuries; other means include market forces, regulation, and public insurance funds. Market forces can help control injury costs in several ways. Under conditions of competition and good information, producers of goods and services respond to consumers' desires for safer products, employers respond to employees' desires for safer workplaces, and insurance companies offer policies to respond to potential victims' desires to reduce the uncertainty they face.

One efficiency rationale for supplementing market forces with some form of government involvement is simply that many injuries—automobile accidents, releases of toxic chemicals, and so forth—are unrelated to any economic transaction. Indeed, some academic economists favor restricting the scope of tort liability to such "stranger" injuries. For other types of injuries, making an efficiency argument for government intervention requires the existence of some market imperfection: perhaps potential victims lack good information about the risks they face, suffer from biases that limit their ability to use the information, or have few choices because of monopoly or collusion in the market.[4] Of course, government actions have their own weaknesses and thus may not improve efficiency in practice. For example, regulation requires centralized information about costs and benefits, and regulators may be co-opted by the parties they regulate.

Tort liability supplements the market in a more decentralized way. The basic idea is that making injurers pay for the harm they cause not only compensates victims but also gives injurers (if not victims) appropriate incentives to reduce the frequency and severity of that harm. The different liability standards used by the courts aim to achieve those goals in different ways: in particular, under the doctrine of strict liability, injurers are responsible regardless of how much care they exercise in trying to minimize injuries, whereas under the doctrine of negligence, they are responsible only if their actions fail to meet a standard of due care.[5]

The tort system is no panacea, however, even in principle—it is difficult if not impossible to craft liability rules that can consistently achieve the desired levels of both efficiency (taking into account all of the relevant costs) and equity. For example, because the expected level of compensation may affect the degree of care that potential victims exercise, the efficiency objective of cost-effective deterrence can conflict with the equity objective of compensation. Moreover, because the terms of that trade-off can vary, a single rule may not achieve the desired balance between efficiency and equity in all cases.

In practice, tort liability is further limited because information—particularly the information needed to determine the cause of an injury—is incomplete and costly. The transaction costs of the tort system derive from information problems: lack of complete information is

4. There is no presumption that market forces tend to produce equitable outcomes; hence, arguments for government intervention can also be made on equity grounds.

5. Even in a case judged under strict liability, the injurer may not be held responsible if the victim's own behavior contributed too much to the occurrence of the harm.

what allows plaintiffs and defendants to hold divergent views and encourages them to devote resources to proving their respective cases. Information problems are also the root cause of courtroom errors, and they can make it hard to set standards for due care at efficient levels.

The Costs and Benefits of Tort Liability

Analyzing the policy questions that surround tort liability is difficult because of incomplete data not only on tort cases themselves but also on the indirect costs and benefits of the tort system. Indeed, from the standpoint of economic efficiency, the actions that the system encourages potential injurers and victims to take (or refrain from taking) to avoid injuries can be more important than some of the direct "costs" associated with individual cases.

In efficiency terms, the primary benefits of the tort system are measured not by payments to victims—which represent transfers of wealth but not gains or losses to society as a whole—but by reductions in injury costs. Those benefits arise indirectly, through precautions taken by potential injurers (for example, efforts to design safer products or reduce production defects).[6] Thus, they are not observable in data on trials or settlements.

Several important types of costs are also indirect, including the costs of specific actions that firms take to reduce the injury risks associated with their products (such as including air bags in automobiles), the opportunity costs of goods and services not offered because of liability concerns or not purchased because of liability-related price increases, and the disruption costs of layoffs and bankruptcies.

Arguments About the Effectiveness of Tort Liability's Incentives

Indirect benefits and costs are very difficult to measure. In general, data do not exist to show how liability affects the degree of care that potential injurers take—let alone how injury costs change as a result of that care. Moreover, theoretical analysis alone cannot answer the key questions, because the extent to which the potential efficiency benefits of tort liability are realized depends on the relationship between the true costs of injuries and the expected costs to injurers. If potential injurers expect to pay one dollar more for each additional dollar of injuries they cause, they will have the optimal incentive to take all (and only) cost-effective precautionary actions. But they might anticipate paying more than one dollar per dollar of additional injury (for example, because of excessive punitive damages) or less than that (for example, if some of their torts go undetected or if their liability costs are insured and their premiums do not rise commensurately). For potential injurers whose actions are thought at the time to be harmless—such as the firms that manufactured or used asbestos before its health risks were identified—there is no expectation of increased liability costs and hence no specific incentive for precaution.[7]

Controversy over both the efficiency and equity effects of liability has particularly focused on nonpecuniary damages (punitive damages and compensatory damages for pain and suffering). Critics argue that large nonpecuniary damages are awarded arbitrarily and unpredictably, with little connection to the actual harm or to the character of the injurer's conduct. In that view, such damages are not only inequitable but also inefficient: arbitrary and unpredictable awards do not provide incentives for precaution but do raise costs, thereby distorting price signals. Critics further argue that nonpecuniary damages, whether arbitrary or not, have a separate adverse effect on the distribution of risk—in particular, that liability for pain and suffering implicitly provides consumers with a form of inefficient overinsurance.[8]

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6. Some indirect benefits may also arise from better distribution of risk. In principle, risk-averse consumers who expect to be compensated for injuries more fully through the liability system than they would be through their own insurance may be more willing to buy certain goods or services (space heaters, perhaps).

7. However, the mere possibility that seemingly harmless activity may later produce tort claims increases uncertainty and gives potential injurers general incentives to buy insurance, investigate possible risks, and take generic prevention or avoidance measures (such as not researching or developing new products), which may be efficient or inefficient.

8. The argument is that consumers benefit by insuring themselves against pecuniary losses, such as lost income or increased medical costs, but not against pain and suffering (as illustrated by the fact that people generally do not purchase life insurance policies for their young children). Thus, when producers expect to pay nonpecuniary damages and build the costs of those damages into the

In contrast, supporters of the liability system argue that large punitive damages can serve equity by expressing society's disapproval of behavior that reflects wanton disregard or contempt for potential victims. Such damages can also promote efficiency, they say, by providing proper incentives for the prevention of injuries that have a significant probability of going undetected. (For example, if bolt manufacturers expect the role of defective bolts to go unrecognized in four out of five accidents that their products cause, they will have inefficiently low incentives to prevent defects unless they expect to pay five times the actual damage on those occasions when they are penalized.) Supporters further argue that pain and suffering represent real losses that should be reflected in the prices of products (to send consumers efficient signals) and that limiting awards for such losses might undercompensate some injury victims.

Evidence About the Effects of Tort Liability

Without direct data or clear theoretical predictions about the incentive effects of tort liability, analysts have tried to tease out the truth statistically. However, their most detailed efforts to date, which have focused mainly on punitive damages, have not yielded conclusive results. The best available study of the effects of punitive damages in the United States found no evidence that the 46 states that allow such damages have fewer environmental or safety torts than the four states that do not allow them. However, that lack of evidence may simply reflect the limitations of the data.[9]

Given the scarcity of data on the benefits and many of the costs of the current tort system, economists cannot judge the system's efficiency. But they can answer a narrower question about its cost-effectiveness as a means of compensating injury victims. The best available data on the direct costs of tort cases suggest that victims who file claims receive an average of 46 cents from each direct dollar spent on the system (with the other 54 cents going to attorneys' fees and insurance expenses).[10] The best available data show that such transaction costs are proportionately much smaller in public insurance programs—20 percent nationwide in state workers' compensation programs (though that figure excludes spending on claimants' attorneys, which is reportedly rising) and 15 percent in the federal Vaccine Injury Compensation Program. A no-fault public insurance program for other torts would probably not lower transaction costs to those levels, in part because of the costs of establishing which injurers were responsible for particular injuries. Nonetheless, it is safe to say that the existing tort system is a relatively costly way to compensate victims and, thus, that any justifications for it must rest on its effects on deterrence, equity, or both.

Policy Options for Changing the Tort System

The controversies over the costs and benefits of the tort system have led to numerous proposals for change at the federal level. This report discusses the potential advantages and disadvantages of various policy options in qualitative terms. Those options—which were chosen to illustrate the trade-offs between efficiency and equity that lawmakers face—fall into three main categories.

Policies for reducing the scope of tort liability include options that would eliminate liability for all injuries or all "nonstranger" injuries, exempt products certified as safe by a federal regulatory body (such as the Food and Drug Administration or the Consumer Product Safety Commission), or replace tort liability with a federal compensation system for injury victims, like the present state-

prices they charge for goods and services, consumers implicitly pay a kind of insurance premium for coverage they would not otherwise choose to buy. The effect of that implicit premium and coverage is to shift wealth inefficiently—raising it in the event of an injury, but not by enough to justify the reduction in wealth in the case of no injury.

9. One key limitation is that the control group includes only four states; another is that punitive damages would not be expected to deter typical torts but only those rare ones that were egregious enough to be the subject of such damages. See W. Kip Viscusi, "The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts," pp. 285-345, Theodore Eisenberg, "Measuring the Deterrent Effect of Punitive Damages," pp. 347-357, and David Luban, "A Flawed Case Against Punitive Damages," pp. 359-380, all in *Georgetown Law Journal*, vol. 87, no. 2 (November 1998).

10. Tillinghast-Towers Perrin, *U.S. Tort Costs: 2002 Update—Trends and Findings on the Costs of the U.S. Tort System* (2003).

level workers' compensation system and the federal fund for vaccine victims.

Policies that are more incremental in nature but that could be applied broadly to all types of torts include options that would restrict compensation for pain and suffering or punitive damages, limit fees charged by plaintiffs' attorneys, reduce the use of joint-and-several liability (under which one or a few injurers can be held responsible for paying all of the damages caused by a number of injurers), or modify the "collateral-source rule" (under which the amount of damages owed by a defendant does not take into account any benefits that an injured plaintiff has received from an insurance policy or other independent source).

Policies targeted toward particular types of tort cases include options that would create specialized courts to hear medical malpractice cases, establish minimum medical criteria for asbestos claims and perhaps set up a victims' compensation fund, tie the fees received by plaintiffs' attorneys in class-action suits more closely to benefits actually received by the class members, or allow defendants to shift more class-action cases from state courts to federal courts.

In most cases, data limitations make it impossible for CBO to determine whether a particular option would be likely to improve or reduce economic efficiency. Nonetheless, the economic perspective leads to some general conclusions that decisionmakers may wish to keep in mind as they consider proposed changes to the liability system.

- The impact on efficiency of using tort liability to try to improve on market outcomes may be either positive or negative—depending on the incentives that liability provides for potential injurers and potential victims and on how those incentives interact with incentives and constraints from other sources, such as government regulations and private insurance policies.

- Most, if not all, options for changing the tort system involve some trade-offs. In particular, policies that seem desirable on efficiency grounds may be problematic from the equity perspective, or conversely.

- Federal involvement in an area governed predominantly by state law may be justified by its benefits for interstate commerce, but it limits state innovation and experimentation (as well as the ability of U.S. residents to "vote with their feet" by choosing to live under one state's liability regime rather than another's).

- Because the efficient solution is the one that minimizes the sum of several different costs, which may vary in their relative importance, different policies may be appropriate for different types of tort cases.

CHAPTER

1

Introduction

Injuries have many causes, including economic activities: consumers are injured or killed by defective products, workers are hurt on the job, train passengers are injured by derailments, and patients are harmed by medical errors. Markets provide broad incentives to control the number and costs of such injuries. For example, employers can save on wage costs by making jobs less hazardous; drivers with good safety records pay lower insurance premiums; and enhanced safety features can give a product a marketing advantage over its competitors. In addition, the insurance market responds to people's desire to reduce the financial uncertainty associated with potential injuries.

Society uses three tools to augment the safety incentives and insurance opportunities provided by the market: regulation, public compensation programs, and tort liability. In particular, the U.S. tort liability system is intended to reduce the number of injuries—by providing incentives for individuals and firms to take appropriate care—and to compensate those who are harmed.[1]

"Tort" is defined very broadly in law as an injury to "one's person, reputation or feelings" or damage to "real or personal property."[2] Tort liability is the court-enforced obligation of a "tortfeasor" (injurer) to pay for a victim's losses. The concept of tort liability evolved as a generalization of various specific types of injuries—including trespass, deceit, slander, and assault and battery—some of which generally occur outside the context of economic activity. Even today, tort law's diverse origins are reflected in a complex and heterogeneous body of common law. One example of that complexity is the boundary line between tort law and contract law. Notwithstanding the broad definition of a tort, injuries caused by a breach of contract are generally addressed under contract law—with the exception of injuries involving medical malpractice or defective or dangerous products, which are addressed as torts even when the parties have an explicit contract.

Tort law is almost exclusively contained in state law, and the large majority of tort cases are filed in state courts. Not surprisingly, therefore, most past efforts to reform the tort liability system in the United States have taken place at the state level. In particular, most states have adopted one or more reforms favoring defendants during the past 30 years—especially in 1986, when a perceived insurance crisis led to 41 new state laws.[3] The courts have also taken action at various times: recently, for example, the U.S. Supreme Court reiterated an earlier ruling that the Due

1. The aims of the tort system are sometimes also said to include providing a forum for the less privileged to be heard and punishing egregious behavior.

2. Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999), pp. 1496-1497.

3. Those reforms included limits on nonpecuniary damages, reductions in the scope of joint-and-several liability, and offsets for benefits from collateral sources (which are discussed in Chapter 5).

Process Clause of the Constitution establishes limits on punitive damages.[4]

Still, many critics of the current tort system say that additional federal action is needed for several reasons. At the general level, they argue that the system's costs are too high, particularly because of excessive "transaction costs" (mainly compensation to plaintiffs' and defendants' attorneys) as well as excessive and arbitrary awards for noneconomic losses ("pain and suffering") and for punitive damages. Such high costs sometimes have perverse negative effects on safety, they argue—for example, by discouraging firms from conducting safety research that could create a legal "paper trail" or by raising the prices of risk-reducing goods and services, such as medical care. Critics also contend that plaintiffs frequently bring frivolous lawsuits when they know that the defendant is inclined to settle out of court to avoid the costs of litigation.

The tort system's critics also take issue with specific types of cases. They argue that medical malpractice claims are contributing to a crisis in the cost and availability of certain health care services, that claims for exposure to asbestos by people who show no evidence of illness are burdening the courts and pushing firms into bankruptcy, and that misuse of the class-action mechanism is allowing local judges and juries who are biased against distant corporate defendants to bring verdicts that have damaging national implications.

Supporters of the current tort system question the factual basis of some of those criticisms. They note that the number of tort cases filed nationwide has been falling since 1996. Moreover, they say, large awards for punitive damages are rare and are often reduced before payment is made. They further argue that the costs of the tort system are worthwhile given the system's contributions to the social goals of compensating victims, holding injurers responsible for their actions, and improving safety. Supporters of the present system also maintain that proposed reforms are generally too broad and that fewer negative consequences would occur if the Congress allowed the states and the judiciary to address any real problems that exist.

The Congress has modified tort law several times in the past, although its actions have generally focused on torts that spring from a particular cause or affect specific industries. For example, the General Aviation Revitalization Act of 1994 exempted manufacturers of small planes from liability for crashes if the planes are more than 18 years old and not used in scheduled service. In addition, federal compensation programs that have been created for victims of vaccine injuries and the September 11 terrorist attacks limit the ability of people receiving compensation to sue for damages.[5]

This primer looks at the tort system from an economic perspective: it discusses the factors that influence whether tort liability improves or reduces economic efficiency and analyzes, in qualitative terms, the likely effects of some reform initiatives. In principle, tort liability can provide incentives for potential injurers and victims to take precautions, thus reducing injury rates. In practice, however, implementation problems can reduce the strength and value of those incentives to the point that liability decreases efficiency and may even have net negative effects on safety. Although available evidence about the tort system is too limited to support many firm conclusions, it does indicate that the system is more costly than other methods of compensating victims. Thus, an economic perspective suggests that changes to the system should focus on improving the incentives it provides, lowering its costs, or both.

4. The Court held that punitive damages must be "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." It also alluded to rough limits on the ratio of punitive damages to compensatory damages in cases involving only economic losses. *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. ___ (2003).

5. For a summary of some federal tort reform laws, see Henry Cohen, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, CRS Report for Congress 95-797A (Congressional Research Service, updated May 2, 2003).

CHAPTER

2

An Overview of the U.S. Tort System

Most legal scholars agree that the scope of liability in the U.S. legal system has expanded dramatically in the past three decades. That expansion began early in the 20th century with a growing acceptance of the notion that more extensive tort liability would serve to compensate injured parties and reduce the level of accidents. Although no complete set of data is available, limited data call attention to several prominent features of the current tort litigation landscape—that the vast majority of tort claims are settled out of court, that state courts handle the bulk of torts, and that different types of torts have different impacts on litigants and on the tort system.

The Expansion of Tort Liability in the United States

U.S. tort law is based primarily on common law—in which judicial rules are developed on a case-by-case basis by trial judges—rather than on legislation. Tort liability is assigned using two basic standards: strict liability and negligence. Under strict liability, injurers are held fully liable for their victims' losses without regard for whether they were actually negligent or intended to harm anyone.[1] Under a negligence standard, by contrast, injurers are held liable only if they failed to meet a certain standard of care. According to legal scholars, a number of important developments have increased the scope of liability for torts in the United States.

Early English tort law, the antecedent of U.S. tort law, was chiefly concerned with making injurers pay for the losses of their victims, with little emphasis on fault or negligence.[2] That standard was used in the United States until the 19th century, when U.S. common law established negligence as the basis for tort liability. However, strict liability continued to apply in certain cases, such as injuries caused by wild animals kept as pets or damage to crops caused by trespass of domestic animals.[3] Some scholars argue that the requirement for plaintiffs to show that defendants had been negligent effectively limited the scope of the U.S. tort system.[4]

The turn of the 20th century saw public policy increasingly emphasize victim compensation and accident reduction. The enactment of workers' compensation laws—which established a public insurance system aimed at low-

1. Strict liability—sometimes called "liability without fault"—is based on the breach of an absolute duty to make something safe. See Bryan A. Garner, ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn.: West Group, 1999), p. 926.

2. See Stuart Speiser and others, *The American Law of Torts*, vol. 1 (Rochester, N.Y.: Lawyers Cooperative Publishing Co., 1983), pp. 144-145.

3. Ibid., pp. 144-145, note 96.

4. See, for example, George L. Priest, "The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform," *Journal of Economic Perspectives*, vol. 5, no. 3 (Summer 1991).

ering employers' payments while making workers' recovery of damages automatic—played an important role in the evolution of tort law and policy.[5] Before workers' compensation programs, the only remedy that injured workers had was to prove their employers negligent through the tort system. Workers favored legislation instead because they often had been unable to recover damages or had experienced delays or high costs when they had been successful. For their part, employers favored legislation because it limited their liability and made payments predictable.[6] That shift away from tort law to a public compensation system led to more thought about how tort liability could be improved or better applied in other types of cases.

By the 1940s, legal scholars had begun to think about two ways in which the tort system could serve the wider goal of enhancing social welfare. First, they saw the economic concept of "cost internalization" as a tool for reducing accident rates: if potential injurers know they will be held liable for accidents, they will take appropriate action to avoid liability. In that view, by awarding damages to compensate victims, tort law would serve as a mechanism to ensure that potential injurers faced the appropriate future costs of their actions.[7] Second, some scholars argued that the tort system could provide a kind of accident insurance for victims. They did not focus on the possibility that an expanded liability system could increase carelessness on the part of potential victims, nor did they adopt any of the methods that traditional insurance policies use to deal with that problem.[8] Rather, they focused exclusively on the distributional goal of relieving victims of the burden of accident losses and spreading that burden across a broader population.

One area in which those concepts proved appealing in practice was product liability.[9] Historically, product liability was dealt with either as a breach of warranty under contract law or as a tort subject to the negligence standard. Under contract law, recovery in such cases was limited to repair and replacement of the product; under tort law, recovery was limited by the difficulty of proving negligence. In the 1960s, the courts moved rapidly toward a standard of strict liability for defective products; in 1964, that standard was accepted and recommended by the American Law Institute in its second *Restatement of the Law* volume on torts. By the mid-1970s, most states had adopted provisions that were either identical or similar to those in the *Restatement.*[10]

5. The first workers' compensation law was enacted in 1908 to cover certain federal civilian workers. By 1920, most states had workers' compensation laws; today, all states and the District of Columbia have their own programs. See Cecili Thompson Williams, Virginia P. Reno, and John F. Burton Jr., *Workers' Compensation: Benefits, Coverage, and Costs, 2001* (Washington, D.C.: National Academy of Social Insurance, July 2003), p. 6.

6. Depending on the state, workers' compensation requires employers to purchase insurance from either private sources or a public insurance fund, unless they can prove the ability to self-insure. Employers are responsible for benefit payments specified by state statute for on-the-job injuries regardless of who is at fault.

7. From society's perspective, the optimal level of accident avoidance is the point at which the total cost of additional avoidance is equal to the total additional benefits obtained. However, without cost internalization, an individual firm does not take losses to accident victims into account and thus underprovides accident avoidance, because the costs outweigh the private benefits. Tort liability works by aligning the private benefits of accident avoidance with the social benefits. Markets for products may also lead firms to internalize the costs of accidents when consumers are well informed about the products and the risks of injuries do not fall on third parties.

8. See the discussion in Priest, "The Modern Expansion of Tort Liability," pp. 31-50. Those scholars also did not note that using the tort system to provide insurance could adversely affect the supply of goods and services by raising companies' costs.

9. Early attempts to figure out how the tort system could be used to internalize costs in the case of automobile accidents failed because identifying which of the parties should be held liable for such an accident is generally difficult.

10. Strict liability for product defects can be seen as an evolution of negligence and warranty law. Gary T. Schwartz, in "New Products, Old Products, Evolving Law, Retroactive Law," *New York University Law Review*, vol. 58, no. 4 (October 1983), pp. 796-852, points to the fundamental "high correlation between product defect and manufacturer negligence, making the issue of negligence not worth the costs and uncertainties of litigation." Judging defective products under strict liability rather than negligence reduces plaintiffs' burden of proof. In particular, a plaintiff need not show exactly what happened inside the factory, only that the product is defective.

In addition, the concept of negligence has undergone significant reinterpretation over time, according to legal scholars. The law now takes into account the fact that manufacturers often have more ability than consumers to avoid accidents; thus, it is more likely to view failure to take inexpensive action as negligence or to attach liability to indirect or partial contribution to an injury.

Characteristics of the Tort System Today

Getting a complete picture of the state of the U.S. tort system is difficult because no data are available that cover all of the tort cases brought in the various jurisdictions across the country. However, the National Center for State Courts (NCSC) provides some data on trends in civil filings in general-jurisdiction courts in several states.[11] It also conducts periodic surveys of civil trials in the nation's 75 largest counties for the Bureau of Justice Statistics (BJS). In addition, data about cases disposed of in federal court are available from the Administrative Office of the U.S. Courts.

In 16 states consistently tracked by the NCSC, tort filings in general-jurisdiction courts grew from 189,520 in 1975 to 260,745 in 2000, which appears to support the common view that the number of tort cases is rising. But controlling for population growth in those states indicates that tort filings relative to population declined by 8 percent over that period—from 230 per 100,000 residents in 1975 to 212 in 2000.[12] Additionally, total tort filings in those 16 states were relatively constant from 1986 to 1996 and have shown a downward trend since then, falling from 320,976 filings in 1996 to 260,745 in 2000.

In drawing inferences about the tort system as a whole, however, it is important to note several limitations of the available information.

- Data do not exist for those tort disputes that do not go to trial, because the details of settlements are usually private.[13]
- Collecting consistent data between the various jurisdictions is difficult. The overwhelming majority of tort filings occur at the state level, and the structure of state courts and the laws under which they operate differ from state to state. Moreover, those courts have not tended to view keeping records on the details of case outcomes as being central to their mission.
- Both anecdotal and statistical evidence about damage awards can be misleading because the amount of damages actually paid can be reduced after a trial.[14]
- Overall trends can be misleading because various categories of torts have different economic impacts, and the timing and disposition of mass torts (cases involving large numbers of people) can significantly skew the numbers.

Settlement Versus Trial

The majority of tort disputes never reach a trial verdict. For example, of the 41,696 tort cases that were terminated in U.S. district courts in fiscal year 2000, only 3 percent

11. Although all states have at least one court of general jurisdiction, 44 states have limited-jurisdiction courts that hear certain types of cases, such as small claims, traffic, or probate cases. See Neal Kauder, *Examining the Work of State Courts*, vol. 1, no.1 (Williamsburg, Va.: National Center for State Courts, August 1995).

12. Data for the early years of that period may not be complete, but that would only sharpen the finding of a decline. See Brian J. Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2001: A National Perspective from the Court Statistics Project* (Williamsburg, Va.: National Center for State Courts, 2001), with accompanying spreadsheets available at www.ncsconline.org/D_Research/csp/2001_Files/2001_Tort-Contract_Tables.xls.

13. The NCSC data are limited to the number of court filings; they do not give details about cases. They also cover only a subset of states. Another possible source of data on the outcomes of tort cases is insurance company records—since a large percentage of tort awards are paid by defendants' insurers—but companies do not regularly make those records available.

14. Many, if not most, court awards are negotiated among the parties after trial, are reduced by the judge, or are subject to statutory reductions, such as caps on damages. For example, in the widely reported case involving a person scalded by a cup of McDonald's coffee, the trial court reduced the plaintiff's $2.7 million punitive damage award to $480,000 (three times the compensatory damages).

were decided in trials.[15] The NCSC similarly reports that "[t]he vast majority of all [state] tort cases are disposed through some form of settlement, with only 3 percent of all tort matters resulting in a jury trial."[16] Litigants have mutual incentives to save on litigation costs by settling out of court. They avoid uncertain trial outcomes and delays and can agree to keep settlements confidential.[17] In some cases, settlements may be reached through alternative methods of dispute resolution, such as voluntary arbitration or mediation.

Generally, details of civil disputes settled before a trial are not reported to the courts and hence are not included in publicly available data. Those data therefore show only part of the picture—there may be important differences between cases that go to trial and cases that settle out of court.[18] For example, cases that go to trial probably involve larger dollar amounts, on average. Nevertheless, trial verdicts set precedents for all cases and thus affect the incentive to settle by signaling the value and probability of success to future litigants.[19]

Where Are Tort Cases Heard?

The vast majority of tort filings occur in state courts. In 2000, more than 700,000 torts were filed in state general-jurisdiction courts, compared with only about 37,000 in federal courts, the Congressional Budget Office (CBO) estimates.[20] Liability standards are not uniform among the various jurisdictions. For example, the extent to which damages may be reduced if the injured party contributed to the accident differs among states. In addition, a small number of local courts have been described as "class-action magnet courts" and criticized for being biased toward plaintiffs.[21]

U.S. district courts have jurisdiction in civil cases when a case deals with a federal question, the federal government is either a defendant or plaintiff, or the case involves "diversity of citizenship."[22] Of the tort cases that were terminated by trial in federal courts in fiscal year 2000, 72 percent involved diversity of citizenship, 18 percent in-

15. Congressional Budget Office calculation based on "Civil Terminations, 2000," *Federal Court Cases: Integrated Data Base* (Federal Judicial Center, Washington, D.C.), dataset no. 117, available from the Inter-university Consortium for Political and Social Research at www.icpsr.umich.edu/cgi/archive.prl?study=8429.

16. Kauder, *Examining the Work of State Courts*, p. 2.

17. Also, in some circumstances, compensatory damages are not taxable but punitive damages are. Therefore, plaintiffs who anticipate that the net value of a trial award will be reduced because of taxes have an incentive to settle for an amount below the expected trial award. See A. Mitchell Polinsky, "Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.," *Journal of Legal Studies*, vol. 26, no. 2 (June 1997).

18. George L. Priest and Benjamin Klein argue, on the basis of a model of the determinants of settlement and litigation, that disputes selected for litigation are neither random nor representative of all disputes. See Priest and Klein, "The Selection of Disputes for Litigation," *Journal of Legal Studies*, vol. 13, no. 1 (January 1984), pp. 1-55.

19. Firms such as Jury Verdict Research Inc. provide data to attorneys to help them value claims on the basis of verdicts for similar cases. Using their own private information about the probability of success, the litigants can calculate the expected return from going to trial. Thus, if a plaintiff thinks she has a 30 percent chance of winning at trial, and successful cases like hers average a trial award of $1,000, she should be willing to settle the case for $300 or more—or even a bit less if she is averse to risk.

20. The state figure is based on the information that 537,000 tort filings occurred in 2000 in general-jurisdiction courts in 30 states tracked by the National Center for State Courts and that those states contain 72 percent of the U.S. population. According to the Administrative Office of the U.S. Courts, 36,586 tort cases were filed in fiscal year 2000; see Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts* (2003), Table C-2A, p. 132, available at www.uscourts.gov/judbus2002/appendices/c02asep02.pdf. Those statistics represent the number of cases filed, not the number of plaintiffs or defendants.

21. John H. Beisner and Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Civil Justice Report No. 5 (New York: Center for Legal Policy, Manhattan Institute, July 2002). Some observers argue that state courts in general are biased against large corporate defendants; see, for example, Robert J. MacCoun, "Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis," *Law & Society Review*, vol. 30, no. 1 (1996).

22. Federal questions arise from interpretation and application of the U.S. Constitution, treaties, or acts of Congress. Diversity of citizenship cases are those in which no plaintiff and no defendant are citizens of the same state and at least one plaintiff seeks $75,000 or more in damages.

volved a federal question, and 11 percent involved the U.S. government as a defendant or plaintiff. Many of those tort cases did not originate in federal courts: 28 percent were removed from state courts.[23]

Categories of Tort Cases

Different types of torts pose different challenges for the goals of the liability system, so it is useful to track the trends in filings for important categories of torts. For example, overall statistics on torts can be substantially driven by developments in mass torts. The General Accounting Office found that asbestos litigation accounted for half of the growth in tort filings that occurred in federal courts between 1974 and 1986.[24] Although tort filings as a whole have fallen significantly since 1996, that overall trend masks important developments in key categories of torts.

The major areas of tort litigation, based on their share of total tort trials completed in the general-jurisdiction courts of the 75 largest U.S. counties in 1996, are automobile-related torts (49 percent), premises liability (22 percent), and medical malpractice (12 percent).[25] Many of the common categories of torts pose few policy problems. For example, automobile torts often have low awards: a median jury award of $18,000 for winning plaintiffs in state courts in the 75 largest counties in 1996, compared with a median award of $31,000 for all torts *(see Table 1)*.

In contrast, torts that have received the most public attention—such as product liability cases (including asbestos litigation) and medical malpractice cases—often involve larger stakes and have more significant effects on courts' resources, victims' compensation, the viability of businesses, and insurance premiums. Winning plaintiffs in state courts received a median award of $309,000 in asbestos cases and $286,000 in medical malpractice cases in the 75 largest counties in 1996. Moreover, about 20 percent of medical malpractice awards and 16 percent of product liability awards (other than in asbestos-related cases) were at least $1 million, compared with only 6 percent of state courts' awards for all torts. (Although punitive damages were infrequently awarded in medical malpractice and asbestos cases, they were also higher than the average for all torts: median amounts of $250,000 and $110,000, respectively, compared with $38,000 for tort cases overall.)[26] At the federal level, medical malpractice cases terminated by trial in U.S. district courts in 1996 had a median final award of $252,000.

Policymakers and the business community have been concerned about the increasing costs of asbestos litigation. Researchers at RAND estimate that claims for asbestos-related compensation totaled $54 billion through 2000, with estimated future costs ranging from another $145 billion to $210 billion.[27] They also identified 67 bankruptcies related to asbestos litigation through 2002, up from three through 1982. Adding to that concern is the latency that occurs in the onset of asbestos-related disease, which makes it difficult to predict firms' exposure to liability and to ensure adequate compensation for victims who have yet to file claims.[28]

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23. Congressional Budget Office calculations based on "Civil Terminations, 2000," *Federal Court Cases: Integrated Data Base* (Federal Judicial Center, Washington, D.C.), dataset no. 117, available from the Inter-university Consortium for Political and Social Research at www.icpsr.umich.edu/cgi/archive.prl?study=8429.

24. General Accounting Office, *Extent of "Litigation Explosion" in Federal Courts Questioned*, GAO/HRD-88-36BR (January 1988).

25. Department of Justice, Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 1996*, NCJ 179769 (August 2000). The same data also show that tort cases typically involve individuals suing individuals (42 percent of all torts) or individuals suing businesses (39 percent).

26. Those medians exclude cases with awards of zero.

27. Presentation by Deborah Hensler at the U.S. Chamber of Commerce seminar "Understanding Asbestos Litigation: The Genesis, Scope, and Impact," Washington, D.C., January 23, 2003, available at www.legalreformnow.com/resources/012303.pdf. See also Stephen J. Carroll and others, *Asbestos Litigation Costs and Compensation: An Interim Report* (Santa Monica, Calif.: RAND Institute for Civil Justice, 2002), available at www.rand.org/publications/DB/DB397/DB397.pdf.

28. Another factor contributing to the concern has been a recent surge in new asbestos cases. New filings in U.S. district court for asbestos cases involving personal injury or product liability rose from 5,041 in fiscal year 2000 to 26,818 in 2002 (see Administrative Office of the United States Courts, *2002 Annual Report of the Director*, Table C-2A). But federal cases are only a portion of total claims (which also include state and trust fund claims), and the number of new cases (which represent old exposures now coming to light rather than new exposures) fluctuates greatly from year to year.

Table 1.

Characteristics of Tort Cases Decided by Trial in State and Federal Courts, 1996

	Percentage of Cases Won by Plaintiff	Median Award (Dollars)	Percentage of Awards $250,000 or More	Percentage of Awards $1 Million or More
All Tort Cases				
State	48.2	31,000	16.9	5.8
Federal	45.8	139,000	38.1	14.6
Automobile Accidents				
State	57.5	18,000	8.7	3.4
Federal	59.7	100,000	37.4	11.6
Medical Malpractice				
State	23.4	286,000	51.0	20.2
Federal	39.8	252,000	54.3	22.9
Asbestos				
State	55.6	309,000	50.6	12.1
Federal[a]	40.0	465,000	50.0	0
Product Liability Other Than Asbestos				
State	37.1	177,000	41.2	16.3
Federal	26.6	368,500	62.0	24.0

Source: Congressional Budget Office based on Department of Justice, Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 1996*, NCJ 179769 (August 2000), and "Civil Terminations, 1996 and 1997," *Federal Court Cases: Integrated Data Base* (Federal Judicial Center, Washington, D.C.), dataset nos. 103 and 104, available from the Inter-university Consortium for Political and Social Research at www.icpsr.umich.edu/cgi/archive.prl?study=8429.

Notes: State numbers are based on trials in general-jurisdiction courts in the 75 largest counties in the United States in calendar year 1996 (calculated from data for fiscal years 1996 and 1997). Federal numbers are based on trials in U.S. district courts in calendar year 1996.

Data on awards exclude cases won by defendants and those with awards of zero.

a. There were only two federal asbestos cases with monetary awards in 1996.

Asbestos cases also differ from other torts in the number of firms affected. The median number of defendants in asbestos litigation was 18, compared with a median of one defendant in tort cases overall.[29] Over time, the targets of asbestos suits have expanded from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities. According to RAND, the total number of defendants in asbestos litigation rose from 300 in 1982 to more than 6,000 in 2000.[30]

Recent data show no growth in the total number of medical malpractice tort claims, but the size of awards has increased. Median payments for medical malpractice claims at trial rose from about $100,000 in 1990 to over $300,000 in 2001, according to the Physician Insurers

29. Department of Justice, *Tort Trials and Verdicts in Large Counties, 1996.*

30. Carroll and others, *Asbestos Litigation Costs and Compensation.*

Association of America.[31] (BJS data from the nation's largest counties show an increase in median awards in state courts from $201,000 in 1992 to $286,000 in 1996.)[32] That rise coincides with increasing malpractice premiums for doctors, which critics blame for leading to a reduction in the availability of health care in some parts of the country.

Another set of tort claims that concerns policymakers is cases filed using the class-action procedure, in which a small number of plaintiffs represent a larger group of people who were similarly affected by the same product or tort. Class-action cases are designed to address relatively small but numerous losses for which individual suits would be impractical. However, when the class is large enough, even claims that are trivial individually can have a significant effect on particular firms and even whole industries. Limited data are available on class actions, but those cases are more likely than other torts to be filed in federal court. For example, a RAND study estimated that during the 1995-1996 period, 40 percent of reported class-action decisions arose in federal court, whereas CBO estimates that less than 5 percent of all torts are filed in federal court.[33]

31. Data supplied to the Congressional Budget Office by the Physician Insurers Association of America in spring 2003.

32. See Department of Justice, Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 1996,* and *Civil Jury Cases and Verdicts in Large Counties,* NCJ 154346 (July 1995).

33. Deborah R. Hensler and others, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, Calif.: RAND Institute for Civil Justice, March 1999).

CHAPTER

3

Tort Liability as a Tool for Achieving Efficiency and Equity

Different observers describe tort liability as serving various combinations of purposes—among them, compensation, deterrence, risk spreading, and punishment or retribution. In economic terms, those various purposes can be related to the overarching social goals of efficiency and equity. The efficiency goal is to allocate scarce resources so as to maximize the total benefits available to society; the equity goal is to distribute those benefits in accord with some (necessarily subjective) conception of fairness or justice. Metaphorically speaking, efficiency involves making the pie as big as possible, and equity focuses on slicing it appropriately.

The Complexity of the Policy Problem

If there were just a single injury for policymakers to consider, then once that injury had occurred, the only relevant policy questions would pertain to equity. That is, the size of the pie would already be determined by the fact of the injury, and the remaining issues would involve what punishment (if any) the injurer deserved and what compensation (if any) the victim deserved.[1]

In reality, of course, policymakers are concerned not with a single injurious event but with many such events over time—which gives rise to the efficiency question of minimizing the total cost associated with future injuries. That total includes not only the costs of the injuries themselves (in medical care, pain, decreased worker output, and so on) but also:

- Prevention costs (the costs of efforts to avoid injuries, which tend to raise the prices of goods and services);
- Transaction costs (the costs of legal and administrative resources, such as attorneys' fees);
- Indirect costs to the economy (for example, from the disruptions caused by layoffs and bankruptcies); and
- Uncertainty costs (the burden of uncertainty for potential victims and potential injurers—since driving the rate of injuries down to zero would be ruinously expensive, if not impossible—as well as the transaction costs of reducing that burden through insurance or other risk-spreading mechanisms).

That sketch of the policy goals suggests the difficulties that policymakers face in seeking to address the personal and social costs of injuries. One potential problem is trade-offs between equity and efficiency. For example, a particular conception of fairness might hold that certain victims should not be considered responsible for exercising some forms of care, although it would be more efficient if they

1. The equitable levels of punishment and compensation need not be the same, even in the case of fines and monetary awards. Depending on the facts of the case and on one's conception of justice, the victim might be felt to deserve more or less than the injurer should pay, with any difference coming from or accruing to the government.

Table 2.

Summary of Major Tort Liability Standards

	Components of Efficiency						
	Standard Provides Incentives for Efficiency in						
Standard	Injurer's Degree of Care?	Scale of Injurer's Activities?	Victim's Degree of Care?	Scale of Victim's Activities?	Distribution of Risk?	Transaction Costs	Implications for Equity
Strict Liability	Yes	Yes	No	No	No (Overinsures nonpecuniary losses)	High	Compensates all victims; bundles unwanted insurance for nonpecuniary losses into product prices
Strict Liability with Comparative Negligence	Yes	Yes	Depends on extent of reduction in compensation to negligent victims	No	No (Overinsures nonpecuniary losses)	High	Compensates non-negligent victims (partially compensates negligent victims); bundles unwanted insurance for non-pecuniary losses into product prices
Negligence	Depends on the efficiency of the legal standard of due care	No	Yes	Yes	No (Overinsures nonpecuniary losses, though less so than strict liability since non-negligent injuries are not compensated)	High	Nonnegligent injurers not held liable; some victims uncompensated

Source: Congressional Budget Office.

did so. Even within the single goal of efficiency, policymakers may have trouble identifying the best approach, given that each approach might have different effects on injury costs, prevention costs, transaction costs, indirect costs, and uncertainty costs and that the relative importance of those costs might vary from one type of injury to another.

Under ideal market conditions, much of the policy problem—the part concerning injuries associated with economic activities—could be solved easily. In particular, market forces would achieve the efficiency goal for such injuries by minimizing the sum of the related costs: producers and employers would respond to consumers' and workers' preferences by taking all cost-effective measures to make their products and workplaces safer, and risk-averse people would buy insurance to eliminate the financial uncertainty surrounding the remaining risks. Any equity goals involving additional compensation of injury victims could be met through a government program of income transfers.[2]

2. Even in that simpler world, society would still face the issue of minimizing the costs of "stranger" injuries—those unrelated to any economic transaction, such as injuries caused by a release of toxic gases from a chemical plant. Chemical companies certainly have incentives to maintain their reputations, but there is no presumption that such indirect effects accurately reflect the interests of potential victims.

In reality, the results produced by market forces can only approximate the efficient outcome, and the accuracy of that approximation depends in large part on how well potential victims understand the risks they face.[3] Some risks (such as long-latency illnesses that result from exposure to new chemical substances) become apparent only years or decades after they are introduced into the economy. Other risks, though recognized by experts, are largely unknown or are not accurately taken into account because of biases in the way people process information about risk and uncertainty.

Incomplete information or understanding about risk raises the possibility that government intervention—through regulations or liability rules—can improve on the efficiency of market outcomes. There is no guarantee that it will do so, however. Whether it does depends on the strengths and weaknesses of the particular interventions, as discussed below.

Liability Rules in Principle

The various forms of strict-liability and negligence standards used by the courts encourage potential injurers to exercise care and result in compensation to victims in different ways and to different extents. Neither type of standard, however, reliably induces optimal levels of care and participation by both injurers and victims, even in theory. Also, both types are prone to inefficiency in their effects on the distribution of risk.

In its purest form, strict liability compensates all victims except those judged to have caused the injury themselves or to have knowingly and voluntarily "assumed the risk" of exposure to a particular hazard. Strict liability thus gives potential injurers an incentive to make all socially efficient changes in the level or form of their activities, because they know they will face the full cost of almost any resulting harm *(see Table 2)*. It may have a very different effect on potential victims, however. To the extent that they expect to be fully or almost fully compensated for their losses (which is more likely to occur in cases involving only property damage, not personal injury or death), strict liability gives potential victims little or no incentive to take reasonable precautions of their own.

In cases alleging defective products—a major category of tort claims subject to strict liability—U.S. courts typically do not apply strict liability in its pure form. Instead, they use a doctrine of comparative negligence.[4] Under that variant of the standard, the compensation paid by an injurer is reduced if the victim is found to have contributed to the injury through his or her own negligence, as defined by some explicit or implicit legal standard. (In 1996, about 16 percent of all awards in tort trials in the nation's 75 largest counties were reduced because of the plaintiff's own negligence. Those reductions averaged 43 percent.)[5] Taking comparative negligence into account is likely to improve the efficiency of strict liability to the extent that plaintiffs' negligence is a broader concept than plaintiffs' causation (or assumption of risk) and thus gives potential victims an incentive to avoid more types of careless behavior.[6] But it still does not give them cause to

3. It also depends on how well potential injurers understand the costs of their opportunities to reduce injury risks (that is, their "production functions" for safety). In practice, that factor is probably less of a constraint on the efficiency of market outcomes than is lack of understanding of risk on the part of potential victims and thus is less likely to provide a good rationale for government intervention.

4. Comparative negligence is also widely applied in types of tort cases that are judged under a negligence standard. Its use in cases judged under strict liability may seem incongruous: in principle, a defendant may be liable even in the absence of any negligence against which to compare the plaintiff's negligence. But current law essentially infers some degree of negligence (whether of design, manufacture, or labeling) whenever a plaintiff shows that a defective product caused an injury.

5. Department of Justice, Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 1996*, NCJ 179769 (August 2000).

6. The impact of that incentive depends on potential victims' awareness of it and on their expectations about how their behavior would affect the compensation they would receive if injured. If they expect to receive some compensation despite engaging in "mild" negligence, they may not be encouraged to make all cost-effective changes in their behavior. (Some states allow a defense of contributory negligence rather than comparative negligence; under that defense, negligent victims have their compensation eliminated rather than reduced.) Conversely, the possibility of reduced compensation under comparative (or contributory) negligence may be irrelevant if potential victims face risks of death or other injuries for which compensation would be greatly inadequate.

adjust the scale of their risky activities, since standards for due care do not consider scale itself. For example, a negligence standard may dictate that bicyclists wear helmets and obey traffic rules, but it will not address how often they ride.

The same analysis applies in reverse when injurers are judged according to a negligence standard. If the standards of due care are set at ideal levels, potential injurers will make all efficient adjustments in the way they conduct their activities. In addition, potential victims who expect injurers to escape liability through the "safe harbor" of due care have an incentive to take all efficient precautions because they will bear the costs of any injuries. However, the standards for care typically do not provide any incentives about the scale of potential injurers' activities. Thus, for example, a manufacturer whose rate of production defects is low enough to be considered nonnegligent will have no incentive to consider the costs of injuries associated with its defects when it decides how many units to produce.

Some observers point to another shortcoming of liability rules: by compensating victims for pain, suffering, and other nonpecuniary losses, those rules provide a kind of excessive and unwanted insurance that distributes risk inefficiently. (That issue applies less strongly to negligence, to the extent that injurers are able to avoid paying damages by meeting the standards of due care.)[7]

The argument is that pecuniary losses such as medical expenses and lost income increase a victim's need for money (technically, the marginal utility of an additional dollar), but nonpecuniary losses do not and hence are not worth insuring against. Persuasive evidence for this argument is the fact that insurance policies bought directly by consumers typically do not cover events such as the death of a young child. Notwithstanding the great suffering they would feel, consumers apparently do not find it worthwhile to buy coverage that reduces their wealth now (by the amount of the insurance premium) in order to increase it in the event of such a loss. But liability awards for pain and suffering shift wealth in precisely that fashion—the prices that a firm charges for its goods and services reflect the future liability claims it expects to pay on them, and thus consumers fund the awards through higher prices that reduce their preinjury wealth. Whether such shifts are equitable depends on subjective judgments (on the one hand, they help compensate victims; on the other hand, they benefit a few at the expense of the many). Nevertheless, they do appear to distribute risk inefficiently.[8]

Liability Rules in Practice

The efficiency of liability rules is restricted not only by theoretical limitations but also by practical problems. The most obvious such problem is the transaction costs of the legal system—particularly, the costs of plaintiffs' and defendants' lawyers. Underlying that problem is the fundamental issue that information (in this case, information about the cause of a tort injury) is generally incomplete and costly to acquire. The lack of complete information allows room for disagreement between plaintiffs and defendants and encourages attorneys to expend effort to unearth and document additional information favorable to their case.

Incomplete information also allows errors to occur. Some torts go unchallenged, unjudged, or undercompensated; conversely, some defendants pay claims for losses for which they were not truly liable or in excess of the harm they caused. For example, one study of medical malpractice torts found that only 1.5 percent of people classified as likely victims of medical error sued and that relatively few of those who did sue appeared to have legitimate

7. In principle, if potential injurers are able to avoid liability under a negligence standard, then consumers face the opposite problem of being underinsured against the risks of pecuniary losses. Consumers can solve that problem, however, by buying their own insurance to achieve the desired level of protection.

8. Note, however, that failing to incorporate the expected costs of nonpecuniary losses into the price of a good or service would not be efficient either. The risks of pain and suffering associated with an item are real components of its cost and should be reflected in its price; otherwise, consumer demand for the item may be inefficiently high. Ideally, potential victims would make their decisions about consumption on the basis of an item's full cost but would receive some kind of payment to mitigate the impacts of the nonpecuniary costs on their wealth. One proposed mechanism for doing that—known as unlimited insurance subrogation—is discussed in Chapter 5.

claims.[9] Such errors reduce the equity of the liability system. They may also reduce its efficiency (as discussed more fully below) by prompting potential injurers to overspend or underspend on precautions or to try to avoid liability in ways that do not reduce the actual risk of injuries.

Concerns about such errors underlie much of the debate about punitive damages. One efficiency-based rationale for punitive damages is that they serve an important corrective role for torts that have a significant probability of going undetected. Potential injurers who expect to be held liable only one-third of the time will not have efficient incentives to exercise care unless they expect to pay treble damages on the occasions when they are held responsible.[10]

Conversely, punitive damages may reduce efficiency if they do more to create errors than to correct them. Critics argue that punitive damages are awarded arbitrarily, at the whim of juries not guided by any clear or coherent standards, and are often erroneous. As evidence, they cite cases in which the punitive damages were tens or hundreds of times larger than the compensatory damages or were awarded even though the injurer had good reason to believe that it was not negligent (in other words, that its behavior satisfied a relevant standard of due care). Whether such criticisms are valid for only a few cases or for punitive damages in general is an open question in need of further study.[11]

Errors—and information problems more broadly—also underpin much of the debate about the class-action procedure. By combining many claims that cover similar factual ground, that procedure reduces transaction costs that could otherwise make it impractical for plaintiffs to pursue claims that may be large as a whole but are small individually. However, critics argue that class actions are susceptible to erroneous judgments—in part because plaintiffs' attorneys have wide latitude to bring them in certain courts that are thought to be biased against out-of-state corporate defendants—and that such errors can have nationwide implications. In some cases, plaintiffs' attorneys may be able to leverage the possibility of such errors to achieve lucrative settlements of even frivolous claims, if defendants are sufficiently averse to risk. Also, because class members may have little incentive or opportunity to exercise effective oversight, plaintiffs' attorneys in such cases may pursue settlements that benefit them but are not in the best interest of their clients.[12]

A final problem associated with limited information is the difficulty of setting the standard of due care in a negligence rule at an efficient level. Courts often defer to a community's customary standard of care in defining negligence, and a custom that has stood the test of time in a competitive market may be a good approximation of the efficient solution.[13] But customary standards may be hard to apply or nonexistent in cases of new risks or new products. Moreover, any general rule may not be detailed

9. Those findings were based on an analysis of 30,000 medical records from New York State in 1984; see A. Russell Localio and others, "Relation Between Malpractice Claims and Adverse Events Due to Negligence," *New England Journal of Medicine*, vol. 325 (July 25, 1991), pp. 245-251. The analysis showed that only 14 percent of claimants appeared to have legitimate cases; however, that percentage was based on a limited sample (47 claims).

10. In principle, punitive damages could also improve efficiency by correcting for compensatory awards that do not fully reflect the amount of harm done. In practice, however, cases in which large punitive damages are awarded also tend to involve large compensatory awards.

11. The most directly relevant empirical study to date examined the occurrence of punitive damages in a year's worth of trials from 45 of the nation's 75 largest counties. It found a strong statistical relationship between the level of punitive damages, when awarded, and the level of compensatory damages, but it did not attempt to identify factors that would explain which cases (of a given type) yielded awards for punitive damages and which did not. Thus, the study left unresolved the question of whether the decision to award punitive damages is arbitrary. See Theodore Eisenberg and others, "The Predictability of Punitive Damages," pp. 623-661, and A. Mitchell Polinsky, "Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.," pp. 663-677, both in *Journal of Legal Studies*, vol. 26, no. 2 (June 1997).

12. Deborah R. Hensler and Thomas D. Rowe Jr., "Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform," *Law and Contemporary Problems*, vol. 64 (Spring/Summer 2001), available at www.law.duke.edu/journals/lcp/articles/lcp64dSpringSummer2001p137.htm.

13. The presumption that customary standards of care are relatively efficient does not apply to stranger injuries, such as automobile accidents, which occur outside any market context.

enough to take into account the specific opportunities and constraints facing each potential injurer and potential victim and thus may set the bar too high for some and too low for others.

Should Tort Rules Be Set at the Federal or State Level?

Although tort cases are primarily governed by state law, the Congress has broad Constitutional authority to change tort rules under its power to regulate interstate commerce.[14] Federal intervention in tort law can have two main benefits. First, it can lower costs by giving manufacturers and other nationwide businesses a single set of standards under which to operate. Advocates of greater federal involvement argue that state preeminence may have been appropriate when most goods were produced locally, but it is inefficient now that firms typically manufacture products in a few locations to sell nationally. Second, whereas state legislatures and courts have an incentive to favor state residents, and thus to design or interpret their legal rules to benefit in-state plaintiffs at the expense of out-of-state defendants, the federal government can potentially take the broad view (in economic terms, "internalize the externality") and craft rules that take equal account of the interests of all parties nationwide.

Supporters of a more decentralized approach argue that federal involvement in state tort law may not provide equal treatment of all costs and benefits. Rather, it may reflect concentrations of political influence, which can tilt toward plaintiffs at one time and defendants at another. In that view, maintaining state preeminence in tort law reduces the risk of nationwide errors in policy. It also allows greater scope for state innovation and experimentation and a wider range from which people can choose the type of liability regime that appeals to them—one with more extensive protection of injured parties or one with lower costs for businesses (and hence, presumably, lower prices for consumers).

14. For a discussion of that general authority and some exceptions to it, see Henry Cohen, *Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes*, CRS Report for Congress 95-797A (Congressional Research Service, updated May 2, 2003).

Tort Liability Versus Insurance and Regulation

As noted above, tort liability is only one of the tools that society uses to try to supplement market mechanisms, such as contracts and private insurance. Other tools are regulation and public compensation programs (such as the workers' compensation system). All of those policy tools have strengths and weaknesses—as do markets—so using them in combination may be beneficial. However, the interactions among different tools and the market can be complex and even counterproductive.[15]

The interplay between liability and private insurance is perhaps the most complicated. From the point of view of potential victims, tort liability acts as a partial substitute for their own insurance—the more comprehensive the set of injuries for which they receive tort damages, the fewer the injuries ultimately compensated by their own coverage. Conversely, from the perspective of potential injurers, liability increases uncertainty, leading many of them to buy liability insurance to control that uncertainty. The extensive use of such insurance makes analyzing the efficiency of tort liability more complicated, because it may undermine potential injurers' incentives to exercise care. The degree to which it does so hinges on the precautions (if any) that insurance companies require as a condition for providing coverage and also on the thoroughness of their underwriting. The more they tailor their premiums to policyholders' specific practices or experiences, the more incentive potential injurers still have to take cost-effective precautions.

The interactions between liability and regulation are perhaps less complex—but in that case also the two can be

15. The relative use of those different policies varies significantly among countries. The United States relies more heavily on tort liability than 11 other industrialized nations do, judging from the estimated shares of gross domestic product that those countries spend on their tort systems; see Tillinghast-Towers Perrin, *U.S. Tort Costs: 2000—Trends and Findings on the Costs of the U.S. Tort System* (February 2002). The different policy mixes may reflect underlying differences in national conditions (such as in the homogeneity or diversity of the industrial sector) and values (such as in conceptions of equity or willingness to trade equity for efficiency).

complements as well as substitutes.[16] In particular, tort lawsuits can be used as a private mechanism for enforcing regulations, particularly when government agencies lack the resources to monitor compliance or prosecute violations themselves. Such lawsuits may be explicitly authorized by statute, as in the case of some civil rights laws. Alternatively, judges may decide that tort claims are an appropriate means by which to carry out the intent of particular statutes. For example, a court may allow a tort claim of deceit under a statute that makes it a crime to roll back an automobile's odometer.[17]

As alternatives to each other, regulation is a more centralized policy tool than liability is. The centralized approach may be more or less efficient for particular classes of injuries—on the one hand, it tends to have lower transaction costs; on the other hand, the regulations it produces can only be as good as the information available to the central decisionmakers. Whereas tort claims arise after specific injuries occur, efficient regulation requires before-the-fact information about risks of injury, types of precaution, and the costs and benefits associated with particular regulatory standards. In addition, the more diverse that a given group of potential injurers is, the greater the amount of information that will be necessary to craft regulations that appropriately reflect the group's various circumstances. In practice, the efficiency of regulations can also be lessened by political factors, such as pressure from interest groups or excessive influence from the regulated entities.

16. For a more extensive discussion of the potential complementarities and conflicts, see Susan Rose-Ackerman, "Product Safety Regulation and the Law of Torts," in Janet R. Hunziker and Trevor O. Jones, eds., *Product Liability and Innovation: Managing Risk in an Uncertain Environment* (Washington, D.C.: National Academies Press, 1994), pp. 151-158, available at www.nap.edu/openbook/0309051304/html/151.html.

17. For a discussion, see American Law Institute, *Restatement of the Law Second, Torts* (Philadelphia: ALI, 1979), section 874A.

CHAPTER

4

The Costs of the Tort System

The efficiency of the tort system is difficult to measure because information about its benefits is so sparse. In particular, data on the damages avoided because of additional precaution are not readily available. Some costs associated with tort liability have been measured, however, and can be used in a limited evaluation of the cost-effectiveness of tort liability as a mechanism for compensating victims. Understanding the nature and magnitude of tort costs can also help policymakers identify options that would tend to control those costs while enhancing the benefits of the tort system.

Defining the Costs of Tort Liability

The most easily measured "costs" of the liability system are its direct costs—that is, those incurred by plaintiffs, defendants, and their insurance companies in litigating and settling specific claims, as well as the court costs that are ultimately paid by taxpayers. For the purposes of policy analysis, however, that measure of costs is too large in one respect and too small in another.

It is too large in that some direct "costs" merely shift money from injurers to victims and thus are not true costs to society as a whole. In economic terms, payments that do not involve any use of resources to produce goods or services are called "transfer payments." Those that do involve using resources for production are known as "real resource costs" (also "social costs" or simply "costs"). Specifically, the portion of a settlement or judgment that goes to the plaintiffs is a transfer payment. The portion that goes to the plaintiffs' attorneys, in contrast, is a real cost because it reflects the value of the resources (attorneys' time, office space, equipment, and so on) devoted to that case and thus not available for other uses.[1]

Conversely, measures of direct costs are too small for policy purposes in that they naturally exclude indirect costs—those associated not with specific claims but with actions that businesses and consumers take or forgo because of the incentives of the liability system as a whole. Indirect costs include various kinds of real resource costs, such as:

- The costs of precautions taken by potential injurers,
- The opportunity costs (forgone value) of goods and services that potential injurers withdraw from the market or do not create because of liability concerns,
- The opportunity costs of goods and services that consumers do not buy because of liability-induced price increases, and

1. The statement that all legal costs are real resource costs assumes that lawyers' services are priced correctly in the market. To the extent that legal fees are kept artificially high by some market imperfection or governmental interference, they include both resource costs and transfer payments.

- The disruption costs of layoffs and bankruptcies caused by liability problems.[2]

Indirect costs are not necessarily bad: from the perspective of efficiency, the question is whether they yield benefits larger than the costs.

Evidence About the Costs of the Tort System

The most comprehensive estimates of tort liability costs —which cover only direct costs—come from studies by Tillinghast-Towers Perrin, an actuarial and management consulting firm.[3] Those estimates take advantage of the fact that most tort costs are paid through the insurance industry, in the form of legal costs to defend policyholders, benefits paid to victims and their attorneys on behalf of policyholders, and internal costs for handling claims. Thus, Tillinghast uses financial data from the insurance industry to estimate insured costs for all types of policies except medical malpractice insurance. (Those costs are estimated separately using the firm's proprietary database of state-level costs, controlling for the changing mix of insured versus self-insured providers.) Finally, Tillinghast estimates self-insured costs (again, except for medical malpractice) on the basis of various specialized studies. Because of a lack of data, the estimates exclude awards and settlements that cannot be insured in particular states (such as those for contract and shareholder litigation or for punitive damages) and certain extraordinary self-insured costs, such as those of the tobacco settlements.[4]

By that definition of costs, the U.S. tort system cost a total of $205.4 billion in 2001, Tillinghast estimates. That figure represented 2.04 percent of gross domestic product—the largest share among the 12 industrialized countries that Tillinghast investigated.[5] Of that amount, 46 percent constituted transfer payments to plaintiffs: 22 percent for economic damages and 24 percent for noneconomic damages. The other 54 percent represented true costs: transaction (procedural) costs for plaintiffs' attorneys (19 percent), defense costs (14 percent), and insurance companies' administrative costs (21 percent).[6]

Estimates for most of the indirect costs of the tort system do not exist—which is not surprising given that many of those costs are difficult to observe. For example, even firms that keep track of their safety-related spending would probably have trouble identifying the share driven by tort liability rather than by regulation or other factors. One notable exception to the lack of estimates of indirect costs comes from a recent study released by the U.S. Chamber of Commerce, which estimated that asbestos liabilities have caused $0.6 billion to $2.1 billion in disruption costs from bankruptcies and layoffs.[7]

Are Tort Costs Excessive?

Costs can be considered excessive if they do not contribute positively to either efficiency or equity. Even transfer payments may be excessive costs in that sense. Although transfers do not use real resources directly, the incentives they provide can have real costs that reduce efficiency. In addition, transfers that are arbitrary or otherwise unfair can reduce equity.

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2. Indirect costs may also include transfer payments, but this discussion focuses only on real resource costs.

3. Tillinghast-Towers Perrin, *U.S. Tort Costs: 2002 Update—Trends and Findings on the Costs of the U.S. Tort System* (2003).

4. The estimates also omit courts' administrative costs, but those are thought to be relatively small. An estimate from the RAND Institute for Civil Justice cited by Tillinghast-Towers Perrin puts those costs at 1 percent of total direct costs.

5. Tillinghast-Towers Perrin, *U.S. Tort Costs: 2002 Update.* In its previous report, dated February 2002, Tillinghast included estimates of tort costs in other countries. That report stated that in 2000, tort costs equaled 1.9 percent of gross domestic product in the United States, compared with 1.7 percent in Italy and 1.3 percent in Germany—the next two closest countries.

6. Administrative costs are insurance companies' overhead expenses. Tillinghast says it includes those expenses because they are "real costs, directly associated with administering the settlement of tort claims."

7. Jesse David, *The Secondary Impacts of Asbestos Liabilities* (prepared by NERA Economic Consulting for the U.S. Chamber of Commerce, January 23, 2003), available at www.legalreformnow.com/resources/012303secondary.pdf.

The Efficiency of the Tort System as a Mechanism for Compensation

On the question of whether tort costs contribute to efficiency—which is the focus of economic analysis—the available data allow a partial conclusion: even leaving aside the largely unknown indirect costs, the current tort system seems to be an inefficient way to compensate victims. As noted above, Tillinghast estimates that only 46 percent of the total direct costs of the tort system go to victims in the form of economic and noneconomic damages; 54 percent go to transaction costs. By comparison, in the no-fault compensation systems for on-the-job and vaccine-related injuries, administrative costs make up only about 20 percent and 15 percent of total costs, respectively.[8]

Those comparisons are not entirely apt, however. The administrative costs of those compensation systems exclude spending on claimants' attorneys—which has reportedly grown in the workers' compensation system as the regulations governing it have become more complex. Moreover, linking injuries to particular injurers (so their premiums can be adjusted to reflect their own track record, as the workers' compensation system does) would be more difficult with torts in general. Nonetheless, given the large percentage differences between the tort liability system and no-fault compensation systems, it seems safe to conclude that the tort system costs more than does an available alternative method of compensating victims.

Some types of torts clearly have little impact on deterring injuries; virtually their entire value to society is as a mechanism for compensating victims. Asbestos torts are an example: the injurious actions generally took place decades ago, and asbestos is now in limited use (as a combined result of litigation and government regulation), so today's cases serve no role in deterring additional asbestos injuries. The same reasoning applies to any torts that deal with injuries whose source was unknown at the time.[9] For such torts, liability costs are indeed inefficient.

The Efficiency of the Tort System as a Mechanism for Deterrence

In the more typical case of torts that are intended to provide deterrence as well as compensation, economists have not reached a consensus about whether costs are efficient. The tort system may conceivably improve efficiency, despite its high transaction costs, if it is particularly effective in reducing the number and severity of injuries. Such effectiveness has not been demonstrated, however.

One key issue is the relationship between actual costs to victims and the liability costs that are faced by injurers. In a situation in which potential injurers anticipate paying an extra dollar for every additional dollar of injuries or transaction costs they cause, they have the right incentive to take cost-effective steps to reduce future costs.

However, potential injurers may expect to pay more or less than one extra dollar in liability for each additional dollar of social costs they cause. If liability awards exceed actual injury losses—for example, because of punitive damages—potential injurers may be motivated to overspend on precaution (provided they can identify enough promising ways to do so). As an example, suppose a firm expects to pay two dollars in liability for every dollar of actual social costs it produces. In that case, it will perceive investments in precaution to be twice as valuable as they are to society as a whole, and thus it will have an incentive to spend up to two dollars for every additional dollar in actual costs saved. All of the spending that returned less than one dollar per dollar from society's standpoint would reduce the net savings from precaution, making it less likely that tort costs on the whole were efficient. Ironically, the inefficiency associated with excessive precaution may result in increased risk. For instance, drug manufacturers may withdraw or withhold otherwise valuable medicines

8. Those numbers are CBO's calculation of the proportion of employers' costs that are not paid out in workers' compensation benefits, using data from Cecili Thompson Williams, Virginia P. Reno, and John F. Burton Jr., *Workers' Compensation: Benefits, Coverage, and Costs, 2001* (Washington, D.C.: National Academy of Social Insurance, July 2003), and CBO's calculation of administrative costs divided by new obligations for the Vaccine Injury Compensation Program Trust Fund, using data from *Budget of the United States Government, Fiscal Year 2004: Appendix*, p. 409.

9. Suits over asbestos and other "hindsight torts" could conceivably help deter future injuries associated with other products by serving as cautionary examples. But once the example was well established, as seems likely with asbestos, any further suits would have negligible value as additional deterrents.

from the market, and physicians may withdraw their services.[10]

Efficiency may also suffer if potential injurers find ways to reduce their liability exposure without reducing the actual risk of injury. Such avoidance efforts typically have real resource costs but do not add to the social benefits of tort liability. That problem arises from errors in assigning liability: if injurers were held responsible for all of (and only) the injuries that they truly caused, they would have no opportunities to reduce expected liability costs without reducing actual risks. A commonly cited example is "defensive medicine," in which medical professionals conduct low-value procedures in hopes of avoiding the costs and stigma of being sued.[11]

Finally, if potential injurers expect to pay less than one dollar in liability costs per dollar of additional social costs —or, more to the point, expect to save less than one dollar per dollar of reduced social costs—they will have too little incentive to take preventive action. That situation may occur if liability judgments have a significant arbitrary component, if avoidance efforts succeed in obscuring injurers' roles in causing some losses, or if injurers insure their liability costs and the premiums they pay do not fully reflect their injury record. Underinvestment in prevention can even arise from perverse incentives that associate increased care with higher liability costs—as in the case of a company that refrains from researching ways to make its products safer lest it create a paper trail of safety-related data that could be used against it in court.[12] Whatever the cause, underinvestment in prevention has the same effect on efficiency as overinvestment: the net savings from precaution are lower than they would be in the ideal case (here, because some worthwhile opportunities are neglected), and thus they are less likely to outweigh the other costs of the liability system.

The Efficiency and Equity of Nonpecuniary Damages

Critics of the tort system have particularly questioned the deterrence benefits of nonpecuniary damages (punitive awards and compensatory awards for pain and suffering). They argue that large nonpecuniary damages cannot provide useful incentives for precaution because they are awarded in a subjective, arbitrary, and unpredictable way, with little connection to the actual harm or, in the case of punitive damages, to the character of the injurer's conduct. In that view, such awards are inequitable as well as inefficient. Indeed, the Supreme Court has ruled that punitive damages violate the Due Process Clause of the Constitution if they are not "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[13]

The accuracy of that characterization of nonpecuniary damages is a matter of some debate. Supporters of the status quo argue that large awards for punitive damages can promote efficiency by sending appropriate signals for precaution in regard to torts that have a significant proba-

10. Whether or not potential injurers overreact (they may not if they lack effective opportunities to reduce their liability), excessive awards can increase risk in a second way: through decreased consumption of risk-reducing goods and services, such as medical care. Consumption of such goods and services is likely to decline as their prices are driven up by liability costs or as price increases for products in general leave consumers with less real income.

11. Most of the available evidence about defensive medicine comes from anecdotes or conjectural surveys of practitioners. That evidence does not rule out doctors' own financial incentives under fee-for-service payment systems as an alternative explanation for "unnecessary" tests. However, Daniel Kessler and Mark McClellan have shown that passage of state laws limiting liability for doctors led to lower spending for certain heart procedures. See Kessler and McClellan, "Do Doctors Practice Defensive Medicine?" *Quarterly Journal of Economics*, vol. 111, no. 2 (May 1996), pp. 353-390. In addition, Lisa Dubay and coauthors found in one study that areas with a high risk for medical malpractice claims tended to have a higher incidence of cesarean births, but without significantly better birth outcomes. In another study, they found a lower incidence of prenatal care in areas with a high risk for medical malpractice claims. See Dubay and others, "The Impact of Malpractice Fears on Cesarean Section Rates," *Journal of Health Economics*, vol. 18 (1999), pp. 491-522, and "Medical Malpractice Liability and Its Effect on Prenatal Care Utilization and Infant Health," *Journal of Health Economics*, vol. 20 (2001), pp. 591-611.

12. See François J. Castaing, "The Effects of Product Liability on Automotive Engineering Practice," in Janet R. Hunziker and Trevor O. Jones, eds., *Product Liability and Innovation: Managing Risk in an Uncertain Environment* (Washington, D.C.: National Academies Press, 1994), pp. 77-81, available at www.nap.edu/openbook/0309051304/html/77.html.

13. *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. ___ (2003).

bility of escaping detection and judgment. Moreover, they say, large punitive damages can serve equity by punishing egregious behavior on the part of large injurers. Supporters further argue that noneconomic losses such as pain and suffering are as real as economic losses (albeit harder to quantify), so setting artificial limits on awards for such losses may undercompensate some injury victims and may produce some product prices that are inefficiently low because they do not fully reflect the products' true risks.

Economists have tried to shed empirical light on the question of the efficiency of tort costs, focusing primarily on punitive damages. However, the limited data have not yielded a compelling answer. A 1998 study investigated the deterrent effects of punitive damages by comparing the four states that prohibit such damages with the 46 states (and District of Columbia) that allow them. The study found no statistically significant differences in deterrent effects—and in many cases, differences of the "wrong" sign—for more than a dozen indicators of environmental and safety risks.[14] The author of the study posited two arguments to explain the lack of an effect: that punitive damages are awarded too randomly to influence behavior, and that federal regulations and market forces other than liability are stringent enough to leave no room for additional deterrence. However, two follow-up papers suggested that the statistical results of that study could merely reflect limitations of the data. Those papers argued that four states do not provide a strong basis for comparison and that punitive damages could be serving their intended purpose of deterring the most egregious torts—which by definition are relatively rare—without having a discernable impact on overall injury rates.[15]

Conclusions

In short, the current state of data and economic analysis do not allow CBO to judge whether the costs of the tort system are efficient or excessive on the whole.[16] What is clear, however, is that those costs are large enough to be significant for the U.S. economy. That fact helps raise the question of whether changes to the current tort system could reduce the system's costs without undermining its benefits.

14. The indicators included toxic-chemical accidents, toxic-chemical accidents involving injury or death, reductions in releases of toxic chemicals (to surface waters and to all media), total deaths, "medical misadventure deaths," total insurance premiums, and premiums for medical malpractice, product liability, and other liability. See W. Kip Viscusi, "The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts," *Georgetown Law Journal*, vol. 87, no. 2 (November 1998), pp. 285-345.

15. Theodore Eisenberg, "Measuring the Deterrent Effect of Punitive Damages," pp. 347-357, and David Luban, "A Flawed Case Against Punitive Damages," pp. 359-380, both in *Georgetown Law Journal*, vol. 87, no. 2 (November 1998).

16. A 2002 report by the President's Council of Economic Advisors investigated the burden of liability costs on the economy, but it did not provide new information about the incentive effects of tort liability. Rather, the report sketched three alternative scenarios, each of which assumed that certain categories of the direct costs estimated by Tillinghast have no impact on the behavior of potential injurers and are thus "excessive." See Council of Economic Advisors, *Who Pays for Tort Liability Claims?: An Economic Analysis of the U.S. Tort Liability System* (April 2002).

CHAPTER

5

An Overview of Policy Options for Changing the Tort System

Various scholars and policy advocates have proposed altering the tort liability system to reduce what they see as excessive transaction costs and other problems associated with it. Those proposals are too numerous for all of them to be discussed here. Instead, this chapter examines a number of policy options to illustrate the range of choices available to lawmakers. The chapter outlines each option's potential implications for efficiency and equity. For reasons of space, however, it cannot analyze any one option in full detail. (For example, it does not consider the effects on state law or the potential transition problems associated with a particular change, nor does it discuss the many possibilities for combining policies that are not mutually exclusive.)

The options discussed here can be grouped according to their general approach. The first approach would greatly reduce the scope of the tort system and rely more heavily on other tools to control the costs of injuries. The second group contains options that are more incremental in nature but that could be applied broadly to the universe of torts. The final set comprises options targeted toward types of tort claims that have raised particular policy concerns, such as claims arising from medical malpractice or asbestos exposure and those litigated as class actions.

In all three groups, most of the proposals can be seen as addressing one or more of the fundamental barriers to efficiency discussed in Chapter 3:

- The difficulty of giving both potential injurers and potential victims incentives to choose the efficient form and scale of their risk-related activities;
- The added difficulty of optimally distributing (insuring) the risks that remain after efficient precautions have been taken; and
- Problems relating to the cost and scarcity of information, including transaction costs, errors in judgments and in settlements, and inefficient standards for due care.

Other options respond to issues that arise from broader aspects of the legal system, such as the perceived problem that some locally elected judges are biased against out-of-state corporate defendants.

Options for Reducing the Scope of Tort Liability

The policy changes in this group—which involve replacing some or all types of tort liability with private or public insurance—generally go well beyond the kinds of proposals now being considered by the Congress. They are included here because they help clarify the strengths and weaknesses of the tort system or provide useful comparisons with other options.

Replacing Tort Liability with Private Insurance

Some academic economists favor the approach of eliminating tort liability, except perhaps for injuries between "strangers" (such as injuries from automobile accidents).[1] Potential victims would rely to a greater extent on their own insurance for protection against injury risks. In cases in which potential injurers could cost-effectively reduce those risks, they would be motivated to do so to the extent that they could gain a marketing advantage—by advertising the safety of their products or by offering injury compensation in a warranty, purchase contract, or the like.[2] Some increases in government regulation might also occur.

From the standpoint of efficiency, eliminating tort liability would have several desirable implications, although it would fall short of the ideal. It would give potential victims the incentive to take all cost-effective precautions and to obtain the optimal amount of risk spreading through insurance or other compensation contracts. And provided that the insurance and contract terms were clear enough, the amount of litigation would decline significantly, reducing both transaction costs and the inefficiencies associated with erroneous judgments. However, this approach would weaken incentives for potential injurers to exercise cost-effective forms of care (at least those not required by regulation) and could increase inefficiencies associated with imprecise or too-stringent regulation.

From the standpoint of equity, the implications of shifting primary responsibility for injury costs to victims could be considered both good and bad. Lower liability-related costs for businesses should lead to lower prices for many consumer goods and services and reduce the extent to which consumers are implicitly forced to pay for unwanted insurance for nonpecuniary damages. But victims would usually get compensation only for pecuniary losses, and those who had not bought insurance might get no compensation at all. Moreover, injurers would pay compensation only to the extent that they had contracted in advance to do so, and in cases of subtle, delayed, or indirect harm, some injurers' roles might go undetected because few, if any, plaintiffs' attorneys would be working to identify the causes of injuries.

A narrower variant of the same basic idea would eliminate liability only for those products (or features of products) that have been certified as safe by a federal body, such as the Food and Drug Administration, the National Highway Traffic Safety Administration, or the Consumer Product Safety Commission. Many of the arguments for and against completely eliminating tort liability would apply here as well, at least qualitatively. For example, the same efficiency and equity implications would follow from making consumers bear the risk of using the relevant products. The main immediate difference from the standpoint of efficiency is that focusing on products that satisfied federal safety regulations would presumably limit the extent of any increase in injury risks. From the perspective of equity, removing the threat of liability from firms whose products met federal standards might be particularly appropriate. Over time, however, this variant could result in a greatly expanded role for federal regulators—with potentially significant consequences for both efficiency and equity—as firms and industries seeking to exempt their products from liability pushed to broaden the scope of federal safety standards.

Replacing Tort Liability with Public Insurance

Another variant of the previous approach would eliminate (or greatly restrict) tort liability as described above but replace it with a public insurance system, like the present workers' compensation system or the fund for vaccine victims. In this option, victims would receive compensation from a government fund according to a fixed schedule based on the type of injury they had and other relevant factors.[3] To finance the fund, businesses would pay "experience-rated" premiums that reflected the previous record of injuries associated with their products. (Companies would ultimately pass on the costs of those premiums to their customers, workers, or investors in the form of higher prices, reduced wages, or lower returns on capi-

1. See, for example, Paul H. Rubin, *Tort Reform by Contract* (Washington, D.C.: American Enterprise Institute, 1993).

2. Contracting in advance for compensation is not possible between parties that had no previous contact or relationship, which is one argument for maintaining tort liability for stranger injuries.

3. Public insurance funds have also been proposed in narrower contexts; an option that focuses on asbestos injuries is discussed later in this chapter.

tal, respectively.) Depending on the details of the proposal, nonprofit organizations and state and local governments might also participate. But cost considerations would probably make it impractical to rate and collect premiums from individuals, so the injuries they caused might still be handled through the tort system.

Proponents of this variant hope that by standardizing the amount of compensation awarded for similar injuries, this approach would cap or reduce punitive damages and compensatory awards for pain, suffering, and other nonmonetary losses. The effects of reducing such nonpecuniary awards would be qualitatively similar to (though not as large as) the effects of simply eliminating tort liability. Again, potential victims would have better incentives to take efficient precautions, and risk would be distributed more efficiently (because consumers would not be implicitly paying for so much unwanted insurance for nonpecuniary damages). However, some injurers might not face sufficient penalties, and some victims might not receive full compensation for their pain and suffering.

Other implications of the public insurance approach flow from its shift away from litigation to an administrative mechanism. For example, one key argument made for the approach is that it would significantly reduce transaction costs from the 54 percent estimated under the current tort system. (However, transaction costs would probably remain higher than the 20 percent estimated for state workers' compensation programs because of higher costs for such things as determining which injuries were compensable and associating injuries with particular injurers.) Conversely, one argument against public insurance is that the schedule of damages might not do justice to individual cases. Another is that in some cases of subtle, indirect, or delayed harm—such as cancers with long latencies caused by exposure to a particular chemical—victims might not recognize that they had suffered a compensable injury, since there would be few, if any, plaintiffs' attorneys working to identify injury causes. In addition, this option would represent a sharp departure from current practice for injuries that are judged under a negligence standard. Providers of medical care, for example, are now held liable only for injuries considered to result from negligence; but with this option, all compensable injuries to patients under their care would be reflected in their assessed premiums for the public fund.

The incentives for potential injurers to exercise care might be more or less efficient under a public insurance program than they are now. For a firm to be encouraged to take all cost-effective precautions, its assessed premiums would need to reflect all of the effects of its actions on expected future injury costs, and the experience rating would probably not be that thorough. However, even if the new incentives fell on the low side, the error could be smaller than it is now if current incentives are inefficiently high because of mistaken or excessive trial awards.

Options for Reforming the Tort System as a Whole

Changes that would maintain the basic structure of the tort system can take many forms. The options discussed here focus on nonpecuniary damages, attorneys' fees, joint-and-several liability, and payments from "collateral sources," such as victims' insurance policies. (Those options are summarized in *Table 3*.) All of the policy changes could be applied to the broad universe of tort claims or, alternatively, to one or more subsets of particular concern.

Controlling Nonpecuniary Damages

As noted above, one goal of people who advocate public insurance as an alternative to tort liability is to control nonpecuniary damages. That goal can be achieved in other ways, however—most directly, through statutory limits or bans on those damages. Many states impose such restrictions, either in general or for particular types of torts. In addition, several federal bills considered in recent years have proposed limits in specific contexts. Examples from the current Congress include the Asbestos Compensation Fairness Act of 2003 (H.R. 1586), which would prohibit punitive damages in asbestos cases, and the HEALTH Act of 2003 (H.R. 5) and the Common Sense Medical Malpractice Reform Act of 2003 (H.R. 321), which would limit noneconomic compensation in medical malpractice cases to $250,000 and punitive damages to twice the economic damages or $250,000, whichever was greater.

A second, less centralized way to reduce nonpecuniary damages would be to allow producers of goods and services to specify in advance the extent of damages they would pay in the event of an injury. Products carrying limits on damages could be offered at lower prices (because

Table 3.

The Primary Effects of Some Broad Options for Tort Reform

Option	Effects on Efficiency: Positive	Effects on Efficiency: Negative	Effects on Equity
Control Nonpecuniary Damages			
Cap or prohibit nonpecuniary damages	Improves allocation of risk (by reducing implicit over-insurance); may reduce distortions of safety incentives if current damages are excessive or arbitrary	May undermine incentives for care and encourage excessive consumption of risky products if current damages are appropriate	Consumers are not forced to buy as much bundled insurance for non-pecuniary losses; depending on the character of existing damages, lower payments by injurers may reduce excessive judgments or punish injurers inadequately, and lower awards to victims may represent inadequate compensation or smaller windfalls
Allow buyers and sellers to agree in advance to limit liability damages	Same as above	Same as above	Same as above, except that incomplete compensation to victims may be viewed as equitable if it follows voluntary, informed choices by consumers
Allow unlimited insurance subrogation	Improves allocation of risk (by reducing implicit over-insurance) and incentives for care by consumers	No major negative effects	Consumers can effectively undo the bundled insurance for nonpecuniary losses; injurers still pay such damages, but the payments go to victims' insurance companies rather than to victims
Control Attorneys' Fees			
Cap contingent fees	Reduces nuisance suits	Makes it harder for some victims with difficult claims to find representation	Defendants face fewer claims for both legitimate and nuisance suits; some victims receive cheaper representation but others cannot find representation
Promote early offers and limit fees when such offers are made and accepted	Reduces transaction costs for some cases; may reduce nuisance suits	May indirectly make it harder for some victims (though fewer than above) to find representation if attorneys cannot subsidize difficult cases with profits from easy cases	Defendants may face fewer nuisance suits and perhaps fewer legitimate suits; some victims receive cheaper representation but others(though fewer than above) cannot find representation

(Continued)

their expected costs would be lower), and the forces of supply and demand would determine the options available in the market. That approach could lead to the elimination of nonpecuniary damages for risky products—if, as argued in Chapter 3, consumers would rather have lower prices than actuarially fair insurance for such damages. In principle, the courts could implement this option on their own, without legislation, by enforcing damage-limitation contracts in injury cases. They have not done so up to now, however (which is why producers today cannot offer consumers lower prices in exchange for reduced liability). Moreover, Congressional action could allow a faster and clearer transition to the new system.[4]

4. Rubin, *Tort Reform by Contract.*

Table 3.

Continued

Option	Effects on Efficiency: Positive	Effects on Efficiency: Negative	Effects on Equity
Restrict or Eliminate Joint-and-Several Liability	May reduce transaction costs if the inability to target injurers with deep pockets discourages some suits; may make incentives for care more or less efficient	May increase transaction costs if plaintiffs pursue larger numbers of defendants; may make incentives for care more or less efficient	Injurers with deep pockets pay lower damages and transaction costs; victims get less compensation and may pay higher transaction costs
Offset Payments from Collateral Sources	May reduce erroneous findings of liability if some verdicts are motivated by concern that plaintiffs need money for their injuries (such as for medical care)	Reduces incentives for care to the extent that potential injurers expect losses to be covered by other sources	Injurers pay lower damages; victims are not doubly compensated, nor are victims' insurance companies and other collateral sources reimbursed for the benefits they provide

Source: Congressional Budget Office.

The efficiency effects of letting producers and consumers limit tort liability damages through contracts would be similar to those of capping or prohibiting damages by statute. Again, to the extent that nonpecuniary damages were reduced, uncertainty would be distributed more efficiently, but lower prices for risky products would probably lead to inefficiently high consumption unless consumers took the risks into account in their decisions about purchases.

The equity implications of the two approaches would differ, however. According to some conceptions of equity, limiting victims' access to compensation for pain and suffering is problematic if it is done by legislative fiat but not if it results from the victims' own choices (provided those choices are adequately informed and voluntary).

A third option focusing on nonpecuniary damages—known as unlimited insurance subrogation (or substitution)—would allow insurance policies to specify that the insurance company would collect all of a liability award or settlement paid by an injurer for an injury covered by the victim's policy.[5] In contrast, the limited subrogation allowed under current law lets a company receive only the portion of an award that is necessary to reimburse it for benefits paid under its policy.

Assuming that consumers continued to insure themselves only for pecuniary losses, the result of this option would be that insurance companies could collect more than they paid out whenever one of their policyholders was awarded punitive damages or compensation for pain and suffering (or pecuniary damages in excess of the policy's benefits). The expected value to insurers of the net proceeds from such cases would reduce their costs, and in a competitive market, they would pass on the savings to consumers through the premiums they charged. In principle, the result for the average consumer would be to exactly undo the inefficient "bundled" coverage for nonpecuniary damages that is implicitly included in the prices of risky goods and services. Taking into account their savings on premiums and their restricted compensation in the event of an injury, consumers would be paying for and receiving coverage only for pecuniary damages.

Like the previous two options, unlimited subrogation would reduce the inefficiency associated with bundled insurance for nonpecuniary damages at the cost of reducing the compensation received by victims. Indeed, it would probably go farther than proposals that merely cap such

5. See David Rosenberg, *Deregulating Insurance Subrogation: Toward an Ex Ante Market in Tort Claims*, Discussion Paper 395 (Cambridge, Mass.: Harvard Law School, John M. Olin Center for Law, Economics, and Business, undated).

damages, by eliminating them for injuries covered under most, if not all, insurance policies. But unlike the previous options, it would leave injurers liable for such damages—the difference being that the awards and settlements would go to insurance companies rather than to victims.[6] Thus, potential injurers would still have an incentive to consider the full social costs of their risk-related actions, and consumers would continue to see those total costs reflected in the prices of products. In short, the unlimited-subrogation approach would not only allocate consumers' wealth more efficiently between the uninjured and injured states (again, by reducing or eliminating overinsurance for nonpecuniary damages) but would also maintain efficient incentives in product markets.

Controlling Attorneys' Fees

Typically, plaintiffs' attorneys in tort cases charge their clients "contingent" fees that are based on a percentage of any damages ultimately received from the defendants. Like nonpecuniary damages, those fees could be constrained by law. The Congress has considered various proposals that would cap such fees in specific contexts.[7]

In an ideal world without errors and information costs, attorneys would pursue only meritorious claims; thus, from the standpoint of efficiency, restricting their incentive to do so by limiting the fees they could charge would be unambiguously negative.[8] Proponents of such caps argue that in practice, however, the costs of inhibiting some legitimate claims would be outweighed by the benefits of reducing the number of "nuisance suits" (such as those filed solely to extract settlements from defendants who would face high litigation costs).[9] From the standpoint of equity, capping contingent fees would help some victims by letting them keep a larger share of the damages they collected, but it could hurt other victims by reducing their access to legal representation.

Some more-targeted versions of this approach could lessen the negative effects. Under one variant—called the "early offers" proposal—a plaintiff's attorney who charged contingent fees would be required to send claim notices in all personal injury cases; his or her fees would be capped only if the defendant made an offer within a specified time after receiving the claim notice and the plaintiff accepted the offer.[10] Because that variant would cap fees only in cases for which the plaintiff's attorney had done relatively little work, it would be likely to reduce any adverse effect on the ability of injury victims to find legal representation. Still, limiting attorneys' fees in those cases could make it harder for attorneys to take chances on meritorious but difficult cases that might ultimately yield them no income.

Restricting or Eliminating Joint-and-Several Liability

For injuries caused by more than one party, the question arises of how much liability to assign to each party. Courts generally use one of two rules in answering that question (although other approaches can be imagined). Under joint-and-several liability, any one injurer or subset of injurers can be held responsible for paying all of the damages. That individual or group often has the right to seek reimbursement from the remaining injurers. Under several liability, by contrast, the court determines the relative contribution of each injurer in causing the harm and holds each one responsible for only that proportion of the dam-

6. This approach assumes that insurance companies could secure the cooperation of their injured policyholders at trial. For a discussion of that issue, see ibid., footnote 22.

7. For example, the HEALTH Act of 2003 would allow plaintiffs' attorneys in medical malpractice cases to collect no more than 40 percent of the first $50,000 recovered in a case by all plaintiffs, 33 percent of the next $50,000, 25 percent of the next $500,000, and 15 percent of any amount above $600,000.

8. In that textbook world, the ideal approach would be to allow attorneys to buy claims from the plaintiffs for agreed-upon amounts and collect 100 percent of any settlement or judgment, since that would give them the incentive to pursue cases to the efficient extent. But under current law, such complete transfer of a claim from plaintiff to attorney (known as "champerty") is illegal. See Robert D. Cooter, "Economic Theories of Legal Liability," *Journal of Economic Perspectives*, vol. 5, no. 3 (Summer 1991), p. 20.

9. Versions of this approach that would limit contingent fees for court judgments but not for voluntary settlements would have the additional effect of giving plaintiffs' attorneys more incentive to settle. Again, that effect is clearly inefficient in a simple textbook world, but it may improve efficiency if other factors currently bias attorneys against settlement and toward trial.

10. The capped fees would increase plaintiffs' incentives to accept early offers and thus defendants' incentives to make them.

ages. In the past 20 years, many states have either eliminated joint-and-several liability under some or all circumstances or have restricted it in various ways—for example, by limiting it to certain types of damages or to injurers whose liability exceeds a certain percentage threshold.

Whether such changes have increased or decreased efficiency is not clear. Ideal incentives require joint injurers to each face liability equal to the incremental effect of their own actions, but neither joint-and-several nor several liability reliably achieves that result. To illustrate, consider a case in which the actions of two injurers are both necessary to cause harm—for example, in which each one disposes of a chemical and the two chemicals then combine to produce an explosion. Avoiding the explosion is efficient if either party could do so at a cost lower than the cost of the resulting damage. But neither injurer might take care if it expected to share liability evenly under either joint-and-several or several liability and its prevention costs exceeded 50 percent of the damage.[11]

What is clear is that several liability has two disadvantages for plaintiffs—and conversely, two advantages for defendants—relative to joint-and-several liability. First, it makes plaintiffs bear a higher share of the transaction costs. Instead of pursuing only a selected subset of the alleged injurers (often just the single party with the deepest pockets) and shifting the costs of dealing with the remaining parties to that selected group, plaintiffs must sue everyone from whom they hope to collect damages. Second, if some of the injurers are bankrupt, defunct, or otherwise unable to pay their share of the damages, several liability leaves plaintiffs partially uncompensated, whereas joint-and-several liability compensates them more fully, to the extent that other, deeper-pocketed injurers can be tapped for their fellow injurers' shares.

11. In that case, strict liability could provide efficient incentives if *each* party faced potential liability for 100 percent of the damages, rather than 100 percent for both parties combined. Negligence standards could also provide efficient incentives here; as discussed above, however, such standards are not fully efficient in general because they do not provide appropriate incentives for the scale of nonnegligent activities. See Thomas J. Miceli and Kathleen Segerson, "Joint Liability in Torts: Marginal and Infra-Marginal Efficiency," *International Review of Law and Economics*, vol. 11, no. 3 (December 1991), pp. 235-249.

Offsetting Payments from Collateral Sources

Under the law's traditional "collateral-source rule," the fact that an injured plaintiff has received benefits from some independent source—such as an insurance policy—may not be considered in determining whether a defendant should pay damages and, if so, how much. In some cases, the collateral source exercises a lien or right of subrogation and is reimbursed for the overlap between the benefits and the damages. In many cases, however, the effect of the collateral-source rule is to allow victims to receive double compensation for their injuries.

In the past two decades, many states have revised the collateral-source rule in various ways that could serve as models for federal action. Those revisions range from merely allowing collateral payments to be introduced as evidence in certain types of cases to requiring that damages be reduced to offset such payments under all circumstances. If verdict errors never occurred, there would be no clear economic rationale for such changes—efficiency dictates that injurers should face the costs of their actions (or, at least, of their negligent actions) regardless of the other benefits available to victims. However, if judges or juries sometimes wrongly find defendants liable because of conscious or subconscious concern that plaintiffs may lack the resources to deal with their injuries, then such changes may improve efficiency. In either case, it may be more equitable for injurers not to pay victims who receive collateral benefits, at least under some circumstances—which may argue for allowing information about such benefits to be introduced as evidence and considered by juries and judges.

Options for Reforming Certain Types of Torts

Most of the recent Congressional attention on tort reform has focused on specific types of claims, particularly those arising from medical malpractice or asbestos exposure and those litigated as class actions. Proposals that target those types of claims often include the application of one or more of the broad approaches discussed above, but they generally also include some options that reflect more specifically the nature of the particular claims. This section discusses some of those narrower options.

Creating Specialized Courts

Will the tort system function better if special courts are established to hear particular kinds of claims? For certain classes of difficult cases, specialized courts may yield one or both of the following benefits. First, they may achieve administrative efficiencies that will move cases through the judicial system faster or at lower cost. The pursuit of such efficiencies appears to be the main reason that 10 states (as of August 2000) have created courts focusing on business or complex litigation.[12] Second—as advocates of the creation of special courts to hear medical malpractice claims argue—assigning certain types of complex cases to judges with particular expertise in a subject may improve the quality of case outcomes.[13] The idea is that judges who have experience or specialized training can more accurately interpret scientific or technical issues (in the terms discussed in Chapter 3, lower the cost of information), provide more consistent application of the law, or both.

One potential argument against specialized courts is that to the extent that they make the process of litigation more efficient, they may encourage additional plaintiffs to bring suits. Indeed, some analysts argue that efforts to streamline asbestos cases (in part by consolidating claims for trial) "actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved."[14] In addition, a tension exists between using judges with special areas of expertise to improve case outcomes and the tradition and values of using nonspecialist juries.

Addressing Asbestos Claims

As noted in Chapter 2, claims for injuries resulting from asbestos exposure have grown rapidly over the past three decades, have involved larger amounts of damages than the average tort case, and have been implicated in the bankruptcies of dozens of defendants. Another notable feature of asbestos claims is that a large share of the plaintiffs have not yet become sick—that is, they are not functionally impaired—but nonetheless they are subject to statutes of limitations that begin when they discover (or should have discovered) bodily evidence of exposure. Thus, one option that the Congress has considered is to specify certain medical criteria that asbestos victims would have to satisfy in order to pursue claims.[15] In effect, asbestos injury would be redefined in terms of impairment rather than exposure.

Limiting asbestos claims to those involving impairment would probably improve efficiency by reducing the number of cases and hence lowering total transaction costs. In addition, allowing injurers to avoid paying damages to people who have been exposed but are not notably impaired should have little adverse effect on the efficiency of incentives for precaution against future tort injuries. From the standpoint of equity, this option would benefit victims who are sick today by reducing the competition for court time and injurers' compensation funds. Conversely, it would impose a loss on victims who are not yet impaired, many of whom will incur higher medical costs to monitor their condition over time. Moreover, those victims would not be guaranteed to benefit if they became impaired later, because the funds available to pay claims might be greatly diminished by then.

Another option that the Congress has considered would combine the approach of setting minimum criteria for impairment and establishing a public fund that would compensate victims according to a schedule reflecting the severity of injury and perhaps other relevant factors, such as smoking history.[16] Such a fund would be a narrower

12. National Center for State Courts, "Focus on Business and Complex Litigation Courts," *Civil Action: A Briefing on Civil Justice Reform Initiatives*, vol. 1, no. 1 (August 2000), available at www.ncsconline.org/wc/publications/Res_SpePro_CivilActionV1N1pub.pdf

13. See the remarks of Philip K. Howard before the Common Good forum, "Beyond Patients' Rights: Do We Need a New System of Medical Justice?" hosted by the AEI/Brookings Joint Center for Regulatory Studies, Washington, D.C., April 24, 2002, available at http://cgood.org/medicine/item?item_id=3390.

14. Stephen J. Carroll and others, *Asbestos Litigation Costs and Compensation: An Interim Report* (Santa Monica, Calif.: RAND Institute for Civil Justice, 2002), p. 26.

15. See, for example, the Asbestos Claims Criteria and Compensation Act of 2003 (S. 413).

16. See the Fairness in Asbestos Injury Resolution Act of 2003 (S. 1125). Another bill, the Asbestos Compensation Act of 2003 (H.R. 1114), takes an intermediate approach: like S. 1125, it would

variant of the idea of replacing tort liability with public insurance, but some of the pros and cons of the broader idea discussed above would be less relevant here. In particular, because asbestos exposures generally happened decades ago, using a public fund rather than the liability system to compensate victims would have little impact on incentives for precaution against future injuries. The main issues raised by proposals for a compensation fund are the potential savings in transaction costs and the adequacy and appropriateness of the funding sources and compensation schedule.

Addressing Class-Action Claims

Several approaches have been proposed for changing the rules that govern class-action claims. One of those approaches would broaden the "diversity of citizenship" rule to allow more cases to be removed from state court to federal court.[17] That rule—which currently states that U.S. district courts have jurisdiction in civil cases in which no plaintiff and no defendant are citizens of the same state and at least one plaintiff seeks at least $75,000 in damages—could be broadened to a greater or lesser degree. At the extreme, all cases (or perhaps all cases above some low monetary threshold) that involve at least one plaintiff and one defendant from different states could be made removable.

In a simple model of how courts work, changes to the diversity rule would at best be irrelevant—and at worst be harmful to both efficiency and equity to the extent that they inhibited some claims by raising plaintiffs' costs. But the evaluation is less clear when two complicating factors are taken into account. On the one hand, if significant problems of bias against out-of-state defendants exist in some local courts, an expanded diversity rule may improve efficiency and equity by circumventing those problems. Evidence about the highly disproportionate incidence of class-action suits in a small number of jurisdictions suggests that local bias may indeed be a significant problem.[18] On the other hand, if expanded diversity leads to lengthy delays in trying legitimate claims because federal courts have more-limited capacity than state courts do, the costs to efficiency and equity may subtract from or outweigh the benefits.

A second type of proposal targets a different perceived problem with class-action suits—namely, that plaintiffs' attorneys often act independent of any effective oversight by members of the class and collude with defendants to reach settlements that reflect their own interests rather than those of class members.[19] Proposals to address that problem attempt to bring attorneys' interests more closely in line with those of the class. One approach might be to tie the compensation of plaintiffs' attorneys to the benefits actually received by class members. (For example, in the case of a settlement that gave class members coupons for discounts on future purchases from a defendant, the attorney's compensation might be made proportional to the number of class members who used the coupons.) In principle, aligning the two sets of interests should improve both efficiency and equity. In practice, however, it might be difficult to devise rules that would be both comprehensive (and thus not easily circumvented) and flexible enough to accommodate the full range of possible circumstances.

establish a fund that would offer compensation to asbestos victims according to a schedule. (Both bills would allow unimpaired victims of asbestos exposure to be reimbursed for some medical monitoring costs.) But the fund would be financed on a claim-by-claim basis through settlements with or judgments against individual defendants, rather than as a public insurance program. Moreover, victims would retain the right to file claims in court instead of accepting compensation from the fund.

17. See, for example, the Class Action Fairness Act of 2003 (H.R. 1115 and S. 274).

18. John H. Beisner and Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Civil Justice Report No. 5 (New York: Center for Legal Policy, Manhattan Institute, July 2002).

19. For examples of seemingly abusive class-action settlements, see Trial Lawyers for Public Justice, *Class Action Abuse Prevention Project*, brochure (Washington, D.C.: Trial Lawyers for Public Justice, undated), available at www.tlpj.org/caappbrochure.pdf.

4

Testimony
United States Senate Committee on the Judiciary
The Asbestos Litigation Crisis Continues – It is Time for Congress to Act
March 5, 2003

Mr. Dennis Archer
President-elect , American Bar Association

Mr. Chairman and members of the Committee:

My name is Dennis Archer and I am here today at the request of our ABA President Alfred P. Carlton, Jr. on behalf of the American Bar Association, the world's largest voluntary professional organization with more than 410,000 members. I appear before you today in my capacity as the President-Elect of the ABA. I am pleased to be with you today and present you the views of the ABA regarding asbestos litigation.

I. Introduction
Today the United States faces an asbestos crisis that has gotten progressively worse over the past 20 years and is taking its toll on those who are sick with asbestos-related diseases and their families and on the court system. More than 200,000 claims are presently clogging the court system and tens of thousands of new claims are filed each year. Truly sick individuals are facing lengthy delays due to clogged court dockets. Funds that are needed to compensate persons who are sick now or who will become seriously ill from asbestos later are in danger of being dissipated due to claims by those who are not sick and may never become sick. The flood of claims from those who are asymptomatic is also harming current employees, retirees and shareholders of defendant corporations.

The ABA has long been concerned about the situation regarding asbestos claims. In February 1983, the ABA reaffirmed its opposition to broad federal product liability legislation. However, in the same resolution, (hereinafter identified as the February 1983 ABA policy), the ABA adopted a policy in support of narrowly drawn federal legislation in two discrete areas of product liability law. One of those areas was victim compensation for certain occupational diseases such as asbestosis.

The February 1983 ABA policy supported federal legislation that addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: a) there is a long latency period between exposure to the product and manifestation of the disease; b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

In its report, the Committee that sponsored the February 1983 policy stated that it "believes that the current social problem presented by occupational latent diseases, such as asbestosis, is unique and has been a catastrophic phenomenon on a national scale to asbestos workers and to the asbestos industry. While this Committee is reluctant to recommend federal intervention in the tort liability and common law systems of the several states, the Committee believes that the unique national scope and magnitude of the problems for adequate compensation to injured parties and liability for occupational latent diseases as they affect the financial stability of the specific industry, such as asbestos, warrants attention at the federal level. The Committee also believes that federal attention to such a unique and urgent national problem is neither premature nor precipitous, and would not result in harmful violation of the inherent values of this country's common law tort liability systems of the several states."

In 1991 the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found that "the situation has reached critical dimensions and is getting worse." The Ad Hoc Committee "recognize[d] that virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for the Congress" and stated that it "firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem...". U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, p.2 (March 1991) (emphasis added). In the continued absence of legislative action, some courts and parties attempted to craft creative solutions to the growing body of asbestos claims, including litigation class actions, settlement class actions, mass trial consolidations, joint defense claims handling organizations, and "global" settlement negotiations. None succeeded. Class actions failed because the factual disparity among the various claims and the disparate interests of present and future claimants precluded proper treatment under Federal Rules of Civil Procedure 23. The Supreme Court in 1997 and 1999 reviewed and struck down two proposed class action settlements known as the Amchem settlement and the Ortiz settlement. In both cases, however, the Supreme Court called upon Congress to correct the problem. Justice Ginsberg delivered the opinion for the Court in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed. 2d 689 (1997), in which she noted that the Judicial Conference had urged Congress to act on the situation and "no Congressional response has emerged." In Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L.Ed. 2d 715 (1999), Justice Souter delivered the opinion for the Court and said "this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in Amchem will suffice to show how this litigation defies customary judicial administration and calls for national legislation" 527 U.S. at 821 (emphasis added). Chief Justice Rehnquist's concurring opinion stated that asbestos litigation "cries out for a legislative solution" 527 U.S. at 865.

Mass consolidations, at least in the eyes of some courts, suffered similar shortcomings. See, e.g., Cimino v. Raymark Industries, Inc., 151 F.3d 297, 320-21 (5th Cir. 1998); Malcolm v. National Gypsum Co., 995 F.2d 346, 350-353 (2d Cir.1993); Cain v. Armstrong World Industries, 785 F.Supp. 1448, 1454-56 (S.D.Ala. 1992). Joint defense claims handling organizations dissolved over various strategic and liability share issues, as did "global" settlement negotiations.

The February 1983 policy is silent as to what type of federal legislation might be appropriate in the area of asbestos. In the intervening years, the situation has become much worse and we believe must be addressed. Until last month, no subsequent ABA policy was adopted to address asbestos litigation or legislation.

In November 2002, at my request, the ABA created a Commission on Asbestos Litigation to bring a recommendation to the House of Delegates at its February 2003 meeting concerning widely reported and longstanding problems in asbestos litigation. The recommendation was to address dual concerns: 1) protecting the right of claimants with impairing asbestos-related injuries to obtain fair compensation efficiently in the tort system, and 2) preventing scarce judicial and party resources from being misdirected by a flood of premature claims by individuals who have been exposed to asbestos but do not have, and may never get, any functional impairment from asbestos-related disease.

In establishing a commission to develop policy in the area, the ABA was most concerned about ensuring that those who become sick from asbestos-related diseases will receive reasonable and fair compensation for themselves and their families. The ABA is concerned that funds are being dissipated by payments to those who are not now sick and may never be sick with asbestos-related diseases, and the costs associated with administering those claims. A number of factors go into why those who are not yet sick file a claim. We acknowledge that those who file a claim often do so when

they are not yet sick in order to file within the time prescribed by a statute of limitations. Others do so because they fear that, if companies go bankrupt by waiting, these claimants may not be compensated. These people often settle for a comparatively small amount of money in return for a complete release. Most never get sick, but those who do become sick are often precluded from the compensation they need, at the time they really need it.

Over the past 20 years, the problems associated with the tremendous volume of cases and the national scope of the problem resulted in increasingly urgent calls for federal legislation to address the problem. Recently, the concept of federal legislation to: 1) allow those with non-malignant asbestos-related diseases to file a cause of action only if they meet specific medical criteria; and 2) toll all applicable statutes of limitations until those criteria are met has come to the radar screen as a possibility of dealing with the crisis at hand. At this time there is no national Standard to separate claimants who are not sick from those who are sick from asbestos.

The ABA believes that Congress should enact a Standard like the one developed by the ABA Commission or a similar appropriate Standard that would: (a) identify non-malignant claims that are entitled to compensation and defer those that do not currently belong in the courts, and (b) ensure that state and federal statutes of limitations do not run against individuals who do not yet (and may never) meet the medical criteria in the Standard. Such a Standard should deal only with non-malignant claims and not in any way deal with claims for asbestos-related cancers or malignancies.

The ABA adopted policy last month, attached as "Appendix A," does just that. Attached as "Appendix B" is a medically sound "Standard for Non-Malignant Asbestos-Related Disease Claims" that the ABA has developed. The ABA developed the Standard with the goal of ensuring that no one who should be permitted to file a claim would be precluded from filing one. We have attempted to be inclusive, while recognizing that no real progress could be made without establishing objective medical criteria for presently compensable claims.

While this issue is indeed complex and does indeed have important consequences, it is not new. Lawyers, public advocacy groups and think tanks have been studying the issue for more than two decades. The ABA Commission members reviewed the extensive list of studies, statements and testimonies that have resulted from this effort and held consultations with leading medical experts on pulmonary function. Commission members worked very hard on this matter because they are truly concerned about those who have become sick due to exposure to asbestos. Their hard work produced, in my view and in the view of the 70% of the members of the ABA House of Delegates, a fair standard.

We believe this Standard or appropriate similar standards should be considered by Congress.

If legislation along these lines is not enacted, the assets of the defendants will be consumed by people who are not sick, leaving little or nothing for those who become sick in the years ahead. In addition, companies continuously being sued by those not impaired are likely to become less capable of earning money to pay claims. Analysts are now looking at footnotes in the annual reports of such companies to determine asbestos liability, and the financial ratings of these companies are being impacted negatively. If the present course continues, jobs and economic value will be lost and even more companies will be pushed into bankruptcy—causing further delays and reduced compensation to the very sick.

II. Background

Asbestos litigation is not a new phenomenon. It is the tragic legacy of extensive industrial use of

asbestos in the workplace, predominantly from the 1930s to the early 1970s. Significant numbers of industrial workers began developing disabling, and sometimes fatal, asbestos-related diseases decades later (a delay attributable to the long latency between exposure and manifestation of disease). They brought suit against a relatively small number of former manufacturers of asbestos-containing industrial insulation products.

By the 1980s, what had once been a series of isolated cases turned into a steady flow. Claimants began regularly obtaining significant awards. In 1982, Johns-Manville Corporation -- the single largest supplier of asbestos-containing insulation products in the U.S. and the primary target of the early claims -- declared bankruptcy due to the burden of the asbestos litigation. At that point, it had approximately 16,000 pending claims. By comparison, today it is common for some defendants to have more than 100,000 cases pending.

The asbestos litigation paused only briefly, if at all, as a result of the Manville bankruptcy. Heavily exposed industrial workers continued to get sick from asbestos-related diseases and to bring claims in the tort system throughout the 1980s and into the 1990s. Asbestos dockets in certain jurisdictions swelled. Several other former manufacturers of asbestos-containing insulation declared bankruptcy (e.g., Unarco, Eagle-Picher, Raybestos Manhattan, Celotex).

Despite the failure of efforts to find a new solution to the asbestos litigation, the tort system appeared to be relatively stable in the early 1990s. The flow of new claims was substantial (RAND estimates it was 15,000 to 20,000 per year), but fairly predictable. (Asbestos Litigation Costs and Compensation, An Interim Report, RAND Institute for Civil Justice, 2002, hereinafter the "RAND report"). More importantly, it appeared that by the mid 1990s there was a downward trend in new filings, reflecting the fact that the period of most intensive industrial use of asbestos had drifted further into the past and the occurrence of disabling non-malignant diseases was falling in corresponding fashion.

In retrospect, however, it is clear that a countervailing trend was emerging and accelerating in the 1990s: for profit litigation screenings began systematically generating tens of thousands of new non-malignant claims each year by individuals who had some degree of occupational asbestos exposure, but did not have, and probably would never get an impairing asbestos-related disease. These individuals may or may not have markings on lung x-rays "consistent with" exposure to asbestos (and dozens of other possible causes) but do not, and may never, experience any symptoms of asbestos disease or develop any asbestos-related conditions that would impair or affect their life or daily functions.

Asbestos exposure can affect the body in a number of ways. It can cause mesothelioma, a cancer of the exterior lining of the lung and peritoneum. It can also cause cancer inside the lung. Although there is an ongoing debate about the issue, some believe that it can cause cancer at other sites in the body.

Asbestos exposure can also cause non-malignant pulmonary disease. Asbestosis is a fibrosis (scarring) of tissue inside the lung, particularly in the walls surrounding the alveolar spaces at the end of the airways. Significant fibrosis in this area reduces the elasticity of the lung and interferes with the lung's ability to oxygenate the blood. Asbestotic lungs are characterized by reduced capacity, i.e., they can process only a reduced volume of air compared to normal lungs. Workers who suffer from significant asbestosis generally have shortness of breath on exertion.

Asbestosis can be a progressive disease. In its milder forms, it may not cause any symptoms. It may or may not progress to the point of causing functional impairment detectable on objective pulmonary function tests.

Asbestos exposure may also cause non-malignant changes in the pleura, the tissue that lines the outside of the lung and the inside of the rib cage. The purpose of the pleura is to facilitate the smooth, constant movement of the lungs as they expand and contract. Asbestos exposure can cause circumscribed thickening of pleural tissue (called "pleural plaques") as well as diffuse pleural thickening. Ordinarily, these conditions -- which occur outside the lung -- do not result in any functional impairment. Significant diffuse pleural thickening, however, can restrict the ability of the lung to expand and may result in objective impairment that can be identified by pulmonary function testing.

While pleural plaques and diffuse pleural thickening involve the same tissue that is involved in the malignant disease mesothelioma, they are different physiological processes. Pleural plaques and pleural thickening do not become or lead to mesothelioma. Mesothelioma incidence is a function of exposure and individual susceptibility, not the presence or absence of non-malignant pleural changes.

By virtually all accounts, contemporary asbestos litigation is no longer driven solely, or even primarily, by the occurrence of disabling asbestos-related diseases. Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings. A recent RAND report noted that some studies claim that somewhere between two-thirds and 90% of new claims are now brought by individuals who have radiographically detectable changes in their lungs that are "consistent with" asbestos-related disease (and with dozens of other causes), but have no demonstrated functional impairment from those changes: The RAND report concluded that, "it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily life." RAND report at pg. vi; and, pg. 20, 21.

Currently, lawyers are doing what they think is best for their clients. The manner in which the statutes of limitations operate under some states' laws is a major factor in generating numerous claims by claimants who are asymptomatic or without functional impairment. The ABA wants to improve the administration of justice by ensuring that only symptomatic persons file claims and that the statute of limitations is tolled for those who are not yet sick. Thus, the courts and the lawyers will be better able to handle these cases.

A number of states have expressly adopted a "two disease" rule for asbestos-related claims. Under this rule, a claimant who suffers from asbestosis must timely file a claim for that disease, but is not automatically barred from bringing a separate claim many years later should he or she develop an asbestos-related cancer. However, even states that have adopted the two-disease rule have found that it has not stopped the high levels of filings by asymptomatic plaintiffs.

The result of the legal dilemma created by screenings and statues of limitations is the wholesale filing of premature non-impairment claims. The statistics are startling. In 2001, the Manville Trust received over 90,000 new claims -- more than in any prior year and nearly six times the total number of claims pending against Manville when it declared bankruptcy twenty years before. Between 2000 and 2002, the Trust received more than 200,000 claims. The Trust has reported that more than 90% of the claims allege only non-malignant changes.

The experience of the Manville Trust is not unique. According to the RAND report, there has been a substantial increase in annual new filings for all defendants since the mid 1990s, and the increase is almost entirely attributable to non-malignancy filings. The vast majority of those non-malignancy claims, RAND reports, do not involve functional, objectively measurable impairment from asbestos-

related disease.

The financial impact of this flood of non-impairment claims has been profound. According to the RAND report, more than sixty otherwise financially viable companies have gone bankrupt due to asbestos-related liabilities, over twenty in the last two years. None has claimed an inability to pay fair compensation to truly sick claimants. Virtually all point to the same problem: tens of thousands of non-impairment claims filed each year, with no end in sight.

Nobel Laureate Professor Joseph Stiglitz of Columbia University recently issued a report, commissioned by the American Insurance Association, that calculates the economic impact of these bankruptcies on the employees of the bankrupt companies. He estimates that 60,000 workers have lost their jobs when their companies went bankrupt as a result of asbestos-related liabilities. (The RAND report estimates job losses at approximately 128,000.) Stiglitz concludes that "[e]ach displaced worker at the bankrupt firms will lose, on average, an estimated $25,000 to $50,000 in wages over his or her career" and every worker will suffer "roughly $8,300 in pension losses, which represent[s], on average, a roughly twenty five percent reduction in the value of the 401(k) account." Joseph E. Stiglitz, Jonathan M. Orszag, & Peter R. Orszag, "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms" (December 2002) at 3.

The direct costs of asbestos-related bankruptcies can be very substantial. Owens Corning, for example, recently disclosed that, in approximately two years, it has incurred $200 million in legal and consulting fees. These costs directly reduce the funds available to pay claimants.

Bankruptcy has not helped seriously ill asbestos claimants, either. Claims payments stop immediately when bankruptcy is declared and do not resume for several years, and then at significantly reduced values. The Manville Trust is currently paying only five cents on the dollar to claimants. Due to the flood of non-impairment claims, the Trust reports that, over the last five years, it has paid more money to claimants who describe themselves as unimpaired than it has to mesothelioma claimants.

Once a lawsuit is filed, unimpaired claimants may choose to resolve their claims for minimal values, executing a complete release. For the vast majority who never develop a disabling asbestos-related disease, the money is arguably a windfall. For those who later develop mesothelioma, the filing and resolution of a premature claim and execution of a full release can become a haunting mistake.

It is for these reasons, as well as concerns over the availability of fair compensation for seriously ill asbestos disease victims, that many disparate voices have joined in the call for change. The flood of non-impairment claims generated by litigation screenings crowd active litigation dockets, lengthening delays in the disposition of mesothelioma and other serious injury claims.

III. Discussion of the Standard referred to in the ABA's resolution that was developed by the ABA's Commission on Asbestos Litigation

The bulk of the ABA Commission on Asbestos Litigation's work focused on developing objective medical criteria that identify individuals with non-malignant asbestos-related disease causing functional impairment and separate out cases where either the individual has no functional impairment or is impaired solely by some other cause, such as asthma, emphysema or smoking.

Similar criteria have been in use in many areas of the asbestos litigation for years. Several courts, including those in New York, Boston, Chicago and Baltimore, have used medical criteria to place unimpaired claimants on "pleural registries" or inactive dockets that keep such cases dormant until the

claimant becomes impaired. Some private settlement agreements between defendants and plaintiffs' firms use such criteria, and courts have found such criteria to be fair. However, rather than adopt existing criteria from some other source, the Commission developed its criteria only after interviewing pulmonologists and occupational medicine specialists, including doctors who had testified for both plaintiffs and defendants in asbestos litigation. As a result, while the Commission's recommended criteria are similar to many of those already in use, it is not identical to any of them.

A diagnosis of asbestos-related pleural disease, and particularly asbestosis, requires assessment of a number of factors, including the review of chest x-rays, pulmonary function tests, latency, and the taking of a complete occupational, exposure, medical and smoking history. Because many symptoms and findings are not specific to asbestos-related disease, this approach is necessary to enable a physician to exclude other more probable causes for various findings. This then enables the physician to support a conclusion that the patient's medical condition is the result of asbestos exposure. These types of requirements are typical for assessment of disability or impairment under various legislative and regulatory systems, including Social Security, the Federal Employees Compensation Act (FECA), and state worker compensation programs.

As a result, the Commission's medical criteria in the recommended Standard include several elements. Doctors basically agree that diagnosis of asbestosis that causes functional impairment requires several components, including (1) a history of occupational and other asbestos exposure, as well as a complete medical and smoking history, (2) a latency period of at least 15 years between initial asbestos exposure and the onset of disease, (3) an x-ray that suggests the presence of asbestosis, and (4) pulmonary function test ("PFT") results that establish abnormally low lung function and rule out the probability that the impairment was caused solely by something other than asbestos. Each of these requirements is incorporated into the Commission's recommended Standard, but certain key issues are discussed more fully below.

In drafting this Standard, the Commission attempted to achieve its goal of deferring only those claims involving individuals who are not impaired as a result of exposure to asbestos. As will be seen below, in several instances the Standard adopts less restrictive alternatives than some physicians recommended. The effect of this may be to allow claims that do not really belong in the tort system, but the ABA prefers to take that approach rather than to unfairly exclude any significant number of deserving claims.

If Congress were to adopt a weaker Standard it would render it ineffective in achieving the goal of ending the flood of premature claims that clog the courts and sap resources from the system and from truly sick claimants. Thus, the ABA would support enactment of either this Standard or an appropriate similar Standard.

A. X-ray Standards

A positive x-ray reading is almost always viewed as a necessary component of the diagnosis of asbestosis. It is not by itself a finding of functional impairment or a diagnosis of asbestos-related disease. X-ray readings have governing standards, but often depend upon the judgment of the individual doing the reading.

1. ILO Readings: The International Labor Office, in an attempt to standardize the classification of chest x-rays involving pneumoconiosis, created the ILO scale as a means of grading dust-related changes on chest x-rays. The ILO scale attempts to gauge the severity of the irregularities found by the reader, using a scale from 0 (normal) to 3. A grade of 0/0 would indicate a normal lung. A grade

of 1/0 indicates that the reader found evidence of minimal lung irregularities – the "1" – but also considered whether the x-ray should be read as normal, or "0." A reading of 1/1 means that the reader found clear evidence of minimal lung irregularities, and is a stronger finding than a 1/0. A 2/1 or greater indicates more extensive lung abnormalities.

The American Thoracic Society (ATS) has stated that a 1/1 reading is an important factor in the diagnosis of asbestosis, but allows a diagnosis of mild asbestosis based upon a chest x-ray reading graded 1/0 in the presence of other confirming diagnostic findings. However, some settlement agreements and court orders creating "inactive dockets" have used 1/1 as an appropriate standard.

The Commission elected to incorporate a 1/0 standard into its medical criteria, for several reasons. First, the Commission intended that the standards not be unfairly exclusionary. Second, those who over-read x-rays as 1/0 for litigation purposes might just as easily over-read them as 1/1 if necessary to meet a medical standard. Finally, properly administered PFT's (discussed below) are the most important screening tool to determine significant asbestos-related functional impairment.

2. B readers: The minimum standard recommended by the Commission requires a positive chest x-ray finding by a NIOSH certified B reader. A B reader is a person, usually but not necessarily a doctor, who has passed the tests necessary for certification that he or she is qualified to read x-rays according to ILO standards. The requirement of a B reading in the proposed medical criteria reflects the Commission's attempt to create a uniform standard for the diagnosis of nonmalignant asbestos-related disease. The Commission also notes that B readings are already prevalent in asbestos litigation. The Commission acknowledges that many physicians who are not certified B readers are still qualified to read chest x-rays for the presence or absence of asbestos-related disease, but the Standard adopts the B reader requirement in an attempt to obtain uniform standards.

3. CT Scans: A number of medical experts consulted by the Commission felt that both computer tomography scans and high-resolution computer tomography scans (CT & HRCT) can be useful diagnostic tools in distinguishing asbestosis and asbestos-related pleural disease from other chest abnormalities. However, these doctors acknowledged that no objective standard analogous to the ILO B reading scale for grading chest x-rays exists for the grading of CT and HRCT Scans. The lack of applicable standards compelled the Commission to require a positive B reading of a chest x-ray as the minimum radiologic diagnostic standard, rather than positive CT or HRCT Scans.

B. Pulmonary Function Tests

The Commission's proposed Standard requires that a claimant meet certain requirements on pulmonary function tests. The PFTs in the Standard demonstrate functional impairment, and also demonstrate that the impairment is of the type (restrictive impairment) that can be caused by asbestos exposure.

1. Testing methodology: It is generally accepted that pulmonary function testing provides the primary objective basis for assessment of functional impairment. However, the results of such testing can be affected by patient effort as well as technical deficiencies. Many of the doctors who met with the Commission believe that adherence to test quality standards has eroded in the asbestos litigation arena.

The American Thoracic Society in their 1991 and 1994 Official Statements published technical standards for pulmonary function testing, including equipment, methods of calibration, technique and interpretation. Virtually all of the physicians consulted by the Commission agreed that PFT's used for purposes of satisfying the medical criteria should meet the ATS technical criteria. This includes attachment of all test results and appropriately labeled spirometric tracings. One physician who met

with the Commission, who has never testified in asbestos litigation, has evaluated tens of thousands of pulmonary function test results. He believes that ATS technical criteria are met in only 1% of the cases he has seen arising from litigation; in contrast, pulmonary function results outside the litigation/claims arena meet ATS technical criteria 90% of the time.

The Commission strongly believes that PFT's must be conducted according to ATS testing standards to be reliable for use in medical criteria. In addition, to ensure compliance with quality standards, the Standard requires that all PFT reports be included as attachments. This should not be an undue burden on claimants since, under the proposed Standard, they are required to have had these tests prior to filing their claim.

2. Impairment measures: The proposed criteria include several measures of impairment. These are discussed below.

Forced Vital Capacity: Asbestosis can cause restrictive lung disease. The scarring of the lung caused by asbestosis reduces the capacity of the lungs. to retain and expel air. This reduced volume can be measured by Forced Vital Capacity (FVC), the amount of air exhaled after a deep breath with maximum force during a standard pulmonary function test. The proposed criteria require that to demonstrate impairment, a claimant demonstrate Forced Vital Capacity "below the lower limit of normal." The Commission considered whether to select a particular standard to use as "normal," but elected not to do so in order to allow medical science to continue to develop in this area. The Commission does note, however, that some standards suggest the use of racial adjustment factors in determining the measure of lung capacity. The Commission expressly intends that racial adjustment factors not be used in applying its medical criteria. Omitting these racial adjustments will have the effect of qualifying additional claims, rather than excluding claims, but is consistent with fairness and the Commission's desire that its standard be inclusive rather than overly exclusive.

FEV1/FVC ratio: It is critical to distinguish restrictive lung disease, which can be caused by asbestos, from obstructive lung disease, which is normally associated with smoking and is not associated with asbestos exposure. This is important because the population of persons exposed to asbestos includes a high percentage of smokers. A reduced FVC can be caused by either restrictive or obstructive lung disease. Additional findings help draw the distinction. When obstructive lung disease is present, the amount of air that can be expelled in the first second of a pulmonary function test falls faster than the amount that can be exhaled in the entire test. As a result, a low ratio of FEV1 (the amount of air that can be exhaled in the first second of the test) to FVC (the total amount of air exhaled during the test) indicates obstructive, rather than restrictive, lung disease. An FEV1/FVC ratio that is within normal limits is consistent with restrictive disease, assuming other tests of restrictive disease are also met, because the amount of air expelled in the first second does not fall faster than the total amount of air that can be expelled. Thus, the criteria adopt a commonly used measure that requires the FEV1/FVC ratio to be above the lower limit of normal, in order to exclude cases where the impairment is obstructive rather than restrictive.

Total Lung Capacity: The most accurate method of determining restrictive impairment is Total Lung Capacity ("TLC"). Restrictive lung disease (which can be asbestos-related) reduces the total capacity of the lung, while obstructive disease (usually associated with smoking) usually does not. Thus, a TLC below the lower limit of normal is indicative of restrictive disease but not obstructive disease. Many doctors believe TLC's are more accurate in screening out obstructive cases than FVC in conjunction with the FEV1/FVC ratio discussed above, which can result in "false positives" – findings of restriction in individuals that do not have it. However, TLC tests can be slightly more costly and less widely available than the other tests described above, and the Standard developed by the Commission does not require them, notwithstanding that they may be the best evidence of restrictive impairment. Rather, in keeping with the ABA's goal of being overly inclusive rather than

unduly strict, the Standard allows claimants to meet the impairment definition through the use of either FVC with the FEV1/FVC ratio or TLC test results.

Paragraph 4c ("Backstop" provision): There were additional pulmonary function findings suggested by one or more of the doctors as possible ways to identify asbestos-related restriction in individuals who have other unrelated lung problems, such as chronic obstructive pulmonary disease. Other doctors rejected these suggested findings as unreliable, non-specific, or otherwise inappropriate. Rather than attempt to resolve these disputes, the Commission drafted a provision (paragraph 4c)) that would allow claimants to file suit even if they fail to meet the criteria set forth in paragraphs 4a) or 4b).

The overwhelming majority of persons who are functionally impaired as a result of non-malignant asbestos disease would meet the criteria of either paragraph 4a) or 4b). However, it is possible that in unusual cases, some legitimate claim might be excluded. The Commission felt it inappropriate to draft the general Standard based on these rare cases. Instead, the Commission adopted a "backstop" provision so that in cases of clear interstitial fibrosis (defined in the Standard as a person whose x-ray grades at 2/1 or higher under the ILO system), a treating physician's detailed opinion that the person suffers from restrictive impairment due to asbestosis is sufficient to allow the claimant to proceed.

C. Medical Report and Diagnosis

The ABA heard extensive evidence, some of which is discussed above, that the huge increase in claims from unimpaired claimants is caused by litigation screenings that do not comply with generally accepted clinical standards. In many cases, claimants are not seen by a licensed physician and no medical "diagnosis" has been made. The Commission believes that cases of abuse will be minimized if true medical standards are observed. In addition to the requirement discussed above that PFT tests meet ATS standards and that supporting documentation be filed with the complaint, the Commission's proposed criteria require a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor. The Commission believes that such a requirement will dramatically enhance the integrity of the process by requiring that a licensed physician take responsibility for the diagnosis. Similar requirements exist today in many state statutes relating to medical malpractice and have helped to raise the standard for filing such cases. The Commission believes that the indisputable impact of for-profit litigation screenings that lack appropriate medical oversight justifies the simple requirement proposed in the Commission's criteria. The Commission believes that the integrity of the physician community, perhaps even more than the tests described above, is a key safeguard against the abuses that have been prevalent in the asbestos litigation.

Recommended Changes to the Statute of limitations

The ABA strongly believes that it would be unfair to require that claimants wait to file suit until they develop the level of functional impairment required by the Standard, if a statute of limitations could simultaneously be running against them. Thus, in any legislation deferring asbestos-related claims involving no functional impairment, the ABA recommends that there be a concomitant provision tolling any otherwise applicable statute of limitations until the required level of diagnosis is met. No other changes in state statutes of limitations are proposed.

IV. Conclusion

The ABA believes that the flood of asbestos cases fully justifies limited Federal intervention with respect to statutes of limitation and impairment criteria. We urge enactment of federal legislation that would: 1) allow those alleging non-malignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the "ABA Standard For Non-

Malignant Asbestos-Related Disease Claims" dated February 2003 (which should be updated periodically in accordance with medical advances and scientific research) or an appropriate similar medical standard; and 2) toll all applicable statutes of limitations until such time as the medical criteria in such standard are met. However, the ABA has not addressed broader legislative solutions that have been discussed by others.

The ABA believes that any asbestos legislation should infringe on state law only to the extent necessary to achieve the goal of ensuring that the justice system operates to compensate those who are injured by asbestos equitably. As mentioned earlier, with few exceptions, the American Bar Association has long and consistently opposed the enactment of federal legislation that would attempt to create a national body of tort law that would apply in the fifty state justice systems. In addition to the February 1981 and February 1983 policies discussed earlier in this report, the ABA has adopted numerous other policies over the years that oppose the federalization of the tort laws in a host of areas. It has been the ABA's position that the state courts and legislatures are normally the appropriate bodies to develop product liability laws and that, except in discrete circumstances, Congress should not substitute its judgment for systems that have evolved in each state. A national solution is required because asbestos litigation presents unique challenges for this country's civil justice system and I believe the ABA's resolution adopted by our House of Delegates last month accomplishes this goal.

The ABA's resolution does not propose to create original federal jurisdiction for the prosecution of asbestos claims to the extent that such jurisdiction does not currently exist.

Thank you for giving me this opportunity to present to you the views of the ABA on this most important issue.

APPENDIX A

RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

FEBRUARY 2003

RESOLVED, That the American Bar Association supports enactment of federal legislation that would: 1) allow those alleging non-malignant asbestos-related disease claims to file a cause of action

in state or federal court only if they meet the medical criteria in the "ABA Standard For Non-Malignant Asbestos-Related Disease Claims" dated February 2003 (which the House will be requested to update periodically in accordance with medical advances and scientific research) or an appropriate similar medical standard; and 2) toll all applicable statutes of limitations until such time as the medical criteria in such standard are met.

FURTHER RESOLVED, That the American Bar Association does not support limitations on the filing of claims for asbestos-related malignancies.

FURTHER RESOLVED, That the American Bar Association does not support the preemption of legal definitions for claiming or impairment as they may be found in regulations relating to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-50, Federal Employees' Compensation Act (FECA), 5 U.S.C. §§8101 et. seq., Energy Employees Occupational Illness Compensation Program Act, 42 U.S.C. §§7384-7385, Occupational Safety and Health Administration (OSHA), the Americans with Disabilities Act, the federal Rehabilitation Act, their state, territorial and local counterparts, Workers Compensation statutes in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico and the insular territories and their regulations, and federal, state and territorial laws regulating employee benefit plans and employer health care coverage plans.

APPENDIX B

ABA Standard For Non-Malignant Asbestos-Related Disease Claims
February 2003

I. The filing of any civil action alleging personal injury for asbestos related non-malignant disease must be accompanied by a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

a. A detailed occupational and exposure history from the person ("claimant") whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all of the principal

employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and
b. A detailed medical and smoking history that includes a thorough review of claimant's past and present medical problems, and their most probable cause.
2. Sets out the details of the occupational, medical and smoking history, and verifies that at least 15 years have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.
3. Verifies that the claimant has:
a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or
b. Pathological asbestosis graded 1(B) or higher under the criteria published in the Asbestos-Associated Diseases, Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).
4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and technique that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5th Ed.) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A)§3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am. Rev. Resp. Dis. 1991:144:1202-1218 that shows:
a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or
b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.
c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board certified pulmonologist, internist or occupational physician that states:
1. That the doctor has a doctor/patient relationship with the claimant; and
2) That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and
3) That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and
4) That the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality and reporting standards set forth herein.
5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.
II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be attached to any complaint alleging non malignant, asbestos related disease. Failure to attach the required reports or demonstration by any party that the

reports do not satisfy the standards set forth herein shall result in the dismissal of the action, without prejudice, upon motion of any party.

No state or federal statute of limitations governing personal injury tort actions arising from exposure to asbestos shall commence as a result of a purported diagnosis or finding of a non-malignant disease related to asbestos that does not meet the criteria set forth herein.

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Adopted 2/13/03

RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

FEBRUARY 2003

RESOLVED, That the American Bar Association supports enactment of federal legislation that would: 1) allow those alleging non-malignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the "ABA Standard For Non-Malignant Asbestos-Related Disease Claims" dated February 2003 (which the House will be requested to update periodically in accordance with medical advances and scientific research) or an appropriate similar medical standard; and 2) toll all applicable statutes of limitations until such time as the medical criteria in such standard are met.

FURTHER RESOLVED, That the American Bar Association does not support limitations on the filing of claims for asbestos-related malignancies.

FURTHER RESOLVED, That the American Bar Association does not support the preemption of legal definitions for claiming or impairment as they may be found in regulations relating to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§901-50, Federal Employees' Compensation Act (FECA), 5 U.S.C. §§8101 et. seq., Energy Employees Occupational Illness Compensation Program Act, 42 U.S.C. §§7384-7385, Occupational Safety and Health Administration (OSHA), the Americans with Disabilities Act, the federal Rehabilitation Act, their state, territorial and local counterparts, Workers Compensation statutes in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico and the insular territories and their regulations, and federal, state and territorial laws regulating employee benefit plans and employer health care coverage plans.

ABA Standard For Non-Malignant Asbestos-Related Disease Claims

February 2003

I. The filing of any civil action alleging personal injury for asbestos related non-malignant disease must be accompanied by a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

   a. A detailed occupational and exposure history from the person ("claimant") whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all of the principal employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and

   b. A detailed medical and smoking history that includes a thorough review of claimant's past and present medical problems, and their most probable cause.

2. Sets out the details of the occupational, medical and smoking history, and verifies that at least 15 years have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.

3. Verifies that the claimant has:

   a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

   b. Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases,* Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).

4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and technique that meet the criteria incorporated in the

AMA Guides to the Evaluation of Permanent Impairment (5th Ed.) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A)§3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am. Rev. Resp. Dis. 1991:144:1202-1218 that shows:

a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or

b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.

c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board certified pulmonologist, internist or occupational physician that states:

1. That the doctor has a doctor/patient relationship with the claimant; and

2) That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and

3) That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and

4) That the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality and reporting standards set forth herein.

5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.

II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be attached

to any complaint alleging non-malignant, asbestos-related disease. Failure to attach the required reports or demonstration by any party that the reports do not satisfy the standards set forth herein shall result in the dismissal of the action, without prejudice, upon motion of any party.

III. No state or federal statute of limitations governing personal injury tort actions arising from exposure to asbestos shall commence as a result of a purported diagnosis or finding of a non-malignant disease related to asbestos that does not meet the criteria set forth herein.

REPORT

The Commission was created in November 2002 by the Board of Governors, at the request of President-Elect Dennis Archer, to bring a recommendation to the House of Delegates at its February 2003 meeting concerning widely reported and longstanding problems in asbestos litigation. The recommendation was to address dual concerns: 1) protecting the right of claimants with impairing asbestos-related injuries to obtain fair compensation efficiently in the tort system, and 2) preventing scarce judicial and party resources from being misdirected by a flood of premature claims by individuals who have been exposed to asbestos but do not have, and may never get, any functional impairment from asbestos-related disease.

By way of background, the ABA, beginning in 1981 and in numerous subsequent policies adopted over the years, has been on record generally opposing federal product liability legislation. In February 1983, it reaffirmed its opposition to broad federal product liability legislation. In the same resolution, however (hereinafter identified as the February 1983 policy), the ABA adopted a policy in support of narrowly drawn federal legislation in two discrete areas of product liability law. One of those areas was victim compensation for certain occupational diseases such as asbestosis.

In the early 1980's, courts, policymakers and lawyers were concerned that the volume of asbestos claims was threatening to overwhelm the court system. The February 1983 policy supported federal legislation that addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: a) there is a long latency period between exposure to the product and manifestation of the disease; b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

In its report, the Committee sponsoring the February 1983 policy stated that it "<u>believes that the current social problem presented by occupational latent diseases, such as asbestosis, is unique and has been a catastrophic phenomenon on a national scale to asbestos workers and to the asbestos industry. While this Committee is reluctant to recommend federal intervention in the tort liability and common law systems of the several states, the Committee believes that the unique national scope and magnitude of the problems for adequate compensation to injured parties and liability for occupational latent diseases as they affect the financial stability of the specific industry, such as asbestos, warrants attention at the federal level. The Committee also believes that federal attention to such a unique and urgent national problem is neither premature nor precipitous, and would not result in harmful violation of the inherent values of this country's common law tort liability systems of the several states</u>." (Emphasis added)

The February 1983 policy is silent as to what type of federal legislation might be appropriate in the area of asbestos. To date, no subsequent ABA policy has been adopted to address asbestos litigation or legislation.

For the reasons discussed in this Report, the Commission believes that Congressional action on asbestos litigation is urgently needed. The Commission proposes that Congress enact a Standard that would (a) identify non-malignant claims that are entitled to compensation and defer those that do not currently belong in the courts, and (b) ensure that state and federal statutes of limitations do not run against individuals who do not yet (and may never) meet the medical criteria in the Standard. **The Commission's Standard deals only with non-malignant claims and does not in any way deal with claims for asbestos-related cancers or malignancies.** The Commission's recommendation is designed to establish a minimum impairment threshold in order to file a non-malignant asbestos claim, and is not intended to change the law of causation that exists from state to state. The Commission's recommendation is also not intended to in any way affect the ABA's long-standing policy against the broad federalization of tort law.

I. Background

Asbestos litigation is not a new phenomenon. It is the tragic legacy of extensive industrial use of asbestos in the workplace, predominantly from the 1930s to the early 1970s. Significant numbers of industrial workers began developing disabling, and sometimes fatal, asbestos-related diseases decades later (a delay attributable to the long latency between exposure and manifestation of disease). They brought suit against a relatively small number of former manufacturers of asbestos-containing industrial insulation products.

By the 1980s, what had once been a series of isolated cases turned into a steady flow. Claimants began regularly obtaining significant awards. In 1982, Johns-Manville Corporation -- the single largest supplier of asbestos-containing insulation products in the U.S. and the primary target of the early claims -- declared bankruptcy due to the burden of the asbestos litigation. At that point, it had approximately 16,000 pending claims. By comparison, today it is common for some defendants to have more than 100,000 cases pending.

The asbestos litigation paused only briefly, if at all, as a result of the Manville bankruptcy. Heavily exposed industrial workers continued to get sick from asbestos-related diseases and to bring claims in the tort system throughout the 1980s and into the 1990s. Asbestos dockets in certain jurisdictions swelled. Several other former manufacturers of asbestos-containing insulation declared bankruptcy (e.g., Unarco, Eagle-Picher, Raybestos Manhattan, Celotex).

As the litigation expanded, calls for a national solution intensified. In 1991 the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found that "the situation has reached critical dimensions and is getting worse." The Ad Hoc Committee "recognize[d] that virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for the Congress" and stated that it "<u>firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem</u>...". U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, p.2 (March 1991) (emphasis added).

In the continued absence of legislative action, some courts and parties attempted to craft creative solutions to the growing body of asbestos claims, including litigation class actions,

settlement class actions, mass trial consolidations, joint defense claims handling organizations, and "global" settlement negotiations. None succeeded. Class actions failed because the factual disparity among the various claims and the disparate interests of present and future claimants precluded proper treatment under Federal Rules of Civil Procedure 23. The Supreme Court in 1997 and 1999 reviewed and struck down two proposed class action settlements known as the *Amchem* settlement and the *Ortiz* settlement. In both cases, however, the Supreme Court called upon Congress to correct the problem. Justice Ginsberg delivered the opinion for the Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed. 2d 689 (1997), in which she noted that the Judicial Conference had urged Congress to act on the situation and "no Congressional response has emerged." In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L.Ed. 2d 715 (1999), Justice Souter delivered the opinion for the Court and said "this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation" 527 U.S. at 821 (emphasis added). Chief Justice Rehnquist's concurring opinion stated that asbestos litigation "cries out for a legislative solution" 527 U.S. at 865.

Mass consolidations, at least in the eyes of some courts, suffered similar shortcomings. *See, e.g., Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 320-21 (5th Cir. 1998); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350-353 (2d Cir.1993); *Cain v. Armstrong World Industries*, 785 F.Supp. 1448, 1454-56 (S.D.Ala. 1992). Joint defense claims handling organizations dissolved over various strategic and liability share issues, as did "global" settlement negotiations.

Despite the failure of efforts to find a new solution to the asbestos litigation, the tort system appeared to be relatively stable in the early 1990s. The flow of new claims was substantial (RAND estimates it was 15,000 to 20,000 per year), but fairly predictable. (*Asbestos Litigation Costs and Compensation, An Interim Report*, RAND Institute for Civil Justice, 2002, hereinafter the "RAND report"). More importantly, it appeared that by the mid-1990s there was a downward trend in new filings, reflecting the fact that the period of most intensive industrial use of asbestos had drifted further into the past and the occurrence of disabling non-malignant diseases was falling in corresponding fashion.

In retrospect, however, it is clear that a countervailing trend was emerging and accelerating in the 1990s: for-profit litigation screenings began systematically generating tens of thousands of new non-malignant claims each year by individuals who had some degree of occupational asbestos exposure, but did not have, and probably would never get an impairing asbestos-related disease. These individuals may or may not have markings on lung x-rays "consistent with" exposure to asbestos (and dozens of other possible causes) but do not, and may never, experience any symptoms of asbestos disease or develop any asbestos-related conditions that would impair or affect their life or daily functions. (In this Report, such individuals are referred to as being asymptomatic or without functional impairment.)

Asbestos exposure can affect the body in a number of ways. It can cause mesothelioma, a cancer of the exterior lining of the lung and peritoneum. It can also cause cancer inside the

lung. Although there is an ongoing debate about the issue, some believe that it can cause cancer at other sites in the body.

Asbestos exposure can also cause non-malignant pulmonary disease. Asbestosis is a fibrosis (scarring) of tissue inside the lung, particularly in the walls surrounding the alveolar spaces at the end of the airways. Significant fibrosis in this area reduces the elasticity of the lung and interferes with the lung's ability to oxygenate the blood. Asbestotic lungs are characterized by reduced capacity, i.e., they can process only a reduced volume of air compared to normal lungs. Workers who suffer from significant asbestosis generally have shortness of breath on exertion.

Asbestosis can be a progressive disease. In its milder forms, it may not cause any symptoms. It may or may not progress to the point of causing functional impairment detectable on objective pulmonary function tests.

Asbestos exposure may also cause non-malignant changes in the pleura, the tissue that lines the outside of the lung and the inside of the rib cage. The purpose of the pleura is to facilitate the smooth, constant movement of the lungs as they expand and contract. Asbestos exposure can cause circumscribed thickening of pleural tissue (called "pleural plaques") as well as diffuse pleural thickening. Ordinarily, these conditions -- which occur outside the lung -- do not result in any functional impairment. Significant diffuse pleural thickening, however, can restrict the ability of the lung to expand and may result in objective impairment that can be identified by pulmonary function testing.

While pleural plaques and diffuse pleural thickening involve the same tissue that is involved in the malignant disease mesothelioma, they are different physiological processes. Pleural plaques and pleural thickening do not become or lead to mesothelioma. Mesothelioma incidence is a function of exposure and individual susceptibility, not the presence or absence of non-malignant pleural changes.

By virtually all accounts, contemporary asbestos litigation is no longer driven solely, or even primarily, by the occurrence of disabling asbestos-related diseases. Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings. According to the recent RAND report, some recent studies say somewhere between two-thirds and 90% of new claims are now brought by individuals who have radiographically detectable changes in their lungs that are "consistent with" asbestos-related disease (and with dozens of other causes), but have no demonstrated functional impairment from those changes: "In sum, it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily life." RAND report at pg. vi; and, pg. 20. The Commission conducted numerous interviews with some of the nation's leading medical authorities in asbestos-related pulmonary function analysis. Virtually all of them stated that their clinical experience confirmed the RAND data.

The asymptomatic claimants find their way into the tort system due to a confluence of factors. Key among them are the activities of for-profit litigation screening companies and the manner in which statutes of limitations operate under some states' laws.

A. Litigation Screenings

For-profit litigation "screening" companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have "free" testing done -- usually only chest x-rays. Promotional ads declare that "You May Have Million $ Lungs" and urge the workers to be screened even if they have no breathing problems because "you may be sick with no feeling of illness." The x-rays are usually taken in "x-ray mobiles" that are driven to union halls or hotel parking lots. There is evidence that many litigation screening companies commonly administer the x-rays in violation of state and federal safety regulations. In order to get an x-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are "positive."

The x-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the x-rays are taken or have malpractice insurance for these activities. According to these doctors, no doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for x-ray evidence that is "consistent with" asbestos-related disease. Some x-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars -- in some cases, millions -- in the aggregate by the litigation screening companies due to the volume of films read.

Despite the fact that there are approximately 500 qualified B readers (experts in reading x-rays for the presence of occupational disease pursuant to the International Labor Office standard, discussed more fully below) in the United States, the litigation screening companies often use only a handful of them to read their x-rays. According to the Manville Trust, 49.6% of the tens of thousands of non-malignancy claims it receives that identify a doctor are based on the B reads of just ten doctors. A single doctor accounted for over 30,000 non-malignancy claims submitted to the Trust over a six-year period.

The rate of "positive" findings by these doctors can be startlingly high, often upwards of 50% and in some studies as high as 90%. In one case, a "positive" rate of 94% was reported. *Raymark Indus. v. Stemple*, 1990 WL 72588, *10 (D. Kan.). While those readings do not purport to be medical diagnoses and the B readers make no assertion that their findings establish actual breathing abnormality, the findings serve as the basis for new lawsuits.

Independent audits of the results of litigation screenings have produced disturbing results. A National Institute for Occupational Safety and Health (NIOSH) audit evaluating the "positive" x-rays of 795 tire workers, for example, showed "only two had any signs of parenchymal change and only 19 showed pleural abnormalities." *Raymark Indus. v. Stemple* at *15. The Manville Trust audit of non-malignancy claims showed that certain B readers, responsible for thousands of claims, failed independent review more than 50% of the time.

Some litigation screening companies purport to go beyond x-rays, offering pulmonary function testing and the opportunity to see a physician. Even there, however, the participating doctors assert they are not practicing medicine. They often examine the workers in hotel rooms and meeting halls, not hospitals or doctors' offices. Medical and occupational histories are taken by non-medical personnel who work for the litigation screening companies, not the doctors. The examinations are completed in minutes; "reports" are written by assistants who are not on site. One such litigation screening doctor has testified that he has been paid over $1 million to examine approximately 14,000 workers in this fashion. He found that all 14,000 have asbestosis. Another litigation screening company acknowledges that it was paid more for "positive" findings than for "negative" findings.

B. Statute of Limitations Concerns

A worker put on notice that he or she has x-ray changes "consistent with" asbestos-related disease may face a legal dilemma. It could be and frequently is argued that this finding triggers the running of the statute of limitations, despite the fact that the worker does not have any breathing problems and does not consider himself to be "sick." State law generally requires a claimant to sue within a certain period after he knew or had reason to know of an "injury" and its possible wrongful cause.

A number of states have expressly adopted a "two disease" rule for asbestos-related claims. Under this rule, a claimant who suffers from disabling asbestosis must timely file a claim for that disease, but is not automatically barred from bringing a separate claim many years later should he or she develop an asbestos-related cancer. The statute of limitations runs separately for the "second" disease.

The two disease rule is not uniformly embraced by state law. More importantly, some states have not expressly decided whether a litigation screening x-ray finding of non-disabling changes "consistent with" asbestos-related disease triggers the statute of limitations for a non-malignancy claim. If it does, a worker who has asymptomatic pleural plaques could be time-barred from bringing a claim if many years later he or she develops impairing asbestosis. As a result, even states that have adopted the two disease rule have found that it has not stopped the high levels of filings by asymptomatic plaintiffs.

C. The Impact of Screenings and Statute of Limitations Concerns

The result of the legal dilemma created by screenings and statues of limitations is the wholesale filing of premature non-impairment claims. The statistics are startling. In 2001, the Manville Trust received over 90,000 new claims -- more than in any prior year and nearly six times the total number of claims pending against Manville when it declared bankruptcy twenty years before. Between 2000 and 2002, the Trust received more than 200,000 claims. The Trust has reported that more than 90% of the claims allege only non-malignant changes.

The experience of the Manville Trust is not unique. According to the RAND report, there has been a substantial increase in annual new filings for all defendants since the mid-1990s, and the increase is almost entirely attributable to non-malignancy filings. The vast majority of

those non-malignancy claims, RAND reports, do not involve functional, objectively measurable impairment from asbestos-related disease.

The financial impact of this flood of non-impairment claims has been profound. According to the RAND report, more than sixty otherwise financially viable companies have gone bankrupt due to asbestos-related liabilities, over twenty in the last two years. None has claimed an inability to pay fair compensation to truly sick claimants. Virtually all point to the same problem: tens of thousands of non-impairment claims filed each year, with no end in sight.

Nobel Laureate Professor Joseph Stiglitz of Columbia University recently issued a report, commissioned by the American Insurance Association, that calculates the economic impact of these bankruptcies on the employees of the bankrupt companies. He estimates that 60,000 workers have lost their jobs as a result of asbestos-related bankruptcies. (The RAND report estimates job losses at approximately 128,000.) Stiglitz concludes that "[e]ach displaced worker at the bankrupt firms will lose, on average, an estimated $25,000 to $50,000 in wages over his or her career" and will suffer "roughly $8,300 in pension losses, which represent[s], on average, a roughly twenty-five percent reduction in the value of the 401(k) account." Joseph E. Stiglitz, Jonathan M. Orszag, & Peter R. Orszag, "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms" (December 2002) at 3.

The direct costs of asbestos-related bankruptcies can be very substantial. Owens Corning, for example, recently disclosed that, in approximately two years, it has incurred $200 million in legal and consulting fees. These costs directly reduce the funds available to pay claimants.

Bankruptcy has not helped seriously ill asbestos claimants, either. Claims payments stop immediately when bankruptcy is declared and do not resume for several years, and then at significantly reduced values. The Manville Trust is currently paying only five cents on the dollar to claimants. Due to the flood of non-impairment claims, the Trust reports that, over the last five years, it has paid more money to claimants who describe themselves as unimpaired than it has to mesothelioma claimants.

Once a lawsuit is filed, unimpaired claimants may choose to resolve their claims for minimal values, executing a complete release. For the vast majority who never develop a disabling asbestos-related disease, the money is arguably a windfall. For those who later develop mesothelioma, the filing and resolution of a premature claim and execution of a full release can become a haunting mistake.

It is for these reasons, as well as concerns over the availability of fair compensation for seriously ill asbestos disease victims, that many disparate voices have joined in the call for change. The flood of non-impairment claims generated by litigation screenings crowd active litigation dockets, lengthening delays in the disposition of mesothelioma and other serious injury claims. The President-Elect of the ABA, Dennis W. Archer, and the members of the Commission believe that the flood of asbestos cases fully justifies limited Federal intervention with respect to statutes of limitation and impairment criteria. However, this Commission has not addressed broader legislative solutions that have been discussed by others. The ABA's present policy

believes that any asbestos legislation should infringe on state law only to the extent necessary to achieve the goal of ensuring that the justice system operates to equitably compensate those who are injured by asbestos. We believe the Commission's recommendations are consistent with this policy.

II. The Commission's Process

Guided by the foregoing principles, the Commission began its arduous task and after careful study and deliberation, with the help of the medical profession, developed its recommendation and report. The Commission held 4 one-day meetings in the Chicago headquarters office and numerous lengthy conference calls. The Commission reviewed voluminous materials including, but by no means limited to, court orders from state and federal courts, medical and legal articles, including studies from organizations such as RAND, settlement agreements covering non-malignant claims, and statements of medical organizations such as the American Medical Association and the American Thoracic Society.

With the assistance of the American Medical Association, in addition to the individual experience of Commission members, a group of ten of the nation's most prominent physicians in the area of pulmonary function were identified and interviewed at length at the Chicago offices and in numerous subsequent telephone conferences. These physicians volunteered their time and energy to explain not only their clinical experience in the care and treatment of individuals with asbestos related disease, but to discuss their personal involvement in the medical/legal issues surrounding asbestos injury claims. The doctors interviewed by the Commission represented a cross-section of experts in this area – some had testified for plaintiffs in asbestos litigation, some had testified for defendants, some for both and some for neither. The physicians are: Dr. Robert Crapo, Pulmonologist at the University of Utah School of Medicine; Dr. David W. Cugell, Professor of Medicine of the Feinberg School of Medicine, Northwestern University; Dr. Paul Epstein, Clinical Professor of Medicine, Pulmonary Medicine at Penn Medicine at Radnor; Dr. Gary Friedman of the Texas Occupational Medicine Institute in Houston, Texas; Dr. Edwin Holstein, Environmental Health Associates, Boston; Dr. Paul Kvale, Chairman of the Pulmonary Medicine Department of the Henry Ford Hospital, in Detroit; Dr. Stephen Levin from the Occupational Medicine Department at Mount Sinai Hospital in New York; Dr. Neil MacIntyre, Professor of Medicine at Duke University; Dr. Albert Miller, who had been with the Mount Sinai Hospital and is now with St. Vincent Catholic Medical Center of Brooklyn and Queens; and Dr. Christine Oliver, Occupational Health Initiative, Boston. Additionally, the Commission members separately interviewed other physicians with whom their personal and professional experience provided a consulting relationship, including experts in internal medicine and epidemiology.

The Commission is aware of, and considered, the situation of the residents of Libby, MT. Their plight is exacerbated by the fact that their recourse is limited to claims against W.R. Grace, which has filed for bankruptcy reorganization due to asbestos claims. The Commission reviewed reports suggesting that the Libby exposure causes an unusually aggressive and progressive form of asbestos pleural disease that rapidly produces increasing pulmonary function impairment. The Commission believes that its recommendations, by curtailing the flow of money to claimants

who have no present functional impairment, will help preserve the assets of W.R. Grace for persons such as Libby residents both now and in the future.

III. The Standard Recommended By the Commission

The bulk of the Commission's work focused on developing objective medical criteria that identify individuals with non-malignant asbestos-related disease causing functional impairment and separate out cases where either the individual has no functional impairment or is impaired solely by some other cause, such as asthma, emphysema or smoking. The physicians interviewed by the Commission almost uniformly agreed that this can be done and substantially contributed to the development of the Commission's proposed Standard.

Similar criteria have been in use in many areas of the asbestos litigation for years. Several courts (including courts in Massachusetts, Chicago, Baltimore and, most recently, New York City) have used medical criteria to place unimpaired claimants on "pleural registries" or inactive dockets that keep such cases dormant until the claimant becomes impaired. Many private settlement agreements between defendants and plaintiffs' firms use such criteria, and courts have found such criteria to be fair. However, rather than adopt existing criteria from some other source, the Commission based its criteria on the input from the pulmonologists it interviewed, which included doctors who had testified for both plaintiffs and defendants in asbestos litigation. As a result, while the Commission's recommended criteria are similar to many of those already in use, it is not identical to any of them.

Each of the doctors interviewed by the Commission independently stated that the diagnosis of asbestos-related pleural disease, and particularly asbestosis, requires assessment of a number of factors including the review of chest x-rays, pulmonary function tests, latency, and the taking of a complete occupational, exposure, medical and smoking history. Because many symptoms and findings are not specific to asbestos-related disease, this approach is necessary to enable a physician to exclude other more probable causes for various findings. This then enables the physician to support a conclusion that the patient's medical condition is the result of asbestos exposure. These types of requirements are typical for assessment of disability or impairment under various legislative and regulatory systems, including Social Security, the Federal Employees Compensation Act (FECA), and state worker compensation programs.

As a result, the Commission's medical criteria in the recommended Standard include several elements. There was virtually unanimous agreement among the doctors that diagnosis of asbestosis that causes functional impairment requires several components, including (1) a history of occupational and other asbestos exposure, as well as a complete medical and smoking history, (2) a latency period of at least 15 years between asbestos exposure and the onset of disease, (3) an x-ray or other radiographic reading that suggests the presence of asbestosis, and (4) pulmonary function test ("PFT") results that establish decreased lung function and rule out the probability that the impairment was caused solely by something other than asbestos. Each of these requirements is incorporated into the Commission's recommended Standard, but certain key issues are discussed more fully below.

In drafting this Standard, the Commission has attempted to achieve its goal of deferring only those claims involving individuals who have no functional impairment as a result of exposure to asbestos. As will be seen below, in several instances the Standard adopts less restrictive alternatives than some physicians recommended. The Commission recognizes that the effect of this may be to allow claims that do not really belong in the tort system, but prefers to take that approach rather than to unfairly exclude any significant number of deserving claims. As a result, however, the Commission strongly feels that to weaken the Standard further would render it ineffective in achieving its goal of ending the flood of premature claims that clog the courts and sap resources from the system and from truly sick claimants. Accordingly, the Commission believes that its Standard should be adopted "as is."

A. X-ray Standards

A positive x-ray reading is almost always viewed as a necessary component of the diagnosis of asbestosis. It is not by itself a finding of functional impairment or a diagnosis of asbestos-related disease. X-ray readings have governing standards, but often depend upon the judgment of the individual doing the reading. All of the doctors interviewed by the Commission believed, and most had seen extensive examples, that x-ray readings can be subject to bias and have been increasingly abused in many of the litigation screenings discussed earlier in this report.

1. **ILO Readings**: The International Labor Office, in an attempt to standardize the classification of chest x-rays involving pneumoconiosis, created the ILO scale as a means of grading dust-related changes on chest x-rays. The ILO scale attempts to gauge the severity of the irregularities found by the reader, using a scale from 0 (normal) to 3. A grade of 0/0 would indicate a normal lung. A grade of 1/0 indicates that the reader found evidence of lung irregularities – the "1" – but also considered whether the x-ray should be read as normal, or "0." A reading of 1/1 means that the reader found clear evidence of lung irregularities, and is a stronger finding than a 1/0. A 2/1 or greater normally indicates more extensive lung abnormalities.

The ILO has stated that a 1/1 reading is an important factor in the diagnosis of asbestosis, but allows a diagnosis of mild asbestosis based upon a chest x-ray reading graded 1/0 in the presence of other confirming diagnostic findings. However, some settlement agreements and court orders creating "inactive dockets" have used 1/1 as an appropriate standard. The doctors interviewed by the Commission agreed that there have been numerous instances of probable bias and over-diagnosis, primarily based on x-ray readings from mass screenings. Most doctors interviewed had seen hundreds or even thousands of examples of over-reading of x-rays for litigation purposes. One doctor concluded after reviewing 15,000 cases of asbestos disease previously diagnosed on x-ray readings alone that only 10% of the persons could validly be diagnosed with asbestosis. Another doctor reported a 62% error rate on review of x-ray screening results previously read as "consistent with asbestosis." Another doctor's research of 22,000 asbestos-related bankruptcy claims found a presumptive x-ray review error rate of up to 86% among 5 readers, none of whose results matched the general patterns in epidemiological studies.

These and similar anecdotes, as well as the findings of courts and audits discussed in section I.A., clearly illustrate a widespread pattern of x-ray over-reading in litigation screenings. A number of doctors described the negative impact on patients of these misdiagnoses. They had dealt with many instances of unnecessary distress and confusion caused in individuals who had been given "diagnoses" of asbestosis (or conditions "consistent with" asbestosis) through litigation-based x-ray screenings, when the individuals had no evidence of disease at all.

As a result of this evidence, the Commission gave strong consideration to requiring a reading of 1/1 to offset the inherent litigation bias associated with litigation-based x-ray readings. Several of the doctors consulted by the Commission recommended that a 1/1 standard be implemented. Others, although favoring a 1/0, cautioned that such a standard assumes impartial readings that are conservative and unbiased, and preferred a system that would utilize an impartial panel of B readers who had no financial incentive in the litigation or diagnosis process. However, the Commission recognized the many issues inherent in establishing an independent panel of B readers and did not consider the creation of such a panel to be either necessary or feasible.

After extensive discussion, the Commission elected to incorporate a 1/0 standard into its medical criteria, for several reasons. First, as stated above, the Commission intends that its standards not be unfairly exclusionary. Second, some doctors indicated that there appears to be little difference in the error rate whether one looks at 1/0 or 1/1 readings. Stated another way, B readers who over-read x-rays as 1/0 for litigation purposes might just as easily over-read them as 1/1 if necessary to meet a medical standard. Finally, properly administered PFT's (discussed below) are the most important screening tool to determine significant asbestos-related functional impairment, and x-ray readings are of lesser importance.

2. **B readers:** The minimum standard recommended by the Commission requires a positive chest x-ray finding by a NIOSH certified B reader. A B reader is a person, usually but not necessarily a doctor, who has passed the tests necessary for certification that he or she is qualified to read x-rays according to ILO standards. The requirement of a B reading in the proposed medical criteria reflects the Commission's attempt to create a uniform standard for the diagnosis of nonmalignant asbestos-related disease. The Commission also notes that B readings are already prevalent in asbestos litigation. The Commission acknowledges that many physicians who are not certified B readers are still qualified to read chest x-rays for the presence or absence of asbestos-related disease, but the Standard adopts the B reader requirement in an attempt to obtain uniform standards.

3. **CT Scans:** A number of medical experts consulted by the Commission felt that both computer tomography scans and high-resolution computer tomography scans (CT & HRCT) can be useful diagnostic tools in distinguishing asbestosis and asbestos-related pleural disease from other chest abnormalities. However, these doctors acknowledged that no objective standard analogous to the ILO B reading scale for grading chest x-rays exists for the grading of CT and HRCT Scans. The lack of applicable standards compelled the Commission to require a positive B reading of a chest x-ray as the minimum radiologic diagnostic standard, rather than positive CT or HRCT Scans.

B. Pulmonary Function Tests

The Commission's proposed Standard requires that a claimant meet certain requirements on pulmonary function tests. The PFTs in the Standard demonstrate functional impairment, and also demonstrate that the impairment is of the type (restrictive impairment) that can be caused by asbestos exposure.

1. **Testing methodology:** It is generally accepted that pulmonary function testing provides the primary objective basis for assessment of functional impairment. However, the results of such testing can be affected by patient effort as well as technical deficiencies. Many of the doctors who met with the Commission believe that adherence to test quality standards has eroded in the asbestos litigation arena.

The American Thoracic Society (ATS) in their 1991 and 1994 Official Statements published technical standards for pulmonary function testing, including equipment, methods of calibration, technique and interpretation. Virtually all of the physicians consulted by the Commission agreed that PFT's used for purposes of satisfying the medical criteria should meet the ATS technical criteria. This includes attachment of all test results and appropriately labeled spirometric tracings. One physician who met with the Commission, who has never testified in asbestos litigation, has evaluated tens of thousands of pulmonary function test results. He believes that ATS technical criteria are met in only 1% of the cases he has seen arising from litigation; in contrast, pulmonary function results outside the litigation/claims arena meet ATS technical criteria 90% of the time.

The Commission strongly believes that PFT's must be conducted according to ATS testing standards to be reliable for use in medical criteria. In addition, to ensure compliance with quality standards, the Standard requires that all PFT reports be included as attachments. This should not be an undue burden on claimants since, under the proposed Standard, they are required to have had these tests prior to filing their claim.

2. **Impairment measures:** The proposed criteria include several measures of impairment. These are discussed below.

Forced Vital Capacity: Asbestosis can cause *restrictive* lung disease. The scarring of the lung caused by asbestosis reduces the capacity of the lung to retain and expel air. This type of lung condition is normally measured by Forced Vital Capacity (FVC), the amount of air that the lung exhales during a standard pulmonary function test. The proposed criteria require that to demonstrate impairment, a claimant demonstrate Forced Vital Capacity "below the lower limit of normal." The Commission considered whether to select a particular standard to use as "normal," but elected not to do so in order to allow medical science to continue to develop in this area. The Commission does note, however, that some standards suggest the use of racial adjustment factors in determining the measure of lung capacity. The Commission expressly intends that racial adjustment factors <u>not</u> be used in applying its medical criteria. Omitting these racial adjustments will have the effect of qualifying additional claims, rather than excluding claims, but is consistent with fairness and the Commission's desire that its standard be inclusive rather than overly exclusive.

FEV1/FVC ratio: It is critical to distinguish *restrictive* lung disease, which can be caused by asbestos, from *obstructive* lung disease, which is normally associated with smoking and is not

associated with asbestos exposure. (Although some physicians believed that asbestosis causes a lung abnormality known as small airways obstruction, this is distinct from large airways obstruction, or chronic obstructive pulmonary disease, associated with smoking.) This is important because the population of persons exposed to asbestos includes a high percentage of smokers. When obstructive lung disease is present, the amount of air that can be expelled in the first second of a pulmonary function test falls faster than the amount that can be exhaled in the entire test. As a result, a low ratio of FEV1 (the amount of air that can be exhaled in the first second of the test) to FVC (the total amount of air exhaled during the test) indicates obstructive, rather than restrictive, lung disease. A ratio that is within normal limits is consistent with restrictive disease, assuming other tests of restrictive disease are also met, because the amount of air expelled in the first second does not fall faster than the total amount of air that can be expelled. Thus, the criteria adopt a commonly used measure that requires the FEV1/FVC ratio to be above the lower limit of normal, in order to exclude cases where the impairment is obstructive rather than restrictive.

Total Lung Capacity: An alternative method of determining restrictive impairment is Total Lung Capacity ("TLC"). Restrictive lung disease (which can be asbestos-related) reduces the total capacity of the lung, while obstructive disease (usually associated with smoking) usually does not. Thus, a TLC below the lower limit of normal would be consistent with restrictive disease but not with obstructive disease. Many doctors believe TLC's are more accurate in screening out obstructive cases than the FEV1/FVC ratio discussed above, which can result in "false positives" – findings of restriction in individuals that do not have it. However, TLC tests can be slightly more costly and less widely available than the other tests described above, and the Commission's Standard does not require them, notwithstanding that they may be the best evidence of restrictive impairment. Rather, in keeping with the Commission's goal of being overly inclusive rather than unduly strict, the Standard allows claimants to meet the impairment definition through the use of *either* FEV1/FVC ratio or TLC test results.

Paragraph 4c ("Backstop" provision): There were additional pulmonary function findings suggested by one or more of the doctors as possible ways to identify asbestos-related restriction in a small minority of individuals who have other unrelated lung problems, such as chronic obstructive pulmonary disease. Other doctors rejected these suggested findings as unreliable, non-specific, or otherwise inappropriate. Rather than attempt to resolve these disputes, the Commission drafted a provision (paragraph 4c)) that would allow some claimants to file suit even if they fail to meet the criteria set forth in paragraphs 4a) or 4b).

The physicians agreed that the overwhelming majority of persons who were functionally impaired as a result of non-malignant asbestos disease would meet the criteria of either paragraph 4a) or 4b). However, it is possible that in unusual cases, some legitimate claim might be excluded. In view of the overwhelming consensus of the doctors on the fairness of the basic criteria, the Commission felt it inappropriate to draft the general Standard based on these rare cases. Instead, the Commission adopted a "backstop" provision so that in cases of clear disease (defined in the Standard as a person whose x-ray grades at 2/1 or higher under the ILO system), a treating physician's detailed opinion that the person suffers from restrictive impairment due to asbestosis is sufficient to allow the claimant to proceed.

C. Medical Report and Diagnosis

The Commission heard extensive evidence, some of which is discussed above, that the huge increase in claims from unimpaired claimants is caused by litigation screenings that do not comply with generally accepted clinical standards. In many cases, claimants are never seen by a licensed physician and no "diagnosis" has been made. The Commission believes that cases of abuse will be minimized if true medical standards are observed. In addition to the requirement discussed above that PFT tests meet ATS standards and that supporting documentation be filed with the complaint, the Commission's proposed criteria require a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor. The Commission believes that such a requirement will dramatically enhance the integrity of the process by requiring that a licensed physician take responsibility for the diagnosis. Similar requirements exist today in many state statutes relating to medical malpractice and have helped to raise the standard for filing such cases. The Commission believes that the indisputable impact of for-profit litigation screenings that lack appropriate medical oversight justifies the simple requirement proposed in the Commission's criteria. The Commission believes that the integrity of the physician community, perhaps even more than the tests described above, is a key safeguard against the abuses that have been prevalent in the asbestos litigation.

IV. Recommended Changes to the Statute of limitations

The Commission strongly believes that it would be unfair to require that claimants wait to file suit until they develop the level of functional impairment required by the Standard, if a statute of limitations could simultaneously be running against them. Thus, in any legislation deferring asbestos-related claims involving no functional impairment, the Commission recommends that there be a concomitant provision tolling any otherwise applicable statute of limitations until the required level of diagnosis is met. No other changes in state statute of limitations are proposed.

V. Scope of the Commission's Recommendations

With few exceptions, the American Bar Association has long and consistently opposed the enactment of federal legislation that would attempt to create a national body of tort law that would apply in the fifty state justice systems. In addition to the February 1981 and February 1983 policies discussed earlier in this report, the ABA has adopted numerous other policies over the years that oppose the federalization of the tort laws in a host of areas. It has been the ABA's position that the state courts and legislatures are normally the appropriate bodies to develop product liability laws and that, *except in discrete circumstances*, Congress should not substitute its judgment for systems that have evolved in each state. However, the ABA has supported limited federal legislation in such circumstances when there exists a legitimate concern that can best be addressed by narrow federal legislation – and has since 1983 identified asbestos litigation as one such area. Asbestos litigation presents unique challenges for this country's civil justice system, and requires a national solution.

The Commission on Asbestos Litigation has drafted its recommendation with the intention that the ABA should support federal legislation that establishes medical criteria and

provide for a waiver of the statute of limitations until those criteria are met. The Commission's recommendations do not propose to create original federal jurisdiction for the prosecution of asbestos claims to the extent that such jurisdiction does not currently exist. This recommendation is also not intended in any way to create artificial barriers to the filing of a cause of action.

VI. The Need for the House of Delegates to Adopt Policy on this Issue at the February Midyear Meeting

In the 107th Congress, the Senate Judiciary Committee held hearings on asbestos litigation on September 25, 2002. The hearings were held to lay the groundwork for attention to the issue in the 108th Congress. In this 108th Congress, Congressional leaders from both parties are currently working to address the situation. Senate Judiciary Committee Chairman Orrin Hatch (R-UT) and Ranking Minority Member Patrick Leahy (D-VT) are reported to be working together to develop legislation in this area. Legislation is likely to be introduced well before the Annual Meeting of the American Bar Association in August. In fact, on January 15, 2003, the *Congressional Daily AM* reported that Senator Hatch is "apt to introduce a bill in March, possibly in conjunction with Senate Judiciary ranking member Patrick Leahy (VT). Leahy's and Hatch's staffs have been working together to seek consensus on a 'medical criteria' bill that puts those already sick in line for compensation ahead of those with only an exposure to asbestos." In the House, it has been reported that Representatives Christopher Cannon (R-UT) and Calvin Dooley (D-CA) are working together on asbestos legislation.

In order for the ABA to have a voice in the Congressional debate, it is imperative that the House of Delegates adopt this policy at this Midyear Meeting. ABA leaders and ABA Governmental Affairs staff have been told by members of Congress and their staffs that ABA views on this legislation would be most welcome.

The Members of Commission on Asbestos Litigation are: Honorable Nathaniel R. Jones, Ret., Chair; Harold S. Barron; Paulette Brown; David Christensen; Robert A. Clifford; Stanley Ferguson; Julia Bennett Jagger; Steven Kazan; Peter A. Kraus; Robert S. Krause; and Philip McWeeny.

Respectfully submitted,

Honorable Nathaniel R. Jones, Ret., Chair
Commission on Asbestos Litigation

February 2003

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COVER STORY

SEC Filings Show Corporations Inundated With Asbestos Claims

By **Gary S. Mogel**

Disclosures by public corporations in their second-quarter 10-Q reports submitted to the Securities and Exchange Commission hammer home the continuing enormity of the asbestos litigation problem.

Making matters worse, many of these companies reported a second-quarter uptick in claims caused by a barrage of lawsuit filings in Mississippi, as plaintiffs tried to get in under the July 1 wire before tort reforms capping punitive damages and restricting forum shopping go into effect in that state.

The asbestos woes of Albany International Corp., a Menands, N.Y.-based fabrics manufacturer, have become especially acute due to the "Mississippi factor." Of the 28,457 asbestos-related lawsuits pending against the company, 24,646 were filed in Mississippi by people who worked in or may have spent time in a paper mill that previously used Albany International products.

As is typical in these types of cases, plaintiffs allege respiratory and other ailments—or fear of contracting such ailments—based on exposure to asbestos that the company used in its products or processes decades ago, before the dangers became known.

Albany International did manage to settle or dismiss 9,476 claims for $5.03 million, 99 percent of that amount being paid by its insurance carriers, which provide a total of $130 million in limits.

Georgia-Pacific Corp. is another company hit by a sudden influx of claims from Mississippi. The Atlanta, Ga.-based paper products company reported 67,100 pending asbestos claims, with 29,500 of those filed in the first six months of the year, mainly in Mississippi. Since the start of its asbestos woes, Georgia-Pacific has resolved 300,900 claims and spent $529 million on settlements and legal fees, its 10-Q reveals.

"About 60 percent of what we're paying for asbestos settlements and judgments is going to plaintiffs' attorneys," said Georgia-Pacific spokesperson Robin Keegan.

Ms. Keegan also noted that 20 percent of the plaintiffs aren't even sick from asbestos, and for those that are sick, the company doesn't know whether they got their alleged illnesses from Georgia-Pacific products. "Our goal is to see that the truly sick people are helped, but the current system is not working that way," she noted. "The system for handling asbestos claims is hopelessly broken."

Shareholders of the company are among those feeling the brunt of the "hopelessly broken" asbestos reparations system, according to Ms. Keegan. "Nothing has impacted the world's view of Georgia-Pacific and penalized our shareholders as much as the [stock] market's fear of the unknown regarding our asbestos liabilities," she said. "It has discounted our stock in the market."

Tort reforms slated to go into effect in Texas during the third quarter may offer relief to some companies. Those reforms limit the liability of successor companies—whose asbestos-related suits are traceable to predecessor companies they merged with or acquired—to the predecessor's total assets adjusted for inflation. The law applies to pending and future claims for which a trial has not started.

One of the primary beneficiaries of the Texas reforms is expected to be Crown Holdings Inc., a Philadelphia, Pa.-based packaging products company. Crown reported 76,000 outstanding asbestos claims and $233 million in estimated asbestos liabilities in its 10-Q. In a statement, the company praised the Texas reforms, noting that 25 to 30 percent of its pending claims are in Texas. Crown shares rose 11 percent after the Texas reforms were passed.

Enpro Industries Inc., based in Charlotte, N.C., traces its current asbestos problems to gaskets formerly manufactured by two of its units, noted general counsel Rick Magee. "At one time, asbestos fibers were used to encapsulate the gaskets," explained Mr. Magee.

According to its 10-Q, Enpro, a manufacturer of air compressors and diesel engines, spent $2.5 million in the second quarter of 2003 settling or litigating asbestos claims, up from $1.8 million from the same period a year ago.

"The $2.5 million represents expenditures that were not reimbursed by insurance," Mr. Magee pointed out. He noted that the company has about $86 million in potential coverage for asbestos-related claims, in "many excess layers."

"Most of these suits are by employees of other firms who worked with or around En-

pro gaskets and allege that they contracted asbestosis, lung cancer, mesothelioma or other illnesses from the asbestos," Mr. Magee said.

"A majority of these plaintiffs have no current physical impairment," Mr. Magee continued, "but they are clogging the courts and delaying resolution of claims by people who are really sick."

"There are law firms that recruit potential plaintiffs by advertising that they perform screenings for asbestos-related conditions," said Mr. Magee.

The effects of these cases go well beyond the dollars spent on judgments, settlements and defense costs, Mr. Magee indicated. "These cases consume capital—money has to be allocated to this instead of other things."

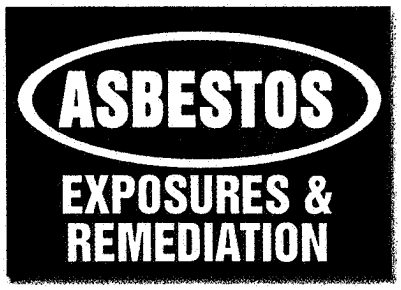
He also noted that the cases consume management's time and make it difficult to attract high-level executives, many of whom don't want to deal with ongoing asbestos issues.

Mr. Magee's point about the ripple effects of asbestos litigation and claims is borne out by a study authored by Nobel Prize-winning economist Joseph Stiglitz and sponsored by the Washington, D.C.-based American Insurance Association. The study estimated that 61 companies have gone bankrupt due to asbestos liabilities, in turn causing the loss of at least 52,000 jobs and reducing pension assets at those companies by 25 percent.

The RAND Institute for Civil Justice, an independent research firm in Santa Monica, Calif., released a report showing that over 600,000 people in the United States. have filed claims for asbestos-related injuries, costing businesses about $54 billion. The report projects another 500,000 to 2.4 million claims in the years ahead that will cost businesses as much as $210 billion more.

"We found that over the past decade there has been a rapid increase in both the number of asbestos claims and the cost of the litigation," said Stephen Carroll, a RAND senior economist who headed the study. "This surge challenges the notion that the litigation is manageable and raises new questions about whether there will be enough money to pay all the claims that are likely to be filed," Mr. Carroll added.

In addition, the RAND report found that plaintiffs get only 43 cents out of every settlement or judgment dollar, with the remainder going to attorney fees and other litigation expenses. About 6,000 businesses have become defendants in asbestos litigation, with only five states—Mississippi, New York, West Virginia, Ohio and Texas—accounting for two-thirds of the cases filed. The typical plaintiff names 60 defendants, the report notes.



Asbestos litigation has multiplied to the point where several companies now have over 100,000 pending asbestos claims, according to their 10-Q filings:

- Goodyear Tire & Rubber Co. of Akron, Ohio, reported 111,500 open claims, compared to 102,000 in last year's second quarter. The company spent $10.9 million on asbestos claim litigation and settlements during the first six months of 2003.
- Dana Corp., the Toledo, Ohio-based automotive products manufacturer, reported 151,000 asbestos-related claims outstanding, compared to 130,000 in last year's second quarter. The company attributes the increase in part to the surge in Mississippi filings. Dana estimates the value of the claims to be $140 million and expects to collect $119 million of that amount from its insurers.
- Foster Wheeler Ltd., a Clinton, N.J.-based holding company for several construction and manufacturing subsidiaries, is facing 169,900 claims. Foster Wheeler's total expected insurance recovery is $555.7 million.
- Halliburton Co., the oil services firm based in Houston, Texas, reported 425,000 claims. Many of these claims are traceable to DII industries, a subsidiary of Halliburton. Recently, Halliburton announced that it will create a $4 billion asbestos trust to pay these claims and place DII into Chapter 11 bankruptcy.

Although Midland, Mich.-based Dow Chemical Co.'s 10-Q did not indicate the number of claims against its Union Carbide subsidiary, its estimated liability of $2.1 billion for future asbestos costs suggests claims well in excess of 100,000. The company estimates insurance recoveries of $1.2 billion.

Bankruptcy has been a shield used by many companies overwhelmed by asbestos liabilities. One of the most prominent of these is W.R. Grace & Co., the chemicals and building materials company based in Columbia, Md. Grace reported $968.5 million in asbestos-related liabilities as of the end of the second quarter of 2003. The company also reported $272.4 million in expected insurance recoveries for asbestos-related losses during the next 12 months.

The solution to the asbestos litigation juggernaut, according to business trade groups such as the Washington, D.C.-based National Association of Manufacturers and The Asbestos Alliance, is a bill that would establish a national asbestos trust fund, which was proposed by Sen. Orrin Hatch (R-Utah). The Senate's judiciary committee passed the bill, but it has yet to progress any further.

In addition, the Albany, N.Y.-based National Conference of Insurance Legislators unanimously adopted a resolution supporting federal and state initiatives targeting reform of the asbestos litigation system.

Initiatives mentioned in the NCOIL resolution include a tolled statute of limitations for unimpaired victims so they don't have to file claims until they actually become ill. Another initiative is a requirement that suits be filed where the asbestos exposure occurred or where the defendant has its principal place of business, in order to prevent forum shopping.

Even the American Bar Association, based in Chicago, has endorsed medical standards requiring asbestos claimants to exhibit symptoms of illness before being allowed to sue.

However a plaintiffs' attorney group, the Washington, D.C.-based Association of Trial Lawyers of America, blasted the ABA's stance. "One could liken the situation to saying a person infected with HIV through a tainted transfusion should have no legal rights unless he or she contracts AIDS," said Mary Alexander, ATLA's president. "Asbestos cases should be decided by juries that hear all the evidence," she added.

Meanwhile, companies continue to be swamped by thousands of individual lawsuits. Third-quarter 10-Qs likely will reveal even more claims, given the aggressive plaintiff recruitment by the trial bar and claimants' desire to file claims before state statutes of limitations expire.

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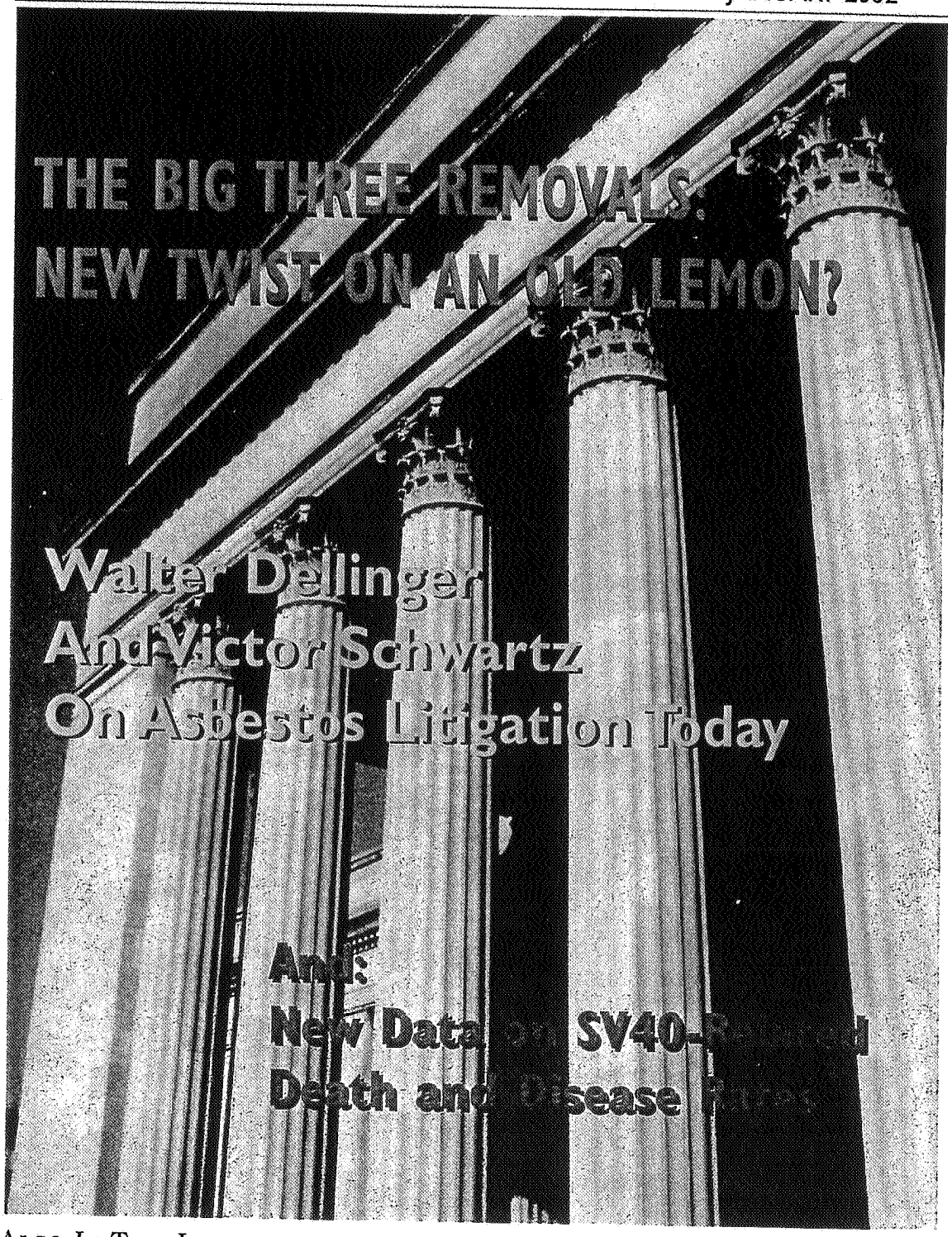
JANUARY 2002

COLUMNS



THE BIG THREE REMOVALS: NEW TWIST ON AN OLD LEMON?

Walter Dellinger And Victor Schwartz On Asbestos Litigation Today

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New Data [illegible] SV40-[illegible]

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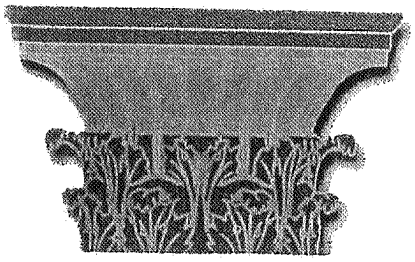

ALSO IN THIS ISSUE:

- Corporations Do Damage Control After Halliburton's Stock Price Plunge
- Maryland Judge Issues 'Watershed' Asbestos Premises Liability Ruling
- Texas Pipe Manufacturer Latest to File Asbestos-Related Chapter 11 Petition

COLUMNS

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LETTER FROM THE EDITOR

Arguments for and against the auto industry's removal and transfer of asbestos cases to the bankruptcy court in Delaware are ongoing and have been scheduled to come before a federal judge later this month.

To a limited extent, the move has worked, as the judge overseeing the consolidated bankruptcies of five defendants — including Federal-Mogul's — allowed for the provisional transfer of several removed complaints earlier in December. But the transfer is provisional, more likely permitted so that the court can decide relevant issues without having to work under the limbo of more than a hundred possibly-displaced lawsuits.

Another federal judge has already sent dozens of the removed cases back to state court and sternly reminded removing counsel that they must comply with the order.

Meanwhile, counsel are stepping outside the courtroom to talk about the impact the removal and transfers are having on their caseload and how the anticipated ruling, whatever it may be, could affect the future of asbestos litigation.

This month, Al Brayton and Lloyd "Butch" LeRoy of Brayton Purcell in California have, in addition to filing briefs in opposition to the transfer motions, offered their candid opinions of the auto industry's tactics, referring to them as a "New Twist on an Old Lemon."

While not discussing the removal and transfer issue, Walter Dellinger III and Victor Schwartz do continue the discussion of other recent trends in asbestos litigation. Their article was derived from a recent presentation before the American Legislative Exchange Council in New York City during which both addressed the asbestos litigation issue before hundreds of state legislators.

Also this month, a new study of more than 1,000 people who received SV40-contaminated polio vaccines reveals that given the data available, none appears to have died from what might be considered an SV40-related illness. However, as some — including the study's authors — might be quick to point out, the study has its limitations. Follow up to the study is expected and will likely be discussed at HarrisMartin's Asbestos Law and Medicine Conference scheduled for Feb. 21-22 in Coronado, Calif. For more information about the event, call (800) 496-4319, or log onto www.harrismartin.com.

Jeff Andrus
Editorial Director

ASBESTOS LITIGATION TODAY

A Discussion of Recent Trends

By Walter Dellinger III & Victor Schwartz

Moderator: Mark A. Behrens, Partner, Shook, Hardy & Bacon, L.L.P.; Advisor, American Legislative Exchange Council Civil Justice Task Force:

Asbestos litigation has been around for more than two decades. You may think there is nothing new to be learned about the subject. But, much has changed. Asbestos litigation is at a new crossroads. For that reason, we thought it would be worthwhile to sit down and revisit the litigation with some experts. They will tell you why you should be concerned about trends in asbestos litigation, and some things you might consider to improve the situation.

Early in the litigation, the claimants who filed asbestos claims generally had very substantial exposures, and were very sick. The people they were suing were manufacturers of asbestos-containing products, such as Johns-Manville Corp. Now, the litigation has become more of a claims processing factory, and claims are pouring in at an unprecedented rate. In the six years between 1993 and 1999, the number of claims pending doubled, rising from over 100,000 cases to over 200,000 cases. Some have estimated that as much as 80 percent of the people who are presently filing claims are unimpaired. Paying these claimants may deprive sick claimants of a swift and full recovery; there is not enough money to go around.

To date, more than 30 major companies have declared bankruptcy as a result of asbestos liability costs. As a result of these bankruptcies, many of the defendants being named in asbestos cases are "peripheral defendants," dragged into lawsuits to replace the "traditional defendants" that are no longer around. These companies are diverse, ranging from oil companies to automobile manufacturers to small businesses. Many are household names. They only have attenuated connections to asbestos, but they provide new "deep pockets," and that is why they have become targets of litigation.

Our first panelist is Walter E. Dellinger III. Walter is a partner with the Washington office of O'Melveny & Meyers LLP, one of the top law firms in the country. He is also the Douglas B. Maggs Professor of Law at Duke University in North Carolina. Before that, Walter's most recent job was as Solicitor General of the United States under President Clinton. Walter is a constitutional expert and nationally renowned scholar.

Our second panelist is Victor E. Schwartz. Victor wrote the leading torts case book in the United States, Prosser, Wade & Schwartz's Cases and Materials on Torts. He Chairs the Public Policy Group of the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He is also the Private Sector Chair of the American Legislative Exchange Council's Civil Justice Task Force.

Victor and I serve as co-counsel to the Coalition for Asbestos Justice, Inc. The Coalition was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. It is not a tort reform group. Rather, the Coalition was established by property and casualty insurers to promote public and judicial education, and to educate state legislators in discussions like this panel today.

A primary mission of the Coalition is to foster a better understanding of the current asbestos litigation environment. The Coalition also promotes legal scholarship on asbestos-related issues, provides its members with a forum for discussing current trends in asbestos litigation, and files *amicus curiae* (or "friend of the court") briefs in important cases that may affect the asbestos litigation environment. The Coalition is not involved with insurance coverage issues.

Walter E. Dellinger, III, Partner, O'Melveny & Myers LLP; Douglas B. Maggs Professor of Law at Duke University:

I am looking at a group of unusually conscientious state legislators, gathered on a Friday morning when Broadway is beckoning, to talk about a really serious problem. I am also looking at a roomful of potential asbestos plaintiffs. There is not anybody in this room that has not been exposed to asbestos fibers — not a single one of us. That is, in one sense, the heart of the problem. That is why we are facing, in a sense, an asbestos crisis.

There are a limited number of persons who took Fen-Phen; and unless you took that diet drug combination, you cannot be in the potential class of plaintiffs. There are, however, a limitless number of people — 260 million of us — who have had some exposure to asbestos. If you keep that background fact in mind you will understand why we have the present crisis we are in.

For whom is it a crisis? For lots of people. There are the impaired persons who were occupationally exposed to significant amounts of asbestos at a time when the companies that produced asbestos, according to the evidence, failed to adequately warn about the harm of the product. Those claimants need to be compensated for asbestos-related injuries caused by serious occupational exposure, such as mesothelioma.

Those people for whom serious illnesses will occur in the future face a possibility that there will be no funds or assets to take care of them because we are overwhelmed by this larger, and some sense, infinite amount of people who could suggest that they have been

exposed to asbestos. X-rays are being read with increasing frequency by people retained by plaintiffs' lawyers to read X-rays and see that there is evidence of exposure. These claims are overwhelming the system, creating a vicious cycle in which it is impossible to distinguish between meritorious and unmeritorious cases, which of course leads to the filing of even greater numbers of unmeritorious cases since somebody gets paid something on every case – for reasons I will come to. That, in turn, means that the overwhelming numbers make it still more difficult to distinguish between meritorious and unmeritorious cases going forward, so the system builds upon itself.

At first we thought the litigation was a problem that would adversely affect a small number of major companies that produced and manufactured asbestos or asbestos-containing products, and who therefore had occupational exposure issues — the Johns-Mansvilles.

Those companies went bankrupt. Then there was a secondary group of companies that were more marginally involved. They are going bankrupt too.

The litigation affects those who work in state legislatures because every one of you is in a state which now has potential asbestos defendants. As the people who bore a primary responsibility have gone bankrupt and no longer exist, as the individuals who may have been culpable for failure to provide adequate warnings in the 1950s and the 1960s have retired or died, plaintiffs' lawyers are making efforts to find an ever-expanding pool of defendants. Now, many of the ordinary companies that exist everywhere are being named as asbestos defendants.

As a result, a wholly intrastate company — not doing national business — that merely was a construction company, all of a sudden finds itself a defendant because in the remote past it had some asbestos products on its construction site – products the company did not manufacture, or know anything about. The system seems utterly unable to distinguish between culpable and non-culpable defendants.

As the litigation continues to expand it is going to affect more and more small and independent businesses that exist in every part of the country. For example, there may be a company that may have sold an asbestos-containing product for a few years in the 1950s — say a company like Owens–Illinois, Inc.

Owens–Illinois, which is based in Ohio, is a major bottle manufacturer; it makes half of the bottles in the world. Owens–Illinois employs 40,000 people, and is doing good work. It had a very small exposure, and because it was not an asbestos company, it did not go bankrupt. More and more often, however, the company is named as a defendant, and is picking up the share of the companies that have declared bankruptcy. Once secondary companies like Owens-Illinois go bankrupt, the next set of defendants will be the small, locally-owned "mom and pop" businesses.

> *When the litigation began, everyone understood what seemed absolutely obvious, which was that asbestos was going to be a large problem for a lot of individuals and companies*
>
> *- Walter E. Dellinger III*

Here is the key year to remember — 1971. In 1971, the Federal Occupational Safety and Health Administration issued a regulation banning the further use of asbestos. When the litigation began, everyone understood what seemed absolutely obvious, which was that asbestos was going to be a large problem for a lot of individuals and companies. Considering the number of workers who built ships during World War II — where there was heavy exposure — and the number of people who were in the asbestos mining or manufacturing industries, everyone expected there to be a large number of people exposed. These people are a declining group of plaintiffs, because there is no new asbestos for sale anymore. Therefore, many predicted the litigation would be a serious but declining problem, so that a quarter of a century after the last product containing asbestos was manufactured, sold or installed, the problem would have virtually been solved.

Thirty years have now passed, and all of a sudden, as the statistics show, the number of asbestos filings is going up, not down, because the courts have created a litigation machine that runs off itself. That machine is finding an ever-expanding pool of plaintiffs and involving an ever-expanding list of defendants.

What do we need to do? And how does the United States Constitution figure into this?

First of all, everybody recognizes the need to pay promptly people who are sick from major asbestos exposure and have asbestos-related diseases and impairment. But, the process of compensating those individuals is being inhibited because the courts are being clogged with suits brought by people who are not sick.

They are encouraged to file claims because of the random presence of punitive damages. When you have 400,000 cases already resolved, another 200,000 currently filed, the fact that in random instances punitive damages are awarded does not seem to advance any public policy goal. The number of filings also seriously threatens to overwhelm many state judiciaries, with no sign of cessation.

What about a federal solution? A federal solution is not going to work for two different sets of reasons. One, the United States Supreme Court has made it clear that the federal rules do not permit for a mass settlement of future cases. [See *Amchem Prods., Inc, v. Windsor,*

continued on page 68

Asbestos Litigation Today

continued from page 5

521 U.S. 591 (1997)].

Secondly, the fact that the federal courts have managed this problem better than the state courts has meant that plaintiffs are no longer choosing the federal system.

At one point, all 30,000 then-pending federal cases were sent to Senior Judge Charles Weiner of the United States District Court for the Eastern District of Pennsylvania. I actually was involved in suggesting to Judge Weiner that he needed to sever the punitive damages claims when the cases were sent back to trial in the jurisdictions that they came from. There were constitutional reasons and policy reasons why punitive damages needed to be severed in asbestos cases. Judge Weiner understood better than I did the policy reasons for severing punitive damages. The purpose of punitive damages is to punish defendants who have engaged in wrongdoing and deter them from doing it in the future. When you have someone who engages in a reprehensible conduct that does not cause much actual injury, the way to provide an incentive for people not to do that in the future is to add an element of punitive damages.

Judge Weiner understood that there is simply no room for punitive damages in asbestos cases because no one would ever set foot on a course of conduct for which compensatory damages could run into the billions of dollars, and in which you have over a half a million cases settled or pending. When the compensatory liability — that is, paying people for their actual injuries — is so enormous, the need for punitive damages is not there.

Secondly, there is the problem that when punitive damages are awarded, they are often awarded for the whole course of conduct, so that the defendant is being repeatedly punished for conduct that has already been punished in another state by another jury. You may have a situation similar to one Texas asbestos case, where a jury awarded $130 million, including $60 million in punitive damages, to five plaintiffs. [See Texas Jury Awards $130 Million to Five Plaintiffs In Asbestos Suit, 23 No. 19 Andrews Asbestos Litig. Rep. 3 (Sept. 27, 2001)].

There are some companies that because of their very limited involvement, if they actually go to trial, win a majority of their cases. But every now and then there may be a multi-million dollar punitive damage award for a single, unimpaired claimant.

At the Constitutional Convention in Philadelphia, in the summer of 1787, the Framers had many great debates. Occasionally, they would talk about the basic, fundamental rules of constitutional law, even as the Constitution was being drafted. One of the fundamental propositions of our Western system of law is that you cannot take the property of A and give it to B by legislative or judicial act unless that advances some public purpose. Compensating someone who has been injured by the fault of another does serve a public purpose. Sometimes awarding punitive damages, when it is actually necessary to take money from one person and give it to another for future deterrence, serves a public purpose.

Once you have already served those purposes, when further punitive damages are not necessary, then allowing such awards becomes a raw transfer of property. It is no longer a transfer of property just from big asbestos companies to sick people. It has now become a transfer from companies that had only a remote connection to the asbestos problem to many people who are not sick at all, and to the attorneys who represent them. It is not clear what constitutionally justifiable purpose is served by these repeated punitive damages awards.

The federal courts have accepted the argument that no more punitive damages should be awarded in asbestos cases. The federal courts understand that awarding punitive damages in asbestos cases is bad policy, and uses up funds that ought to be used to pay people who develop mesothelioma in the future. Second, such awards raise severe constitutional problems, because no one can demonstrate now that punitive damages in asbestos cases are actually necessary to fulfill a public purpose. I think that everyone who has looked at the litigation and who does not have a vested interest understands that asbestos cases pose a problem for the integrity of the administration of justice. In our state court systems, which in some places are going to be overwhelmed, the result may be that the people in your district who have a contract dispute or other claim may not have a ready place to solve it. The courts are clogged.

The imposition of repeated punitive damages in asbestos cases is also going to have an effect on consumers and the national economy.

I first got interested in punitive damages as a professor at Duke University in a way that will be quite surprising to you. Everybody thinks of the subject of punitive damages as sort of a liberal or conservative issue, but it is not. When you have punitive damages that are excessive and do not relate to actual damages, you are deterring the sale of beneficial products that may be very necessary. I came at this issue in a very unusual way. I have advised women's and public health groups on contraception issues. I had occasion to investigate in the late 1980s why there had been no research and development into better contraceptives in the United States. The last serious new developments came at about 1970. One of the principle reasons, it turned out, was the possibility of products liability lawsuits with punitive damages against the company that would create a new contraceptive product. The idea of trying out a new product, knowing that birth defects are inevitable and your product may be blamed, coupled with the spectre of large punitive damages awards, made everybody stay away.

So the United States, which is the world leade in pharmaceutical research and development, got out of the contraceptive research business because of the threat of punitive damages.

The effect in this country has been bad, but it has been really disastrous in the rest of the world. In places like sub-Saharan Africa, the price of birth control pills can exceed the average annual income of the population. So the mortality and morbidity rates in those countries have been enormous. That led me to understand vividly how punitive damages

overkill translates into harm to consumers by pricing products out of reach, and by making certain products unavailable. That is where the adverse effects will be felt, as well as on small businesses.

Let me conclude by mentioning a few points. First, mass joinder of cases does not work for two reasons: It creates more filings, and it violates the Due Process Clause of the U.S. Constitution. You simply cannot try 2,000 cases at once, in any way that remotely resembles due process. Ultimately, the U.S. Supreme Court is going to so hold on the state level.

Second, medical monitoring for people who have any exposure sounds like a sensible alternative. But the problem is, it is not clear where you draw the line. For a number of reasons, recognition of medical monitoring would be bad public policy.

Finally, I think we need to make sure that cases that are tried in any given state are cases where people are truly from that state or have been injured in the state, not out-of-staters.

Victor E. Schwartz, Partner, Shook, Hardy & Bacon, L.L.P.; Private Sector Chair, American Legislative Exchange Council Civil Justice Task Force:

Let me very quickly get to the bottom line. Some judges in the late 1980s and early 1990s saw the storm cloud of thousands of asbestos cases on the horizon. They did what made common sense to them. They pushed the cases through as fast as they could. The judges believed that if they retained normal legal bulwarks or protections, the litigation would never come to an end. [See generally Victor E. Schwartz & Leah Lorber, A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 Am. J. Trial Advoc. 247 (2000)].

Judges can bring the asbestos litigation system under control. They should be encouraged to restore the rule of law to asbestos litigation.

- Victor E. Schwartz

While some judges did this, plaintiffs' lawyers took notice. They began to aggressively recruit clients, and file more claims.

In some of your legislative districts you may see trucks with signs recruiting potential asbestos plaintiffs. Lawyers who help promote X-rays know that they may not be carefully examined in court. In some jurisdictions, it has been shown that lawyers discuss the potential solvency of asbestos defendants with their clients.

This is the kind of information that can become more public if state legislators hold hearings on the subject of asbestos litigation. The purpose of such hearings is not to thwart victims' rights. To the contrary, it is to encourage judges to filter out the real claims from the claims of the unimpaired, move the cases of those who are truly injured, and stem the tide of bankruptcies. Bankruptcies hurt asbestos victims and those currently employed who had nothing to do with asbestos-related decisions made decades earlier.

Judges can bring the asbestos litigation system under control. They should be encouraged to restore the rule of law to asbestos litigation. Judges can allow adequate discovery of plaintiffs to assure that they are ill. Judges can keep junk science away from the jury. Judges can assure that if there is case consolidation or joinder of plaintiffs, like is grouped with like, and a truly sick person's claim is not consolidated with people who are unimpaired.

Legislation also can help restore equity to asbestos litigation. First, if people are not sick, but may become ill in the future, their names can be placed on a registry that will protect their future claims without having the claim of an unimpaired person heard now. Even a liberal state like Massachusetts has a registry for people that have been to exposed to asbestos, but who are not sick.

Massachusetts also suspends the statute of limitations for those people, so if they get sick, they can still bring their claim. Plaintiffs' lawyers who represent people who are really sick support this reform. The lawyers who bring claims on behalf of people who are not sick would say 'no' to it. The public will agree that it is fair to all concerned.

Second, legislatures can prevent repeated punishment for the same act or course of conduct. Multiple punitive damages awards drive companies out of business before people who need compensation have been paid.

Third, legislation could help assure that joinder or consolidation rules are only applicable to cases that are virtually the same. This would prevent attempts to have a sick person's claim used as a lever to get a higher settlement or award for a claimant who is unimpaired.

Finally, legislatures can enact fair venue rules. In Jefferson County, Miss., there are more lawsuits filed than there are people who live in the county. The people who do not live in Jefferson County are bringing lawsuits there because plaintiffs' lawyers recognize that awards in that county are very high.

This slows justice for the residents of that county. This situation can be addressed very simply. Venue should be limited to where a person has been hurt or where there was exposure to a harmful substance. If I were exposed to asbestos in Decatur, Ill., I should have a right to sue there. If I live in Alexandria, Va., I should have the right to sue there. Having the whole United States as my playing field for filing lawsuits, however, is not just or fair.

8

The Tort Mess

Michael Freedman, 05.13.02

Forbes Magazine

It's even worse than you think. Out-of-control lawsuits are shutting down medical practices, killing businesses and costing the economy $200 billion a year.

For two and a half weeks this winter, Dr. Walter Eckman, 58, sat in a courtroom in the center of Tupelo, Miss. as a defendant in a lawsuit. In 1999 a 27-year-old man had taken a fall at a movie theater and was admitted to the emergency room at the North Mississippi Medical Center, where Eckman was on call as a neurosurgeon. The patient was alert and awake but he had a headache and a cut on the back of his head. Two days later he went into respiratory arrest, resulting in severe brain damage. He died 15 months later.

Did Eckman screw up by not ordering enough tests? Yes, testified the widow's medical experts; no, responded Eckman's equally qualified experts. It appeared to be the kind of judgment call doctors make daily, this one with a tragic ending. But doctors and insurance companies are easy targets in the hands of tort lawyers. The jury awarded the widow $5 million, double what a similar case might have yielded just a few years ago.

The country has grown immune to verdicts like these: $5 million for a medical tragedy; $50 million in punitive damages for business interference in a case involving $1.5 million; $150 million to six Mississippi plaintiffs in October who are not sick but fear they may suffer someday from asbestos-related illnesses; $1 billion for punitive damages over the alleged contamination of 33 acres of land. It sounds at first like yesterday's news--weren't we hearing a decade ago about a $3 million verdict for a hot cup of coffee or $4 million for a repainted BMW? The tort crisis, though, is really tomorrow's news. If the momentum of litigation costs cannot be slowed, it could easily, in the space of a few years, crush important parts of the economy.

Look at the devastating consequences in Mississippi. The North Mississippi Medical Center, a hospital that serves 22 counties and 600,000 people, is now finding it all but impossible to recruit new doctors. They're scared away by the state's tort-friendly medical malpractice environment, soaring insurance premiums and word of the $5 million award. The hospital's insurance premiums have doubled in the last year to $2 million. It may have to cut back on emergency services. There is now no neurosurgeon on call one out of every four days. If there's a wreck on the highway that bisects town, or on any of the winding roads in northern Mississippi or Alabama, it will take at least one hour for the victim to be transported to the nearest neurosurgeon in Memphis or Jackson. That hour is crucial; it could cost a life.

In the next few years, predicts insurance consultancy Tillinghast-Towers Perrin, tort costs could increase twice as fast as the economy, going from $200 billion last year to $298 billion, or 2.4% of GDP, by 2005. Since 1994 the average jury award in tort cases as a whole has tripled to $1.2 million, in medical malpractice it has tripled to $3.5 million and in product liability cases it has quadrupled to $6.8 million, according to just released data from Jury Verdict Research.

At the rate tort costs are rising, wide swaths of the country, particularly rural areas, will soon be without medical specialists. Drug companies will elect to stop producing vital but less profitable drugs. Construction companies will give up building the condos and high-density projects necessary to affordable living. And smart corporate directors will recognize that the income and prestige that come with serving on boards are not worth the risk to their personal assets.

Chicken Little? Who would have predicted asbestos litigation would cripple so many companies?

But 52 companies have already filed for bankruptcy and hundreds more, with only the tiniest connection to the material, are being targeted by lawyers. Listen to Houston lawyer W. Mark Lanier, who claims to be looking into a St. Louis company called Metal Goods Corp., which he says once sold fake snow for indoor Christmas trees that was made of pure asbestos. "I'm going to find where the St. Louis metals company is today, and I will bring them to their knees," he says.

It's not Chicken Little to Charlie F. Connor, who is paying $580,000 for an insurance policy for his Bellevue, Wash. construction company--up from $92,000 last year. He's thinking about getting out of building condominiums because they are especially prone to suits over construction defects. Or to Wal-Mart, which got hit with that $51.5 million verdict in June after requiring a vendor whose contract had ended to remove its vending equipment from stores (now on appeal). Or to Halliburton and 3M, companies that got hit with the $150 million asbestos award. Or to Exxon Mobil, which was hit last May with that $1 billion award (now on appeal).

Tort lawsuits are a necessary evil in a market economy. There has to be a mechanism for making polluters and incompetent doctors and penny-stock scamsters pay. But when the payments lose any tether to the harm caused or the culpability of the defendant, they create economic havoc. "Many will sense that this is a replay of the liability crisis of the 1980s," says Robert Hartwig, chief economist of the Insurance Information Institute. "But it is more broad-based this time and more severe." Here's a look at the impact in five areas of the economy.

* The Doctor Won't See You Now

In December the nation's second-largest medical malpractice insurer, St. Paul Cos., announced it would abandon this line of business after losing $985 million on it in 2001. It was running up $1.99 in costs and expected ultimate payouts on malpractice for every $1 of premium it was taking in. A liability insurer can make up a small underwriting loss with investment income from its reserve funds. It cannot make up 99 cents on the dollar.

St. Paul's absence will be a huge loss for the industry. It handled 42,000 doctors and 750 hospitals, covering at least 25% of the market in 12 states. When those policies expire over the next 20 months, doctors will pay as much as 300% more for new coverage, or up to $400,000 a year for some legally hazardous specialities (like neurosurgery and obstetrics). Other insurers have also stopped writing new policies, and those still willing to cover doctors have raised rates or scaled back coverage themselves. Legislatures in Nevada, West Virginia, Pennsylvania and Mississippi have considered legislation to stem the tide of lawsuits. But the reform can't come fast enough to save some medical practices. A study by a University of Nevada medical school professor says 42% of obstetricians are making plans to move their practices out of southern Nevada. If that happens, only 78 obstetricians would be left in an area that includes Las Vegas, a city of 1.5 million with 23,000 births last year. The same study notes that 76% of the city's obstetricians have been sued, and 40% have been sued three or more times.

In some parts of the country, doctors say, it is almost better to let a patient die than to attempt heroic surgery, fail and risk a lawsuit. In the border town of Bisbee, Ariz., hospital administrators recently closed the maternity ward because its family practitioners were seeing insurance rate increases of up to 500%, to $88,000 a year. The hospital services 4,000 square miles. Now, hundreds of women must travel at least 60 miles to the closest hospitals, in Sierra Vista or Tucson. Since the ward's closure, four women have delivered babies en route.

Dr. John Angstadt, 44, started looking to move out of suburban Philadelphia when his insurance increased from $14,000 in 1994 to $66,000 last November. In December he joined a large practice in Savannah, Ga., where he pays just $16,000 for insurance. Now, instead of worrying about rising costs and lawsuits, he can practice medicine.

"That was missing in Philadelphia," he says. "I got up in the morning and the idea of facing

another day was onerous." That's a lot like how Tupelo neurosurgeon Jimmy D. Miller, 47, felt. He was beginning to see patients as adversaries. So after practicing for seven years he quit medicine in 2000--and enrolled in law school.

* Prescription For Disaster

The pharmaceutical industry has always been a ripe target for suits. The difference nowadays is simply that the dollar amounts have gotten bigger. Between 1989 and 2000 the 300,000 claimants alleging damage from the Dalkon Shield contraceptive device got $2.6 billion in settlements. By contrast, the 320,000 claimants in the Wyeth (formerly American Home Products) diet drug litigation will share $13 billion. The litigation sliced Wyeth's net worth from $7 billion in 1996 to $2.8 billion in 2000.

If a drug saves 100 lives for every one it loses, someone who faces certain death should not hesitate to use it. But what happens if the tort system says every death must be paid for? The average payout on a wrongful death claim increased from $1 million in 1994 to $5.7 million in 2000 (the most recent data point available), according to Jury Verdict Research. To merely break even, the drug's maker would have to charge $57,000 for every dose. It can't get away with that. So a potential wonder drug may never see the light of day.

A study in the *Journal of the American Medical Association* estimates that 100,000 people die each year in the U.S. from drug-related deaths. If the families of each sued and won that average of $5.7 million, total liability would hit $570 billion. That's twice the combined revenues of the top 12 drug companies.

That day is not yet here. But we are inching closer to it. Look at this: A series of pending suits seeks to force vaccine manufacturers to test for autism in every child born in the 1990s--all 30 million of them. Plaintiffs say a preservative once used in vaccines that contains mercury causes the disorder. There are serious legal obstacles to winning such a suit, including liability protection for vaccine manufacturers (see sidebar). There is also no scientific evidence of the link. There is, meanwhile, plenty of evidence that vaccines have saved millions of lives. But what if plaintiffs can show a correlation between blood-mercury levels and autism? They are suing for $30 billion, an amount roughly equal to the combined assets of defendants Baxter International and Eli Lilly.

Steven Garber, a researcher at the Rand Research Institute for Civil Justice, says drug companies are willing to take on the risk of lawsuits in marketing blockbusters like Viagra and Vioxx. But in other cases the chance of liability is too great. Garber says companies once stopped making new products for use during pregnancy because of the high risk of birth defects. Companies also limit research on orphan drugs--those that cure rare, often fatal illnesses--because the potential tort liability outweighs the profit potential.

James Beck, a defense lawyer who has represented drug and medical-device manufacturers, studied a series of medical journals and other publications and found liability fears have also stymied AIDS research and the development of new contraceptive devices.

The pharmaceutical firms shy away from discussing their research plans with such a stark calculus. Who could blame them? In a trial, evidence of merely conducting a risk-benefit analysis of a new product can damage a company's defense. Imagine what the plaintiff's lawyer can do with a memo in which people's lives are weighed in the balance against dollars of profit.

Drug company executives worry about another impact, as lawyers try their cases in the popular media. When lawyers filed suits against Novartis Pharmaceuticals in 2000, alleging the company conspired with the medical establishment to push its attention deficit disorder drug, Ritalin, the suits were accompanied by congressional hearings and news stories. This March the last of those suits was dismissed. But from a medical perspective, the damage was already done. "One of the things we think may be happening," says Steven Sokolow, Novartis Pharmaceuticals' head

of litigation, "is that patients who could benefit from these drugs are scared away from taking them."

* Board Games

Want to risk being bankrupted? Join a corporate board of directors and take a chance that you will get enmeshed in the next Enron.

Companies buy insurance to cover the liability of directors and officers. Until recently a board member could safely assume that the insurance would cover any settlement. Not anymore. A typical policy covers only a few hundred million dollars of claims. What if an inattentive board allows a few billion dollars to slip down a rathole? Enron's policy limit was $350 million, scarcely enough to cover the huge losses to shareholders and creditors in that fiasco. And the insurers are reportedly trying to back out of that policy, saying Enron defrauded them.

The plaintiff lawyers just might start going after directors' personal assets, as Melvyn Weiss, a leading lawyer of shareholder class actions, makes clear. "I think I would be enormously worried," he says of directors. It's a view held by Joseph Grundfest, a former commissioner of the Securities & Exchange Commission and now a Stanford Law School professor.

Anthony Galban, Chubb Group's manager of D&O underwriting, wonders why candidates for board seats don't worry more than they do. "You've worked hard," he says. "You've got a wife and kids and maybe a house in Aspen. Why would you risk all that?" Charles Elson, head of the University of Delaware's Center for Corporate Governance, expects 10% of all directors to leave by year's end because of liability fears. One director who is having second thoughts, although she has not resigned from seats on the Lucent and Polycom boards, is Betsy S. Atkins. Says she: "I am much more cognizant of risk at a much more gut level than ever before."

All those shareholder suits are costing a ton of money--and the shareholders, in a sad irony, are footing the bill for the litigation that supposedly benefits them. In the last year the premium on a $250 million D&O policy, for instance, doubled to $20 million.

* If You Build It, They Will Sue

Like a lot of trends, suits claiming construction defects began in California. The trend has spread into Texas and Florida and now into Nevada, New York, Colorado and Arizona. Heavyweight class-action plaintiff firms like Cohen, Milstein, Hausfeld & Toll have jumped in, filing claims alleging that the exterior siding known as synthetic stucco was improperly installed and caused water damage. The year ending June 30, 2001 saw the filing of 13,000 cases alleging mold damage in Texas alone.

It's not just the builders getting sued--insurers are at risk, too. One Texas plaintiff, denied payment of a claim for water damage on a homeowner policy issued by a subsidiary of Farmers Insurance Group, won a $32.1 million judgment. An appeal is pending.

In response to this lawsuit crisis, construction company insurers like CNA are discontinuing coverage for construction defects. Others include exclusions in policies stating that they will not insure for mold or synthetic stucco damage, according to Jeffrey Masters, a Los Angeles defense lawyer.

Even big companies are hurt. A year ago a $500 million (sales) Colorado construction company would have been able to pay $400,000 for a $1 million policy with a $25,000 deductible. Now, if it can get a policy at all, it must self-insure for the first $1 million and then pay $1.5 million for the next $5 million of coverage.

Insurers brought some of this on themselves by undercharging builders for years. Post-Sept. 11

expenses and the weak stock market have contributed to losses as well. But the growing and unpredictable wave of lawsuits has forced builders to either swallow the extra cost, charge more to customers or consider stopping building altogether.

A subsidiary of Lozier Homes in Bellevue, Wash. just finished building a 60-unit condominium and paid $250 per unit for $2 million insurance. That company has not been named in any lawsuits, but insurance for new projects will cost between $5,000 and $10,000 per unit. Lozier President Michael Levy says it's going to be impossible to pass along that kind of a price increase. Solution: Lozier Homes has stopped building condos.

* The Tort That Won't Go Away

Asbestos is an object lesson in how massive litigation starts slowly and spins wildly out of control. Insurers now estimate asbestos liability will hit $200 billion, with literally thousands of firms paying out claims. Much of the money will be extracted from companies with only the most peripheral and limited connection to dangerous asbestos-containing products, and much of it will go either to lawyers or to plaintiffs who are not even sick, just worried about getting sick.

The result: 52 companies have entered bankruptcy to escape asbestos litigation. That group includes Federal-Mogul, a $9 billion (assets) company, 16% owned by employees, that in October 2001 became the 15th-largest bankruptcy in history.

Dozens more could be on the way; 1,000 companies have been named in suits. Ford Motor and General Motors, which had asbestos fibers in brakes, have been named. Pfizer, which once owned companies that sold construction and talc products that contained small amounts of asbestos, has 232,000 claims against it. It gets sillier. Lawyers are looking at consumer product companies like Kimberly-Clark, International Paper and other manufacturers and distributors of facial tissue and writing paper that may have contained traces of asbestos. Is there any scientific evidence that people contracted mesothelioma from Kleenex? No, but Kimberly-Clark has deep pockets to be picked.

Plaintiff lawyers plumb the depths of creativity to find defendants. Houston lawyer Lanier is looking into filing a suit against Hasbro division Milton Bradley because of a clay used in elementary school classrooms. Experts say it's only a matter of time before retailers like Wal-Mart get enmeshed in the asbestos litigation machine.

The mere hint of exposure can kill a company's stock. In January, Georgia-Pacific Chief A.D. (Pete) Correll tried to quash rumors that asbestos litigation was bringing the paper and lumber giant toward the brink of insolvency. In a matter of days the rumor had knocked 20%, or $1.5 billion, off its market value. "Where the hell does everybody believe these future liabilities are going to come from," he fumed.

It was a good speech. But the truth is, like the rest of the tort system, asbestos has proven impossible for defendants to get ahead of. When Johns Manville, a building-materials company, filed for bankruptcy in 1982 in order to settle asbestos litigation, it established a trust fund to pay out 100,000 expected claims. By 1991 the trust had already received 171,000 claims--and they just keep coming. Now Johns Manville expects 2 million claims. Even the insurance industry thought it had finally turned the corner on asbestos in 1997 as unfunded future liabilities appeared to be on the decline. Wrong again. Georgia-Pacific General Counsel James Kelley says the company has learned enough from the experience of others to avoid making their mistakes. But does he know for sure? "Frankly," he says, "we don't know."

Unfortunately for the U.S. economy, when it comes to tort costs there is indeed no end in sight.

9

By ERIC ROSTON

The Asbestos Pit

An old issue is back, and the lawsuits are killing shares

RONALD HUBER SPENT 35 years as a steelworker, breathing in asbestos particles he never saw. In 1995, recruited by personal-injury lawyers he had never met, he joined a class action against 200 companies that made or distributed asbestos or products made with it. At the time, the only detail that really seemed to matter was that the lawyers were giving Huber a shot at what would become a $140 million settlement.

Yet Huber, who claims he is suffering from an asbestos-related illness, maintains that he never saw a dime. So on Feb. 7 he joined 2,644 other plaintiffs in another class action. This one charges six personal-injury attorneys and their firms in federal court in Pittsburgh, Pa., with fraud, malpractice and deception—or, as the complaint boldly states, "this case arises from corruption within the asbestos personal injury bar."

Welcome to the wild world of asbestos litigation. For all the lives asbestos has destroyed over the years, only now is it becoming clear how much additional ruin personal-injury lawyers caused by taking advantage of hapless plaintiffs and of the emotionally charged debate over corporate responsibility for unleashing the deadly substance. The first asbestos suits were filed in the 1970s and by 1982 had pushed Johns-Manville, the largest manufacturer, into bankruptcy. Wave after wave followed, forcing more than 50 companies into Chapter 11, including Owens-Corning and, last year, chemical and materials giant W.R. Grace.

Many of the lawsuits have been justified, aimed at redressing victims' unimaginable suffering. But some have appeared opportunistic, including a recent cluster filed on behalf of healthy plaintiffs against companies that have only peripheral connections to asbestos, among them media giant Viacom, baby-products maker Gerber (a subsidiary of Novartis) and Gallo Winery. If the cascade of litigation continues, according to a recent Tillinghast-Towers Perrin study, its financial toll could reach $200 billion, more than the damage attributed to the Enron debacle. "The liability—both projected and actual—is far in excess of Enron," says David Austern, general counsel for the Manville Trust, which was created from bankrupt asbestos maker Johns-Manville in 1988 to administer claims against the company. "Yet there seems to be very little congressional interest in this subject."

How did asbestos, the industrial scourge of the past century, bounce back into this one? In 1982 Johns-Manville declared bankruptcy, thwarting thousands of lawsuits on behalf of plaintiffs sickened by asbestos exposure. Two state supreme courts, New Jersey's in 1982 and Louisiana's in 1986, set crucial precedents by determining that defendant Manville was liable for asbestos-related illnesses even if the company had not been aware of the substance's danger. Two years later, the trust was established from the company's assets, and officials predicted that 80,000 to 100,000 people would file claims against it.

Instead, filing asbestos claims became a booming industry in its own right, and the estimated number of claimants has ballooned past 1.4 million people. Money-hungry lawyers took a connect-the-dots approach: drum up the standard legal precedents and then solicit clients through local ads or unions (which also sponsored mobile X-ray scans for asbestos-related ill-

ILLUSTRATION FOR TIME BY ROBERT NEUBECKER

It's hard to heed the saying **"LEAVE IT TO THE COURTS"** when they are the problem

nesses). None of this required much investment, and the potential rewards were huge.

That's how in 1995 Ronald Huber became one faceless plaintiff among 5,000 class members—"They viewed their clients as mere inventory," the 2002 complaint says of its defendants. These mass tort cases typically involve dozens or even hundreds of corporate defendants and thousands of plaintiffs. There could be a core of wrenching cancer cases, but many of the plaintiffs are healthy people who could prove that they had been exposed to asbestos. Publicity about the evils of big corporations and asbestos cover-ups helped make for plaintiff-friendly juries, especially in states such as Texas and Mississippi, where the original Huber case was heard.

The results have been stunning. More than 2,400 companies have been sued, pushing at least 54 of them into bankruptcy. At least two companies filed for Chapter 11 just last month.

The corporate carnage is beginning to take some particularly odd twists. Consider oil-field-services company Halliburton. Its Dresser Industries subsidiary, which was acquired in 1998, may still face 200,000 lawsuits from a unit, Harbison-Walker, that was spun off in 1992 and that declared bankruptcy on Feb. 14. Then there is Viacom, which, via its purchase of CBS in 2000, inherited Westinghouse Electric's 130,000 lawsuits. When Dow Chemical bought Union Carbide last year, its executives were well aware that they would be inheriting litigation—but didn't expect liability concerns to push its stock down 30%, as they did during one week in January before recovering.

Certainly nobody predicted the effect the phrase "asbestos liability" has had on the stock prices of Viacom, Halliburton and 3M, which have also taken recent hits. What is more disturbing, however, is that evidence suggests the number of recent claimants who are actually ill is on the decline; in other words, the number of healthy claimants is climbing. "The bulk of these people have no impairment," says Steven Kazan, a lawyer who represents only patients sick with asbestos-related diseases. In 1999, 12% of the Manville Trust's 31,700 claimants were sick with asbestos-related ills. Last year the number of claimants soared to 91,000, only 6% of them sick.

But lest we forget: even more disturbing than the victorious, healthy plaintiffs are those who are sick and feel shortchanged. It's this trend that *Huber v. Taylor* hopes to address. Federal Judge Donald J. Lee will assess that case's merits in coming months.

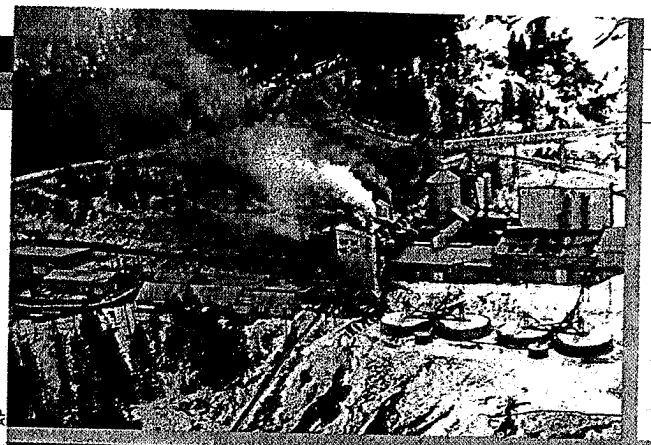
The litigious boom may deplete both the goodwill and the financial resources to deal with serious future victims of asbestos poisoning. "Asbestos has a long incubation period, and we're still seeing cases where the exposure took place in World War II," says Kazan. "How will cancer victims 40 years from now be compensated?" Adding to the problem: thousands of healthy plaintiffs, worried they may be left out, file claims to protect themselves lest a firm go bankrupt before they show any symptoms.

Solutions are a long way off. Efforts to create a central claims administrator have repeatedly collapsed. Reform is predictably in conflict with political realities. The Democrats received $77 million from lawyers during the 2000 election cycle. For their part, in a post-Enron world, the Republicans have little interest in exacerbating the perception that they are the party of Big Business. (Halliburton, for instance, because its former CEO Vice President Dick Cheney, is on its own.)

Among those who think the problems need fixing, there is no shortage of ideas about how to clean up what U.S. Supreme Court Justice David Souter has called an "elephantine mass." The Asbestos Alliance, a group of about 100 companies led by the National Association of Manufacturers, has put forth a three-point solution: establish medical criteria under which an individual can make a claim, restrict plaintiffs from filing suit in a state unrelated to the case (such as Texas or Mississippi) and prevent lawyers from lumping together healthy and sick plaintiffs.

Oddly, it may be up to people like Huber—who feel they have been had and are not going to take it anymore—to raise the call against allegedly crooked lawyers. If he wins, he and his fellow plaintiffs could receive more than 10 times the $14,000 they were originally promised in the settlement. The complaint asks for compensatory damages above $150,000 and punitive damages in excess of $500,000. The defendants named in the Huber complaint have yet to file an official response, and lawyers representing the proposed class have declined to comment.

Plenty of Ronald Hubers out there—manipulated, dwarfed by industry and ignored by government—ought to be willing to fight back. —*With reporting by Laura Bradford/New York*



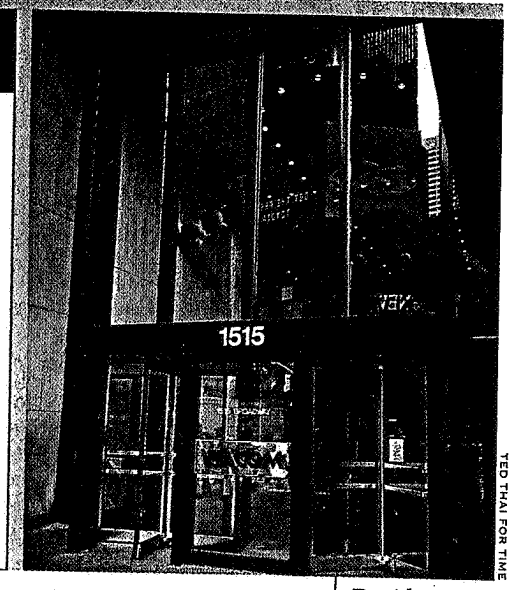
AP

◀ **W.R. Grace ran this asbestos mine in Libby, Mont., until 1990**

▼ **Viacom got saddled with liability from CBS—formerly Westinghouse**

BANKRUPTED BY THE ASBESTOS WARS

- **Harbison-Walker** Halliburton could inherit its 200,000 suits; Feb. '02
- **Kaiser Aluminum** Felled by 112,000 suits plus low prices as debt began to mature; Feb. '02
- **Federal Mogul** Partsmaker faced 365,000 suits; automakers share some liability; Oct. '01
- **USG** Building-materials firm cited losses from 250,000 claims; June '01
- **W.R. Grace** Materials distributor couldn't fight 325,000 cases; April '01



TED THAI FOR TIME

Unlike polyester, late-'70s **ASBESTOS LITIGATION** has never gone out of style

10

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COMPANIES & FINANCE THE AMERICAS: Asbestos casts shadow over US corporations: An expensive judgment against Halliburton has rekindled investor concern over exposure to litigation, writes Christopher Bowe
By CHRISTOPHER BOWE
Financial Times; Jan 18, 2002

The spectre of asbestos liability concerns has recently settled upon several big US companies, including Dow Chemical, 3M, and Halliburton, and investors have shed the stocks as if they carried corporate leprosy.

An unexpectedly expensive asbestos judgment in December against Halliburton has ignited investor worries over the US oil services group's exposure and rekindled the stigma for others dealing with related litigation. Wall Street analysts are also seeking any hint that liabilities are rising.

The fear stems from a string of futile corporate fights, stretching back more than 20 years, against waves of claims that have eventually prompted bankruptcy filings. In recent years, a proliferation in liabilities has followed a lucrative settlement on behalf of asbestos defendants, which companies typically attempt to deal with on an individual basis.

Asbestos is the name for a group of minerals that are formed in deposits of long silky fibres. It found its way into many industries and can cause cancer. It was so widely used in the US that experts say the entire population has been exposed to it to some degree.

In early December, a Texas jury handed down four verdicts against Halliburton totalling about Dollars 152m. The decisions caused Halliburton shares to plunge 43 per cent to about Dollars 12 per share. Lingering worries about further liabilities have since sent its shares to their lowest level in 15 years - less than Dollars 9 per share.

The stigma spread to others with current asbestos exposure, such as manufacturing conglomerate 3M and Dow, the world's largest chemicals group. Since settling a Texas lawsuit for an undisclosed amount, Dow's shares have fallen about 30 per cent from about Dollars 34 to Dollars 25.66 per share yesterday.

In one week, 3M shares have fallen about 9 per cent to near Dollars 104 per share, despite no new developments on asbestos since a Dollars 22.5m verdict against it in October.

Merrill Lynch estimates asbestos-related claims against companies who mined, or used it in products, to be at least Dollars 30bn in the US. Corporations have cried out to Congress for legal reform to help relieve them of this.

Halliburton has vowed to fight its 246,000 pending claims and said it can "weather any kind of liquidity storm". Dow says its exposure, from its acquisition of Union Carbide last year, is not material to its finances and is likely to total less than Dollars 175m - which is covered by insurance. 3M says nothing has changed in its situation, where plaintiffs have alleged its safety masks did not protect against asbestos, and it faces about 20,000 lawsuits, as of last September.

Georgia-Pacific and Viacom have also seen asbestos-related fears too.

Hundreds of thousands of people each year file a lawsuit against companies not yet bankrupt. Bankruptcies in the last year include G-1 Holdings, Owens Corning, USG, Federal-Mogul, Owens-Illinois and WR Grace.

The concern, analysts say, is not necessarily immediate pay-outs by the companies, but more an acute fear over whether companies like Dow are to be the next deep-pocket targets for asbestos plaintiffs' attorneys.

On Monday, Dow was downgraded from "strong buy" to "hold" by UBS Warburg because of worries that liability is getting deeper. The report said court filings against Dow have escalated from 31 per month on average for most of last year, to 905 filings in December.

"We just don't know what Dow can do or will do to try and calm fears," said Andrew Cash, at UBS Warburg in the report. "Asbestos is not strictly about quantification: it is very much an emotional issue."

On Wednesday, Banc of America analyst Mark Gulley suspended his "strong buy" rating on 3M because of asbestos. Nevertheless, calm was urged by some after the market's steep reaction. "It's not business as usual (for Dow), but I don't think the doors are closing," said one analyst.

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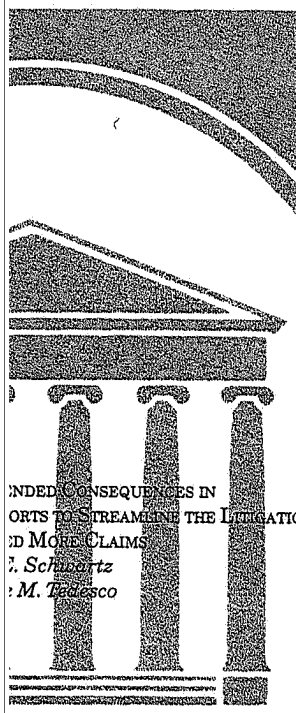

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M. Tedesco

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THE LAW OF UNINTENDED CONSEQUENCES IN ASBESTOS LITIGATION: HOW EFFORTS TO STREAMLINE THE LITIGATION HAVE FUELED MORE CLAIMS

Victor E. Schwartz[*]
Rochelle M. Tedesco[**]

Asbestos litigation has become an unwieldy permanent fixture in the American civil justice system. Courts and commentators have described asbestos litigation as "an elephantine mass,"[1] a "multi-billion-dollar crisis,"[2] a "job-eating blob"[3] and a "court perennial."[4] Although thirty years ago, many in the legal community knew that asbestos litigation was going to be big, few would have guessed that courts today would still be grappling with ways in which to

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[1] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

[2] Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 383 (1993).

[3] Editorial, *The Job-Eating Asbestos Blob*, WALL ST. J., Jan. 23, 2002, at A22, [hereinafter *Asbestos Blob*], *available at* 2002 WL-WSJ 3383766.

[4] Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, *available at* 2001 WL-WSJ 2856111.

deal with an exploding number of filings. In fact, many people do not even realize that asbestos litigation is still an issue. They think that it is a relic of the past. They are wrong. As we will show, the current situation is a litigation nightmare, and, unless steps are taken now to address the crisis, it will continue to be a problem in the future.

While one might think that because "use of new asbestos essentially ceased in the United States in the early 1970's,"[5] asbestos cases would be decreasing; in fact, the opposite is true. The number of new asbestos filings is increasing, and according to most estimates, will continue to be a major legal and policy problem for many years (if not decades) to come.[6] For example, from 1993 to 1999, the number of pending cases doubled—from 100,000 cases to more than 200,000 cases throughout the country.[7] From 1997 to 1999, new filings against individual defendants ranged from 20,000 to over 60,000 for individual defendants each year.[8] Armstrong World Industries reported receiving 40,200 new claims for the first three-quarters of 1999 and 71,000 claims for all of 1998.[9] Kaiser Aluminum reported 29,700 new claims for the first three-quarters of 1999 and 22,900 claims for 1998.[10] GAF Corporation reported 42,200 new claims during the first three quarters of 1999.[11] W.R. Grace & Co. reported 20,629 new claims during that same period.[12] All of these companies are now in bankruptcy.

Like the number of asbestos cases being filed, the size of

[5] *See In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 737 (E. & S.D.N.Y. 1991), *vacated* 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

[6] *See, e.g.*, Michael E. Angelina & Jennifer L. Biggs, *Sizing Up Asbestos Exposure*, *available at* http://www.tillinghast.com/tillinghast/publications/periodicals/emphasis/Emphasis_2001_3/2002041814.pdf (visited Sept. 18, 2002).

[7] *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 27 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Edley Statement].

[8] *See* H.R. REP. NO. 106-782, at 18 (2000).

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

jury awards in asbestos cases is also on the rise. For example, in March of 2001, a Texas jury awarded twenty-two plaintiffs a total of $35 million for damages including "future physical impairment" and "future medical costs" despite the fact that these claimants were awarded no damages for a present physical injury and may never become seriously ill.[13] In October of 2001, a Mississippi jury awarded $150 million to six plaintiffs "who are not sick from asbestos and may never become so."[14] The plaintiffs were awarded $25 million apiece because their exposure to asbestos-containing products in the workplace, often decades ago, allegedly places them "at risk" for developing an illness at some point in the future.[15] In November of 2001, another Texas jury awarded $3 million to three plaintiffs who were exposed to asbestos at an aluminum plant.[16] "Their attorney said the verdict was reached even though two plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past asbestos exposure."[17]

The increase in asbestos claims and rise in verdicts are acutely affecting the parties involved in asbestos litigation. An example is the Manville Personal Injury Settlement Trust. The Manville Trust was established to deal with asbestos compensation claims against Johns-Manville Corp., which in 1982 was the first major asbestos defendant to file for bankruptcy. In 2000, the Manville Trust received over 58,000 claims, which is nearly twice as many claims as the Trust received in 1999.[18] In 2001, over 69,000 claims were filed against the Manville Trust, prompting the Trust to announce

[13] *Two Asbestos Defendants Hit with $35 Million Verdict*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

[14] Patti Waldmeir, *The Need for Damage Limitation*, FIN. TIMES (FT.COM), Nov. 15, 2001, *available at* 2001 WL 28473877.

[15] Margaret Cronin Fisk, *Jury Awards Six Asbestos Plaintiffs $25 Million Each*, NAT'L L.J., Nov. 12, 2001, at B1.

[16] *See Texas Jury Awards $3 Million in Asbestos Exposure Cases*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001).

[17] *Id.*

[18] Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, *available at* 2001 WL-WSJ 29680683.

that it would have to lower payments to claimants due to the increase in claims.[19] Truly injured individuals have become victims of this avalanche of new claims.

Other companies are being forced into bankruptcy as a result of the avalanche of new asbestos claims pouring into the tort system. In fact, "the process is accelerating."[20] In 2000, Babcock & Wilcox Co., Pittsburg Corning Corp., Owens Corning and Armstrong World Industries, Inc. declared bankruptcy. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. Early in 2002, RHI Refractories Holding Co., the world's leading producer of refractory materials for the steel industry, was forced to seek bankruptcy protection for two of its United States subsidiaries (Harbison-Walker Refractories Co. and North American Refractories Co.) as a result of asbestos liability claims.[21] Porter-Hayden Co. and Kaiser Aluminum Corp. also were forced to file for Chapter 11 reorganization in early 2002.[22] To date, approximately sixty companies have been driven into bankruptcy.[23]

As more and more "traditional" asbestos defendants enter bankruptcy, the list of companies affected by asbestos litigation has grown and is no longer limited to "traditional

[19] *Id.*

[20] *In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom.* Collins v. MacMillan Bloedel, Inc., 532 U.S. 1066 (2001).

[21] *See* William Hall, *Asbestos Claims Force RHI to Seek Protection for U.S. Arm*, FIN. TIMES (FT.COM), Jan. 8, 2002, *available at* 2002 WL 3302344; William Hall, *RHI Forced to Seek Protection for U.S. Business*, FIN. TIMES (FT.COM), Jan. 7, 2002; Alexei Barrionuevo, *Halliburton's Asbestos Liability May Gain Clarity As Harbison Files for Chapter 11*, WALL ST. J., Feb. 15, 2002, at A2, *available at* 2002 WL-WSJ 3386190.

[22] *See* Robert Guy Matthews, *Kaiser Aluminum Files for Bankruptcy Under Chapter 11*, WALL ST. J., Feb. 13, 2002, at A4, *available at* 2002 WL-WSJ 3385837; Peter Geier, *Porter-Hayden Bankrupt*, THE DAILY REC. (Baltimore, Md.), Mar. 19, 2002, *available at*, http://www.mddailyrecord.com.

[23] *See* AM. ACADEMY OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 17 (Dec. 2001). The monograph lists fifty-two asbestos-related bankruptcies. Several companies declared bankruptcy after the monograph was issued. *See also* Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, MEALEY'S BANKR. REP.: ASBESTOS 1 (Aug. 2001).

defendants" that manufactured or sold asbestos. Recently, 3M Co. and Halliburton Co. watched, along with retired persons and others who invested in these trusted companies, as their stocks plummeted after juries imposed sizable verdicts on each for asbestos claims.[24]

The current system of asbestos litigation has become unworkable. A wise federal judge in Pennsylvania recognized problems in asbestos litigation over a decade ago. He observed:

> Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure.[25]

In the decade that has passed since this statement was made, the situation has only become worse.[26] The current situation is a crisis not only for defendants, many of whom have already been forced into bankruptcy as a result of asbestos liability, but also for individuals who suffer or will suffer from asbestos-related injuries.

Due to the increase in asbestos claims, many seriously ill individuals may not receive timely or proper compensation. In addition, other claimants in the civil justice system may find "justice delayed" as they are forced to wait behind long lines of asbestos claims to have their day in court.

Ironically, the recent explosion in asbestos claims may have been prompted by the very mechanisms that were intended to help resolve asbestos claims more efficiently.[27] In order

[24] *Asbestos Blob*, *supra* note 3; Susan Warren, *Halliburton Stock Falls Nearly 43% After Recent Asbestos Verdicts*, WALL ST. J., Dec. 10, 2001, at B2, *available at* 2001 WL-WSJ 29680262.

[25] *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir. 1986).

[26] *See* Edley Statement, *supra* note 7 (noting that between 1993 and 1999, "the already grim [asbestos litigation] situation . . . deteriorated").

[27] *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judg-*

to help the truly sick have their claims heard promptly and to ensure that individuals will be compensated if their claims are successful, courts should reinstate the fundamental rules of justice that have been ignored for the sake of expediency in asbestos cases.[28]

This article will outline the practices that have led to the deluge in asbestos filings. Many of these practices, when originally adopted by the courts, appeared to be creative and helpful ways in which to curb excesses in asbestos litigation. We now know, however, that these practices have led to more asbestos filings rather than less. After explaining the problems with the current system, the article also proposes changes which, if adopted, could help courts resolve asbestos claims more equitably for injured plaintiffs who need compensation; these changes would also ease unfair burdens on judges.

I. THE UNINTENDED CONSEQUENCES OF EXPEDIENT HANDLING OF ASBESTOS CLAIMS

The recent increase in filings is easily explainable when one looks at the ways in which courts have attempted to deal with asbestos litigation. Many judges, overwhelmed with the number of asbestos cases on their docket, have allowed consolidation of claims that are totally different in kind, have shortened discovery procedures (if discovery is taken at all) and have allowed questionable scientific evidence to be presented in their courtrooms. As one judge has recently observed:

> Think about a country circuit judge who has dropped on her 5,000 cases all at the same time. . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The

es: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 AM. J. TRIAL ADVOC. 247 (2000).

[28] *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); The Hon. Griffen B. Bell, *Asbestos Litigation and Judicial Leadership: the Courts' Duty to Help Solve the Asbestos Litigation Crisis*, at http://www.nlcpi.org/books/welcome.htm.

> judge does not purposely ignore, fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.[29]

Similarly, the Rand Institute for Civil Justice noted that in response to the large volume of asbestos litigation, beginning in the 1980s, trial courts looked for ways to "manage asbestos caseloads more efficiently so as to reduce public and private transaction costs."[30] Although, at the time, these efforts by judges were "widely admired and imitated by fellow federal and state court judges,"[31] hindsight has shown that making it easier to file asbestos claims has simply invited plaintiffs' lawyers to file thousands of additional claims.

Obviously, this is a bad result for our society. Sound public policy suggests that the focus of asbestos litigation should be directed toward holding defendants who are true wrongdoers responsible and compensating people who are truly injured. Instead, in some places the focus of attorney efforts has been on stockpiling cases, rather than pursuing compensation for seriously injured individuals.[32] Some plaintiffs' law firms have "built up 'inventories' of tens of thousands of asbestos cases."[33] Noted Mississippi plaintiffs' attorney Richard Scruggs has acknowledged that "[a]sbestos litigation has become a cottage industry . . . [s]ome attorneys are building their practices on these mass production inventory asbestos settlements."[34] Some firms, seeking to "buil[d] up [their] inventories" of cases, have

[29] *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 27 (1999) (statement of the Hon. Conrad L. Mallett, Jr., former Chief Justice, Michigan Supreme Court).

[30] STEPHEN CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 25 (Rand Inst. for Civil Justice ed., 2002).

[31] *Id.*

[32] *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36; Roger Parloff, *The $200 Billion Miscarriage of Justice*, *at* http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc_id=206477; Eric Roston, *The Asbestos Pit*, *at* http://www.time.com/time/magazine/article/0,9171,1101020311-214107,00.html (last visited Mar. 9, 2002).

[33] *See* Schmitt, *supra* note 4.

[34] *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17 MEALEY'S LITIG. REP.: ASBESTOS 1, 7 (Mar. 2002) [hereinafter *Medical Monitoring and Asbestos Litigation*].

attempted to recruit asbestos plaintiffs by driving through working class areas with vans set up with x-ray machines.[35] Plaintiffs can get a free x-ray to determine if they show any signs of exposure to asbestos in return for signing a forty percent contingency fee agreement.[36] One solicitation said: "Find out if you have MILLION DOLLAR LUNGS!"[37] It is doubtful that this type of solicitation, which sounds more like an advertisement for a lottery than an attempt to attract injured individuals, actually helps to reach individuals who are sick and who would not otherwise have sought out an attorney. It is far more likely that this type of solicitation merely assists plaintiffs' attorneys in "stocking up" on their "inventory" of asbestos claims.

A. *Compensation of Unimpaired Claimants*

One of the biggest dilemmas in asbestos litigation is how to handle unimpaired claimants—that is, plaintiffs who are not presently sick. Unimpaired claimants account for a large portion of new asbestos filings. One company has estimated that "as many as 80% of its asbestos settlements are paid to unimpaired people."[38] In addition, the Supreme Court of the United States has said that "up to one half of asbestos claims are now being filed by people who have little or no physical impairment."[39]

[35] *In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 748 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d. Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (working in conjunction with unions, plaintiffs' lawyers have "arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque"); Eagle-Picher Indus. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when [the] suit is filed.").

[36] *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341.

[37] *See id.*; *see also In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. at 748.

[38] Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12, *available at* 2001 WL-WSJ 2850312.

[39] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Edley & Weiler, *supra* note 2, at 393). The American Academy of Actuaries estimates that more than 90% of claimants are alleging nonmalignant injuries. *See* JENNIFER L. BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS 1 (December 2001), *available at* http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf.

In tort law, a plaintiff is traditionally required to demonstrate an injury before courts are willing to allow recovery,[40] so one might wonder how it is possible that a majority of the claimants in asbestos cases are unimpaired. The answer is twofold. First, courts are increasingly willing to recognize as an "injury" internal changes in a plaintiff that in some cases can only be seen on an x-ray and may never impair the claimant's health.[41] Second, some courts have been willing to recognize claims for medical monitoring in cases in which a plaintiff has been exposed to a hazardous substance but is not sick.[42]

There is a spectrum of injuries that can result from exposure to asbestos. Mesothelioma, which is linked to asbestos exposure, is a very serious disease and is often fatal. Lung cancer and asbestosis are two other sicknesses that can be caused by asbestos. The "injury" that is often attributed to unimpaired plaintiffs, however, is pleural thickening. Essentially, this means that the plaintiffs have some spots or markers on their lungs but may never become sick as a result of their exposure to asbestos.[43] In a recent Mississippi case, the plaintiffs' lawyer acknowledged that the plaintiffs did not actually have asbestosis but claimed that his clients were suffering from "shortness of breath and spots on the lung."[44] The same plaintiffs' lawyer conceded, however, that "most of [the plaintiffs] have not missed a day of work in their lives."[45] In addi-

[40] *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (10th ed. 2000).

[41] *See, e.g.*, *infra* notes 44-46 and accompanying text.

[42] *See infra* notes 58, 59 and accompanying text.

[43] *See The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the Senate Subcomm. on the Judiciary*, 106th Cong. 17-23 (1999) (prepared statement of Christopher Edley, Jr., Professor, Harvard Law School) (noting that plaintiff's sue "seeking compensation for pleural conditions which are a mere marker of asbestos exposure. Although these conditions can be detected by medical tests, they generally do not cause impairment to lung function and they are not early warning signs of more serious conditions such as cancer.").

[44] *See* Jerry Mitchell, *Staggering Jury Verdicts Draw Calls for Tort Reform*, CLARION-LEDGER (Jackson, Miss.), Oct. 30, 2001, at A1.

[45] *Jury Awards $150 Million in Asbestos Case*, ASSOC. PRESS NEWSWIRE, Oct.

tion, one of the plaintiffs, a senior citizen, acknowledged that he walks three to four miles daily.[46] Therefore, because courts have allowed "spots" on an x-ray to fulfill the requirement that a plaintiff show an injury, plaintiffs are being permitted to bring suits in cases in which the plaintiff is not presently sick and may never become sick.

Another way in which unimpaired claimants have been allowed to proceed in the tort system is by asking courts to recognize a new cause of action for medical monitoring. In *Metro North Commuter Railroad Co. v. Buckley*,[47] the United States Supreme Court considered, and rejected, a claim for medical monitoring under the Federal Employers' Liability Act (FELA). The plaintiff, Michael Buckley, was clearly exposed to asbestos. Mr. Buckley maintained the steam tunnel pipes in New York City's Grand Central Terminal.[48] As a pipefitter, Mr. Buckley "hammer[ed], slice[d] and pull[ed]" asbestos-containing insulation off of pipes, releasing asbestos fibers into the air.[49] Asbestos dust so thoroughly covered Mr. Buckley that he testified that he could taste it in his mouth, and he and his fellow workers were called "the snowmen of Grand Central."[50]

Yet despite Mr. Buckley's exposure to asbestos, the Supreme Court declined to recognize a tort law cause of action for Mr. Buckley's medical monitoring costs.[51] The Court reasoned that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring."[52] Current estimates indicate that the number of individuals exposed to asbestos is probably near 27 million.[53] In a medical monitoring claim, that exposure alone entitles an individual to a remedy. Therefore, under

28, 2001, *available in* WL APWIREPLUS.

[46] *See* Parloff, *supra* note 32, at 154.

[47] 521 U.S. 424 (1997).

[48] *Buckley*, 521 U.S. at 446.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 440.

[52] *Id.* at 442.

[53] CARROLL ET AL., *supra* note 30, at 13. The American Academy of Actuaries estimates that as many as 100 million people in the United States may have been exposed to asbestos. *See* BIGGS ET AL., *supra* note 39.

a medical monitoring theory each of those 27 million individuals may be entitled to a remedy, whether they are injured or not. As the Supreme Court has indicated, however, recognition of medical monitoring could lead to "a 'flood' of less important cases (potentially absorbing resources better left available to those more seriously harmed)."[54]

Although the Supreme Court refused to recognize medical monitoring under FELA, a federal statute, the supreme court of each state is still empowered to determine whether medical monitoring will be recognized in that state.[55] States that have recently addressed medical monitoring, such as Nevada,[56] Alabama[57] and Kentucky[58] have concurred with the reasoning of the United States Supreme Court in *Buckley* and refused to recognize it as a cause of action. There are still a minority of states that recognize such claims.[59] In the states that have recognized medical monitoring, one of the ways in which it has been used is to bring claims on behalf of individuals exposed to asbestos.[60]

The relaxation of the injury requirement provides only a partial explanation for the increase in unimpaired claimants. There are other reasons for the rise in claims by unimpaired claimants. In some cases, concerns about the statute of limitations may prompt lawyers to file suit on behalf of claimants before the claimants are actually sick. As one court has observed, some unimpaired claimants file claims "because they are aware of the latent and progressive nature of asbestos-related disease and because they fear that their claims might

[54] *Buckley*, 521 U.S. at 442.

[55] *See generally* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057 (1999); James A. Henderson & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

[56] *See* Hinton v. Monsanto Co., 813 So. 2d 827 (2001).

[57] *See* Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001).

[58] Wood v. Wyeth-Ayerst Labs., 2002 WL 1940664 (Ky. Aug. 22, 2002).

[59] *See, e.g.*, Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

[60] *See, e.g.*, Dragon v. Cooper/T. Smith Stevedoring Co., 98-1375 (La. App. 4 Cir. 1/6/99), 726 So. 2d 1006 (permitting a class action for medical monitoring for seamen exposed to asbestos).

be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability."[61] Another reason may be that plaintiffs' lawyers are aware that many traditional asbestos defendants are going bankrupt and wish to seek compensation now out of fear that it will not be available later. Finally, some plaintiffs' lawyers may be aware of the huge awards being given to other unimpaired plaintiffs and think "why wait for an injury to manifest itself if I can receive compensation now?"[62]

Although a plaintiff may have legitimate reasons for desiring to file suit when he or she is unimpaired, allowing cases with unimpaired claimants to proceed is unsound public policy. As the United States Supreme Court has clearly recognized, these cases crowd court dockets and make it more difficult for courts to adjudicate the claims of truly injured individuals. As the Supreme Court appricated, when unimpaired claimants are successful, their claims divert resources away from seriously ill individuals in order to compensate individuals who may never become sick. As a bipartisan federal study has noted, "[t]here is a risk . . . that satisfaction of relatively minor claims may exhaust assets that ought to be preserved for more serious claims."[63]

B. *Mass Consolidations*

Mass consolidation of cases is one of the innovative mechanisms that courts have developed in order to deal with asbestos litigation. In the mid-1980s judges began to allow cases to be consolidated because it promoted efficiency and allowed judges to dispose of many cases at once.[64] Initially, judges allowed small scale consolidations in which there were "very similar

[61] *In re* Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991).

[62] *See* Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA TODAY, July 15, 1999, at A17, *available at* http://www.usatoday.com.

[63] *See* Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States, 187 F.R.D. 293, 303 (1999)

[64] *See The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89-104 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School).

liability issues . . . and careful attention [was paid] to the precise claims raised by each plaintiff against each defendant."[65] Due to the success of the small consolidations and the increasing numbers of asbestos cases being filed in their districts, judges subsequently allowed massive consolidation of cases. One of the most notable mass consolidations was a Mississippi case in which there were 1738 plaintiffs from around the country consolidated into one case.[66] After the trial of twelve plaintiffs resulted in a jury verdict of $48.5 million, the judge pressured the defendants into settling the remainder of the claims on terms that the defendants thought were particularly harsh.[67]

Similarly, in 1999, the West Virginia Supreme Court established a Mass Litigation Panel to streamline the handling of the more than 25,000 asbestos cases pending in that state.[68] According to the plan established by the West Virginia Supreme Court, all pending asbestos cases would be resolved in 2002 through "mass trials."[69] Three defendant railroad companies and an underwriter objected, noting that disposing of such an enormous number of cases in such a short amount of time would effectively prevent the defendants from interviewing plaintiffs or having them examined by doctors.[70] As a result, the companies filed a federal lawsuit against West Virginia, claiming that the Mass Litigation Panel denies them due process of law. Despite the lawsuit filed by the defendants, however, Judge Martin Gaughan recently entered an order scheduling mass trials for "all asbestos cases pending between the parties," with the trial set to begin on September 23, 2002.[71]

Notably, of the 5000 cases that have been filed against the three railroads in West Virginia, 4400 have been brought by

[65] *Id.* at 91.

[66] *Id.* at 93.

[67] *Id.*

[68] *See* W. VA. TRIAL CT. R. 26.01; *see also* Michelle Saxton, *Railroads File Lawsuit Against W. Va. Supreme Court*, ASSOC. PRESS NEWSWIRE, Nov. 29, 2001.

[69] *See* Saxton, *supra* note 67.

[70] *See id.*

[71] *See In re* West Virginia Asbestos Personal Injury Litigation, 01-C-9000 (Cir. Ct. Kanawha County, W. Va. Feb. 26, 2002) (Trial Scheduling Order).

plaintiffs "who do not work, live or pay taxes in West Virginia."[72] Moreover, fifty-seven percent of the cases pending against the railroads nationwide have been filed in West Virginia.[73] The high percentage of cases filed by out-of-state plaintiffs suggests that "efficient" handling of asbestos claims does not help courts dispose of cases, it merely attracts more cases.

The efficiencies that were created by consolidating cases ten or fifteen years ago are now overshadowed by the inequities that result from enormous consolidations. In these mass consolidations, impaired claimants are mixed with unimpaired claimants, and the plaintiffs who may not have been exposed to asbestos at the same time or place are lumped together in the same case. Consolidation of these cases does not promote efficiency; it merely forces defendants to settle. In addition, consolidation of impaired claimants with unimpaired claimants is bad for the impaired plaintiffs because they often end up receiving smaller awards than they would if their cases were considered individually.[74] As Professor Christopher Edley of Harvard Law School has noted:

> [L]oading a large number of [impaired and unimpaired] claims together produces a bet-the-company risk for the defendants, making settlement more likely. In the settlement, then, the higher potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.[75]

[72] Dennis O'Brien, *Norfolk Southern Sues W. Va. over Asbestos Ruling*, VIRGINIAN-PILOT & LEDGER-STAR, Nov. 30, 2001, at D1.

[73] *See id.*

[74] *See id.*; Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 507 (1994) ("Those with serious cancer diseases want their cases pressed first and most strongly. Clients with generally less serious asbestosis and pleural-plaque symptoms do not want to wait, even though their damage is less severe. All of these cases cannot be tried at one. Mixing the cases for trial and settlement may result in a lower recovery for the more seriously injured, but generally it will result in a quicker fee for counsel.").

[75] Edley Statement, *supra* note 7, at 33.

Mass consolidations are not only unsound because impaired claims and unimpaired claims are often mixed. The cases are also unsound because they raise the question of whether, in groups of thousands of plaintiffs, the attorneys involved can adequately represent each of the plaintiffs. For example, in one case, a group of asbestos defendants reached a settlement with a group of 4000 plaintiffs in five states.[76] When the awards to the various groups of plaintiffs were leaked to the public, it appeared that the amount of the awards depended more on where the plaintiffs lived than on their injuries.[77] Plaintiffs from Mississippi, the state in which the case was brought, each received, on average, $263,000.[78] The Texas plaintiffs, the closest group of out-of-state plaintiffs, received $43,500 each.[79] Over 2500 plaintiffs who lived farther away (in Ohio, Indiana and Pennsylvania), but were just as badly injured, received only $14,000 each.[80] The disappointed plaintiffs are now suing the attorneys who created this unbalanced settlement.[81]

C. *Abandoning Procedural and Evidentiary Principles*

In an effort to streamline asbestos litigation procedures, many courts departed from traditional procedural and evidentiary principles in asbestos cases. In some jurisdictions, basic discovery procedures are virtually nonexistent. Judges, in an effort to move cases through their dockets have pressured defendants to settle asbestos cases, even in cases where defendants may not have even had a chance to conduct basic discovery regarding the plaintiffs.[82]

[76] Stephen Labaton, *Settlement Reached in Huge Asbestos Case; But Unequal Awards to Victims Inspire Talk of Legislation to Fix System*, MILWAUKEE J. SENTINEL, Jan. 23, 2000, at 13A, *available at* 2000 WL 384759.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See* Huber v. Taylor, No. 02-304 (W.D. Pa. Feb. 6, 2002).

[82] *See, e.g.*, Cosey v. E.D. Bullard Co., Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County Sept. 16, 1998). In the mass consolidation *Cosey* case in Mississippi,

In addition, many courts are allowing questionable "expert" evidence to be presented in support of asbestos claims. In *Daubert v. Merrell-Dow Pharmaceuticals*[83] and *Kumho Tire Co. v. Carmichael*,[84] the United States Supreme Court sent a clear message to federal judges that they must take an active role as a "gatekeeper" in the courtroom and filter out unreliable scientific evidence. The Supreme Court's imperative naturally applies in asbestos cases, where the judge's gatekeeper role may be particularly important with regard to testimony regarding the possible causes of a plaintiff's alleged illness. In fact, the legitimacy of expert testimony suggesting that the defendant's pharmaceutical product was a cause of an illness was at the heart of the *Daubert* case. In mesothelioma cases, causation may not be questioned because mesothelioma has been almost exclusively identified with asbestos exposure.[85] Yet other diseases that can be caused by asbestos, such as lung disease, can also be caused by a variety of other factors.[86]

The *Daubert* rule was based on the Federal Rules of Evidence and does not apply automatically to state judges. Nevertheless, the rules of evidence in most states are virtually identical to those that apply in federal courts. For example, in *E.I. duPont de Nemours & Co. v. Robinson*,[87] the Texas Supreme Court adopted *Daubert* as the relevant standard for evaluating

the judge, after the trial of twelve plaintiffs, forced the defendants to settle the cases of nearly 2000 other plaintiffs. *See* Schwartz & Lorber, *supra* note 27, at 255.

[83] 509 U.S. 579 (1993).

[84] 526 U.S. 137 (1999).

[85] Recently some scientists have questioned whether Simian Virus 40 (a virus apparently contained in certain polio vaccines given to individuals in the 1950s) is a contributing factor in the development of mesothelioma. *See, e.g.*, C. Mulatero, *Simian Virus 40 and Human Pleural Mesothelioma*, 54 THORAX 60 (1999), *available at* http://www.thorox.bmjjournals.com.

[86] *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 44 (1999) (prepared statement of Alex G. Little, M.D., past president, American College of Chest Physicians) (stating that mesothelioma "is usually associated with a history of asbestos exposure" whereas "[l]ung cancer has several known causes" and "[c]onsiderable evidence exists to suggest that such 'other' cancers in fact are not caused by asbestos).

[87] 923 S.W. 549 (Tex. 1996).

expert testimony under the relevant Texas Rule of Evidence.[88] Like the United States Supreme Court, the Texas Supreme Court emphasized the important role trial judges play in screening out unreliable expert testimony.[89]

At least one trial court judge in Texas has taken the directives of the United States Supreme Court and the Texas Supreme Court seriously. Recently, Judge Jim Lovett of Lamar County, Texas, applied the *Daubert/Robinson* standard to testimony that was being offered by two "asbestos experts" and found that the proffered testimony was based on "junk science."[90] Judge Lovett ruled that the testimony of the two experts would not be allowed in any pending or future cases filed by the plaintiffs' law firm.[91] Judges who are conscious of their role as a gatekeeper in asbestos cases are not only displaying good judgment in following the advice of higher courts; they are also furthering sound public policy by discouraging baseless lawsuits from being brought in the courts.

D. *Improper Defendant Identification*

It is no secret that as the "traditional" asbestos defendants go out of business, plaintiffs' attorneys have begun to look for a new "generation" of asbestos defendants. Prominent Mississippi plaintiffs' lawyer Richard Scruggs has critically described the problem as the "endless search for a solvent bystander."[92] Mr. Scruggs also recognized that "[m]ost of the companies that were culpable in promoting the sale of asbestos-containing products have been held accountable, and most of them have gone bankrupt."[93] Another asbestos lawyer openly has acknowledged that he is "trying to turn this litigation away from

[88] *See Robinson*, 923 S.W. at 556.

[89] *See id.* (noting that "[t]he trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards" of *Daubert*).

[90] *Expert Testimony Stricken from Pending, Future Asbestos Cases in Lamar County, Texas*, 16 MEALEY'S LITIG. REP.: ASBESTOS 9 (July 2001).

[91] *Id.*

[92] *Medical Monitoring and Asbestos Litigation*, *supra* note 34, at 1, 5.

[93] *Id.*

its traditional targets."[94] In a recent study, Rand noted that in 1983, approximately 300 companies were defendants in asbestos litigation.[95] Rand estimates that today, there are over 6000 companies that are defendants in asbestos litigation.[96]

One problem with the ever-widening scope of defendants in asbestos litigation is that some defendants are being held liable where there is little evidence that their product harmed a claimant. In Texas, one company was found liable for damages simply because the plaintiffs testified that they remembered seeing the defendant company's sealant around the refinery where they worked.[97] Similarly, a jury imposed a $90 million jury verdict against 3M Co. (the company that produces Post-it® notes) because respirators made by the company, which were labeled for nontoxic use, were alleged not to have completely protected the plaintiffs from asbestos-related illnesses.[98]

II. RESTORING THE RULE OF LAW

The solution to the asbestos problem, if there is to be one, will most likely have to come from the states, particularly the state courts. The Supreme Court has made it clear in *Amchem Products, Inc. v. Windsor*[99] and *Ortiz v. Fibreboard Corp.*[100] that it will not approve mass settlements of asbestos cases under Rule 23 of the Federal Rules of Civil Procedure. To date, Congress has failed to enact legislation to address this problem, despite calls for such legislation from the Supreme Court[101] and the Judicial Conference of the United States.[102] While additional measures may be introduced in Congress, until Congress acts, the solution to the problem lies with the state judges before whom most asbestos cases are brought. There are a number of measures that judges can take in order to discourage individuals who may have been exposed to asbestos, but are not sick, from bringing claims in their courtrooms.

[94] Schmitt, *supra* note 4.

[95] *See* CARROLL ET AL., *supra* note 30, at 49. A.M. Best estimates that "the defendant pool has increased to more than 2,400 companies." *See* Raji Bhgavulta, *Asbestos: A Moving Target*, BEST'S REVIEW, *at* http://www.bestreview.com/2001-09/pc_asbestos.html (last visited Feb. 19, 2002).

[96] *See* HENSLER ET AL., *supra* note 30, at 49.

[97] *The Asbestos Blob*, WALL ST. J., July 2, 2001, at A14, *available at* 2001 WL-WSJ 2868353.

[98] *See id.*

[99] 521 U.S. 591 (1997).

[100] 527 U.S. 815 (1999).

[101] *See Ortiz*, 527 U.S. at 821 (noting that the asbestos problem "defies customary judicial administration and calls for national legislation").

[102] *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, 6 MEALEY'S LITIG. REP.: ASBESTOS 3 (Mar. 1991) (concluding that federal legislation is needed to solve the asbestos litigation problem).

A. *Stop Mass Consolidation*

The theory behind consolidation is that it saves time and resources for both the court and the parties involved. Today, however, mass consolidation often results in a few cases of truly sick individuals being mixed with hundreds or thousands of cases involving unimpaired claimants. In most cases, defendants faced with hundreds or thousands of claims that have been amassed in one case will settle, regardless of the individuals merits of each case. As Judge Jack Weinstein, perhaps the most experienced jurist in the United States in providing oversight to settlements in mass tort cases such as asbestos, DES and Agent Orange, has noted:

> Often the pressure for block settlements comes from plaintiffs' attorneys who hope to get something for a large mass of questionable cases. Some attorneys are selective about the cases they take, while others will take almost any case without regard to its merit, hoping for a global settlement. The attorneys with thousands of cases are almost invariably in this second category.[103]

The solution to the mass consolidation issue is relatively straightforward and simple: courts should not permit mass consolidation of asbestos cases, especially in cases where the consolidation will result in mixing unimpaired claimants with impaired claimants.

[103] Weinstein, *supra* note 74, at 521.

B. Apply Sound Science

Courts need to apply sound standards in order to determine if a plaintiff is suffering from an asbestos-related disease. Some asbestos claims have been allowed based upon plaintiffs' subjective claims, rather than sound medical criteria.[104] Independent organizations, such as the American Thoracic Society of the American Medical Association, have adopted objective minimum criteria for determining if a plaintiff is suffering from an asbestos-related disease. Although these standards are set by an independent organization with no bias toward defendants, in many asbestos cases medical screeners have diagnosed asbestos-related "injuries," where plaintiffs failed to meet minimum diagnostic criteria set by the American Thoracic Society.[105] In response to the questionable scientific methods employed in many mass screening cases, Senior United States District Judge Charles R. Weiner, who oversees the federal multidistrict asbestos litigation that has been consolidated in the Eastern District of Pennsylvania, has recently issued an order that all cases initiated through a mass screening shall be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.[106] His ruling should be followed elsewhere.

According to Rand, approximately 27 million individuals have been exposed to asbestos.[107] Many of those individuals, thankfully, will never become ill. Courts must carefully consider, which of those exposed individuals have been injured and

[104] *See, e.g.*, *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 3063, 1566 (D. Haw. 1990) (noting that cases are often diagnosed based on "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings).

[105] *See, e.g.*, Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *2, *8, *22 (D. Kan. May 30, 1990) (finding that medical screeners disregarded standards set by American Thoracic Society and reported that workers had asbestos-related "injuries" despite the fact their medical readings had no clinical significance, and stating that the screening program produced a "steady flow of faulty claims" and a "fraud on the court").

[106] Administrative Order, *In re* Asbestos Prods. Liab. Litig. (No. VI) (E.D. Pa. Jan. 16, 2002) (MDL875).

[107] *See* CARROLL ET AL., *supra* note 30, at 13.

need compensation. Objective criteria, such as that set forth by the American Thoracic Society, should be used in evaluating whether a plaintiff has an asbestos-related disease.

C. Require Plaintiffs to Prove Their Injuries Were Caused by the Defendants in the Case

The search for new defendants is not surprising, especially if one considers that some attorneys have made a business out of pursuing claims of unimpaired claimants. With increasing numbers of unimpaired claimants and decreasing numbers of solvent manufacturers and sellers of asbestos-containing products, for some plaintiff attorneys the solution is to find new defendants. Plaintiffs' attorneys are "'cast[ing] the litigation net further' in an endless effort 'to find corporate pockets deep enough to satisfy the vast numbers of pending and future tort claims.'"[108]

The problem with this strategy is that in the early stages of the asbestos litigation, the culpability of the defendants was clearly established. For the new generation of defendants, however, their culpability is much less clear. Nevertheless, these peripheral defendants are being dragged into the asbestos litigation morass and hit with multi-million dollar verdicts, even though they never manufactured or sold asbestos. Plaintiffs should be required to provide proof that they were harmed by a product made or marketed by a specific defendant.

D. Use an Inactive Docket System

As noted above, the Rand Institute for Civil Justice estimates that approximately 27 million individuals have been exposed to asbestos.[109] Common sense indicates that each of the 27 million individuals who have been exposed to asbestos cannot be compensated with a multi-million dollar verdict, particularly since most of them will never get sick. Yet many claimants are filing cases before they are actually impaired. As legal scholars have noted, "While there are understandable

[108] *See* Edley Statement, *supra* note 7, at 28.

[109] CARROLL ET AL., *supra* note 30, at 13.

legal and emotional reasons why these premature suits are being filed in huge numbers, their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."[110]

One way in which courts have dealt with the claims of unimpaired claimants is through the use of inactive dockets.[111] Inactive dockets are "judicially-managed docketing and calendaring systems that alter the priority of trials of asbestos cases."[112] The Commonwealth of Massachusetts,[113] Cook County (Chicago), Illinois,[114] and Baltimore, Maryland,[115] have each established an inactive docket system. Although the inactive docket systems vary slightly, the basic idea is the same.[116] Plaintiffs who have been exposed to asbestos can register with the inactive docket. Once the plaintiff registers with the inactive docket, the statute of limitations is tolled and will not run on the individual's claim. If, at a later date, the plaintiff develops asbestos-related injuries, or mesothelioma or other cancers, the plaintiff's case may be moved from the inactive docket to active docket. At that time, the plaintiffs case may proceed.

Some have suggested that inactive dockets are a bad idea because if plaintiffs are required to wait until they actually become injured in the future, the defendants will have gone bankrupt. Based upon the recent string of defendant bankruptcies, however, it is virtually certain that if courts do *not* stop paying unimpaired claimants, if and when future claimants become ill, the present defendants will almost certainly have gone bankrupt long ago.

[110] Edley & Weiler, *supra* note 2, at 393.

[111] *See* Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001); *Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, COLUMNS—ASBESTOS: RAISING THE BAR IN ASBESTOS LITIG. 2 (Feb. 2002) (discussing various inactive docket plans and reporting that state judges who oversee asbestos dockets in states with inactive dockets find the plans fair and effective); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 568 (1992).

[112] *See* Schuck, *supra* note 111, at 542.

[113] *See* Commonwealth of Mass., Middlesex Superior Court, "Massachusetts State Court Asbestos Personal Injury Litigation Order," Sept. 1986 (on file with authors).

[114] *See* Order to Establish Registry for Certain Asbestos Matters, *In re* Asbestos Cases (Cir. Ct., Cook County, Ill. Mar. 16, 1991).

[115] *See* Order Establishing an Inactive Docket for Asbestos Personal Injury Cases, *In re* Asbestos Personal Injury and Wrongful Death Asbestos Cases, No. 9234451 (Cir. Ct., Baltimore, Md. Dec. 9, 1992).

[116] Behrens & Parham, *supra* note 111.

III. STOP RETRIBUTION AGAINST DEFENDANTS WHO TRY TO ENFORCE THEIR LEGAL RIGHTS

One of the more disturbing aspects of asbestos litigation is that if defendants try to enforce their basic legal rights, they are sometimes threatened by plaintiffs' lawyers with a "claim dump" of hundreds or even thousands of claims. If asbestos defendants make motions to dismiss or move for summary judgment, they may be singled out and penalized by plaintiffs' lawyers. The same is true if defense counsel insist on plaintiffs relying on good science, a right guaranteed to defendants in most jurisdictions. If defendants utilize discovery procedures that are proper, they may be punished. If they move to break up joinder of cases that are dissimilar, they may be punished. Judges should encourage defendants to exercise their legal rights and should discourage retaliatory case filings.

IV. CONCLUSION

State trial and appellate judges could make a great deal of progress in addressing the current asbestos litigation crisis. Putting a premium on expediency and efficient resolution of cases made sense at one point in the history of asbestos litigation, but now that approach is leading to an extraordinary number of new asbestos filings. These filings are often made by lawyers representing unimpaired persons bringing claims against peripheral defendants.

State court judges can stop this onslaught of claims by enforcing very basic rules of law. The changes to the current asbestos litigation system suggested in this article would not hinder the ability of sick individuals to receive compensation for their asbestos-related diseases. To the contrary, they will help sick claimants have their claims heard and resolved quick-

ly and fairly. By these simple actions, judges can stem the tide of bankruptcies, preserve defendants' assets, help truly injured plaintiffs and create a fair resolution to the ever-growing asbestos litigation crisis.

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Thursday, November 15, 2001

The need for damage limitation.

EXPOSURE. THE GOVERNMENT MUST STEP IN.

Believe it or not, some problems are just too big to be solved by litigation.

The courts cannot rapidly and fairly compensate thousands of September 11 victims, so their loss is to be soothed by an administrative process that avoids litigation altogether.

The US government, in one of the biggest civil justice reforms ever imposed from above, has stepped in to handle the problem itself. Those left bereaved by the disasters can submit claims against the airlines direct to a government-backed compensation fund. They can still choose to sue - but they are being heavily discouraged from doing so.

Yet the problem of asbestos exposure is, if less dramatic, even bigger. Anyone who has ever entered a building more structurally complex than a dung-smeared hut has probably been exposed to asbestos. Yet virtually all the traditional asbestos companies have already been sued into bankruptcy.

So the rest of us who share this potentially lethal exposure to the modern world are left with no choice but to strike further afield: to sue those who installed asbestos products, or used them as building materials (at a time when the stuff was a cliche of contemporary construction), or manufactured masks to keep the dust at bay. As ever more asbestos defendants flee to the bankruptcy courts, nobody is left to sue but those removed from the evil by several degrees of sep-aration.

So, in a suitably expansionist spirit, a Mississippi court last month awarded $150m to six plaintiffs who are not now sick from asbestos and may never become so. The defendants sued 3M, which makes dust masks, and two other companies, on the grounds that they may in future suffer asbestos-related diseases because their work, often decades ago, brought them into contact with asbestos-containing products in boiler rooms, schools and other locations.

The plaintiffs were driven to the courthouse not by suffering but by the entrepreneurial zeal of their lawyers, who screened scores of potential plaintiffs in a handful of rural Mississippi counties, hoping to recruit them

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to the role of asbestos victim.

Indeed, doctors retained by these and other plaintiffs' attorneys "screened" so many county residents - administering physical exams and chest X-rays to determine their potential as litigants - that the judge had trouble assembling a jury for the case that did not include others screened as potential litigants.

And following the recent ruling, the litigant pool can only grow. In Jefferson, another Mississippi county, the number of asbestos claimants exceeds the total of county residents. Holmes county, where the recent judgment was rendered, cannot be far behind.

Asbestos defendants are hoping the sheer audacity of the Holmes county award could provoke a backlash. For example, Willie Alexander, one of the plaintiffs, was awarded $25m solely because he once worked for 18 months in a shipyard and now has tiny spots on his chest X-ray. The only doctor who testified to his condition was paid by the plaintiffs' lawyer and even the plaintiffs' doctor could make only the most speculative case for future impairment.

He said Mr Alexander had an increased risk of contracting cancer because of his exposure to asbestos-bearing materials and the dark spots on his X-ray.

The defence countered that it was just as true to say that the plaintiff would bear an increased risk of dying in a aeroplane crash simply by boarding an aircraft, on the grounds that those who fly are more likely to die from air disasters than those who remain on the ground. Though exposure to asbestos certainly increases the possibility of an eventual cancer, it does not make it a probable outcome.

But for every healthy claimant who demands compensation now for suffering that may never arise, there is a dying victim whose pain cannot be compensated because the defendants have run out of money settling dubious claims.

The problem has become so severe that Judge Jack Weinstein of New York, a federal judge who has taken the lead in asbestos litigation, has summoned both sides to a meeting next month to consider what to do.

With the media and the plaintiffs' lawyers continuing to encourage what he called "a flood of new claims", and with the bankruptcy of asbestos defendants cutting off funds available for victims, "there may be a misallocation of funds, inequitably favouring those who are less needy over those with more pressing asbestos-related injuries", he wrote - strong language for a judge.

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He noted that the oldest asbestos settlement fund, the Manville Personal Injury Settlement Trust, had been so drained by claims that it could now pay only five cents on the dollar of claims, down from 10 cents only a few months ago.

Meanwhile, with every new verdict, the market value of potential asbestos defendants diminishes further. Ivy Zelman, the top-rated housing analyst at Credit Suisse First Boston, recommended earlier this month that investors avoid all companies with any potential asbestos liability, however peri-pheral.

The list of such defendants could easily include companies such as Ford and General Motors, which are being targeted for the use of asbestos in brake linings, not to mention most of the rest of the Fortune 500, depending how loosely liability is defined.

This, surely, is the stuff of which judicial emergencies are made: viable companies threatened by decades-old activities in which they share, surely, only the tiniest portion of guilt; innocent victims deprived of their rights; and dubious claimants overcompensated from scarce resources.

Congress is now busy with other things. But eventually it will turn its attention to other national emergencies, far from the war front. When it does, it should again consider the asbestos emergency. Courts can solve some problems - but this, apparently, is not one of them. It is time for the government to step in to help out.

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RESPONSIBLE PUBLIC POLICY DEMANDS AN END TO THE HEMORRHAGING EFFECT OF PUNITIVE DAMAGES IN ASBESTOS CASES

Mark A. Behrens
Barry M. Parsons

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RESPONSIBLE PUBLIC POLICY DEMANDS AN END TO THE HEMORRHAGING EFFECT OF PUNITIVE DAMAGES IN ASBESTOS CASES

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I. INTRODUCTION

A decade ago, the number of asbestos claims pouring into the tort system had reached such crisis proportions that the Chief Justice of the United States Supreme Court appointed a special Ad Hoc Committee of the United States Judicial Conference to study the problem and recommend possible solutions. In its subsequent report, the Ad Hoc Committee summarized the "most objectionable" aspects of the asbestos litigation:

> dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[1]

Unfortunately, in the years since the Committee's report, "the already grim situation has [further] deteriorated."[2] The number of pending cases nationwide doubled in the six years between 1993 and 1999, rising from 100,000 cases to more than 200,000.[3] Even today, the number of new asbestos-related filings continues to explode.[4] Much of this explosion is driven by aggressive law

1. JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 3 (1991) [hereinafter JUDICIAL CONFERENCE REPORT].

2. *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 29 (1999) [hereinafter Prof. Edley Testimony] (statement of Christopher Edley, Jr., Professor, Harvard Law School); *see also The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. 79 (1999) (statement of Dean Paul R. Verkuil, Cardozo Law School) ("The rate of new filings and the growing number of pending cases vividly demonstrates a basic fact—the asbestos litigation problem is not getting better, it is getting worse.").

3. *See* Prof. Edley Testimony, *supra* note 2. This figure may be conservative. In their Form 10Q filings with the Securities and Exchange Commission for the third quarter of 1999, Armstrong World Industries reported 182,000 pending claims, GAF Corp. reported 114,000, USG Corp. reported 100,000, W.R. Grace & Co. reported 102,894, and Kaiser Aluminum reported 110,599. *See* H.R. REP. NO. 106-782, at 18 (2000) (citing SEC filings). During the first nine months of 2000, the Manville Trust—established as part of Johns-Manville Corp.'s bankruptcy reorganization plan after that company sought bankruptcy protection in 1982—received 39,500 new claims, which was more than the total filings in 1999. *See Manville Trust Files Statement for Third Quarter*, 22 No. 20 ANDREWS ASBESTOS LITIG. REP., Nov. 9, 2000, at 7.

4. *See* Patricia G. Houser & David T. Austern, *Manville Personal Injury Settlement Trust*, *in* MEALEY'S ASBESTOS CONFERENCE 1999, at 415 (showing that almost 500,000 claims are likely to be filed against Manville Personal Injury Settlement Trust over the next 50 years) (citing estimates prepared by B. Thomas Florence, Ph.D., ARPC, Wash., D.C., Aug. 1999).

firms using mass-marketing and screening techniques and other "client drives" to attract potential claimants.[5] Strikingly, most of these new claimants have little or no impairment.[6]

The financial pressure of this never-ending flood of asbestos claims is forcing an increasing number of companies to file for bankruptcy.[7] For example, Federal-Mogul Corp.; USG Corp.; W.R. Grace & Co.; and G-I Holdings, Inc., formerly known as GAF Corp. (GAF), all filed for bankruptcy in 2001.[8] The chairman of Federal-Mogul—which manufactures engine bearings, pistons, gaskets, and seals for auto makers and the spare-parts market—explained that: "The decision was based on the fact that asbestos liabilities weren't going to diminish. In fact, they were going to grow."[9] GAF also believed its options were exhausted when "despite settling more than 500,000 claims

5. *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 748 (Bankr. E. & S.D.N.Y. 1991) (working "[i]n conjunction with unions," plaintiffs' lawyers have "arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque"), *vacated by*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."); *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. 100 (1991) (statement of Lester Brickman, Professor, Cardozo Law School) ("The existence of tens of thousands of such claims is accounted for by mass screenings of industrial workers financed by plaintiffs' lawyers and usually done with the active assistance of local union officials. Often, mobile x-ray vans brought to plant sites are used for the screenings."); Patrick Lysaught, *Forces Shaping Mass Tort Litigation: Strategies for Defense Counsel*, 67 DEF. COUNS. J. 165 (Apr. 2000) ("Type in 'asbestos litigation' . . . and almost any search engine will take the user to a number of plaintiffs' attorneys' websites."); Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL. ST. J., Mar. 5, 2001, at A1 (reporting on the use of Internet websites devoted to asbestos cases to attract new clients).

6. *See* Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL. ST. J., Jan. 8, 2001, at B12 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people"); *see also* Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992) (proposing docketing plan to preserve assets for impaired claimants).

7. *See Asbestos Liability System Needs Immediate Overhaul*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Apr. 9, 2001, at 18; Quenna Sook Kim, *Asbestos Claims Continue to Mount*, WALL. ST. J., Feb. 7, 2001, at B1.

8. *See* Patricia Callahan, *USG Files for Chapter 11 After Referring to Senate's Power Shift as Latest Setback*, WALL. ST. J., June 26, 2001, at A4; Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12; Mitchell Pacelle, *Federal-Mogul Files in Bankruptcy Court After Estimate for Asbestos Liability Soars*, WALL ST. J., Oct. 2, 2001, at B11; Susan Warren, *W.R. Grace Seeks Bankruptcy Protection In the Face of Asbestos-Related Litigation*, WALL ST. J., Apr. 3, 2001, at B8.

9. *See* Pacelle, *supra* note 8.

to the tune of $1.5 billion, there was no ebb in the tide of personal injury claims."[10] GAF's general counsel reported a "dramatic increase in the number of claims" against the company in 2000.[11] W.R. Grace also reported that the pace of asbestos filings against it had skyrocketed as well, "with 81% more claims filed [in 2000] than in 1999."[12] In the fourth quarter of 2000, the number of claims filed against W.R. Grace "more than doubled over the year-earlier period, and the rate continued to accelerate in the first quarter of [2001]."[13] In 2000, four otherwise solvent companies with asbestos liabilities—Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc.—filed for bankruptcy.[14]

Thus far, asbestos litigation has cost American companies over $21.6 billion and may ultimately cost another $43.4 billion during the next twenty years, resulting in a total of $65 billion, according to a recent study by ratings agency A.M. Best.[15] At least thirty-three companies have been driven into bankruptcy,[16] and others are likely to follow.[17]

Many plaintiffs' lawyers recognize the problem they helped create. One lawyer admitted that "[t]he liabilities [of the asbestos defendants] exceed the value of assets of all these companies . . . . There's nothing you can get but the company."[18] Another plaintiff's lawyer candidly stated: "The asbestos companies are going bankrupt faster than you and I can eat the food."[19]

10. Kim, *supra* note 8.

11. *Id.*

12. Warren, *supra* note 8; *see also* Susan Warren, *Grace Considers Chapter 11 Filing Amid Rising Asbestos Litigation*, WALL ST. J., Jan. 30, 2001, at A4.

13. Warren, *supra* note 8.

14. Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2000, at B4; *see also* Mark D. Plevin et al., *Don't Bankrupt Asbestos*, LEGAL TIMES, Mar. 19, 2001, at 68.

15. Christopher Oster, *Some Insurers Face Shortfall in Reserves For Costly Claims Related to Asbestos*, WALL ST. J., May 7, 2001, at A4.

16. *See Federal-Mogul Corp. Declares Bankruptcy, Cites Asbestos Suits*, 23 NO. 20 ANDREWS ASBESTOS LITIG. REP., Oct. 11, 2001, at 3 (noting that ten companies had declared bankruptcy due to asbestos litigation since January 2000 and more than 30 companies had done so since 1982).

17. *See* Schmitt, *supra* note 5.

18. F.T. McCarthy, *Asbestos claims: Still Killing:*, ECONOMIST, Aug. 19, 2000, at 55.

19. *See* Schmitt, *supra* note 5.

Bankruptcy is bad for everyone involved in the ever-growing "elephantine mass of asbestos cases."[20] It can mean loss of jobs or wages for managers and employees. Employees, including hundreds or thousands of hourly workers, may lose their investments in company stock—money that they need for retirement. Other groups with pension funds invested in the debtor's stock lose out as well.[21]

Bankruptcies also jeopardize the ability of current and future claimants to obtain full and prompt compensation for their injuries. As the United States Court of Appeals for the Third Circuit recently wrote: "The resources available to persons injured by asbestos are steadily being depleted. The increase in bankruptcy filings by asbestos defendants illustrates that the process is accelerating. . . . This continued hemorrhaging of available funds deprives current and future victims of rightful compensation."[22] Each new bankruptcy puts "mounting and cumulative financial pressure on the remaining defendants, whose resources are limited."[23]

Punitive damage awards play an important role in speeding corporate defendants down the path to bankruptcy, threatening the availability of funds needed to compensate sick plaintiffs now and in the future.[24] Punitive damages are not standard civil damages, but are awarded "over and above compensatory

20. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

21. *See* Dunn v. Hovic, 1 F.3d 1371, 1403 (3d Cir.) (Weis, J. dissenting) ("Payment of [punitive damage] awards not only jeopardizes the ability to provide compensation for future plaintiffs, but also, by forcing companies into bankruptcy, injures employees, customers, and trade creditors who took no part in, and had no knowledge of, the wrongdoing."), *modified in part*, 13 F.3d 58 (3d Cir. 1993); Partick J. Hagan et al., *Totalling Up the Costs of Asbestos Litigation: Guess Who Will Pay the Price?*, 9 TEMP. ENVTL. L. & TECH. J. 1, 14 (1990) (discussing the broad economic consequences when a company declares bankruptcy).

22. *In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000).

23. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993).

24. *See* Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims . . . ."); Bishop v. Gen. Motors Corp., 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs."); Froud v. Celotex Corp., 437 N.E.2d 910, 914 (Ill. App. Ct. 1982) (Sullivan, J., specially concurring) ("[I]t cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality."), *rev'd*, 456 N.E.2d 131 (Ill. 1983).

damages"[25]—providing a "windfall recovery" to plaintiffs.[26] Plaintiffs' lawyers now seek punitive damages in virtually every asbestos case they file,[27] and they have shown the ability to "ring the bell" with success at trial.[28] The following table highlights some recent examples:

Table I: *Recent Case Examples*

Date	State	Comp. Dmgs (Million)	Punitive Dmgs (Million)	Total Dmgs (Million)	Comment
Sept. 2001	Tex. (jury)	$70	$60	$130	Asbestos personal injury and wrongful death lawsuit involving five plaintiffs.[29]
Aug. 2001	Tex. (jury)	$40.5	$15	$55.5	To a mesothelioma victim, his wife, and their children.[30]
Mar. 2001	Mo. (jury)	$3	$7	$10	To a couple claiming that exposure to asbestos in fireproofing at the husband's workplace caused his mesothelioma.[31]
Feb. 2001	Tex. (jury)	$3	$15	$18	To a single plaintiff diagnosed with asbestosis.[32]
Sept. 2000	Tex. (jury)	$1.9	$3.5	$5.4	To the family of a mesothelioma victim.[33]
May 2000	Ill. (jury)	$9.1	$25	$34.1	To a former roofer with mesothelioma.[34]
Feb. 2000	Tex. (jury)	$4.3	$15	$19.3	To the widow of a deceased chemical operator who contracted lung cancer.[35]
Aug. 1999	Fla. (appeal)	$1.8	$31	$32.8	Florida Supreme Court affirmed punitive damages; exposure case brought by one individual.[36]
June 1998	Tex. (appeal)	$4.6	$5.2	$9.8	Texas Supreme Court upheld an appeal involving four consolidated actions.[37]
Feb. 1998	Tex. (jury)	$15.6	$100	$115.6	To twenty-one plaintiffs for asbestos exposure.[38]
	Totals	$153.8	$276.7	$430.5	

25. *Collins*, 233 F.3d at 812; *see also* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1004 (1999); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can And Should Meet The Challenge Issued By The Supreme Court Of The United States in* Haslip, 42 AM. U. L. REV. 1365, 1368-70 (1993).

26. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981).

27. Judge William W. Schwarzer, *Punishment Ad Absurdum*, CAL. LAW., Oct. 1991, at 116, 116.

28. Jury Awards of punitive damages do not necessarily reflect final judgments. Many punitive damage awards are later reduced or overturned on appeal. Texas, for example, has enacted statutory limits: two times economic damages up to $200,000 plus non-economic damages up to $750,000. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon Supp. 2002).

29. *See Texas Jury Awards $130 Million to Five Plaintiffs In Asbestos Suit*, 23 NO. 19 ANDREWS ASBESTOS LITIG. REP., Sept. 27, 2001, at 3.

30. *See Meso Victim and Family Awarded $55 million by Texas Jury*, 23 NO. 18 ANDREWS ASBESTOS LITIG. REP., Sept. 13, 2001, at 3.

31. *See Couple Awarded $10 Million After Exposure to Asbestos in Fireproofing*, 23 NO. 6 ANDREWS ASBESTOS LITIG. REP., Mar. 29, 2001, at 3.

32. *See Texas Jury Finds Insulation Maker Liable For $18 Million*, 23 NO. 4 ANDREWS ASBESTOS LITIG. REP., Mar. 1, 2001, at 3.

These awards are sometimes even fueled by courts. For example, the Montana Supreme Court recently ruled that W.R. Grace & Co. could *not* introduce evidence regarding the adverse effect a punitive damages judgment could have on the company's ability to pay sick claimants in approximately 97,000 pending cases nationwide, including eighty-four in the same Montana county.[39] The court ruled that evidence of these other

33. *See $5.4 Million Awarded to Family of Mesothelioma Victim in Texas*, 22 NO. 16 ANDREWS ASBESTOS LITIG. REP., Sept. 14, 2000, at 4.

34. *See Illinois Jury Awards $34 Million to Former Roofer With Mesothelioma*, 22 NO. 9 ANDREWS ASBESTOS LITIG. REP., June 8, 2000, at 3.

35. *See Texas Jury Issues $19.3 Million Verdict to Chemical Worker's Widow*, 22 NO. 4 ANDREWS ASBESTOS LITIG. REP., Mar. 17, 2000, at 5.

36. *See Fl. Sup. Ct. Upholds $31M Punitive Damages Award Against Owens Corning*, 21 NO. 15 ANDREWS ASBESTOS LITIG. REP., Sept. 3, 1999, at 15 (upholding a punitive damage award over 18 times the compensatory award, despite a statutory limit of 3 times). The Florida Supreme Court held that the defendant's net worth along with the nature of the conduct fell under an exception allowed when "clear and convincing" evidence demonstrates that the award is "not excessive in light of the facts and circumstances." *Id.*

37. *See Tx High Court Upholds $5.2 Punitives Award Against OCF*, 20 NO. 10 ANDREWS ASBESTOS LITIG. REP., June 19, 1998, at 3.

38. *See Carborundum Co. Hit With $115.6 Million Verdict in 21 Texas Cases*, 13 NO. 3 MEALEY'S LITIG. REP.: ASBESTOS, Mar. 6, 1998, at 5-6.

39. *See* Finstad v. W.R. Grace & Co.-Conn., 8 P.3d 778, 786-87 (Mont. 2000).

claims was "not relevant to the jury's determination of the amount of punitive damages."[40] This ruling drew a sharp dissent from two justices on the court who characterized it as "beyond imagining" that "the existence of the approximately 97,000 asbestos cases pending against W.R. Grace nationwide could *fail* to relate to its financial affairs and condition."[41] Less than one year after the majority's ruling, W.R. Grace filed for bankruptcy.[42]

The *in terrorem* effect of punitive damages on cases that settle also threatens the availability of funds needed to compensate sick claimants.[43] Yale law professor George Priest has observed:

> [T]he availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation.[44]

Judge Joseph Weis, Jr. of the United States Court of Appeals for the Third Circuit also astutely recognized this problem:

> [T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.[45]

40. *Id.* at 787.

41. *Id.* at 789 (Gray, J., concurring in part and dissenting in part).

42. Warren, *supra* note 8 (reporting in April 2001 that W.R. Grace had become the "latest" in a growing list of companies to file for bankruptcy protection to "dig...out from under an avalanche of asbestos-related litigation"). The *Finstad* case had been decided eight months earlier in August 2000. *Finstad* 8 P.3d at 778.

43. *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, of civil matters filed but not tried").

44. George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996). Professor Priest's observation is further confirmed by a separate study by the Pacific Research Institute for Public Policy that concluded:

> Both the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or even frivolous cases.

STEVEN HAYWARD, PACIFIC RESEARCH INST. PUBLIC POL'Y, THE ROLE OF PUNITIVE DAMAGES IN CIVIL LITIGATION: NEW EVIDENCE FROM LAWSUIT FILINGS 8 (1996), *available at* http://www.pacificresearch.org/pub/sab/entrep/punitive1/punitive2.html.

Imposition of punitive damages in asbestos cases also poses a significant obstacle to settlement negotiations and blocks the ability of claimants to recover quickly for their injury or the loss of a loved one. As one federal district judge wrote, "[b]arring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs."[46]

Furthermore, federal and state courts have expressed strong concerns that multiple punitive damage awards, such as those in asbestos cases, may violate constitutionally protected due process rights.[47] Commentators in the field have expressed the same

45. Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir.) (Weis, J., dissenting) (*citing Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. 137-38 (1992)), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

46. Schwarzer, *supra* note 27, at 116.

47. *See* Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989) ("[T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment. The right to assess punitive damages in mass tort litigation permits a jury to punish but not to execute a company."), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds sub nom.* Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir. 1990); *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982); *see also* King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."); *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) (arguing that unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process"); Morse v. S. Union Co., 38 F. Supp. 2d 1120, 1126 n.12 (W.D. Mo. 1998) ("While the Missouri courts seem not to have considered whether the likelihood of multiple claims should limit punitive damages recoveries, I believe such a factor may be required by Due Process."), *aff'd*, 174 F.3d 917 (8th Cir.); McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("[D]ue process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct."); Magallanes v. Superior Ct., 213 Cal. Rptr. 547, 554 (Cal. Ct. App. 1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the case is tried should be punished again when the second, or the tenth, or the hundredth case is tried.").

concerns.[48]

For all of these reasons, it is time to turn off the tap of punitive damages in asbestos cases. Repetitive punishment of defendants for acts allegedly committed decades ago no longer serves any useful purpose in the asbestos context. To the contrary, those who are likely to be hurt the most from continued punitive damages overkill are current and future asbestos claimants.[49] Many people who suffer asbestos-related injuries may be unable to obtain basic compensation for their injuries if funds are further depleted by earlier filing claimants who either obtain windfall punitive damage recoveries or inflated settlements as a result of the threat of such awards.[50] Others who will suffer include stockholders, pensioners, employees, and customers of the defendant companies.[51] Wasting limited and diminishing assets in this way "is a tragedy of major proportions."[52]

Fortunately, two federal courts—the Eastern District of Pennsylvania (the federal "MDL Panel") and the Court of Appeals for the Third Circuit—have recently taken aggressive steps to preserve assets for asbestos claimants who are or may become sick. In *In re Collins*, the Third Circuit approved the MDL Panel's decision to sever all punitive damage claims from

48. *See* Schwartz & Behrens, *supra* note 25; Dennis Jones et al., *Multiple Punitive Damages Awards For A Single Course of Wrongful Conduct: The Need For A National Policy To Protect Due Process*, 43 ALA. L. REV. 1 (1991); Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 ADELPHIA L.J. 101 (1992). *Cf.* Richard J. Mahoney, *Punishment Without End*, WASH. POST, June 15, 1995, at A3 (criticizing repetitive punitive damage awards for the same past activity as "unfair and excessive punishment" that even worse amounts to a "hidden litigation tax" on the American public).

49. *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir. 1984) (observing that "later victims, not the enterprise, effectively bear the punishment" of multiple punitive awards in asbestos cases).

50. *See* JUDICIAL CONFERENCE REPORT, *supra* note 1, at 27; *see also* DAN B. DOBBS, LAW OF REMEDIES, § 3.11(8) (2d ed. 1993) ("If the first verdict for punitive damages . . . represents the appropriate level of punishment, it may be seriously unfair to inflict additional punishments in all subsequent cases. Besides the unfairness, such awards may destroy a valuable business and may exhaust its assets so that later victims of the same tort collect nothing at all.").

51. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (stating that the cost of needless deterrence is passed on to consumers and "can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin").

52. JUDICIAL CONFERENCE REPORT, *supra* note 1, at 29; *see also* H.R. REP. NO. 106-782, at 19 (2000) (reporting that bankruptcies by asbestos defendants harm "shareholders, employees, and communities affected, as well as future claimants who now must look elsewhere for compensation").

federal asbestos cases before remanding compensatory damage claims for trial.[53] In so doing, the Third Circuit urged state courts to adopt similar standards as responsible public policy designed to protect the dwindling pool of funds available to compensate sick claimants.[54]

This article will first trace the evolution of the Third Circuit's management of punitive damage claims in federal asbestos cases as shown through the court's recent *In re Collins* opinion, and in an earlier decision, *Dunn v. Hovic*.[55] The next section reviews how some state courts are managing their asbestos dockets in a responsible manner to deal with punitive damage claims. The article concludes with specific steps that other state courts should immediately take to preserve assets for impaired future claimants.

II. PUNITIVE DAMAGE CLAIMS IN ASBESTOS CASES BEFORE THE THIRD CIRCUIT AND MDL PANEL

A. Dunn v. Hovic

In *Dunn v. Hovic*, the entire Court of Appeals for the Third Circuit reviewed an earlier panel's decision to affirm a judgment of the United States District Court for the Virgin Islands awarding $500,000 in compensatory damages and $2 million in punitive damages (reduced from $25 million) to a plaintiff injured as a result of exposure to an asbestos insulation product.[56] Defendant Owens-Corning Fiberglas Corp. (OCF) argued that multiple punitive damage awards in asbestos cases should be prohibited as a matter of Virgin Islands law or federal due process.[57]

The Third Circuit indicated that it "[did] not disagree with the concerns that have been expressed about punitive damages awards, particularly in the asbestos cases" but stopped short of granting OCF's request.[58] The court explained that the existing case law did not support striking multiple punitive damage

53. 233 F.3d 809, 812 (3d Cir. 2000).

54. *See id.*

55. Dunn v. Hovic, 1 F.3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

56. *Id.*

57. *Id.* at 1374.

58. *Id.* at 1387.

claims on due process or common law tort grounds.[59] The court also expressed discomfort about being a "pioneer" in this area because it "ha[d] not been chosen for that role as directly as have the state supreme courts."[60] Furthermore creating a rule that would treat Virgin Islands plaintiffs differently from plaintiffs "on the mainland" made the court uneasy.[61] The appellate court therefore decided not to adopt "such an activist role on what is essentially a policy matter."[62] The court did, however, reduce the remitted punitive damage award by an additional fifty percent, holding that "the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation."[63]

In a powerful dissent, Judge Weis set forth numerous arguments against repetitive punitive damages in asbestos cases.[64] Citing a decision of the United States Court of Appeals for the Fifth Circuit,[65] Judge Weis argued that "the avalanche of compensatory claims against asbestos manufacturers has surely served as more of a punishment and deterrent than individual punitive assessments in isolated cases against manufacturers of other types of products."[66]

Judge Weis expressed grave concern that punitive damage awards were competing with assets needed to compensate injured claimants.[67] He drew a sharp distinction between the functions of compensatory damages and "windfall" punitive damage awards: "Every dollar expended on punitive awards, as well as those expended in compensatory damages, will diminish, eventually to the point of exhaustion, resources available for paying future plaintiffs' claims. There is, however, an important distinction. Compensatory damages are a remedy for injuries suffered. Punitive awards are not."[68] Judge Weis made clear his

59. *Id.* at 1387-88.
60. *Id.* at 1387.
61. *Id.*
62. *Id.*
63. *Id.* at 1391 (reducing the already remitted punitive award from $2 million to $1 million).
64. *Id.* at 1393 (Weis, J., dissenting). Judge Weis summarized the number and growth of personal injury actions, the existence of property damage claims, and the effect of the litigation on asbestos defendants. *See id.*
65. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984).
66. *Dunn*, 1 F.3d at 1397 (Weis, J., dissenting).
67. *Id.* at 1398-99.
68. *Id.* at 1399.

belief that asbestos litigation had reached the point that the assets of the defendants would be exhausted before all claimants could obtain compensation.[69] He also stated that "punishment and deterrence cannot justify extra-compensatory awards when they penalize future claimants by depleting available funds."[70] Judge Weis dissented in practical and forward-looking terms:

> It may be argued that it would be unfair to disallow punitive awards at this point because current plaintiffs thus will not receive what earlier ones did. That is true. Nevertheless, such unevenness does not justify continued punishment of asbestos defendants. It would have been better had the matter of punitive damages been resolved at the beginning of the asbestos crisis, but it was not. Courts must grapple with the problem as it now exists. We are confronted with the alternative of permitting current plaintiffs to receive windfalls or stopping punishment that violates due process. The choice is obvious.[71]

B. *In re* Collins: *The Third Circuit Adopts a Rational Approach to Punitive Damages and Urges State Courts to Follow*

The Third Circuit addressed the issue of punitive damages in asbestos cases again in the case of *In re Collins*.[72] The case involved four individuals seeking damages for injuries resulting from exposure to asbestos.[73] Pursuant to the federal multidistrict litigation statute,[74] the plaintiffs' claims were transferred by the Judicial Panel on Multidistrict Litigation to MDL No. 875 (the federal "MDL Panel"), a case that includes all asbestos personal injury litigation in the federal courts.[75] The MDL Panel is managed by Senior Judge Charles R. Weiner of the Eastern District of Pennsylvania.[76] The MDL Panel severed plaintiffs' punitive damage claims "consistent with the [panel's] practice in multidistrict litigation asbestos cases over the past decade of

69. *Id.*
70. *Id.* at 1400.
71. *Id.* at 1403.
72. 233 F.3d 809 (3d Cir. 2000).
73. *Id.* at 810.
74. 28 U.S.C. § 1407(a) (1994).
75. *Collins*, 233 F.3d at 810.
76. *See generally Defendants Succeed in Transferring Three Cases to Asbestos MDL*, 23 NO. 19 ANDREWS ASBESTOS LITIG. REP., Sept. 27, 2001, at 9 (describing the successful argument by defendants in three asbestos cases seeking to transfer into the MDL court).

retaining demands for punitive damages while allowing the compensatory matters to proceed to trial."[77] Plaintiffs thus filed a writ of mandamus asking the Third Circuit to direct the MDL Panel to remand their punitive claims with their compensatory damages claims.

In an opinion written by Judge Weis, the dissenting judge in *Dunn*, the Third Circuit affirmed the MDL Panel's practice of severing punitive damage claims in federal asbestos cases. The court noted that the MDL statute gives the Panel "broad discretion . . . to carry out its assigned functions" of "'promot[ing] the just and efficient conduct of such [civil] actions.'"[78]

Even "more compelling" to the appellate court, however, was the "public policy underlying the practice of severing punitive damages claims."[79] The Third Circuit liberally quoted from the Judicial Conference Report of the Ad Hoc Committee on Asbestos Litigation:

> Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages.[80]

The court further noted that punitive damages represent a pure "windfall" for plaintiffs.[81] Expressing serious concern that such awards accelerate the depletion of funds needed to compensate impaired claimants,[82] the court stated that "the sick and dying, their widows and survivors should have their claims

77. *Collins*, 233 F.3d at 810.
78. *Id.* at 811-12 (second alteration in original) (quoting 28 U.S.C. § 1407(a) (1994)).
79. *Id.* at 812.
80. *Id.* (quoting JUDICIAL CONFERENCE REPORT, *supra* note 1, at 32).
81. *Id.*
82. *See id.*

addressed first."[83] The court went on to support the MDL Panel's decision, stating:

> The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. *It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls*; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand.[84]

In conclusion, the court criticized state courts that continue to allow successive punitive damages in asbestos cases: "*It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.*"[85]

C. *A Momentous Shift from* Dunn *to* Collins

The important shift from *Dunn* to *Collins* on the availability of punitive damages in asbestos cases evidences the Third Circuit's increasing sense of urgency regarding the worsening asbestos litigation environment. In *Dunn*, a majority of the circuit was unwilling to adopt an "activist role" in curbing asbestos punitive damage claims.[86] Judge Weis, in his dissent, called for an end to all punitive damages in asbestos cases.[87] In the years since *Dunn*, Judge Weis's position seems to have become the prevailing view of the both the MDL Panel and the Third Circuit. His influence can be seen through the MDL Panel's practice of severing punitive damage claims from compensatory damages claims; this practice has helped to preserve assets for asbestos claimants by effectively barring federal asbestos claimants from seeking punitive damages. Moreover, as *Collins* illustrates, a majority of the Third Circuit now seems to embrace the need for the judiciary to take an "activist role" in protecting assets for current and future asbestos claimants.

83. *Id.* (quoting *In re* Patenaude, 210 F.3d 135, 139 (3d Cir. 2000) (quoting Carlough v. Amchem, No. 93-215, slip op. at 8 (E.D. Pa. Apr. 15, 1993))).
84. *Id.* (emphasis added).
85. *Id.* (emphasis added).
86. Dunn v. Hovic, 1 F.3d 1371, 1387 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir. 1993).
87. *Id.* at 1399-1400 (Weis, J., dissenting).

The method by which the Third Circuit supported an end to multiple punitive damages is also important. The court chose not to rest its holding on the mantel of due process, which it had been reluctant to do in *Dunn* because of the lack of developed precedent. Instead, the court reinforced its view in *Dunn* that the decision to award punitive damages in asbestos cases is "essentially a policy matter."[88] On that basis, the court concluded that sound public policy requires an end to the "hemorrhaging" effect of punitive damage awards in asbestos cases.[89]

The Third Circuit's decision to stop this "hemorrhaging effect" rests on a well-founded public policy rationale: Punitive damages are designed to punish and to deter, but in asbestos litigation, both motives are moot. The crush of hundreds of thousands of claims for compensatory damages has punished the defendants and wiped out (by multiple margins) any profits made from the sale of asbestos products. Moreover, the compensatory damages combined with the significant legal costs associated with defending the sheer volume of claims will continue to plague and punish asbestos defendants for years to come. The defendants have been further punished by multiple and excessive punitive damage awards.

Similarly, the deterrence goal of punitive damages was served long ago. Use of new asbestos products "essentially ceased in the United States in the early 1970s."[90] In addition, the severe financial problems experienced by asbestos defendants have certainly deterred similar conduct by future actors. Punitive damage awards simply do not serve the public interest in this context. Indeed, important public policy goals would be thwarted by the ongoing levy of punitive damage awards in

88. *Id.*

89. *Collins*, 233 F.3d at 812.

90. *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 737 (Bankr. E. & S.D.N.Y. 1991), *vacated by*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993). Almost immediately after its creation in 1970, the Occupational Safety and Health Administration (OSHA) promulgated an initial regulation limiting asbestos exposure. *See* Air Contaminants, 36 Fed. Reg. 10,503, at 10,506 tbl.G-3 (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit asbestos exposure even further and to require special handling of asbestos products. *See* Emergency Standard for Exposure to Asbestos Dust, 36 Fed. Reg. 23,207 (Dec. 7, 1971); Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11,318 (June 7, 1972) (final standard). OSHA's asbestos regulations became progressively more restrictive, effectively precluding the use of asbestos in most commercial applications. *See generally* 29 C.F.R. § 1910.1001(c) (2001)(the current standard).

asbestos cases by endangering the ability of defendants to pay future claimants.

More importantly, the increasing number of bankruptcy filings by asbestos defendants demonstrates that punitive damages are directly competing with the tort system's ability to compensate claimants. Public policy is not served by wasting assets that should go to the injured or by forcing more companies into bankruptcy.[91] Indeed, as one judge recognized: "Balancing the benefits to be derived from continued imposition of punitive damages against the social and economic consequences of such a course of action, it appears that the continued imposition of punitive damages cannot be justified."[92]

III. WHAT STATE COURTS SHOULD DO

While legal analysts may debate generally when the line should be drawn to eliminate multiple punitive damage awards for the same act or course of conduct, it is clear that the line was crossed a long time ago in asbestos cases. As Judge Weis recognized in *Dunn*:

> It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.[93]

State courts must act now to protect the financial solvency of asbestos defendants so these companies can meet their obligations to injured claimants. While some courts have suggested that Congress may be the best forum for action,[94]

91. *See Dunn*, 1 F.3d at 1404 (Weis, J., dissenting) ("Courts must also remember that punitive damages are intended to 'sting,' not to destroy.") (citation omitted).

92. Judge R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 DICK. L. REV. 265, 296 (1983).

93. *Dunn*, 1 F.3d at 1399 (Weis, J., dissenting).

94. *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 313 (5th Cir. 1998) ("Congress is generally the body responsible for balancing competing interests and setting national policy. There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (quoting Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1327 (5th Cir. 1985)); W.R. Grace & Co.-Conn. v. Waters, 638 So. 2d 502, 505 (Fla. 1994) (stating that "[a]ny realistic solution to the problems caused by [multiple punitive

asbestos claimants and defendants no longer have the luxury of waiting for such a speculative remedy. The courts are responsible for creating many of the serious problems that exist today in the asbestos litigation environment.[95] For that reason, they should step forward to try to address those problems.[96] Already, a few state courts have taken responsible and reasonable steps to end punitive damages overkill in asbestos cases. They have severed, deferred, or indefinitely stayed punitive damage claims.[97]

For example, in Baltimore, Judge Marshall A. Levin has stayed all punitive damage awards in city asbestos cases until compensatory claims are satisfied.[98] In reaching his decision,

damage awards] in the United States . . . can only be effected by federal legislation") (citation omitted); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865-66 (Iowa 1994) ("We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one. . . . We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation."); Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986) ("At the state court level, we are powerless to implement solutions to the nationwide problems created by [multiple punitive damage awards].").

95. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 247-48 (2000) (arguing that an overriding focus on efficiently moving the massive volume of asbestos claims through the courts is leading to an increase in the number of cases and inflating damages).

96. *See* Edley & Weiler, *supra* note 23, at 401 ("The fact that the legislative ideal is probably unattainable only reinforces the responsibility of courts to address the crisis with imagination and urgency.").

97. The courts discussed in the text are not the only state courts to sever, defer, or stay punitive claims. For example, in Philadelphia, a three-judge panel has severed and deferred all pending and future punitive damage claims in the Philadelphia Court of Common Pleas. *See* Yancey v. Raymark Indus., No. 1186 (832) (Ct. Com. Pl. Phila. County Oct. 1986) (Mem. Op.) (order deferring punitive damages for one year to determine the outcome of several bankruptcies of defendants); *see also Third Circuit Rehears Dunn Arguments En Banc*, 8 NO. 1 MEALEY'S LITIG. REP.: ASBESTOS, Feb. 5, 1993, at 20 (reporting that the "Philadelphia Court of Common Pleas has a basic 'standing order' that all punitives are to be stayed"). In New York, at least some judges have severed and indefinitely deferred punitive damage claims in asbestos cases. *See $64.65 Million Awarded in Four Living Meso Cases*, 10 NO. 22 MEALEY'S LITIG. REP.: ASBESTOS, Dec. 15, 1995, at 23 (reporting on a New York case in which the trial court severed and deferred punitive damages indefinitely).

98. *See* Abate v. A.C. & S., Inc., No. 89236704, slip op. at 26 (Cir. Ct. Balt. City Dec. 9, 1992) (involving a consolidated action of 8,555 plaintiffs); *see also* Keene Corp. v. Levin, 623 A.2d 662, 663 (Md. App. 1993) (referencing Judge Levin's deferral of punitive damages "'until all Baltimore City plaintiffs' compensatory damages are paid'" in this subsequent action disputing aspects of the compensatory damage awards); *Baltimore Defendant: Judge had Authority to Defer Payments*, 8 NO. 2 MEALEY'S LITIG. REP.: ASBESTOS, Feb. 19, 1993, at 20 (highlighting several of the defendant's arguments in support of the deferral of punitive damages); *Final Judgments Entered in Baltimore*, 9 NO. 1 MEALEY'S LITIG. REP.: ASBESTOS, Feb. 14, 1994, at 12 (noting Judge Levin's reaffirmance of numerous prior orders and the deferral of punitive damage payments in this final judgment order for three prevailing sample plaintiffs).

Judge Levin commented that it "is manifestly unjust for a judicial system to allow relief based chiefly on the lottery of when a human being happens to become ill."[99] He based his ruling on a concern that future claimants would not be able to collect awards for compensatory damages:

> There is a very real threat that the unrestricted and simultaneous payment of punitive damages and compensatory damages will inevitably bankrupt all of the defendants in the asbestos litigation. . . . [T]his court is deeply concerned about the fact that the simultaneous payment of [such] damages will hurt crucially those claimants who are found to be entitled to fair compensation in the future. . . . The stark fact is that unless the payment of punitive damages is deferred, future deserving plaintiffs will be unable to collect even compensatory damages.[100]

Similarly, in Northampton County Pennsylvania, Administrative Judge Jack Panella recognized that while punitive damages "serve both retributive and deterrent functions[,] . . . the deterrent function will not be directly served in current asbestos litigation since asbestos is no longer manufactured."[101] Judge Panella acknowledged that additional punitive damage awards might have a deterrent effect upon similar future conduct,[102] but given the "onslaught of bankruptcies of asbestos producers," he believed that asbestos litigation had sufficiently instructed the manufacturers of *all types* of products that selling dangerous products "is not a profitable industry."[103] Judge Panella therefore has severed all punitive damage claims from discovery, pre-trial motions, and trial in his court.[104] Under his order, discovery relevant to punitive damages cannot even begin

99. *Abate*, No. 89236704, slip op. at 25.

100. *Id.* at 23-25.

101. Zambor v. Owens-Ill. Glass, Co., No. 1998-C-4532, at 6 (Ct. Com. Pl. Northampton County Pa. Jan. 11, 2001) (order severing punitive damages). Judge Panella also issued a Master Procedural Order severing punitive damages in all pending or future asbestos lawsuits in his court. *In re* Asbestos Litig., No. C0048AB200100003, at 6 (Ct. Com. Pl. Northampton County Pa. Jan. 11, 2001) (order to establish procedures for all asbestos cases).

102. *Zambor*, No. 1998-C-4532, at 6-7 (describing this "similar conduct" as that which is sufficiently "outrageous" to warrant punitive damages, such as that of *certain* well-documented manufacturers of asbestos products that were aware of the harmful effects of asbestos as early as the 1950s, yet continued to produce it).

103. *Id.* Judge Panella also opined that severance of punitive damage awards would lead to more focused trials and more realistic settlement negotiations. *Id.* at 7-8.

104. *In re Asbestos Litig.*, No. C0048AB200100003, at 2.

until a plaintiff obtains a favorable jury verdict on the compensatory damage claim.[105]

Following the rationale of these decisions and the *Collins* case, state courts should immediately implement one of the following procedures to protect the ability of current and future asbestos claimants to recover for their injuries.

A. *Strike Punitive Damage Claims*

"It should require no extended discussion to conclude that in establishing a proper priority, compensation for victims should rank first."[106] Courts that continue to award windfall punitive damages at trial or permit the threat of punitive damages to be used as leverage to inflate settlements are violating this basic principle. For the reasons articulated by the Third Circuit in *Collins*, state courts should begin to strike punitive damage claims in asbestos cases on public policy grounds.[107]

B. *Consolidate Cases for Pre-Trial Proceedings and Sever Punitive Damage Claims Before Remand*

If state courts are unwilling to strike punitive damage claims outright, they can develop a system similar to the federal MDL. On a state-wide basis, states can set up systems to consolidate all asbestos cases for pre-trial proceedings in one court. That court can then sever and retain punitive damage claims before the compensatory claims are remanded to other courts for trial. Another approach would be to consolidate cases for pre-trial purposes at the city or county level and then sever the punitive damage claims before remand. In either situation, courts severing punitive claims should either: (1) strike the claims on due process and public policy grounds, or (2) grant motions to strike the claims without prejudice and condition refiling on the plaintiff's presentation of proof that the defendant possesses sufficient assets to cover all future compensatory damage claims.

105. *See id.* Although Judge Panella allowed punitive damages claims to survive, he acknowledged that no punitive damage award has been allowed in Pennsylvania in an asbestos case since 1985. *Zambora*, No. 1998-C-4532, at 4.

106. Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

107. *See* Edley & Weiler, *supra* note 23, at 401 (looking to bankruptcy cases and urging courts of general jurisdiction to eliminate future punitive damages in asbestos litigation).

C. *Strike or Sever Punitive Damage Claims on a Case-by-Case Basis*

Individual courts can accomplish many of the same goals by striking punitive claims on public policy grounds or staying the claims until a plaintiff can demonstrate that all future compensatory damage awards against that defendant can be satisfied.

D. *Allow Post-Trial Introduction of Evidence*

If courts are unwilling to strike or sever punitive damage claims to address the problems facing current and future claimants as a result of punitive damage overkill, they should at least consider post-trial evidence of compensatory and punitive damage awards that have been or will be paid by the defendant.

Many courts that have addressed the various arguments against multiple punitive damage awards have refused to consider post-trial evidence of the effect of such awards on the defendant.[108] They have done so even when that evidence would surely demonstrate that the defendant's ability to pay future compensatory claims would be severely endangered by punitive damage judgments. Responsible public policy demands that judges at least consider post-trial evidence regarding a defendant's financial condition and how both compensatory and punitive damages could affect the recoveries of current and future claimants. After hearing this evidence, the court could either strike the punitive award or substantially reduce the amount by taking into account these other liabilities.

IV. CONCLUSION

"Punitive damages are a windfall to the recipients over and above compenstory damages to which they are entitled."[109] They are designed to punish and deter wrongdoing. In the context of asbestos cases, however, these twin goals have long since been met. At this point, sick claimants are punished the most by the "continued hemorrhaging of available funds."[110] Responsible

108. *See* Finstad v. W.R. Grace & Co.-Conn., 8 P.3d 778, 787 (Mont. 2000) (holding that other pending or potential litigation against a defendant is not a valid factor to consider when reviewing a punitive damage award).

109. *In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000).

110. *Id.*

public policy supports an immediate end to punitive damage awards in asbestos cases. The time has come for courts to say "enough is enough."

The federal MDL Panel that manages all asbestos personal injury litigation in the federal courts, the United States Court of Appeals for the Third Circuit, and several state courts have taken aggressive steps to preserve assets for asbestos claimants by severing punitive damage claims from asbestos personal injury cases. Other state courts should follow their lead.

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Business Insurance
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News

Asbestos continues to bite industry

DOUGLAS McLEOD

Asbestos liabilities, like a recurring bad dream, are rising again to haunt a new array of corporate defendants and their insurers.

Defying expectations that they would begin to fade with the arrival of the new millennium, asbestos claims are proliferating and settlement demands are rising 34 years after the first asbestos injury lawsuit was filed in Beaumont, Texas, in 1966.

In 2000, a rising tide of claims pushed five manufacturers and users of asbestos products into bankruptcy, which is the largest one-year total of asbestos-related bankruptcies in at least a decade. Those filing include building products makers Armstrong World Industries Inc., Owens Corning and Pittsburgh Corning Corp., and engineering firms Babcock & Wilcox Co. and Burns & Roe Enterprises Inc.

Last week, G-I, the privately held successor to GAF Corp., became the sixth and latest Chapter 11 casualty after paying more than $1.5 billion in asbestos claims and expenses since the 1970s.

More ominously, the Chapter 11 filings promise to speed another trend: Facing smaller recoveries from companies in bankruptcy, plaintiffs' lawyers are suing a widening array of "non-traditional" asbestos defendants, ranging from IBM Corp. and AT&T Corp. to regional "mom-and-pop" installers and distributors of asbestos-containing products.

Nearly 2,000 companies are now defendants in asbestos lawsuits, which is an "exponentially larger" number than a decade ago, said Scott D. Gilbert, a lawyer with Gilbert, Heintz & Randolph in Washington who specializes in mass tort and insurance issues.

"You can't say that someone is just a peripheral defendant and say they don't have risk," said Edward Houff, a lawyer with Church & Houff

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in Baltimore. "In today's climate, they do have risk."

This is bad news for insurers. They not only face mounting asbestos losses from a larger number of policyholders, but also face new demands for coverage under relatively little-used sections of general liability policies.

Changing loss pattern

Earlier losses from big asbestos producers and manufacturers were generally paid under product liability sections of general liability policies, most of which included aggregate limits capping insurers' liabilities.

A growing number of asbestos claims, though, are "non-products" claims, including, for example, claims by installers of asbestos products under the premises and operations sections of GL policies. Insurers typically covered these non-products exposures without aggregate limits, meaning that primary insurers are confronted with potentially huge liabilities in any surge of these claims.

"I believe the potential exposure to the insurance industry for these new defendants on the non-products (claims) is very substantial and could rival the product liability cost" over a period of years, Mr. Gilbert said.

"The insurance industry ought to be getting a wake-up call about now," he said. While "many of them thought this was winding down, they are going to find that is just not the case."

The asbestos litigation crisis has often been described as developing in waves, beginning with personal injury claims of workers at asbestos mines and asbestos product manufacturing plants and moving on to installers of asbestos products and--in the 1980s-laims stemming from the presence of asbestos in buildings.

While these waves were expected to be receding by this year, that hasn't happened.

Christopher Edley Jr., a professor at Harvard Law School, told a congressional committee in 1999 that the number of asbestos cases then pending in U.S. courts had doubled to about 200,000 from 100,000 in 1993, despite the settlement of more than 300,000 cases in the interim.

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Asbestos defendants themselves reported jumps last year in the number of new asbestos cases filed against them. Armstrong, for example, said it had been named in 45,300 claims during the first nine months of 2000, compared with 40,500 during the same period in 1999, and faced a total of 173,000 pending claims.

"Many people believed that the cases would begin tailing off around the year 2000, and what has happened is that they have increased with no signs of any significant drop-off," observed Mr. Houff, a member of the Defense Research Institute's mass torts task force.

Mass settlement efforts by defendants may paradoxically have contributed to the problem by attracting questionable claims, he added.

"I think (defendants) have realized that mass settlement has resulted in two things: more cases and less meritorious cases," Mr. Houff said, noting an increase in claims by plaintiffs claiming exposure but with no symptoms of asbestos-related disease. By their settlement strategy, defendants "have kind of indirectly encouraged that result," he said.

Large-scale settlement schemes and other alternatives to case-by-case litigation in fact have not fared well in many instances.

The U.S. Supreme Court struck down billion-dollar class-action settlements of claims against Amchem Products Inc. and others in 1997 and Fibreboard Corp. in 1999, finding the plaintiff classes too large and varied to meet federal rules governing class actions. In the Fibreboard ruling, the court wrote that "the elephantine mass of asbestos cases defies customary judicial administration and calls for national legislation."

Congress, however, failed last year to enact a bill, the Fairness in Asbestos Compensation Act, that would have created an Asbestos Resolution Corp. to take over managing compensation of asbestos claimants.

Several companies that filed for bankruptcy in 2000 cited these failed efforts--along with the rising frequency and severity of claims--in explaining their decisions to seek court protection from claimants and other creditors.

"We have been attempting to manage this liability for more than two decades," said Glen H. Hiner, chairman of Owens Corning, which had established a National Settlement Program with plaintiffs' lawyers to

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manage its own claims and those of affiliate Fibreboard. "However, the cost of resolving current and future claims, together with a flurry of recent new filings from plaintiff lawyers not participating in the NSP, led us to the conclusion that a Chapter 11 reorganization was prudent and necessary."

"Recent increases in settlement demands from claimants, coupled with a lack of legislative relief from the financial burden presented by the increased demands, have forced us to re-examine our approach," Babcock & Wilcox Chief Executive Officer Roger Tetrault said in announcing the New Orleans-based company's Chapter 11 filing last February.

Burns & Roe Enterprises, a unit of Oradell, N.J.-based Burns & Roe Group Inc., sounded the same note in its Chapter 11 announcement last month: "Over the past 12 months, demands from plaintiffs' lawyers spiked to levels dramatically above the historic pattern, and the number of cases brought against the company increased markedly... (E)fforts to negotiate demands for settlement down to tolerable levels were largely unsuccessful," the company said.

New targets

While the bankruptcy filings may help resolve these companies' liabilities, they will likely make life tougher for other defendants. Plaintiffs' lawyers who see a shrinking potential for recoveries against bankrupt defendants now will increasingly target companies that earlier were considered peripheral.

"To the extent that many defendants are in bankruptcy or post-bankruptcy...(claimants) will now seek recoveries from a broader base," Mr. Gilbert said.

"Plaintiffs' counsel are willing to take on product manufacturers and theories of recovery they were not willing to take on in the past in an effort to extend the liability," Mr. Houff said.

The widening of the litigation net is already well under way, with lawsuits filed against a variety of "non-traditional" defendants. These have included giants like IBM, AT&T, Ford Motor Co. and Chrysler Corp.--accused of exposing workers to asbestos-contaminated brake parts--to small distributors and installers of building materials and supplies, as well as institutions like hospitals and universities with small amounts of asbestos in their buildings.

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"There is no 'asbestos industry' anymore," Harvard's Mr. Edley told the House Judiciary Committee in 1999. "And many, perhaps most, of today's defendants cannot accurately be described as 'asbestos companies.' These defendants are in every industry and every region, from large companies, such as AT&T, to smaller companies."

"We're getting more claims from players that were considered real peripheral," confirmed William Barbagallo, vp and director of claims with the Transit Casualty Co. receivership in Los Angeles. In the last six months, Transit--a major liability insurer before its 1985 insolvency--has seen adverse verdicts against three or four companies that never had asbestos liabilities before. Facing increases in the frequency and cost of claims, Transit has boosted its reserves, he added. "Asbestos is our biggest problem," he said.

Small companies that made limited use of asbestos in their products are not immune to escalating settlement demands and jury awards.

In a widely cited case, a jury in Brazoria County, Texas, ordered Niagara, N.Y.-based Carborundum Corp. in 1998 to pay $115.6 million to 21 plaintiffs claiming injuries from using Carborundum grinding wheels that contained small amounts of asbestos. The award, the first against a grinding wheel manufacturer, consisted of $15.6 million in compensatory damages--much of it future damages for plaintiffs suffering mild to "asymptomatic" asbestosis--and $100 million in punitive damages.

Reserve adequacy

This combination of circumstances--more frequent claims for more money against a widening array of defendants--bodes ill for insurers, many of which have yet to recognize their exposure in their reserving levels, insurance industry observers say.

While a handful of the largest property/casualty companies boosted asbestos reserves in 1999, most did not, and "it is only a matter of time before the current asbestos incurred (loss) activity spreads to additional insurers," warned A.M. Best Co. in an October 2000 report.

Insurers are exposed to a new wave of claims in a few different ways, Best noted.

Claims from peripheral defendants will become more severe as these defendants are forced to contribute larger shares of settlements in the wake of the major manufacturers' bankruptcies.

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In addition, more suits are targeting property owners with asbestos in their buildings, and these defendants are increasingly filing claims under the premises sections of their general liability policies, which typically had no aggregate limits.

Insurers are also exposed to "double dipping" by major asbestos defendants--including those in bankruptcy--that have exhausted their product liability limits and are now filing claims for asbestos product installation activities under the operations section of their GL policies, Best notes. This coverage, as with premises coverage, typically included no aggregate limits.

Non-products coverage litigation and settlements "are going to increase very substantially" in coming years, Mr. Gilbert predicted.

Many of the new defendants will be small companies with limited assets whose insurance claims will be huge in comparison to their asset base, he added.

The rise in asbestos losses for insurers is being masked by improving experience on environmental claims, according to Best. Total calendar-year asbestos and environmental incurred losses were basically unchanged at $2.8 billion from 1998 to 1999, the rating agency found.

The insurance industry, however, swapped about $600 million in environmental reserve decreases for a similar amount of asbestos loss deterioration. In 1999, insurers' net asbestos losses jumped 40% from the previous year, while calendar-year incurred environmental losses dropped by 50%, Best reported.

A large part of 1999's incurred asbestos loss, moreover, was concentrated in just seven large insurance groups that boosted reserves: CNA Financial Corp., which added $500 million for non-Fibreboard exposures; American Re-Insurance Co. and Munich Reinsurance Co., which added $387 million; Allstate Insurance Co., $360 million; Nationwide Insurance Enterprise, $181 million; Liberty Mutual Insurance Co., $162 million; Fairfax Financial Group, $141 million; and American International Group Inc., $124 million.

"This concentration of activity may signal the need for more groups to increase current reserve levels in recognition of unfavorable peripheral defendant and coverage claim trends," Best noted.

The rating agency went on to predict that "significant asbestos

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reserve strengthening will take place during the next few years, particularly for companies involved with (merger and acquisition) activity as buyers attempt to box in and fund acquired liabilities."

One insurer that led the way in adding to reserves is London-based Equitas Ltd., the runoff reinsurer that assumed pre-1993 long-tail liabilities of Lloyd's of London syndicates. Equitas last year announced a "top-to-bottom" review of its asbestos exposures and boosted net reserves by #711 million ($1.06 billion), much of it to cover future asbestos claims that Equitas Chairman Hugh Stevenson said were "substantially exceeding the group's revised expectations."

Creating chaos, opportunity

The specter of asbestos liabilities, meanwhile, continues to create chaos for defendant companies.

In November, Atlanta-based Georgia-Pacific Corp. was forced to issue a public statement about its asbestos exposure after speculation about the liabilities threatened its proposed takeover of paper producer Fort James Corp. The acquisition was completed later in the month.

Southfield, Mich.-based auto parts maker Federal Mogul Corp. has seen its debt ratings cut and its stock price slide, in part over concerns about its management of asbestos liabilities.

Not everyone is put off by the asbestos cloud, though: Warren Buffet's Berkshire Hathaway Corp. has bought up a 15% stake in USG Corp., a manufacturer of gypsum wallboard with significant asbestos liabilities. Berkshire also announced a deal to buy the ongoing building products business of Johns Manville Corp. from the Manville Personal Injury Settlement Trust--created to fund the bankrupt company's asbestos liabilities--and other Manville shareholders.

The possibility of congressional action to deal with the asbestos litigation morass also may not be dead.

While last year's Fairness in Asbestos Compensation Act may not be revived in its earlier form--having drawn heavy fire from plaintiffs' lawyers and only lukewarm support from defendant companies--a new legislative proposal may emerge in the coming year, said Mr. Gilbert, who described himself as "mildly optimistic" about the possibility.

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Commentary

*247 A LETTER TO THE NATION'S TRIAL JUDGES: HOW THE FOCUS ON EFFICIENCY IS HURTING YOU AND INNOCENT VICTIMS IN ASBESTOS LIABILITY CASES

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Abstract

In an Article framed as an open letter to federal and state trial judges, the authors argue that current attempts to expedite the number of asbestos case filings are having an interesting effect: the current methods are leading to an increase in the number of cases filed. The authors recommend that trial judges restore the rule of law in their courtrooms. Such a restoration, the authors argue, will lead to a truly more efficient handling of asbestos litigation.

Dear Trial Judges of America,

We write this letter as a result of many hours studying the current picture of asbestos litigation. We bring to our study considerable experience. One author has practiced in the area of liability law for over thirty years and is co-author of the nation's leading torts casebook; the other author has been an on-the-scene investigative reporter and is currently a practicing trial lawyer.

We begin our letter with the first surprise: Asbestos cases are not dwindling, they are mushrooming.

***248** Most people, including us, thought that asbestos liability cases were a relic of the 1980s, along with the Rubik's Cube. The truth is that asbestos lawsuits are booming. The number of pending cases doubled in the six years from 1993 to 1999, from 100,000 cases to more than 200,000 cases throughout the country. [FN1] From 1997 to 1999, new filings against individual defendants ranged from 20,000 to over 60,000 for individual defendants each year. [FN2] Consider the experience of just one company: By the time it filed for Chapter 11 protection in October 2000, Owens Corning had been the target of approximately 460,000 asbestos personal injury claims from the beginning of the litigation. [FN3] Ironically, while this growth in lawsuits has continued, it is clear that the degree and severity of asbestos-related injuries alleged by those new claimants have precipitously declined. Fewer and fewer people have been exposed to significant levels of asbestos in the workplace. As a result of increased awareness of asbestos dangers, people have been warned and thus protected.

How does a trial judge make sense of this irony? The answer is based on plain common sense. As we will demonstrate, in the past ten years, the focus of many well-intentioned and hard-working trial judges has been ***249**

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on promoting efficiency in asbestos cases-lowering the legal barriers and moving the cases along at all costs. The hope was that this process would ultimately make the cases disappear. Many trial judges believed, quite sincerely, that processing claims, rather than resolving disputes, was the only thing they could do. You, the trial judges, know that the Supreme Court of the United States, in Amchem Products, Inc. v. Windsor [FN4] and Ortiz v. Fibreboard Corp., [FN5] made clear that Federal Rule of Civil Procedure 23 cannot be used to approve mass settlements in asbestos-related cases in the federal courts. Furthermore, a legislative alternative to address asbestos claims is unlikely. So, the resolution of this problem has been left to you, the trial judges of America. Your general approach to resolve the problem has been to do your best to "move these cases along" as fast as possible. Efficiency has been your primary, initial goal.

The main point of our letter is that your focus on efficiency, unfortunately, has thwarted your final goal: to bring the asbestos litigation mess to a conclusion. Instead of making cases go away, the focus on efficiency has had the opposite effect: it has invited more cases. The efficiency directive has understandably tempted members of the personal injury bar to bring more cases. Many of these asbestos cases would have been dismissed had they been treated as any other type of personal injury claim. But now, plaintiffs' lawyers believe that they may have a shot with the weakest of cases. They know that they may have a chance against defendants that never made asbestos-so-called peripheral defendants. Some of these defendants are small companies, but others are large, multi-national corporations-an attractive bait for potential, massive liability.

The "pile on" litigation situation is reflected in a thoughtful statement by the Honorable Conrad L. Mallett, Jr., former Chief Justice of the Supreme Court of Michigan. He observed:
Think about a country trial circuit judge who has dropped on her 5,000 asbestos cases all at the same time . . . . (I)f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and ***250** efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require that certain values be sacrificed. [FN6]

As one professor observed about the asbestos mess,

Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam. [FN7]

The push toward efficiency has encouraged the filing of baseless claims on behalf of unimpaired claimants. As a result, personal injury lawyers dump on courts lawsuits by people who are "not sick, using those who suffer from serious disease to inflate the value of those claims." [FN8] Efficiency has become a false god that has made your job almost impossible. Importantly, the efficiency drive also has hurt people who are seriously ill; these folks may no longer receive either proper or timely compensation.

In our letter, we will try to show in more detail the unfortunate side effects caused by the drive toward efficiency. We also will suggest how to resolve your final goal: eliminating the asbestos mess in a way that is fair to injured claimants, defendants, and you, as trial judges.

I. Impact of the Focus on Efficiency

As we have briefly outlined, the focus on efficiency has been a magnet for new and unwarranted cases. The numbers are staggering. If these lawsuits were justified, and the claimants actually were injured, the net result might be overwhelming, but at least the results would be fair. This is not the case. The bulk of the new claims are filed by people who have ***251** not been impaired by asbestos. The percentages of those who are unimpaired are major, as much as eighty percent by some estimates. [FN9] If the sole focus on efficiency continues, the barrage of new cases will escalate.

A. Shoddy Practices

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The focus on efficiency has led to shoddy practices by a few plaintiffs' lawyers. It has been documented in Texas that one plaintiffs' firm "prepared" clients for depositions through the use of a memo containing detailed lists of products that contained asbestos, along with descriptions of product packaging and a list of asbestos-related health symptoms that could enhance legal damages. [FN10] "It is important to maintain," the memo said, "that you NEVER saw any labels on asbestos products that said WARNING or DANGER . . . Do NOT say you saw one brand more than another, or that one brand was more commonly used than another." [FN11] (A grand jury investigating allegations that the law firm may have coached clients to lie under oath ultimately took no action. [FN12]) The focus on finding new claimants has led plaintiffs' lawyers to travel in "examobiles" to union halls and into neighborhoods where poor working people reside. [FN13] ***252** The lawyers bring in people who conduct x-ray tests that are not objective. Such testing does not identify sick people. Rather, the testing is a search for "customers" to enroll in large bulk claims with the hope that their actual medical condition will never be examined or tested.

Shoddy practices embarrass our legal system. They are invited if overzealous personal injury lawyers believe that their claims can proceed without proper scrutiny. [FN14]

B. Paying Unimpaired People

No matter how much you (understandably) may hope that asbestos cases will finally go away, they will not. It is a mistake for our trial judges to allow cases to proceed with payments to unimpaired claimants.

Such payments can take place in a number of ways. First, when courts fail to require the use of objective tests to determine whether an individual is truly sick, courts encourage payments to unimpaired claimants. Courts have acknowledged the tendency of medical screeners to depart from accepted medical standards by diagnosing asbestos-related "injuries" that fail to meet minimum diagnostic criteria set by the American Thoracic ***253** Society of the American Medical Association, which has no affiliation with or control by defendants. [FN15] One federal district court judge studied the merits of asbestos claims by appointing his own medical experts to evaluate claimants in sixty-five pending cases. [FN16] Although all the plaintiffs claimed some asbestos-related condition, the court-appointed experts found that, in fact, only fifteen percent had asbestosis, twenty percent had asymptomatic pleural plaques, and sixty-five percent had no asbestos-related conditions at all. [FN17] In other words, "(t)he ordinary tort-law requirement that a claim be supported by an injury has been lost in asbestos. . . . Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured." [FN18]

Second, some courts allow payments to unimpaired claimants to take place when the courts change existing law and allow claims for "emotional harm," thereby raising the possibility that the truly sick will not be adequately compensated. The Supreme Court of the United States identified such a concern in Metro-North Commuter Railroad Co. v. Buckley, [FN19] where the Court carefully examined both precedent and public ***254** policy. Under the (pro-plaintiff) Federal Employers' Liability Act, the Court decided that it was inappropriate, in the context of asbestos, to render awards for emotional harm and medical monitoring to people who had been substantially exposed to asbestos (this specifically applied to the so-called "snowmen" who worked fixing steampipes in the tunnels below Grand Central Station in New York City, but who were not sick). [FN20] The Court appreciated that rewarding those who were not ill would facilitate putting companies into bankruptcy: paying people who were not really injured at the expense of those who were harmed was not in the best interest of the public. [FN21] As one knowledgeable observer concluded, "people who will discover severe injury in 2010 may not get any recovery at all, because uninjured and least-injured plaintiffs have killed the goose that laid them their golden eggs." [FN22]

Third, payments to unimpaired individuals can take place when a court allows claims for medical monitoring, despite the lack of significant evidence, in terms of probability that the person will get sick in the future. [FN23] As one commentator has observed, "it is . . . difficult to quantify the amount of increased risk imposed on an individual who does not yet have a disease." [FN24] Further, it is "difficult to conceptualize what that risk is worth

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in money damages," [FN25] especially where plaintiffs are being ***255** compensated "'for injuries which have not yet occurred and which . . . probably never will.'" [FN26]

Finally, payments to the unimpaired can take place when trial courts actively participate in or encourage "block settlements," where it is known that the majority of the claimants are not really injured but where courts allow plaintiffs' counsel to pressure defendants to make payments for very questionable claims. [FN27] An extreme example of such a court-compelled settlement was in Cosey v. E.D. Bullard Co., [FN28] a Mississippi state court case. Counsel joined almost 1000 plaintiffs nationwide in the original 1995 complaint in Jefferson County Circuit Court; by the end of 1998, the eighth amended complaint included 1738 plaintiffs. [FN29] In May 1998, a trial of twelve plaintiffs, including several with no demonstrable injury, resulted in a verdict of $48.5 million in compensatory damages (with punitive damages to be decided separately). [FN30] The judge pressured the defendants to settle on draconian terms. [FN31] According to sworn affidavits, the judge told the defendants that if they failed to settle, the judge would try the remaining 1700+ cases immediately, before the same jury, with an instruction to find the defendants liable. [FN32] Counsel for the defendants allegedly said the plan sounded "like this side of hell," to which the judge ***256** replied, "No counselor, that is hell." [FN33] Efforts to secure the judge's recusal were rebuffed with threats of discipline against the defense attorneys. [FN34] The cases were settled. [FN35]

The victims of the practice of paying unimpaired people are not only the trial judges with their flooded dockets composed of tenuous claims, but seriously injured people whose cases are substantially delayed or devalued as a result of cases brought on behalf of people who are not sick.

II. Trespasses on the Rule of Law

Unfortunately, the goal of efficiency has led some judges to trespass on the rule of law and upon fundamental legal principles. Such trespasses have occurred in a number of ways and should come to an end.

A. False Consolidation of Cases

A few trial judges, who are attempting to reduce their burgeoning asbestos dockets, have approved, and even encouraged, the joinder of cases that should not be joined-literally, "gold" and "fool's gold" cases are joined. [FN36] People who have serious illnesses, such as mesothelioma ***257** or lung cancer, are lumped into litigation with persons who have nothing wrong with them under any reasonable medical criteria. [FN37]

In other cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries. [FN38] For example, personal injury lawyers attempted to do just that in so-called repetitive stress injury cases. People who were allegedly injured at check-out counters, computer terminals or meat processing plants suffer distinct injuries, even though the term "repetitive stress injuries" could be used to cover all of them. Federal courts unanimously rejected such consolidation even for purposes of discovery and pre-trial handling. [FN39] Judges adhered to the rule of law in repetitive stress injury cases. They should in asbestos cases as well.

***258** B. Improper Discovery Procedures

Basic discovery is a right. Defendants are entitled to find out what the plaintiff's illness is, whether the illness is genuine, how the illness arose, and how serious the illness is or might become. Denying basic discovery rights simply to "move along cases" is a serious trespass on the rule of law. The end result not only denies basic justice to defendants, but the result also encourages plaintiffs' lawyers to bring more and more bogus cases.

C. Pseudo Science

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The Supreme Court, in Daubert v. Merrell-Dow Pharmaceuticals, Inc. [FN40] and Kumho Tire Co. v. Carmichael, [FN41] has given an unequivocal message to federal judges that they must act as gatekeepers against unwarranted and baseless scientific evidence, sometimes called "junk science." There is no exception for asbestos cases or for determining whether exposure to a particular substance causes an illness; courts must apply their gatekeeping function to scientific evidence in asbestos cases. In fact, the legitimacy of expert testimony suggesting a cause of an illness was at the heart of the Daubert case. Exposure to asbestos can undoubtedly cause very serious illnesses: over time, mesothelioma has been almost exclusively identified with asbestos exposure. [FN42] On the other hand, lung cancer and other diseases sometimes associated with asbestos exposure all have a wide variety of causes. [FN43] If a plaintiff claims that a particular substance caused his cancer, real science should link that person's illness with that substance and the defendant's conduct. Nevertheless, ***259** pseudo science or junk science has been used in asbestos cases to suggest that people are ill when they are perfectly healthy. By itself, the tolerance of junk science can bring an avalanche of new claims that are unjustified and baseless. Additionally, it can push legitimate claims to the rear of the line and burden an already overwhelmed docket.

D. Skipping or Not Properly Evaluating Identification of Defendants

A few jurisdictions have abandoned the requirement that a plaintiff identify a specific defendant that caused his injury. In situations when that requirement has been abandoned, however, the cancer-causing products usually involved the pharmaceutical DES, a substance that is absolutely fungible, identical in content and amount. [FN44] In this highly confined exception to the general rule, plaintiffs have been unable to determine the manufacturer of the product that allegedly caused them harm. In asbestos cases, however, the product is absolutely not fungible in either content or amount. Equally important in asbestos cases is the fact that plaintiffs have been able to use employment records to identify the products to which they may have been exposed. There is no need to abandon the principle that a plaintiff must show that his injury was caused by a particular defendant's conduct. Additionally, it is important for you, our trial judges, to assure that the plaintiff's identification is grounded in facts, not speculation. If plaintiffs are permitted to make blatantly false identifications, that conduct will continue to encourage fraudulent practices and bogus cases.

E. Failure to Use Summary Judgment and Motions to Dismiss

Summary judgments and motions to dismiss are fundamental tools to protect the integrity of our justice system: primarily they weed out ***260** baseless and frivolous law suits. Summary judgments and motions to dismiss are used every day in automobile, drug, chemical, and even controversial tobacco cases. In the area of asbestos litigation, the recognition of summary judgments and motions to dismiss has been abandoned by many trial judges. Some trial judges have assumed that if asbestos is mentioned in a complaint, the case is valid. To a great extent this assumption was true with the asbestos cases filed two decades ago; many of the plaintiffs were very sick. Currently, however, the assumption no longer holds true. If the word "asbestos" is used in a complaint, it does not mean serious injury occurred or that there is reliable evidence that the defendant's conduct caused any injury. Accordingly, judges need to restore the recognition of summary judgments and motions to dismiss in asbestos cases. We understand that addressing such motions in hundreds of individual cases is in itself very time-consuming. The effort, however, is worth it. That effort will cut weeds from dockets and not encourage them to grow back.

F. Penalizing Defendants Who Try to Enforce Their Legal Rights

Perhaps the most egregious practice that has arisen in asbestos cases is one that discourages defendants from exercising their legal rights. If asbestos defendants make motions to dismiss or move for summary judgment, they may be singled out and penalized by plaintiffs' lawyers. This penalty, in a form of "legal revenge," involves plaintiff's lawyers thrusting thousands of new cases upon the clients of the "offending" defendant's attorney. Defense counsel suffers a similar revenge if the defense counsel insists that the plaintiffs rely on good science-a right guaranteed to defendants in most jurisdictions. Also, if defendants utilize discovery procedures that are

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proper, or they move to break up joinder of cases that are dissimilar, they may be punished. [FN45]

Only the nation's judiciary-you, our trial judges-can stop the practice of retaliation against asbestos defendants who seek to exercise their basic ***261** legal rights. Each of you can and should discourage the "legal extortion" mentioned above. Defendants should be encouraged to exercise their legitimate rights. Trial judges should stand guard, speak out, and act against plaintiffs' lawyers who use "case dumping" to prevent defendants from exercising fundamental and legitimate rights at trial.

G. The Dwindling Supply of Defendants

When asbestos litigation began, the principal defendants were companies that manufactured asbestos for use in various products or applications. The core of the allegations was that those defendants knew asbestos could create an exposure to workers that presented a significant risk of serious disease and that the defendants failed to warn about the dangers asbestos presents. In numerous cases, those defendants paid dearly with substantial punitive damage awards. Many of those cases were styled as "good triumphing over evil"; the "evil" alleged was so reprehensible that courts bent the rule of law in numerous ways to allow liability against these unpopular defendants and the principle of "equal justice for all" fell by the wayside.

As a result of the court's acquiescence, at least twenty-five defendants went into bankruptcy. [FN46] One recent example is Owens-Corning Fiberglass, which was the target of asbestos litigation stemming from its production of a high-temperature pipe insulation known as Kaylo. [FN47] Owens-Corning Fiberglass sought to manage its asbestos claims in several ways: first, through individual, out-of-court settlements; second, by seeking judicial and legislative relief; and finally, through an innovative program called the National Settlement Program (NSP). NSP was a "private settlement" under which the company agreed to pay $2.4 billion for asbestos-related claims over five years. [FN48] Ultimately, however, Owens-Corning Fiberglass sought Chapter 11 protection. [FN49] "(T)he cost ***262** of resolving current and future claims, together with a flurry of recent new filings from plaintiff lawyers not participating in the NSP, led us to the conclusion that a Chapter 11 reorganization was prudent and necessary," said Glen H. Hiner, the company's chairman and chief executive officer. [FN50] The company raised approximately $135 million in total revenues from the sale of the Kaylo product. [FN51] As of October 2000, the company had paid or agreed to pay more than $5 billion for asbestos-related awards and settlements, legal expenses, and claims-processing fees. [FN52]

Other prominent defendants recently sought bankruptcy court protection. In January 2001, G-I Holdings, Inc., formerly GAF Corp., sought protection under Chapter 11 after paying $1.5 billion to settle more than 500,000 asbestos claims. [FN53] Armstrong World Industries filed for Chapter 11 protection in December 2000 as a result of suits mainly stemming from its installation of another manufacturer's product between 1939 and 1969. [FN54]

Now, with the initial defendants (the actual producers of asbestos) no longer viable, a new series of peripheral defendants have been drawn into asbestos litigation. [FN55] One plaintiffs' lawyer described the process this way: "You have to look under every stone. . . . The deeper you dig into the industry, the more you find." [FN56] The new defendants are diverse; they range from oil companies, to automobile manufacturers, to hospitals and ***263** colleges, to small family-run businesses, but they all have only attenuated connections to asbestos. [FN57]

Issues relating to what these peripheral defendants knew about asbestos dangers, what they could have done to prevent injury, and the extent of their responsibility, are very different than the cases involving those who produced asbestos-containing products. The peripheral defendants have roles that often are marginal at best. One striking example was recently provided in a case where a jury awarded $1.5 million to a New York man who said asbestos-containing products he purchased fifty years ago at Sears caused his cancer. [FN58] The very presence of such peripheral defendants in the litigation demands the restoration of the rule of law in asbestos litigation.

Failure to follow the rule of law with a peripheral defendant creates real injustice. For example, Babcock & Wilcox Company, a long-standing member of corporate America, associated for almost one hundred years with the

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manufacture of custom-built boilers, is now seeking protection under the Bankruptcy Code because of asbestos litigation. [FN59] That company did not produce asbestos and had no specialized knowledge concerning asbestos hazards. Asbestos insulation was incorporated into the company's boiler systems to protect workers and equipment from the high temperatures generated in the boilers and to assure the thermal efficiency of the boiler systems. The company purchased the asbestos from various asbestos manufacturers and installed it during construction.

The plaintiffs who sued Babcock & Wilcox claimed to have come in contact with its boiler systems. [FN60] Beginning in the 1980s, the company developed a broad settlement program, opting to negotiate modest settlements for claims meeting certain minimum criteria, thus reducing ***264** cost and delay in compensating claimants. Because of the domino effect of the failure to institute the rules of law, Babcock & Wilcox's modest settlements were forced to become larger and larger until the volume of cases eliminated the company. [FN61] Babcock & Wilcox's experience is a harbinger of the future-unless the rule of law is restored.

Not all peripheral defendants are large companies. The Carborundum Corporation, which manufactures grinding wheels, found itself hit with a $115 million verdict in one case. [FN62] The plaintiffs claimed that their exposure to a grinding wheel that contained asbestos caused an illness that was "asymptomatic." The plaintiffs did not claim to have developed the usual asbestos-related diseases, mesothelioma or cancer, and Carborundum did not produce asbestos, the product primarily involved in the initial asbestos litigations. Prior to this case, no grinding wheel manufacturer had been held liable for an asbestos-related injury. The result shows what can and will occur when the rule of law is not followed.

In another example, Allwood Door Co., a small San Francisco business that sells wooden doors, became the target of lawsuits by construction workers because it sold fire-barrier doors made by another company in the 1960s and 1970s. [FN63] Unbeknownst to Allwood's president, the wood-sheathed doors allegedly "contained asbestos in mineral core." [FN64] The avalanche of claims against these smaller peripheral defendants is just beginning.

H. Super Strict Liability for All Asbestos Defendants

Perhaps the treatment of asbestos as being somehow "different" began when the New Jersey Supreme Court altered fundamental products ***265** liability law and imposed super strict liability on the defendant in an asbestos case for failure to warn. In Beshada v. Johns-Mansville Products Corp., [FN65] the New Jersey court made clear that the defendant would be subject to liability even if it did not know or could not have known of an asbestos risk. This decision was replicated by the Louisiana Supreme Court in Halphen v. Johns-Manville Sales Corp. [FN66] Some commentators view these cases as being motivated by the need to expedite asbestos litigation, achieved by depriving asbestos manufacturers of defenses that were available to manufacturers of other products. [FN67] The clarity of this distinction was made manifest in New Jersey. When the New Jersey Supreme Court considered a case involving pharmaceutical products, the court declined to apply super strict liability and said the defendant could avail itself of a negligence-based defense. [FN68] The same occurred in ***266** Louisiana in a case involving an escalator incident. [FN69] The legislatures in New Jersey and Louisiana sought to end this invidious distinction and put in place statutes to restore fault-based principles for failure to warn and design cases. [FN70]

Modern products liability law applies fault-based principles to defendants in failure to warn and design cases and makes no distinction as to asbestos. [FN71] Nevertheless, traces of Beshada are occasionally found in the law. [FN72] There may be additional situations where trial courts fail to recognize that asbestos defendants have the right to defend on the basis that they neither knew nor could have known about asbestos-related risks. Such defenses are particularly important for peripheral defendants, who may not have known about the risk to the extent that the manufacturer of the asbestos- containing products knew or should have known about it.

Just as modern products liability defense principles apply to asbestos manufacturers, modern defense principles should also apply to peripheral defendants that are not product manufacturers for the purposes of products liability law. Modern products liability principles dictate that judgments about such peripheral defendants should fall under the same standards ***267** as those for providers of services: whether the defendant acted as a reasonable service

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provider would have acted in the same or similar circumstances. [FN73] Products liability law centers on two main distinctions between sales of products and services. Products liability principles relating to design and warnings are irrelevant when related to mere service providers, and service providers cannot spread their risk of loss through mass production and distribution activities, as product manufacturers do. [FN74] Because many peripheral defendants in asbestos litigation are merely service providers, courts should apply the appropriate standard to the peripheral defendants.

III. Restoring the Rule of Law Is Helpful To You

Mr. or Ms. Trial Judge, only you can restore the rule of law in asbestos cases. Only you have the power to assure fairness to injured people and peripheral defendants who have now come under the asbestos claim net. Congress is unlikely to do it, the Supreme Court of the United States has been unwilling to do it, and appellate courts are limited in what they can do-it is up to you!

***268** Restoration of the rule of law will not bring about more cases or delay your docket. To the contrary, if the rule of law is restored, cases that are baseless will disappear while legitimate cases will be settled more quickly and for a fair amount. Restoration of the rule of law will take courage. Here is how it can be done.

A. Stop Dragnet Joinders

Put an end to the grouping together of thousands of cases that are not alike; principally, by refusing to join cases brought by a few seriously ill plaintiffs with cases brought by persons who are not ill. Joinders of this type deprive those who are seriously ill of quick and adequate compensation. Those who are currently unimpaired obtain a windfall benefit at the expense of those who are seriously injured. [FN75] Claimants need to segregate their cases according to the seriousness of their illnesses. Seriously ill plaintiffs should be separated and treated as individuals. Joinder of factually unrelated claims is clearly inappropriate under Federal Rule of Civil Procedure 20 and analogous state rules. Factually unrelated claims are those plaintiffs' claims that do not arise under any common transaction or occurrence or series of transactions or occurrences, or raise issues of fact or law common to all plaintiffs or all defendants. [FN76]

Some solutions already exist, as some courts have adopted mechanisms for separating out claims by individuals who are not sick. For example, ***269** in Massachusetts, the judges have an inactive docket, which provides a way for plaintiffs with asbestos-related pleural diseases to toll the statute of limitations until such time that they develop asbestosis or some type of malignancy. [FN77] Cases on the inactive dockets are exempt from discovery and can only be removed to the active docket by filing a subsequent complaint. Some courts in Maryland use a similar inactive docket approach. Although clearly not ideal, inactive dockets can offer a practical solution.

B. Apply Sound Medical Criteria

Objective medical criteria, developed by third parties with no interest in the asbestos litigation, should be utilized. For example, the American Thoracic Society of the American Medical Association, which has no affiliation or control by defendants, indicates that a person is only impaired if there is a 1/1 profusion of irregular opacities on a patient's x-ray. [FN78] Use of these criteria will give clear preference to claimants whose cases need to be heard. It also will discourage lawyers from bringing baseless claims. In Pennsylvania, for example, where large numbers of claimants might be expected due to the state's industry and shipyards, courts applying sound medical criteria focus the litigation on those who are really sick. It has worked.

C. Require Plaintiffs to Adequately Identify Defendants

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There is nothing more unfair than holding people legally responsible for something they did not do. This is as true in civil cases as in criminal cases. [FN79] Courts should require objective proof that a particular plaintiff ***270** was harmed by a product made or marketed by a specific defendant. [FN80] The use of alternative liability theories that do not require proof of individualized fault, such as market-share liability, encourages plaintiffs to perjure themselves by concealing evidence as to the identity of the manufacturers responsible for their injuries, especially where many companies that produced asbestos-containing products have gone out of business or are judgment-proof. [FN81] Courts should not permit plaintiffs to file and process their claims unless they can adequately identify the proper defendants.

D. Be a Responsible Gatekeeper

The Supreme Court of the United States has stated clearly and unequivocally that federal judges should act as gatekeepers and guard against junk science. [FN82] That rule of evidence does not apply automatically to state judges, but the rules of evidence in most states are virtually identical to those that apply in federal courts. Opening courts to junk science or rejecting the gatekeeper role in asbestos cases encourages baseless cases to rush into your court. Conversely, the application of stringent judicial gatekeeping can weed out "weak and frivolous claims," and, as a result, "even a mass tort like asbestos could be managed . . . in a way that avoids judicial meltdown." [FN83] Daubert and its progeny are not harsh or artificial rules of law. They are based on the simple principles that good science should be respected, and opinions with no objective basis should be rejected.

State judges who refuse to act as gatekeepers encourage the use of forum shopping. If a plaintiff has a questionable expert, and the state ***271** court will allow the expert to testify but the federal court will not, the plaintiff's lawyer will do everything in his power to oust the federal court of jurisdiction. State judges need to guard against unwarranted forum shopping. This would include requiring that claimants have a real, and not a tenuous connection to the jurisdiction. The vanguard of such forum shopping, unfortunately, has been asbestos. You have an opportunity to bring this to an end. [FN84]

E. Permit Proper Discovery

Discovery can be endless and unwarranted, but severely limiting discovery in asbestos cases allows plaintiffs' counsel to bring claims for people who are not sick and encourages plaintiff "recruitment" of the worst sort. Some discovery can help segregate the real from the surreal, especially if the judge adopts the gatekeeper role. Persons who are truly sick will not be disadvantaged; in fact, their claims will proceed more quickly and the settlement value of their claims will be adequate for their needs.

Conclusion

Mr. and Ms. Trial Judge of America, you have been patient with us. We thank you for reading our letter. We appreciate the weight of the burdens placed upon you as you follow the suggestions we have made. We strongly believe, however, that the results will enable you to keep the pledge you uttered when you agreed to take on the burdens of the bench: provide equal justice under the law.

Both defendants and plaintiffs have pushed efficiency and succumbed to lowering legals barriers in asbestos cases. It is understandable that some trial judges have gone along with this thrust. The numbers of cases seem overwhelming and the "pass-them-through" approach is very tempting, but the results are and will be even more catastrophic-hundreds of thousands of baseless claims may be filed, and those who are really ***272** sick will suffer endless delays and lack of justice. The rule of law must be restored to asbestos cases. Such a restoration will ensure that those who are really sick will be paid more quickly, that baseless claims will be eliminated from the system, that legal costs will be reduced, and that justice will prevail in asbestos cases. All of these can be accomplished by you.

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[FN1]. See Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. at II.1. (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) (hereinafter Prof. Edley Testimony). This figure may be conservative. In their Form 10Q filings with the Securities and Exchange Commission for the third quarter of 1999, Armstrong World Industries reported 182,000 pending claims, GAF Corporation reported 114,000, USG Corporation reported 100,000, W.R. Grace & Co. reported 102,894, and Kaiser Aluminum reported 110,599. See H.R. Rep. No. 106-782, at 18 (2000) (citing SEC filings); see also Patricia G. Houser & David T. Austern, Manville Personal Injury Settlement Trust, Mealey's Asbestos Conference, at 416 (1999) (chart showing that 500,000 claims are estimated to be filed against Manville Personal Injury Settlement Trust over the next fifty years).

[FN2]. See H.R. Rep. No. 106-782, at 18 (2000). Armstrong World Industries reported receiving 40,200 new claims for the first three quarters of 1999 and 71,000 claims for all of 1998. Kaiser Aluminum reported 29,700 new claims for the first three quarters of 1999 and 22,900 claims for 1998. GAF Corporation reported 42,200 new claims during the first three quarters of 1999, and W.R. Grace & Co. reported 20,629 new claims during that same period. See id. at 18-19 n.8.

[FN3]. See Joseph B. White & Jim VandeHei, Owens Corning Files for Chapter 11, Citing Escalating Asbestos-Liability Claims, Wall St. J., Oct. 6, 2000, at A3.

[FN4]. 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

[FN5]. 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999).

[FN6]. The Fairness in Asbestos Compensation Act of 1999, Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr.) (hereinafter Hon. Mallett Testimony).

[FN7]. Francis E. McGovern, The Defensive Use of Federal Class Actions in Mass Torts, 39 Ariz. L. Rev. 595, 606 (1997).

[FN8]. Prof. Edley Testimony, supra note 1, at II.7.

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[FN9]. See Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st & 2d Sess. 77, 100 (Oct. 24, 1991) (testimony of Professor Lester Brickman) (hereinafter Prof. Brickman Testimony); see also In re Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 748 (E.D. & S.D.N.Y. 1991) (Weinstein, J., concurring) (stating some plaintiffs' attorneys "have filed all of their cases without regard to the extent of injury"), vacated, 982 F.2d 721 (2d. Cir. 1992), op. modified on reh'g, 993 F.2d 7 (2d Cir. 1993); see In re Joint E. & S. Dists. Asbestos Litig., 129 B.R. at 935 (showing "pleural" claims accounting for 54.4% of all claims involving the Manville Trust).

[FN10]. See Michael Saul, Grand Jury Doesn't Act Against Law Firm That Had Been Accused of Coaching Clients, Dallas Morning News, July 17, 1998, at 22A.

[FN11]. Holman W. Jenkins, Jr., Business World: How About a Tony for Best Asbestos-Related Script?, Wall St. J., Oct. 7, 1997, at A23.

[FN12]. See Saul, supra note 10, at 22A.

[FN13]. See Prof. Brickman Testimony, supra note 9 ("The existence of tens of thousands of such claims is accounted for by mass screenings of industrial workers financed by plaintiffs' lawyers and usually done with the active assistance of local union officials. Often, mobile x-ray vans brought to plant sites are used for the screenings."); see also In re Joint E. & S. Dists. Asbestos Litig., 129 B.R. at 748 (working "(i)n conjunction with unions, (plaintiffs' lawyers) have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque"); Eagle-Picher Indus. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("(M)any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

[FN14]. Certain plaintiffs' counsel have candidly acknowledged that such practices have burdened the courts with unmeritorious claims. For example, Ron Motley said in the early 1990s that
(t)here are gross abuses of our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent-we have untrammeled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong (and) should be stopped.
Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1889 n.58 (1992) (quoting Ronald L. Motley's remarks in An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims, Transcript of the Administrative Conference of the United States at 15 (Oct. 31, 1991)).

[FN15]. See, e.g., Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *2, *8, *18, *22 (D. Kan. May 30, 1990) (finding that medical screeners disregarded standards set by American Thoracic Society and reported that workers had asbestos-related "injuries" despite the fact their medical readings had no clinical significance, and stating that the screening program produced a "steady flow of faulty claims" and a "fraud on the court"); In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1566 (D. Haw. 1990) (cases are often diagnosed based on "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings).

[FN16]. See Carl Rubin & Laura Ringenbach, The Use of Court Experts in Asbestos Litigation, 137 F.R.D. 35, 37 (1991). Pleural plaques are areas of the membrane covering the lung and chest wall in which cell tissue is replaced

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by tougher tissue. Pleural plaques result from asbestos exposure "but do not affect lung functions and do not necessarily lead to asbestosis or increase the risk of cancer." Id.; see also Jumbo Consolidations in Asbestos Litigation, Prepared Statement Concerning H.R. 1283, Before the House Comm. on the Judiciary, 106th Cong. at I.B. (July 1, 1999) (statement of Prof. William N. Eskridge Jr., Yale Law School) (hereinafter Prof. Eskridge Testimony).

[FN17]. Rubin & Ringenbach, supra note 16, at 45.

[FN18]. Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, Report on Mass Tort Litigation 2 (Feb. 15, 1999) (comments of John Aldock, Esq., participant in Dec. 8, 1998 Mass Torts Working Group Conference).

[FN19]. 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997).

[FN20]. The Court rendered its decision in the context of the Federal Employers' Liability Act, but its reasoning would apply to all asbestos cases.

[FN21]. Metro-North, 521 U.S. at 442.

[FN22]. Prof. Eskridge Testimony, supra note 16, at 15; see also Asbestos Compensation, The Fairness in Asbestos Compensation at a Hearing Before the House Committee on the Judiciary Concerning H.R. 1283, 106th Cong., at I.B. (July 1, 1999) (prepared testimony of Paul R. Verkuil, Dean, Benjamin N. Cardozo School of Law/Yeshiva University) ("(D)isproportionate judgments overcompensate present plaintiffs at the cost of future ones who may be more deserving . . . the funds available for compensation are reduced in total; and bankruptcies of potential defendants become more prevalent, thereby delaying or even foreclosing future awards altogether.").

[FN23]. See Victor E. Schwartz et al., Medical Monitoring: Should Tort Law Say Yes?, 34 Wake Forest L. Rev. 1057, 1077 (1999).

[FN24]. See id. at 1077 (citing Allen Kanner, Medical Monitoring: State and Federal Perspectives, in Litig. 1988, at 549, 560 (PLI Litig. & Admin. Practice Course Handbook Series No. 363, 1988)).

[FN25]. Id. (citing Kanner, supra note 24, at 549, 560).

[FN26]. Carey C. Jordan, Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?, 33 Hous. L. Rev. 473, 487 (1996) (quoting Potter v. Firestone Tire & Rubber Co., 274 Cal. Rptr. 885, 896 (Ct. App. 1990), rev'd, 863 P.2d 795 (Cal. 1995)).

[FN27]. See, e.g., Francis E. McGovern, Rethinking Cooperation Among Judges in Mass Tort Litigation, 44 UCLA L. Rev. 1851, 1858 (1997) ("(P)laintiffs' attorneys rush to their favorite judges and demand draconian procedures to pressure defendants to make block settlements. Then these plaintiffs' attorneys can get money for themselves and their clients before all available funds disappear."); Jack B. Weinstein, Ethical Dilemmas in Mass

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Tort Litigation, 88 Nw. U. L. Rev. 469, 521 (1994) ("Often the pressure for block settlements comes from plaintiffs' attorneys who hope to get something for a large mass of questionable cases. Some attorneys . . . will take almost any case without regard to its merit, hoping for a global settlement." (footnote omitted)).

[FN28]. Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1995).

[FN29]. See Prof. Eskridge Testimony, supra note 16, at I.B.

[FN30]. See id. (citing defense motion for recusal of trial judge, accompanying affidavits, and attempted appeal to Mississippi Supreme Court).

[FN31]. See id.

[FN32]. See id.

[FN33]. See id. (citing Affidavit of Daniel P. Myer, aeae 17-11 (attached to defendants' recusal motion)).

[FN34]. See Prof. Eskridge Testimony, supra note 16, at I.B.

[FN35]. See id.

[FN36]. See, e.g., id. Professor Eskridge described the "jumbo consolidation" model of asbestos litigation that has emerged during the past fifteen years as characterized by: hundreds or thousands of plaintiffs and dozens or hundreds of defendants consolidated in one proceeding; plaintiffs with widely disparate exposure and injury allegations, most of them asymptomatic; aggressive, settlement-minded judges; trial phasing; settlements and jumbo verdicts. See id. He further explained that
(t)he most obvious beneficiaries of the jumbo consolidation . . . are . . . plaintiffs with pleural thickening, many and perhaps most of whom will never develop asbestosis, cancer, or mesothelioma (the least-injured plaintiffs) yet recover verdicts of $1 million or more; and . . . plaintiffs who have either pleural plaques or no medically discernible effect of asbestos exposure (the uninjured plaintiffs) yet who are included in (jumbo consolidation) (c)ases and receive large awards.
Id.

[FN37]. See, e.g., Slafka v. Owens-Corning Fiberglas Corp., No. 26,213 (Milam County, Tex.) (consolidated trial plaintiffs suffered from wide range of illnesses-three alleged the fatal disease of mesothelioma, two alleged asbestos-related pleural disease, two alleged asbestosis, and one did not disclose any diagnosis).
Examples of jumbo consolidation cases include the Massachusetts Mass Joinder Cases, Abdullah v. ACandS, Inc., 30 F.3d 264 (1st Cir. 1994) (cases were subsequently settled due to lack of product identification); the putative Ohio class action, In re Allied-Signal, Inc., 915 F.2d 190 (6th Cir. 1990); the Brooklyn Navy Yard Cases, In re New York City Asbestos Litig., 142 F.R.D. 60 (E.D. & S.D.N.Y. 1992) (federal) and 572 N.Y.S.2d 1006 (Sup. Ct. 1991) (state); the New York Powerhouse Cases, In re New York City Asbestos Litig., 142 F.R.D. 60, 64-67 (E.D. & S.D.N.Y. 1992); the Baltimore City Cases, ACandS, Inc. v. Godwin, 667 A.2d 116 (Md. 1995); ACandS, Inc. v. Abate, 710 A.2d 944 (Md. Ct. Spec. App. 1998), cert. denied sub nom. Crane v. Abate, 713 A.2d 979 (Md. 1998),

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cert. denied sub nom. John Crane Inc. v. Abate, 525 U.S. 1171 (1999); the Mississippi Nationwide Joinder Cases, In re Amchem Prods., Inc., No. 1990-M-01383 (Miss. Sept. 29, 1998); the Kanawha County Premises Liability Cases, State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996); the Monongalia County Mon-Mass II Consolidated Cases, (W. Va. Cir. Ct. Jan. 1996).

[FN38]. See Carter v. Artaz, 1998 WL 782022, at *4 (S.D.N.Y. Nov. 6, 1998); Foster v. All-Pro Elec., Inc., 2000 WL 350467, at *3 (Conn. Super. Ct. Mar. 22, 2000); Aikman v. Atex, Inc., 637 N.Y.S.2d 123, 224 A.D.2d 180 (App. Div. 1996).

[FN39]. See, e.g., Repetitive Stress Injury Prods. Liab. Litig., 1992 WL 403023, at *1 (J.P.M.L. Nov. 27, 1992) (Judicial Panel on Multidistrict Litigation declining transfer and consolidation of multiple federal cases, stating: "(W)e are not persuaded . . . that the degree of common questions of fact among these actions rises to the level that transfer under Section 1407 would best serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of this entire litigation.").

[FN40]. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[FN41]. 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[FN42]. Recently some scientists have questioned whether Simian Virus 40 (a virus apparently contained in certain polio vaccines given to individuals in the 1950s) is a contributing factor in the development of mesothelioma.

[FN43]. See The Fairness in Asbestos Compensation Act of 1999, Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999) (written testimony in support of H.R. 1283, Alex G. Little, M.D., Past President of the American College of Chest Physicians) (mesothelioma "is usually associated with a history of asbestos exposure," whereas "lung cancer has several known causes" and "(c)onsiderable evidence exists that . . . 'other' cancers in fact are not caused by asbestos").

[FN44]. See, e.g., Sindell v. Abbott Labs., 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 145, 607 P.2d 924, 937 (1980) (holding it is reasonable that liability can be apportioned among DES manufacturers according to market share, because DES was absolutely fungible).

[FN45]. See, e.g., text accompanying supra notes 28-35 (discussing Cosey v. E.D. Bullard Co., Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1995)).

[FN46]. See Prof. Edley Testimony, supra note 1, at II.4. & n.23; see also H.R. Rep. No. 106-782, supra note 1, at 19.

[FN47]. See Owens Corning Files Voluntary Chapter 11 Petition to Resolve Asbestos Liability, PR Newswire, Oct. 5, 2000 (hereinafter Chapter 11 Petition); see also White & VandeHei, supra note 3, at A3.

[FN48]. Chapter 11 Petition, supra note 47.

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[FN49]. See id.

[FN50]. Id.

[FN51]. Id.

[FN52]. Id.

[FN53]. Queena Sook Kim, G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases, Wall. St. J., Jan. 8, 2001, at B12.

[FN54]. Queena Sook Kim, Armstrong Holdings Unit Files Under Chapter 11, Wall St. J., Dec. 7, 2000, at A4.

[FN55]. See, e.g., In re Joint E. & S. Dists. Asbestos Litig., 129 B.R. at 747-48 (Weinstein, J., concurring) (stating that "(a) newer generation of peripheral defendants are becoming ensnarled in the litigation" as plaintiffs' lawyers seek "to expand the number of those with assets available to pay for asbestos injuries"-even though "(t)he extent of liability, possible defenses and value of the claims against these new defendants is unknown").

[FN56]. Susan Warren, Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps, Wall St. J., Apr. 12, 2000, at B1 (quoting New York attorney James Early, whose firm specializes in asbestos litigation).

[FN57]. See id.; see also Prof. Edley Testimony, supra note 1, at II.5.

[FN58]. See N.Y. Jury Finds Sears/GE Liable for Exposure; Awards $1.5 Million to Meso Victim, Mealey's Litig. Rep.: Asbestos, Oct. 6, 2000. Sears noted that on the jury's verdict form the jury found that Sears held two percent of the responsibility for the man's illness, and the jury also found that the remaining ninety-eight percent of the responsibility was attributable to the company that supplied asbestos-coated electrical wiring to the man's employer. See id.

[FN59]. Babcock & Wilcox Begins Bankruptcy Notification, Claims Processing, 15 No. 21 Mealey's Litig. Rep. Asbestos 10 (Dec. 1, 2000).

[FN60]. Id.

[FN61]. Id. The company filed for protection under Chapter 11 after it already had settled 340,000 claims at a cost of $1.6 billion and had become unable to see any resolution. Id. Babcock & Wilcox's Informational Brief in the U.S. Bankruptcy Court for the Eastern District of Louisiana filed on February 22, 2000, provides a chilling example of what can happen to peripheral defendants.

[FN62]. See, e.g., Houston Attorneys Win Unprecedented $115 Million Verdict: Court Win Nation's First Against

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a Grinding Wheat Manufacturer, Business Wire, Feb. 23, 1998.

[FN63]. See Warren, supra note 56.

[FN64]. See id.

[FN65]. 90 N.J. 191, 208, 447 A.2d 539, 549 (1982) (holding that asbestos defendants in strict liability case cannot assert "state of the art" defense to failure to warn claims).

[FN66]. 484 So. 2d 110, 113-14 (La. 1986) (ruling on certified question in asbestos case that, when the plaintiff proves a product is "unreasonably dangerous per se," the manufacturer may be held liable even if it did not know and reasonably could not have known of the danger).

[FN67]. See, e.g., Andrew T. Berry, Beshada v. Johns-Manville Products Corp.: Revolution-or Aberration-in Products Liability Law, 52 Fordham L. Rev. 786, 791 (1984) (noting that "Beshada is understood best not as a products liability case, but as an asbestos case" due to the elephantine size of asbestos docket); cf. Beshada, 447 A.2d at 548 ("Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. . . . We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue."); M. Stuart Madden, Strict Products Liability Under Restatement (Second) of Torts § 402A: "Don't Throw the Baby Out with the Bathwater", 10 Touro L. Rev. 123, 143 (1993) (stating that the Beshada court emphasized "that true strict products liability would work economies in the fact-finding process by avoiding laborious mini-trials on the issues of what the manufacturer knew and when the manufacturer learned of it"); Joseph Sanders, Scientific Validity, Admissibility, and Mass Torts After Daubert, 78 Minn. L. Rev. 1387, 1430-31 & n.234 (1994) (noting that mass tort cases "have placed enormous pressures on the judicial process and judges have reacted by seeking out new, efficient ways to dispose of them" and citing Beshada's rejection of the state-of-the-art approach as one "successful" tactic for enhancing efficiency in asbestos litigation).

[FN68]. See Feldman v. Lederle Labs., 97 N.J. 429, 434, 479 A.2d 374, 376 (1984) (limiting Beshada to asbestos cases and holding that "drug manufacturers have a duty to warn of dangers of which they know or should have known on the basis of reasonably obtainable or available knowledge").

[FN69]. See Brown v. Sears, Roebuck & Co., 514 So. 2d 439, 444 (La. 1987) (stating that "Louisiana imposes strict tort liability on the manufacturer of the defective product if the injury might reasonably have been anticipated") (citing Bloxom v. Bloxom, 512 So. 2d 839 (La. 1987); Weber v. Fidelity Cas. Ins. Co. of N.Y., 259 La. 599, 205 So. 2d 754 (1971)).

[FN70]. See La. Rev. Stat. Ann. § 9:2800.59(1) (West 1997) ("Notwithstanding R.S. 9:2800.56, a manufacturer of a product shall not be liable . . . if the manufacturer proves that, at the time the product left his control: He did not know and in the light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design."); N.J. Stat. Ann. § 2A:58C-3 (West 2000) (providing that "state of the art" is an absolute defense in products liability actions).

[FN71]. See, e.g., Restatement (Third) of Torts: Products Liability § 2(b), (c) (1997).

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[FN72]. See, e.g., In re Hawaii Fed. Asbestos Cases, 665 F. Supp. 1454, 1460 (D. Haw. 1986) (state-of-the-art evidence is irrelevant in design defect and failure-to-warn cases); Johnson v. Raybestos-Manhattan, Inc., 69 Haw. 287, 289, 740 P.2d 548, 550 (Haw. 1987) (an asbestos defendant's knowledge of its dangers is irrelevant in a strict products liability action and state-of- the-art evidence is inadmissible); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 438 (Mo. 1984) (the trial court properly denied the use of state- of-the-art evidence in an asbestos case).

[FN73]. See, e.g., Pierson v. Sharp Mem'l Hosp., Inc., 216 Cal. App. 3d 340, 345, 264 Cal. Rptr. 673 (Ct. App. 1989) (noting that "the law reasonably imposes only a standard of negligence rather than strict liability in the provision of human services"). Like service providers, peripheral defendants in asbestos cases who are not product manufacturers have only incidental involvement with the allegedly defective product; they are not in the business of acting as "suppliers" of that product to plaintiffs for purposes of products liability law. See San Diego Hosp. Ass'n v. Superior Ct., 30 Cal. App. 4th 8, 16, 35 Cal. Rptr. 2d 489 (Ct. App. 1994) (stating, "(r)ather than being a supplier or an entity that places a product in 'the stream of commerce,' . . . the fact the hospital provides (defective) equipment for the physician's use is incidental to the overriding purpose of providing medical services") (citing Murphy v. E.R. Squib & Sons, Inc., 40 Cal. 3d 672, 679, 710 P.2d 247, 252, 221 Cal. Rptr. 447, 452 (1985); Silverhart v. Mt. Zion Hosp., 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187, 192 (Ct. App. 1971)).

[FN74]. See, e.g., In re Breast Implant Prod. Liab. Litig., 331 S.C. 540, 548, 503 S.E.2d 445, 449 (1998) (explaining that the "economic theories (which) underlie the imposition of strict liability upon makers and sellers of products . . . (e.g., spreading the risk, redistribution of wealth, and problems of proof and deterrence) . . . do not justify the extension of strict liability to service providers") (quoting Ayyash v. Henry Ford Health Sys., 210 Mich. App. 142, 145, 533 N.W.2d 353, 355 (Ct. App. 1995)).

[FN75]. Professor Edley explained:
It is all but certain . . . that impaired victims receive proportionately less of the settlement sum than they would from a tort award based on individualized adjudication. . . . (L)oading a large number of claims together produces a bet- the-company risk for the defendants, making settlement more likely. In the settlement, then, the higher potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.
Prof. Edley Testimony, supra note 1, at II.7.

[FN76]. See Fed. R. Civ. P. 20; Hon. Mallett Testimony, supra note 6 (discussing the harmful effects of consolidation in the context of a Mississippi asbestos case ultimately involving more than 1,700 plaintiffs and 178 defendants); cf. Cosey v. E.D. Bullard Co., Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1995) (alleging exposure to silica and asbestos at one or more of more than 300 work sites both in and out of Mississippi over a fifty- six-year period).

[FN77]. Hon. Helen E. Freeman, Product Liability Issues in Mass Torts- View from the Bench, 15 Touro L. Rev. 685, 697 (1999).

[FN78]. Richard A. Solomon, Clearing the Air: Resolving the Asbestos Personal Injury Litigation Crisis, 2 Fordham Envtl. L. Rep. 125, 138 (1991).

[FN79]. "(I)mposition of liability without regard to individualized fault is often unfair to certain defendants, and inconsistent with a basic underlying notion of the tort system: that only one who is responsible for causing

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particular and identifiable harm should be held liable for civil damages." Victor E. Schwartz & Liberty Mahshigian, Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution, 73 Cal. L. Rev. 941, 942 (1985) (citing J. Fleming, The Law of Torts 179-81 (6th ed. 1983); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 103, at 713-14 (5th ed. 1984)).

[FN80]. See generally Schwartz & Mahshigian, supra note 79.

[FN81]. See, e.g., Note, Market Share Liability: An Answer to the DES Causation Problem, 94 Harv. L. Rev. 668, 676 (1981).

[FN82]. See Daubert v. Merril-Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); Fed. R. Evid. 702.

[FN83]. Castano v. Am. Tobacco Co., 84 F.3d 734, 747 n.24 (5th Cir. 1996).

[FN84]. See Victor E. Schwartz, Kumho Tire: Will State Judges Agree to Act as Gatekeepers for Admission of Expert Evidence?, NJC Alumni Mag., 12, 15 (1999).

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Prepared Statement Concerning H.R. 1283,
The Fairness in Asbestos Compensation Act,

by

Professor Christopher Edley, Jr.
Harvard Law School.

at a Hearing before

The House Committee on the Judiciary

July 1, 1999

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Statement by Professor Christopher Edley, Jr.

I. Introduction

More than six years ago, I wrote a law review article with my colleague Paul Weiler advocating an administrative solution to the morass of asbestos litigation in the courts.[1] As we wrote, the litigants were finalizing the Georgine settlement and preparing for its review by the trial court judge. I supported the class action settlement because it achieved most of the goals I thought valuable for legislation, although on a scale limited to only 20 defendant companies. Equally important, the settlement was a "bird in the hand" -- it seemed feasible in the short term, while legislation to fashion an administrative solution seemed certain to face a protracted and uncertain authorization process, followed by the delays of appropriations battles and implementation in the executive bureaucracy.

Alas, although the trial judge ruled that the Georgine settlement was fair, the Supreme Court held on appeal (over a dissent authored by Justice Breyer), that the class action device is not flexible enough to get the job done, and invited Congress to consider a legislative solution.[2] And again, just last week, the Supreme Court reluctantly struck down an innovative asbestos class action settlement of hundreds of thousands of claims, again over Justice Breyer's dissent. "[T]he elephantine mass of asbestos cases," the Court concluded, "defies customary judicial administration and calls for national legislation."[3] Chief Justice Rehnquist noted in dismay,

> "Justice Breyer's dissenting opinion highlights in graphic detail the massive impact of asbestos-related claims on the federal courts. Were I devising a system for handling these claims on a clean slate, I would agree entirely with that dissent, which in turn approves the near-heroic efforts of the District Court in this case to make the best of a bad situation. Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims.
>
> "But we are not free to devise an ideal system for adjudicating these claims. . . .

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[1]Christopher F. Edley, Jr. and Paul C. Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. on Legis. 383 (1993).

I have prepared this statement of my views for the Committee at the request of certain proponents of the legislation, and have been compensated for my time and expenses. My statements express my own views on the subject, which may in some respects differ from those of the bill's proponents.

[2]Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628-29 (1997).

[3]Ortiz v. Fibreboard Corp., No. 97-1704, slip op., at 1 (June 23, 1999).

[T]he 'elephantine mass of asbestos cases' cries out for a legislative solution."[4]

My earlier hope that the courts possessed the tools they needed to fashion a response to the crisis has proved a mirage. In both cases, Justice Breyer pleaded with his colleagues to approve the settlements. He noted that "when 'calls for national legislation' go unanswered, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice."[5] I fully subscribe to that view, but the Supreme Court could not have said more clearly that such innovations cannot do the job that the Constitution has entrusted to Congress. Legislation is now the only avenue available to avoid "a massive denial of justice."

In response to the Supreme Court's calls for legislative action, the "Fairness in Asbestos Compensation Act" has been introduced in both the House and the Senate. In this paper I review the proposed legislation and conclude that the proposed legislation provides an imaginative and effective framework for replacing the litigation morass with a secure, fair and efficient means of compensating victims of asbestos exposure.

II. The Asbestos Crisis Remains Grim

In 1993, Paul Weiler and I described an "asbestos tragedy with human, financial, and legal costs that dwarf those created by other examples of medical and product liability."[6] We described several key problems with asbestos litigation as it was then being handled in the traditional tort system.

- Asbestos litigation was clogging the courts, with over 100,000 cases then pending.
- Many claims involved "individuals who are understandably worried about their

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[4]Id., slip op., at 1 (Rehnquist, C.J., concurring). Other courts have also invited -- or even demanded -- legislative action. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628-29 (1997), Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634 (3d Cir. 1996) ("The most direct and encompassing solution would be legislative action."); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation."); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 50 (Tex. 1998); Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 304 (W. Va. 1996); W.R. Grace & Co. v. Waters, 638 So.2d 502, 505 (Fla. 1994) ("Any realistic solution" must be uniform and "such a uniform solution can only be effected by federal legislation.").

[5]Ortiz v. Fibreboard, No. 97-104, slip op., at 3 (Breyer, J., dissenting).

[6]Edley & Weiler, supra note 1, at 386 (1993).

exposure to asbestos but who are not now and *never will be afflicted* by disease,"[7] diverting the dwindling resources of the defendants.

- The transaction costs associated with asbestos litigation -- attorney's fees, expert fees, and other expenses -- were too high, an extravagant waste of limited resources.

- The primary early defendants -- those who made the decisions to produce and market asbestos -- had gone bankrupt.

- Plaintiffs' attorneys had then "cast the litigation net further" in an endless effort "to find corporate pockets deep enough to satisfy the vast numbers of pending and future tort claims."

- Plaintiffs who suffered substantial and even fatal impairments could be forced to wait years to recover.[8]

Since 1993, the already grim situation has deteriorated. Each of the problems identified in our article still plagues asbestos litigation, and many have worsened. Only the Congress can provide a satisfactory response.

1. Size and Nature of the Caseload. In 1993, courts were already clogged with over 100,000 pending cases, most of them involving claimants who, although exposed, had no impairment whatsoever. That figure has increased sharply in only six years, doubling to 200,000 pending cases. The growth is not due to obstinate defendants, because well over 300,000 cases have been settled.[9] New asbestos cases are being filed at a rate we could not have imagined six years ago. For example, from 1994 into 1998, new claims against the largest defendant company alone averaged approximately 40,000 per year; new claims continued to be filed at about that rate through the first three quarters of 1998, the latest available data.[10]

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[7]Id. at 384.

[8]Id. at 384.

[9]Just those twenty defendants involved in the Georgine case have settled approximately this number.

[10]There is no central judicial administrative body that collects data on asbestos cases in both federal and state courts. The Mealey's Report obtains its data from public SEC filings by asbestos defendants. According to those filings, in Sept. 30, 1998, there were 196,300 cases pending against Owens-Corning, a defendant in the great majority of asbestos cases. See Owens-Corning, SEC Form 10-K, Annual Reports for Fiscal Years 1994 through 1997. Following the announcement of Owens-Corning's "National Settlement Program" in late 1998, Owens-Corning's filings ceased reporting the number of new cases filed. See Owens Corning, SEC

No serious analyst believes that the increased number of filings is due to an increased prevalence of asbestos-related disease. Indeed, medical and epidemiological evidence suggests that the number of asbestos-related diseases is declining,[11] yet filings continue to skyrocket. Rather, the new filings represent claims of people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be.[12] In 1992, these claims "account[ed] for sixty to seventy percent of new asbestos claims filed."[13] The trend of an ever-larger proportion of unimpaired claimants appears to have accelerated since then.

2. Increasing Resources Are Devoted to the Unimpaired. Overall, the resources that are devoted today to asbestos litigation have sharply increased. In addition to the increase in the number of pending cases to 200,000, the size of verdicts has increased, even in cases of mild or no impairment. For example, in February 1998, a Texas state court jury awarded $15.6 million in compensatory damages, of which the vast majority was for "future damages," and $100 million in punitive damages, to a group of twenty-one plaintiffs whose claimed illness ranged from "mild" to so-called "asymptomatic" asbestosis. Three of the plaintiffs had no symptoms at all, but nevertheless obtained millions for their admittedly "unconfirmed" disease.[14] A few months later, in another case, two plaintiffs who allegedly suffered asbestosis but whose disease could not be detected by x-ray examinations were nevertheless awarded between $2 and $3.5 million each by a Mississippi state court jury.[15]

The prospect of such verdicts with lottery-like jury awards distorts the settlement process, particularly for claims involving the unimpaired, and represents an overall trend of higher

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Form 10-K, Annual Report for Fiscal Year 1998. See also Asbestos Companies Report Numbers of Pending Claims, New Filings in 1998, 14 Mealey's Litig. Rep.: Asbestos 23-27 (May 7, 1999) (hereinafter "Asbestos Companies Report").

[11]See Edley & Weiler, supra note 1, at 389 n.10 (citing medical studies).

[12]See, e.g., Richard Doll & Julian Peto, Asbestos: Effects on Health of Exposure to Asbestos 2 (1985) ("The benign conditions of the pleura that are produced by asbestos are seldom of any lasting importance.")

[13]See Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?," 13 Cardozo L. Rev. 1819, 1853 (1992).

[14]Aaron v. Abex Corp., No. 94-C-2110-2 (Dist. Ct. Brazoria Cnty. Feb. 19, 1998). See Carborundum Co. Hit With $115.6 Million Verdict In 21 Texas Cases, 13 Mealy's Litig. Rep.: Asbestos 5-6 (March 6, 1998).

[15]Cosey v. E.D. Bullard Co., No. 95-0069 (Miss. Cir. Ct., Jefferson Cnty., June 12, 1998). See Mississippi Jury Awards $48.5 Million in 12 Cases, Andrews Asbestos Litig. Rep., July 17, 1998, at 1.

amounts that defendants are paying to resolve asbestos cases.[16] In 1991, Judge Jack Weinstein estimated total indemnity costs at between $26 billion to $30 billion.[17] In 1992, one study estimated that the cost of compensating asbestos claimants could be over $100 billion, with $50 billion as a best estimate.[18] In light of the unpredicted, rapid caseload growth and the higher verdicts and settlements, one can assume that the higher end of these estimates is more accurate.

3. The Litigation Process Remains Too Expensive. The burden of a larger caseload and larger verdicts for the unimpaired is exacerbated by the unacceptably high transaction costs associated with asbestos claims. In 1993, Paul Weiler and I summarized the research evidence by observing that,

> "[O]f every dollar paid by defendants, over sixty cents goes to the lawyers. Adding the overhead costs of both the judicial and insurance systems, asbestos litigation consumes two dollars of society's resources in order to deliver a single dollar to people who were exposed."[19]

These figures were derived in part from a Rand Corporation study, which remains the most comprehensive study ever done on transaction costs associated with asbestos litigation,[20] and that figure been cited as authoritative in numerous court opinions.[21] There is no evidence that

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[16]See, e.g., Asbestos Companies Report, supra note 10.

[17]See In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 907 (Bankr. E. & S. D. N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992); An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims, Transcript of the Administrative Conference of the United States, at 4 (Oct. 31, 1991).

[18]See Paul W. MacAvoy, The Financing of Liability Payments for Asbestos-Related Disease 4-5 (Yale Univ. School of Management Working Paper Series C, No. 35, 1992).

[19]See Edley & Weiler, supra note 1, at 393; see also Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 13 (March 1991) (hereinafter Ad Hoc Committee Report) at 2-3; Peter Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J. L. & Pub. Pol'y 541, 558 (1992). Judge Jack Weinstein estimated that, by 1991, the percentage of all funds expended in asbestos litigation (including the costs of overhead, the insurance system, and the courts) that were used to compensate victims was only 30%, with 70% expended on transaction costs. See In re Joint E. &S. Dist. Asbestos Litig., 129 B.R. at 749.

[20]See James S. Kakalik, et al., Variation in Asbestos Litigation Compensation and Expenses (Rand 1984).

[21]See, e.g., Fibreboard, slip op., at 2 n.1 ("'[T]ransaction costs exceed the victims' recovery by nearly two to one . . . .'"); id. at 2-3 (Breyer, J., dissenting) ("'[O]f each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims'"); Amchem, 521 U.S. at 632 (Breyer, J., dissenting) (same); see also In re Joint E. &S.

transaction costs have declined since then to acceptable levels, and it is clear that today most of the money spent to resolve asbestos litigation still does not reach the victims. Plaintiffs' attorneys fees remain as high as 33% to 40% on a contingency basis, despite the fact that the risk of no recovery no longer justifies such high fees. There are examples of some plaintiffs' attorneys charging a fee as high as 50% of any recovery.[22] It is possible that defense costs, which are charged on an hourly basis, have moderated in recent years as cases become more routine. However, time-consuming and expensive legal services are inevitable given certain complications of today's court-centered asbestos litigation machinery, such as massive consolidations in state courts, involving disparate claims and enormous financial stakes. Finally, the costs to the court system of resolving hundreds of thousands of asbestos claims -- in judicial attention, salaries of court personnel, and lost or delayed opportunities to adjudicate other cases -- are enormous, no matter how many innovative techniques are employed.

4. Compensation for Future Claimants Remains Doubtful. The burden of asbestos litigation -- in increased caseload, size of verdicts and settlements, and continued high transaction costs -- inevitably raises the most troubling issue surrounding asbestos litigation. If the burden becomes too much for the remaining solvent defendants to bear, future victims may go uncompensated. At least twenty-five companies have been bankrupted, and many other companies have faced potentially crippling awards.[23] Johns-Manville, the most important producer of asbestos products, went bankrupt long ago under the weight of claims against it, and claimants who were exposed to Johns-Manville products must now find some other company to which they can assign blame, or accept the delays and substantially reduced compensation of asserting a claim against the Manville Trust, which emerged from that bankruptcy.[24] Tragically, the bankruptcy means that Johns-Manville claimants who have now developed serious asbestos-related injuries, such as mesothelioma or lung cancer, may receive substantially less compensation than those with relatively trivial injuries, or even no injury, can obtain against

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Dist. Asbestos Litig., 129 B.R. at 749 (regarding that figure as conservative).

[22]See Brickman, supra note 13, at 1834 n.60.

[23]See Ad Hoc Committee Report at 14 (listing eleven major corporate defendants that had filed for bankruptcy by 1991); Edley & Weiler, supra note 1, at 390 (identifying five additional bankruptcies and one dissolution). Further research has brought the total to approximately twenty-five.

[24]The Manville Trust was originally created in 1988 as a result of the reorganization of Johns Manville. It immediately experienced a run on its assets that threatened to deplete everything within a matter of months. Judge Jack Weinstein quickly acted to stem the hemorrhage by entering a stay, and the Manville Trust was reorganized in a class action proceeding. The Trust began to make payments to new claimants in 1995, thirteen years after the initial bankruptcy. The Trust currently pays 10 cents on the dollar on claims made against it. See In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 479, 574 (E. & S.D.N.Y. 1995) (Weinstein, J.).

those companies who are now solvent. There will inevitably be Johns-Manvilles in the future, and claimants who will arbitrarily be denied fair compensation as a result.

5. The Search of Deep Pockets Continues -- and Intensifies. In our paper, Paul Weiler and I described how plaintiffs' lawyers were continually searching for deep pockets among peripheral defendants after the traditional defendants were driven into bankruptcy. This process has accelerated with the new avalanche of claims in the 1990s. Then, the primary concern was the fairness of imposing liability on the shareholders of large companies who had the misfortune of purchasing a small manufacturer of asbestos products in the 1960s and 1970s -- long after the company's fateful decision to market asbestos had been made.[25] Today, lawyers are searching far beyond manufacturers of asbestos products to cast blame on any company with even the most attenuated connection with asbestos.

For example, in the Texas case I describe above, Carborundum Corporation, which manufactures grinding wheels, was hit with a $115 million verdict. Plaintiffs claimed that their exposure to a grinding wheel, which contained some asbestos, caused their "mild" or even "asymptomatic" disease. Until the Carborundum case, no grinding wheel manufacturer had ever been held liable for asbestos-related injuries.[26] In a recent federal court case, companies such as AT&T, Chrysler Corp., Ford Motor Co. and IBM were named as defendants.[27]

In my testimony today I have been careful to speak of "asbestos defendants," never of "asbestos companies" or the "asbestos industry." There is no "asbestos industry" anymore -- virtually all asbestos products are off the market, and most of the former major producers are bankrupt -- and many, perhaps most, of today's defendants cannot be accurately described as "asbestos companies." These defendants are in every industry and every region, from large companies such as AT&T, to smaller companies such as Carborundum.

Finally, although this search for new and creative theories of liability may keep the asbestos plaintiffs' bar in business, it does not ensure compensation for the victims of asbestos disease. Plaintiffs whose primary exposure was to a now-bankrupt defendant (like Johns-Manville) may be able to assert creative claims against solvent peripheral defendants, but they may not. Furthermore, the existence of other potentially liable parties bears no relationship to the seriousness of the victims' diseases or their need for compensation. Whether they will be able to obtain compensation is simply a function of their lawyers' inventiveness and of chance.

6. Delays Continue to Frustrate Access to Justice. Next, a word about the delays in the courts. In our earlier paper, Paul Weiler and I described how asbestos claims can take many years

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[25]See Edley & Weiler, supra note 1, at 384.

[26]See sources cited supra note 15.

[27]See Asbestos MDL 875 Update, Andrews Asbestos Litig. Rep., May 25, 1999, at 6-7.

to resolve, further delaying compensation to those who are sick.[28] According to the Judicial Conference Report in 1991, asbestos cases on average take almost twice as long as other lawsuits to resolve.[29] Since that time, more than 100,000 cases have been added to court dockets, and cases continue to take many years to come to a resolution.

Although asbestos cases have presented a severe problem for the federal judiciary, the vast majority of asbestos cases are filed in state court, particularly now. Asbestos lawyers perceive the federal system as an unfavorable forum for the majority of claimants -- those who are not sick. The judge in charge of asbestos claims within the federal multidistrict litigation system, Judge Charles Weiner, of the Eastern District of Pennsylvania, gives priority to the sick.[30]

There is no centralized repository of data on asbestos cases in the state courts, and states vary in how they record data concerning their court systems. The limited evidence available suggests that delays in the tort system remain high in the states with the largest numbers of asbestos claims. Over one-third (36%) of all asbestos claims pending in state courts are pending in Texas. Several county courts in Texas -- representing about half of the pending asbestos caseload in that state -- responded to a request for data on their asbestos cases. These courts treat cases with a number of plaintiffs as a single case, and so each case may involve many separate claims.[31] The courts that provided the data on age of pending cases show serious delays. The average age of pending cases in Jefferson County was 5 years, 3 months. Other counties were almost as bad -- 3 years, 8 months in Bexar County and 4 years, 9 months in Nueces County. And this is the average age of pending cases -- still more time will elapse before they are fully resolved. For example, in Tarrant County the average age of a pending case is only 15 months, while the average time to disposition is 31 months. In Nueces County the average age of a disposed asbestos case was 5 years, 4 months.[32] All these figures, whether seriously bleak or only moderately so, should be compared with the 4-6 months that could be achieved by the

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[28]See Edley & Weiler, supra note 1, at 394.

[29]Ad Hoc Committee Report at 10-11.

[30]The Administrative Office of the United States Courts (AOUSC) for years has kept comprehensive data on federal asbestsos claims. However, because the AOUSC counts a transfer pursuant to an MDL order as a termination of a case, following the MDL order in 1991 the federal data on delays in asbestos cases are no longer meaningful.

[31]Unfortunately, the counties were unable to respond to a request to segregate actual plaintiffs from court cases, to give a more precise figure for delay. Bexar County stated that the cases contained an average of six plaintiffs per case.

[32]Even this figure may understate delay, because, according to the Texas Civil Justice League, the Texas courts list a case as "resolved" even if claims are still pending against some defendants.

administrative scheme proposed in H.R. 1283.

Data from other states is consistent with the pattern of delays in the state court systems. Louisiana represents about 9% of the asbestos cases nationwide. Only one parish responded to a request for data. The Parish of Jefferson has 143 cases pending, with an average number of twelve plaintiffs per case. The average age of the pending cases is 4 years, 5 months -- similar to Texas. Finally, although New Jersey is a less important forum for asbestos cases (with 2.4% of the cases nationwide), its court system keeps comprehensive statewide data on asbestos cases. According to those data, more than half of the cases have been pending for more than three years – which is the maximum period the state's system is designed to record.

7. Consolidations Exacerbate the Problems Inherent in the Current System. In desperation over the massive caseload and frustrating delays, some state courts have turned to mass consolidations -- in which hundreds or thousands of plaintiffs are grouped into a single case, with defendants numbering possibly in the hundreds -- in order to process claims more quickly. This procedural device does benefit unimpaired claimants, and of course generates substantial income for lawyers. Consolidations of this sort, however, seriously dilute the quality of justice, not only for defendants, but also for those plaintiffs with the strongest claims. In one case, for example, Cimino v. Raymark Industries, Inc.,[33] a federal district court in Texas attempted to adopt a trial plan to adjudicate the claims of 2300 asbestos plaintiffs. The appeals court reversed the plan because the plan would not -- and could not -- determine the issues in each claim with any reasonable degree of accuracy. So, next, the district court decided on a "mini-trials" approach so each plaintiff would receive an individualized assessment of causation and damages. But the district court abandoned that plan because the mini-trials would have required four and a half years to complete under even the most optimistic scenario. Then the court again attempted to devise a generalized approach. The appeals court reversed again, because the generalized approach taken by the district court was inconsistent with Texas substantive law.[34]

In cases where courts have approved mass consolidations, and putting aside for the moment the compromises to the basic legal requirement of individualized determinations of individual issues, the results of consolidation have accentuated the problem of diverting resources from the sick to the non-sick that I have described. When scores or even hundreds of cases are tried at once, it is almost impossible for a judge or a jury to focus attention to the particular issues that are critical to assessing the liability of particular defendants to particular plaintiffs, such as product identification, the adequacy of a particular warning to a plaintiff at a given time, or other critical elements of an asbestos case. And it is similarly all but impossible to assess carefully the compensatory damages due the individual victims. In such a situation, even defendants against whom evidence is very weak must settle, because responsible management cannot "bet the company" on the hope that a judge or jury will focus on those issues.

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[33] 151 F.3d 297 (5th Cir. 1998).

[34] See also Fibreboard, slip op., at 2-3 (Breyer, J., dissenting) (describing Cimino case).

Moreover, as Paul Weiler and I stated in our article, the consolidation "approach inevitably wastes resources on less deserving, unimpaired claimants."[35] For example, in Cimino, the jury awarded $558,900 in every case of pleural plaques, or "freckles",[36] which usually involve no impairment; that magnitude of award, if applied in all cases, would very quickly exhaust the available resources of all defendants and leave victims who develop serious illness in the future with little or no compensation. In a mass consolidation in Mississippi, unimpaired plaintiffs were awarded between $2 and $3.5 million, undoubtedly because they were tried side by side with severely injured plaintiffs.[37] In such cases, the values assigned to those who are not sick are distorted by the jury's sympathy for those deserving claimants who have serious illnesses. Because of this, plaintiffs' lawyers include in consolidations hundreds or thousands of plaintiffs who are not sick, using those who suffer from serious disease to inflate the value of those claims.

The vast bulk of cases, however, are settled before trial. But the same problems distort the settlement process, too. When a large batch of cases is settled, defendants pay a lump sum to cover both the impaired and unimpaired claims. There is no role for defendants or even a judge in reviewing the manner in which plaintiffs' counsel allocates the settlement among the claimants. It is all but certain, however, that impaired victims receive proportionately less of the settlement sum than they would from a tort award based on individualized adjudication.There is a very troubling dynamic here. Combining impaired victims, some of them seriously ill, with the unimpaired gives the unimpaired a sort of "sympathy by association" benefit that would weigh with a jury, if the case ever went to trial. But loading a large number of claims together produces a bet-the-company risk for the defendants, making settlement more likely. In the settlement, then, the higher potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.[38]

The asbestos litigation morass has substantially deteriorated since the collapse of the Amchem settlement in 1997. The need for a legislative response is greater than ever, to provide speedy and inexpensive administration of current claims, security to those who develop injuries in the future, and an end to the litigation lottery that taxes the interests of defendant firms, their employees and their communities.

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[35]Edley & Weiler, supra note 1, at 397.

[36]See Cimino, 151 F.3d at 305.

[37]See sources cited supra note 10.

[38]See William N. Eskridge, Jumbo Consolidations in Asbestos Litigation 18-25 (Prepared Statement at a Hearing Concerning H.R. 1283, the Fairness in Asbestos Compensation Act, Before the House Committee on the Judiciary, July 1, 1999).

III. The Proposed Legislation

In 1998, a bipartisan group of sponsors in both chambers introduced the "Fairness in Asbestos Compensation Act" in response to the invitation of the Supreme Court in Amchem. Similar bills have been reintroduced this year by Chairman Hyde (H.R. 1283) and Senator Ashcroft (S. 758). Again, both bills enjoy substantial bipartisan support.

The proposed legislation would establish an "Asbestos Resolution Corporation" or "ARC" – a government corporation paid for by the defendants but solely responsible (in the familiar manner of independent adjudicatory commissions) to the President and Congress – to administer an asbestos claims resolution program.[39] The program includes two basic components:

- an administrative procedure for determining medical eligibility, keyed to objective clinical and pathological criteria for impairment; and
- an aggressive alternative dispute resolution (ADR) process to resolve claims more quickly and less expensively than is possible in the courts.

Substantively, the bill reflects a number of policy principles, the most critical of which are:

- Impaired claimants, now and into the future, must be assured a recovery of tort-like compensatory damages.
- The resources for compensating victims should go to those who are impaired, while the claims of those who have no impairment should be deferred until any impairment develops; claimants should be able to bring claims whenever they are sick, and not have to rush to file premature claims as a result of any state statute of limitations.
- The resources of defendant companies are better spent on compensation than on litigation costs, so the cost efficiencies of expert administrative decisionmaking and of ADR should be exploited wherever possible.
- Claimants should have meaningful access to courts as a check on administrative discretion and to ensure that, over time, the administrative decisionmaking is

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[39]The ARC's administrative costs will be funded by assessments on the defendants who are named as respondents, with the costs of mediation and arbitration imposed directly on those defendants named in proceedings before the ARC. The Corporation would have authority to enforce its assessments in court and to obtain reasonable attorney's fees and prejudgment interest if it prevailed. Defendants could challenge their assessments, but they would be required to pay first and litigate afterwards. Costs of settlements, awards, and judgments would be borne by the individual defendants, just as they are today, and joint and several liability would remain as under current law.

"aligned" with the compensation available to impaired claimants in tort suits.

Let me turn to a summary of the bill's features.

1. Medical eligibility. The heart of the medical eligibility process is a set of medical criteria that are taken practically verbatim from the criteria agreed upon by leaders of the plaintiffs' trial bar, the AFL-CIO, and 20 defendants in the Georgine/Amchem case. After exhaustive hearings, the Amchem district court found that those criteria would not deny compensation to any significant number of people who are impaired by an asbestos-related disease. That finding was never questioned by the appellate courts.

The legislation would require medical eligibility decisions to be made by doctors who have no substantial ties to either side in the asbestos litigation. A claimant whose application is not granted as a matter of routine by the ARC's claims examiners would be entitled to reconsideration by a panel of three medical experts, who would consider the claimant's case *de novo*. In addition, for unusual situations, where a claimant has persuasive evidence of an asbestos-related impairment but does not meet the medical criteria, the legislation provides an Exceptional Medical Claims Panel modeled on a similar panel in Amchem. That panel would have the authority to examine all the circumstances of a claimant's case and to grant a certificate of eligibility if the claimant establishes by evidence comparable to that required by the criteria that he or she is impaired by an asbestos related disease. The Exceptional Medical Claims Panel would consist of five doctors who are each specialists in a key field such as pulmonary medicine, pathology, or radiology.

A claimant who exhausts the ARC medical review process and is dissatisfied would be entitled to judicial review in a Federal district court. The court would uphold the ARC's decision only if it is supported by "substantial evidence" in the record before the ARC, the test traditionally employed for relatively exacting judicial review of formal administrative decisions.[40]

2. ADR Process. After a claimant has received a medical eligibility certificate and has provided a statement of the basis of his or her claim against the named defendants, the ARC employs a two-step mediation process to encourage quick and final settlements. There is a sixty-day grace period following the medical review process to permit the parties to negotiate settlements voluntarily. If settlement is not reached in sixty days, an ARC mediator is appointed to help the parties reach a settlement within another sixty days. Defendants have an incentive to settle before mediation because they bear the cost of the mediation process.

The legislation requires all parties to disclose information necessary to make mediation effective. The heart of the process is the legislation's requirement that defendants must make good-faith offers at the end of the mediation period, or face a financial penalty that will be added to an arbitration award or court judgment. The legislation defines a "good-faith" offer as one

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[40] 5 U.S.C. 706(2)(E) (substantial evidence review under the APA).

which is within 25% of an eventual award or judgment, and imposes a 10% penalty on defendants for inadequate offers. Claimants, by contrast, would not be subject to a financial penalty for failing to make a good faith demand, although the mediator has the authority to extend the process for up to an additional 60 days if the mediator determines that the claimant's final offer is not in good faith.

The legislation is designed to resolve as many cases as possible through mediation, but a claimant may choose individual adjudication if he or she is not satisfied with the defendants' final settlement offer. The legislation provides the claimant, not the defendant, with a choice of (1) binding arbitration under rules established by the ARC, or (2) filing a lawsuit in a federal or state court of competent jurisdiction. Unlike the Amchem settlement, there is no limit on the number of claimants who can choose to litigate their claims, either through ARC arbitration or in the tort system.

Claimants who wish to resolve their cases quickly and with finality can choose arbitration, paid for by the defendants. Simplified rules would be employed, similar to those used in administrative law judge [ALJ] hearings, and the arbitrator would apply applicable state law to determine liability, as modified by the legislation (i.e., medical criteria must be met, no punitive damages, no statute of limitations defense, no bar to additional compensation if plaintiffs have been compensated for a less serious illness, etc.) The ARC would have authority to use its own arbitrators or contract with established private-sector arbitration services. Moreover, nothing in the legislation prevents the ARC from contracting with ALJs (through an interagency agreement) to act as arbitrators. Arbitration awards would be fully enforceable under the Federal Arbitration Act, with extremely limited potential for challenge.

3. Claimants still have access to court. After establishing medical eligibility, and if time-limited mediation fails, claimants who prefer to litigate their cases in court can choose that option as well. Individual trials would be required,[41] and claimants could choose to file their claims in any state or federal court of competent jurisdiction. Certificates of medical eligibility would be admissible in court to establish medical causation, and would be presumed correct unless rebutted by clear and convincing evidence. Other issues would be resolved in accordance with applicable state law, as modified by the legislation. Jury trials would be available just as they are today, and a jury would assess compensatory damages for a qualified claimant in accordance with state law, including damages for emotional distress and for pain and suffering.

4. Defendants lose statute of limitations and similar defenses.

The legislation abolishes the statute of limitations, and similar timeliness defenses such as laches, for all claims that are not barred as of the date of enactment. Plaintiffs will be able to obtain compensation at any time for their illness, and need not fear that their claims for serious

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[41]Consolidations would be permitted only if all parties agree. If this federal rule requiring individual trials without such agreement is violated by a state court, defendants would have a right to remove the case to federal court.

disease will be barred if they do not file their claims soon after the first markers of exposure become detectable.

5. Protection for cancer victims, and proscription of limited releases.

The legislation protects cancer victims by providing that a claimant is not barred (by the legal rule of res judicata) from collecting compensation for a malignant condition, such as lung cancer or mesothelioma, simply because the claimant has already received compensation for a nonmalignant condition, such as asbestosis or an impairing pleural condition. Likewise, the legislation prohibits defendants from obtaining releases from those with nonmalignant diseases which prohibit further suits if the claimant develops cancer.

6. Precludes punitive damages.

The legislation bars punitive damage awards, but permits full compensatory damages for qualified claimants, including damages for intangibles like pain and suffering or emotional distress, and also allows loss of consortium damages for the spouses of asbestos victims. The legislation ensures that the interests of future victims in obtaining full, prompt and fair compensation is not sacrificed to "punish" defendants for decisions made decades earlier that cannot be undone, and for which society has already exacted a price that provides a sober lesson for those who would supply potentially dangerous products in the future.

IV. The Proposed Legislation Would Provide a "Secure, Fair and Efficient Means of Compensating Victims of Asbestos Exposure."

There are several criteria we should use to evaluate any proposed administrative system for addressing the asbestos crisis. These include:

- The costs of compensation, as well as the administrative costs of the system, should be borne by defendant companies rather than the taxpayers.

- Resources should be focused on compensating the sick, rather than the unimpaired, but the unimpaired must be assured that compensation will be available to them if they become sick in the future, and transaction costs must be reduced.

- The lottery-like unpredictability of litigation must be replaced by predictability, and like cases should be treated alike.

- The sick must have their claims determined, and compensation paid, far more quickly than through litigation.

- The administrative scheme must enjoy legitimacy, in theory and perception. For

example, there must be access to courts in order to ensure the fairness of administrative actions, and the agency must be structured to avoid "capture" or bias.

- The scheme must provide an appropriate balance between the needs of victims of asbestos exposure and present-day workers, families and communities who depend on the companies.

As detailed below, when judged by these criteria the proposed Fairness in Asbestos Compensation Act is a vast improvement over the current system, and a much needed response to a multibillion dollar problem of enormous importance to hundreds of thousands of families.

1. Financial responsibility. Because it is a substitute for tort litigation, victim compensation awarded by the proposed Asbestos Resolution Corporation should obviously be funded by respondent-defendants, rather than general tax revenues. The defendants would remain subject to the state law rules of joint and several liability.

Interestingly, the bill would not collectivize the financial responsibility of defendants and thereby obviate the need for showing that particular defendants are responsible. Unfortunately, although this is what I had in mind when writing in 1993, such a collective mechanism is now impractical because of the enormous diversity within the large set of corporate defendants. There is essentially no asbestos manufacturing industry, as that phrase would have been understood two or three decades ago. Instead, defendants are widely varied in their lines of business, and in their proximate relationship to asbestos production or production use, among other issues. There are unstable patterns in who is named as a defendant in any given type of suit. Some defendants were merely owners of property on which asbestos was present, and at least one is a major insurance company. The rules of civil liability vary depending on the basis for which liability is asserted. All of this is complicated by the fact that different defendant companies have different packages of insurance coverage, with different insurers and reinsurers, and an allocation system would have to avoid shifting the responsibility for compensation costs from insurers back to defendants, and the complex operation of countless different insurance policies and governing state laws. I cannot imagine any legislative formula for allocating financial responsibility under these circumstances. Instead, some form of negotiation and administrative adjudication as among defendants on a case-by-case basis seems necessary, as contemplated in the proposed legislation.[42]

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[42]With new theories of liability every day bringing in new defendants, such as AT&T and IBM, see above, it would be well nigh impossible to calculate the collective proportional liability of all asbestos defendants for all asbestos claims. In legislation that seeks a global resolution for asbestos cases (unlike the Georgine settlement, which involved only twenty companies representing less than a quarter of the liability, and which covered only occupational exposure, not all claims), such issues must be resolved on a case-by-case basis. The legislation provides that state rules of joint and several liability remain in place, permitting the claimant to obtain full compensation from any of several defendants, and provides that issues of relative fault among

For administrative costs, the legislation adopts a contribution mechanism that is formally different from a tax, but fully enforceable. There is a reasonable argument that at least some costs should be borne by the taxpayers because the agency's functions are no less governmental than other activities of either the executive or judicial branches. Wisely, however, the bill funds these operating costs through assessments on the defendants. This is consistent with the bipartisan effort in recent years to make appropriate use of fees and other techniques to reduce taxpayer burden for funding activities when an identifiable portion of the public is specially benefitted by the governmental activity. Of course there are political obstacles, as well as settled expectations, standing in the way of instituting such fee-based funding for established programs that already rely on appropriations. With a new entity, the ARC, the Congress has an opportunity to do it the right way from the start.

As a practical matter, defendant funding also avoids difficulties in the budget process, particularly in light of the continuing importance of the discretionary budget caps. If the effective administration of the ARC were subject to appropriations gridlock or arbitrary budget cuts in either political branch of government, then the fair, expeditious and dependable compensation system we seek would be a legislative chimera, a much less attractive alternative to litigation.

2. Resources focused on the sick. The proposed bill focuses compensation on the sick in five ways. First, in order to recover, claimants must pass the medical eligibility criteria applied by physicians within the ARC mechanism or make a special showing to the Exceptional Medical Claims Panel -- unless they successfully challenge the medical finding of ineligibility through judicial review of the ARC determination. The medical criteria are the culmination of years of clinical and litigation experience. They define a screen to separate out asbestos-related impairments, so that compensation is not available to the unimpaired. The criteria were examined exhaustively by the parties and the court in Georgine, and have provided the general framework in some major settlements since. Second, claimants who are currently unimpaired are free to file for compensation if and when an impairment develops, because the legislation would eliminate the right of companies to defend against a compensation claim by citing the statute of limitations time-bar on lawsuits. Third, a claimant who does receive compensation for a non-cancer impairment but who later develops a malignancy could reenter the system and receive additional compensation. Fourth, the system focuses resources on the impaired by dramatically reducing transactions costs, including court costs and fees paid to lawyers – by defendants and plaintiffs alike. The determination of medical eligibility is not adversarial, and occurs even before the claimant names the respondent companies; mediation and arbitration are far less costly than tort litigation; the entire system is designed to reduce sharply, if not eliminate, the need for sophisticated legal representation. Finally, the legislation eliminates punitive damages, whose purpose (by definition) is to punish rather than to compensate. This, together with eliminating compensation for the unimpaired, reduces the risk of corporate bankruptcies so that resources will be available to those who are sick in the future.

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different defendants can be resolved in mediation or arbitration, without in any way tying up the claimant's recovery. See H.R. 1283, §§ 305, 306(h); S. 758, §§ 306, 307(h).

The most important qualification to the high marks the bill receives on this criterion relate to the first point, the medical criteria. There appears to be a substantial body of medical opinion that the criteria are perhaps too generous to claimants, and will require defendant companies to pay out more in compensation than is required under the pure theory of focusing exclusively on the impaired. Any such screen or assessment, however, will involve balancing the risks of over- and under-inclusiveness, or "false positives" and "false negatives". Quite properly, the parties to the Georgine settlement decided to err on the side benefitting victims, and the trial court approved.[43] That same judgment is reflected in the proposed legislation.

Finally, it is noteworthy that the medical eligibility criteria will trigger compensation for individuals who would not fit the familiar definition of "disability" used by, for example, Social Security. Such tests usually relate to functional incapacities that make the claimant unable to engage in "substantial gainful activity."[44]

3. Predictability and horizontal equity. The proposed legislation would greatly increase predictability for several reasons. First, the use of objective medical criteria, applied by disinterested physicians, is obviously fundamental. This use of expertise is, of course, a traditional justification for the creation of administrative agencies to whom legislative bodies delegate adjudicatory and other powers. Juries and judges without the benefit of repeated exposure to complex technical issues are inevitably less consistent than an expert administrative body.

A second reason to expect improved predictability and similarity of treatment for similar claimants is that by eliminating the "wild card" punitive damages factor, the legislation's structure will decrease the distortion of recoveries from case to case. While punitive damages are rarely awarded, the prospect of a large windfall award creates uncertainty for the parties, which inhibits settlement. It also permits a lucky few to recover millions while those with more serious diseases will often recover far less. Although the traditional tort damage elements of pain and suffering remain under this legislation, as they should, the bulk of the awards will be keyed to more "objective" components of compensatory damages.

Third, the administrative structure will produce better and timely information to guide settlements. In the current system, settlements may come at various stages in the development of evidence. The proposed legislation would ensure that more information about the claimant's circumstances is available earlier in the process, reducing the guess work and lottery-element in the ADR effort.

Unlike Amchem, the bill does not provide for predetermined settlement ranges; there is,

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[43]Georgine v. Amchem Prods., 157 F.R.D. 246, 270-71 (E.D. Pa. 1994).

[44]See, e.g. 42 U.S.C. § 423(f). See generally Jerry L. Mashaw, Charles J. Goetz, Frank I. Goodman, Warren Schwartz, Paul R. Verkhuil & Milton Carrow, Social Security Hearings and Appeals (Lexington 1978).

for example, nothing like a schedule of damages comparable to what we see in some workers' compensation contexts. There are advantages and disadvantages to this approach. With no schedule, the legislation imposes neither maximums (protecting companies) nor minimums (protecting claimants). There is built-in flexibility over time so we can expect that settlements will be yoked to outcomes of cases that are adjudicated. Remember that victims can opt out and go to court after they establish medical eligibility and mediation fails. In this way, the legislation ensures that settlements and arbitration awards will continually track the evolving conscience of the community, as reflected in jury awards, rather than establishing compensation either by statute or by the proverbial bureaucrat wearing green eyeshades.

Perhaps most significantly favoring the bill's approach, the maturity of asbestos litigation means that parties generally will have some rough historical guidance on appropriate settlement amounts. On the other hand, the claimants will need help finding, learning and using those facts about comparable settlement amounts. One can envision some reliance on the ARC to provide information in a neutral fashion, but this information would probably be difficult to digest. Overall, therefore, we might expect a more lawyer-driven process than might be the case with a schedule, although claimants often seek legal assistance even in systems that have such grids, such as Social Security. The bill's design does greatly simplify and reduce the necessary role of claimants' lawyers, which is to the good.

Even if a schedule were desirable, I see no realistic possibility of agreeing to one in legislation. So, what about through administrative rulemaking? The problem is that it would be very reasonable for everyone concerned to worry that this untested agency will go through a protracted notice and comment rulemaking and then somehow get the schedule "wrong". A middle ground, neither included nor excluded from the bill, would be for the ARC to use its resources to assemble settlement information and make it available, perhaps after notice and comment to permit interested persons to object to ARC's proposed synthesis.[45]

With or without this refinement, the bill is clearly a major improvement on the unpredictability and horizontal inequity common in asbestos litigation.

4. Reducing delay. Under the proposed legislation, qualifying cases are likely to be concluded in 4-6 months. This is far faster than tort litigation.

To begin with, there is an efficient determination of medical eligibility, by disinterested medical experts, based on objective criteria. The bill facilitates prompt settlement, with explicit incentives for effective use of ADR. Even before official mediation, there is a strong likelihood of settlement immediately after medical eligibility because plaintiffs law firms will have a history of settlements with previous claimants and the early disclosure of information about the claimant. If the claim goes to the formal mediation stage, defendants who have not settled must bear the costs, and there is an aggressive 60 day time limit. Moreover, in that mediation there is a

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[45]No legislative authorization would be needed for ARC to issue such informational bulletins or, in the language of the Administrative Procedure Act, "interpretative rules."

significant financial penalty against defendants for failure to settle or make a reasonable settlement offer. (There is no similar penalty for claimants.) If mediation fails, the claimant has the option of moving the case to speedy arbitration, at defendant's expense.

With all of these devices at work, it seems likely that the vast majority of cases will be resolved short of formal arbitration, and certainly short of court litigation, producing substantial benefits for all concerned.

5. Legitimacy. The proposed legislation establishes an entity denominated a "corporation" and, finances it through assessments on the defendants. Despite these features, it should be clear that this entity is in every respect governmental. "Corporation" could be changed to "Commission" or "Agency" without altering the substance of its accountability, authority, and legitimacy. The ARC members would be appointed by the President with the advice and consent of the Senate. The ARC would be subordinate to the will of the President and the Congress, like scores of existing independent and quasi-independent administrative agencies, and in accordance with settled principles of constitutional and administrative law. The proposed legislation combines the legitimacy of a good public institution with the flexibility of a good private organization. For example:

- The ARC would not be subject to some of the management entanglements that would hamper traditional agencies in attracting the expertise needed to provide efficient and expert service, including uneconomic constraints related to salaries or personnel slots. Since it is not financed by taxpayers, it seems appropriate to strike the balance between management regulations and service quality in a more flexible way, determined by the ARC Board.

- Despite the funding mechanism, there are ample safeguards for the neutrality of the ARC. The Board Members are appointed by the President and confirmed by the Senate, and conflict-of-interest rules in the legislation will prohibit any person with a financial stake in asbestos litigation from working for the ARC. The ARC will have ample power to enforce its mandatory funding assessments, so no company could obtain leverage over the corporation by threatening to delay or withhold its contribution.

- There is appropriate use of expertise: The bill takes medical determinations away from the adversary system and puts them in the hands of disinterested doctors.

- Legitimacy is further enhanced by choice: In cases that do not settle, plaintiffs choose between streamlined arbitration proceedings and civil trials. Arbitration is preferable in terms of costs and delay, but to some claimants, courts may have greater legitimacy. (Here again, there may be a middle ground. The bill could explicitly authorize the ARC to use qualified federal Administrative Law Judges as arbitrators, in addition to the traditional private sector pool.) The implicit competition with courts will promote sound arbitration.

Most fundamentally, the legitimacy of the proposed ARC should be judged in comparison with the current system. The failings of the asbestos tort industry – and I use that phrase advisedly – have been well documented. The delays, expense, randomness, horizontal inequities and more simply cannot be ignored because each of these tends to undermine public confidence in the judiciary, and in the law. Perceptions of unfairness and waste are corrosive to legitimacy, and that is ultimately why the Congress must act on asbestos.

6. Appropriately Balancing Social Needs. Finally, the legislation must be judged on the most important criterion of all -- whether it provides an appropriate balance among competing social goals and interests. To summarize, the medical criteria err on the side of inclusiveness, and were found by a federal court not to bar claims by any substantial number of plaintiffs who should be compensated. For those exceptional cases who cannot meet the criteria, an Exceptional Medical Claims Panel is established. The legislation adopts mechanisms which will greatly facilitate the prompt delivery of settlements to qualifying claimants, and deprives defendants of some defenses they have today in the tort system. It offers all impaired claimants the choice of streamlined arbitration, or continuing to litigate claims in the tort system, setting up a healthy competition between administrative efficiency and the virtues of the jury system. It requires individual trials, so seriously-ill plaintiffs will have their cases considered on their own, not used to inflate the value of unimpaired plaintiffs' claims. It screens out the backlog of "exposure-only" plaintiffs, so that those who suffer substantial injury can obtain prompt justice, while reserving resources that can be used to compensate those who were exposed if they ever become sick.

Almost everyone currently involved in asbestos litigation today will benefit from this bill. First, claimants who are currently impaired benefit for at least three reasons:

- Their claims will be administered promptly through use of streamlined, alternative dispute resolution techniques which are designed to encourage prompt, fair settlements within months, rather than the years of delay typically encountered in the tort system.

- Sick claimants retain their rights to have their cases heard in court without caps or artificial limits on their compensatory damages.

- The unconscionable if not crushing transaction costs associated with the tort system today will be substantially reduced, both because attorneys' fees will be capped at 25%, and because other transaction costs and expenses will be sharply curtailed or eliminated.

Second, individuals exposed to asbestos who are not now impaired but later become so will benefit because they will not be forced to file their claims prematurely or enter into inadequate settlements due to statute of limitations concerns. Rather, they will have the ability to obtain full recovery if and when they become impaired. Moreover, the risk that asbestos claims will force defendant corporations into bankruptcy will be substantially reduced, thereby ensuring that adequate resources will remain available for impaired claimants into the future.

Third, the former asbestos manufacturers and other defendants will benefit by being able to put this litigation nightmare behind them, thereby relieving them of the enormous distraction and expense associated with the defense of this litigation today as well as obtaining greater certainty as to their exposure and a better ability to plan for the future of their businesses. These costs and risks, amounting in the extreme to the risk of bankruptcy, have consequences not only for current officers and shareholders, but for workers and their families, for economically related businesses, and for communities.

Fourth, the court system will benefit through the enormous savings in time and resources, with asbestos litigation in the courts sharply reduced, if not virtually eliminated, as a result of the legislation.

There are two sets of losers under the new legislation. Lawyers will lose fees, both the plaintiffs' attorneys who charge contingent fees and package huge inventories of claims, and defense attorneys who defend interminable claims, billing by the hour. One can certainly understand the vehement opposition of the trial lawyers to the legislation. But this financial loss to lawyers who have already been paid billions seems entirely unobjectionable from a broad social welfare perspective – just as we would not regret the lost income to hospitals from a breakthrough in disease prevention.

The other losers are individuals who are not now sick, who will never become sick in the future, and who would have won the "jury lottery" under our current tort system. While these individuals will be deprived of their opportunity to win a prize, as a policy matter the interest of such individuals should be subordinated to the weightier concerns of the other stakeholders, especially those who actually are sick today or will become sick in the future.

V. Conclusion

In our earlier article, Paul Weiler and I warned against allowing an "out-of-date morality play" to frustrate the needs of both present-day workers and future victims. We noted that "it is not corporations, but rather real people, who pay the price of tort litigation -- specifically, the present stakeholders in defendant firms such as employees, shareholders, pensioners, and surrounding communities." Their interests -- and the interests of future victims -- must not be ignored "because of tort litigation's preoccupation with retelling, and retaliating for, a tale of corporate 'misconduct' that took place almost sixty years ago."[46]

The legislation recognizes that social resources for the asbestos problem are not inexhaustible. The bill reflects a judgment that those resources should be spent on delivering full and prompt compensation to those who are, and will become, impaired by asbestos disease, and not wasted on compensation for those who are not sick and may never become sick, on punitive

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[46]Edley & Weiler, supra note 1, at 389-91.

damages that seek retribution for the tragic decisions of executives decades earlier (most of whom are dead), on transaction costs such as attorney's fees, and on pointless technical and procedural battles that distract courts from their job of providing justice for asbestos victims and for us all.

The proposed Fairness in Asbestos Compensation Act is a truly innovative response to a crisis that has long evaded a solution. It deserves your careful consideration -- and your approval. Calls for legislative action have gone unheeded for too long. The Supreme Court has made clear, first in Amchem and now in Ortiz v. Fibreboard, that only Congress can solve this crisis. For the victims of asbestos-related disease, our overburdened courts, and defendants (and their stockholders, employees, and communities), the legislation represents the last best chance for a long overdue global resolution of the asbestos litigation crisis.

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STATEMENT OF HON. CONRAD L. MALLETT, JR.
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON H.R. 1283, THE FAIRNESS IN ASBESTOS COMPENSATION ACT OF 1999
JULY 1, 1999

January 4,1999 marked officially the day I retired from the Michigan Supreme Court. I served the people of the State of Michigan for eight years, the last two years as the Chief Justice. Twice nominated by the Michigan Democratic Party, and twice elected by the people of the State of Michigan, I have, throughout my career, approached justice system modification, cautiously and carefully. During my tenure on my state's highest court I was, however, keenly aware of my responsibility to be sure the court system functioned efficiently. I was intrigued therefore, when I was contacted by the former general counsel of a major Fortune 500 corporation, based in Michigan, who described to me the tremendous problems companies like his were still experiencing because of asbestos litigation. He indicated that a group of companies, had formed a government action coalition, whose mission was and is, to present to Congress, a workable administrative solution, to the asbestos litigation crisis. I am the Chairman of the Coalition for Asbestos Reform ("CAR"), whose members now include the GAF Corporation, the United States Chamber of Commerce, the National Roofing Contractors Association, the Automobile Parts and Accessories Association, the Associated Builders and Contractors, Citizens Against Government Waste and many other groups spread out across the country. I do not work for the

federal government nor have I received any federal grant, contract or subcontract, in the current or preceding two fiscal years.

Prior to my association with CAR, I was a justice system professional, clear that exposure to asbestos claims, had been a nationwide, court system, management problem, for twenty five years. In Michigan, we like every other state court, had during the late 1970s and 1980s, redesigned many of our court service delivery systems, to handle the huge number of asbestos cases, filed. In our case, the major battle ground for this kind of case, was the County of Wayne. In order to be sure that our service system functioned properly the Michigan Supreme Court, through the State Court Administrators office, assigned to hear these cases some of our best, most experienced trial court judges. The system implemented performed admirably. The problem of course, was that some of our best judges were managing case flow as opposed to making reasoned decisions, regarding difficult facts and complex areas of the law. The problem of course was that tax payers both individual and corporate, were deprived of the services of some of our best and brightest judges. The problem of course had everything to do with the fact, the trial courts of this land are not designed to handle thousands of cases, filed at the same time, against the same defendants. It is not accidental that administrative systems like workers compensation, unemployment compensation and the social security administration function in place of the courts when the case load strips the trier of fact of her ability to do her job appropriately. The judge's central function is to assist society, through the court system, to discover as best it can, the truth of the matter, before the court. We in the Michigan court system, did not then and do not now have the person power to run a workers compensation system. No one could seriously argue that worker compensation cases present the same level of difficulty as asbestos cases. If the courts are not equipped to handle thousands of workers

compensation cases, how could anyone expect the court system to handle fairly and efficiently thousands of asbestos cases.

Two federal district courts attempted to resolve the asbestos litigation crisis. The first attempt, occurred in Amchem Products, Inc. v. Windsor, 157 FRD 246 (ED PA 1994) and the second attempt, occurred in Ortiz v. Fibreboard Corporation, 162 FRD 505 (ED Texas 1995). Both cases were appealed twice and ultimately both cases, were overturned by the United States Supreme Court. Writing for the majority in Amchem, Justice Ruth Bader Ginsburg also said:

> "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair , and efficient means of compensating victims of asbestos exposure".

Writing for the majority in Fibreboard, Justice David H. Souter said:

> This case is a class action prompted by the elephantine mass of asbestos cases . . . which litigation defies customary judicial administration and calls for national legislation . . . To date Congress has not responded.

Please do not be misled: Asbestos litigation is different from all other mass tort litigation. Plaintiffs sometimes suffer from similar but not identical injuries resulting from different periods of exposure to different products and reports vary from fatal cancers to mild impairment of lung capacity to no impairment at all. Let me quote United States Supreme Court Justice Stephen Breyer, who wrote in the Amchem case:

> "Between 13 and 21 million workers have been exposed to asbestos in the workplace –over the 40 or 50 years. The most severe instances of such exposure probably occurred three or four decades ago..... About half of the suits have involved claims for pleural thickening and plaques –the harmfulness of which is apparently controversial. One expert testified below that they do not transform into cancer and are not predictors of future disease. Up to one half of asbestos claims are now filed by people who have little or no physical impairment. Many of these claims produce substantial payments and substantial costs even though the individual litigants will never become impaired."

I believe it is fair to say that the Unites States Supreme Court agreed with the United States Court of Appeals for the Third Circuit, when that court said:

> Asbestos litigation has burdened the dockets of many state and federal courts and has particularly challenged the capacity of the federal judicial system. The resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue.---

The Third Circuit acknowledged that the asbestos litigation crisis required "innovation in the management of mass tort litigation . . . But reform must come from the policy makers, not the courts." What the United States Supreme Court; the United States Courts of Appeal for the Third and Fifth Circuit ; The Supreme Court of the State of Texas; The Supreme Court of the State of New Jersey and numerous federal district courts suggest be established, is a claim and recovery system that is fair to both parties.

The Coalition for Asbestos Reform agrees with Herbert E. Millstein and Gary E. Mason, specialists in class actions when they wrote in the New Jersey Law Journal, in August 1997 that ". . . resolution of the [asbestos litigation] dilemma lies not with the judiciary, but with Congress."

I think it important to point that the vast majority of these cases settle. In fact, I would venture to say that 99% of these cases settle. Persons will certainly argue that the settlement rate is proof positive that the system need not be changed. Think about a system that is supposedly adversarial, where 99% of the case settle. That settlement rate is duplicated nowhere else in the justice system ,if excluded from the analysis are family law and prisoner related cases. According to the National Center for State Courts, in a survey conducted in 1992, of the total civil cases filed, only 61% of the cases settled. According to survey of federal cases disposed of in FY-1996 and FY-1997 only 35% of the cases filed, settled. I am certain, that interested persons

could, if called upon, produce different numbers taken form different surveys. No one, I am certain, can produce survey results, from any where, that will show settlement rates in excess of 75%. There is indeed, in the asbestos litigation justice subsystem, a lack of balance in the bargaining power of the parties and the lack of balance, is caused sometimes, by the courts.

Be assured, not every case brought by attorneys representing claimants is a sure fire winner. Ask yourself, if it is true persons who suffer no injury, are being compensated, why are not the defendants demanding these case be tried. My response is based on personal supposition and documented evidence. Think about a county circuit judge who has dropped on her 5,000 cases all at the same time. Just so you don't think the judge is lazy, if she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore, fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder. I am a defender of trial court judges. As the former Chief Justice of the State of Mıcnigan Supreme Court I am proud of the fact I was able to secure for the trial court judges in my state a pay raise of almost 10% ---the first pay raise after a pay freeze, for most that lasted five years. But the fact remains institutional pressure is exerted so that the court house, is not consumed by one set of litigation matters that threaten the entire operation. The key is docket management and process. One of the tools trial court judges are expected to use is the power of their office. Parties are required to cooperate with the judge in the management of the docket and are expected to settle cases whenever possible. Confronted with 5,000 cases no judge is going to long let the parties pick and choose which cases are going to be tried and which are going to settled. Even when the judge is operating in good faith case consolidation is a key management tool that must utilized ruthlessly or not at all.

Recent litigation in Mississippi provides the most vivid example of the pressure that trial courts can place on defendants to settle cases by rule manipulation so as to permit mass adjudication of asbestos claims. Cosey v. E.D. Bullard Co., Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson Cty) was filed in July 1995. The original complaint joined 995 plaintiffs, who alleged exposure to silica and asbestos at one or more of more than 300 work sites both in and out of Mississippi over a 56-year period.

Joinder of all these factually unrelated claims was clearly inappropriate under Rule 20 of the Mississippi Rules of Civil Procedure, which is identical to federal Rule 20. The plaintiffs' claims did not arise from any common transaction or occurrence, or series of transactions or occurrences. Nor did the plaintiffs identify any issue of fact or law common to all the plaintiffs or all the defendants. Given the wide disparity in the plaintiffs' claims, individual issues substantially predominated over common issues. Nonetheless, the trial court steadfastly refused all efforts to sever the case into separate claims.

Because of the peculiarities of Mississippi's venue law, this misjoinder had important procedural consequences. Mississippi's venue rules permit a plaintiff to sue an out-of-state corporation in the plaintiff's home county. In Cosey, only 22 of the original plaintiffs resided in Jefferson County, where the action was filed. Indeed, only about half the plaintiffs even resided in Mississippi. But the Mississippi Rules provide that "where several claims or parties have been joined, the suit may be brought in any county in which any one of the claims could properly have been brought." Miss. R. Civ. P. 82(c). By joining all of their claims together under Rule 20, plaintiffs were thus able to file in any Mississippi county where any plaintiff resided. Had the court enforced the joinder requirements, most of these claims could not have been brought in Jefferson County, and would have been transferred elsewhere.

The trial court in Cosey allowed plaintiffs to amend their complaint several times to join additional plaintiffs or defendants. Ultimately, the case involved more than 1,700 plaintiffs and 178 defendants. Trial of such an unwieldy group of claims raised obvious management problems. Rather than trying to conduct a "common issues" trial, the court's solution was to schedule a series of trials disposing of all issues as to particular groups of plaintiffs. The court allowed plaintiffs to select an initial group of twelve plaintiffs. None of the twelve resided in Jefferson County.[1] Trial was conducted from May 6, 1998 until June 12, 1998. On that day, the jury returned a verdict of $48.5 million in compensatory damages alone – an extraordinarily high figure, given the weakness of the plaintiffs' claims. Only four of the twelve plaintiffs had even alleged asbestos related malignancies. The remaining eight claimed only asbestosis, a non-malignant scarring of the lung, and in two of those cases, no symptoms and no chest x-ray abnormalities were detected. Faced with such an astronomical and irrational verdict, all of the defendants settled these twelve claims before the jury could return a verdict on punitive damages.

The trial court judge exerted considerable pressure on the defendants to settle not just the twelve cases, but all of the remaining 1,700-plus cases. This is a vivid example of the harmful affects of case consolidation. Confronted with system demands for settlement verses the huge risks associated with imposition of punitive damages, rational company decision makers opt to settle all of their cases, as opposed to none at all. The only corrective response that will create balance and efficiency is the creation of the administrative entity called for in the legislation.

The courts of this land are not equipped to handle the more than 200,000 cases currently in the system and the 8,000 new filings, thrust upon the courts, in the last month alone. The

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[1]One member of the trial group claimed in his deposition that he lived in Jefferson County, but subsequent investigation revealed that his address was actually located in neighboring Claiborne County.

companies and the truly impaired, associated with these claims, deserve the creation of a mutually fair, claim and recovery system. The period when asbestos use was rising and suppression of knowledge was also operating, is long past. The time has come to recognize that it is up to the legislature to help the parties involved in this litigation do a better job of allocating cost and ensuring, speedy injured claimant recovery. The key point of difference between the parties is of course the medical criteria. This is the crux of the bill and will, I expect, be the focus of much of the committee's work.

The medical criteria contained in House Bill 1283 are essentially the same as the criteria agreed to by most of the participants in the Amchem case. Indeed the AFL-CIO was a key voice of support in the Amchem case to point that most persons refer to this case as the Georgine case after AFL-CIO vice president and president of the building trades, Mr. Robert Georgine. The Federal district court judge who heard the Amchem case determined, after much study, that the criteria was fair and inclusive. Those who argue to the contrary, loudly suggest that the criteria would exclude 80% of the persons now eligible to recover something from the current operating system. It is doubtful that 80% of the those currently eligible would be denied recovery. This extravagant claim, however, underscores a key point. Many and perhaps most of the claimants who currently receive payments in the tort system are not impaired by an asbestos related disease. Our position is clear. We believe the only persons who ought to receive compensation are those persons who have suffered an injury that can be described as a physical impairment. We believe that paying persons, who suffer some degree of emotional distress merely because they have been exposed to asbestos, is a misallocation of valuable resources.

The science in this area is clear. Pleural plaques and a thickening of the surface area of the lung not resulting in a breathing impairment are not early symptoms of cancer. There are no

warning signs, that science has identified that can act as early indicators, of a recovery eligible impairment. That said, how can anyone be opposed to system modifications, that compensate the impaired, within six months of the date the claim is filed and suspends the statute of limitations. This body should be aware that the suspension of the statute of limitations is critical to this effort. Persons need no longer, rush to the court house when they discover that there is a physical manifestation of asbestos exposure, that has not resulted in any physical impairment. Compensation when it is paid, will indeed be connected to actual impairment, not just exposure. It should not be enough to say that all those who can collect from the system today , have some right in perpetuity to collect always. Let those who defend the current system explain why it is appropriate that persons who are not in any way impaired, be compensated.

Honorable members of the House of representatives we seek fairness and ask for leadership. We think that if our descriptions of the current state of affairs, is accepted as true, the current circumstance requires a meaningful response by this great body. We think that it is the task of this body and not the courts, to determine the extent to which damages will be paid, for how long and to whom. We have made our case that the courts cannot and ought not run a claim and recovery system that has at least 208,000 component parts. Here is a better way and we ask for fair and complete consideration.

Thank you.

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BIOGRAPHY OF CHIEF JUSTICE CONRAD L. MALLETT, JR.

Justice Conrad L. Mallett, Jr., is the 60th Chief Justice of the Michigan Supreme Court. He was elected to lead the state's highest court by a unanimous vote of his colleagues on Jan. 2, 1997. With the election, Justice Mallett assumed responsibility as chief administrator of Michigan's judicial system. He also earned the distinction of becoming the first African-American Chief Justice in Michigan history.

Appointed to the Court by Gov. James Blanchard in December of 1990, Justice Mallett was elected to a two-year term in November of 1992 and to a full eight year term in November of 1994. On January 1, 1997, Justice Mallett began his sixth year on the Court.

Prior to his membership on the Court, Justice Mallett was a partner in one of the City of Detroit's leading law firms, Jaffe, Raitt, Heuer & Weiss, P.C. He has served as Director of Legal and Governmental Affairs for the Governor of the State of Michigan; as Senior Executive Assistant to the Mayor of the City of Detroit; and as an attorney in Michigan's oldest law firm, Miller, Canfield, Paddock & Stone, P.C.

Justice Mallett is a product of Michigan's parochial elementary and public middle and senior high school systems. He attended Wayne State University for two and one-half years before

completing his undergraduate degree at the University of California at Los Angeles. Justice Mallett is a graduate of the University of Southern California Law School and also holds a masters degree in public administration from that institution.

Justice Mallett is a member of numerous bar associations, civic and fraternal organizations and despite his busy schedule, follows the Tigers and Lions closely.

He has been married to Barbara Straughn for thirteen years. He has two sons and a daughter - Alex Conrad, Mio Thomas and Kristan Claudia.

January 1997

Conrad L. Mallett, Jr.
Chief Justice

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Briefs and Other Related Documents

Supreme Court of the United States

AMCHEM PRODUCTS, INC., et al., Petitioners,
v.
George WINDSOR et al.

No. 96-270.

Argued Feb. 18, 1997.
Decided June 25, 1997.

Asbestos products manufacturers who were members of Center for Claims Resolution (CCR), and whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court-approved, moved to enjoin actions against them by individuals who failed to timely opt out of class. The United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., J., 878 F.Supp. 716, granted injunction under All-Writs Act and Anti- Injunction Act. Parties objecting to class certification appealed, and the Court of Appeals for the Third Circuit, 83 F.3d 610, vacated and remanded with directions to decertify class. Certiorari was granted, and the Supreme Court, Justice Ginsburg, held that: (1) district court faced with request for settlement-only class certification need not inquire whether case would present intractable problems of trial management, but other requirements for certification must still be satisfied, abrogating *In re Asbestos Litigation*, 90 F.3d 963, *White v. National Football League*, 41 F.3d 402, *In re A.H. Robins Co.*, 880 F.2d 709, and *Malchman v. Davis*, 761 F.2d 893, and (2) requirements for class certification of commonality of issues of fact and law and adequacy of representation were not met.

Affirmed.

Justice Breyer filed an opinion concurring in part and dissenting in part in which Justice Stevens joined.

Justice O'Connor took no part in the consideration or decision of the case.

West Headnotes

[1] Federal Civil Procedure ⚷161
170Ak161 Most Cited Cases

Requirements of rule governing class actions must be interpreted in keeping with both Article III constraints on federal jurisdiction and Rules Enabling Act, which instructs that rules of procedure shall not abridge, enlarge, or modify any substantive right. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[2] Federal Civil Procedure ⚷161.1
170Ak161.1 Most Cited Cases

Rule allowing certification of class action where separate actions by or against individual class members would risk establishing incompatible standards of conduct for party opposing class takes in cases where party is obliged by law to treat members of class alike, such as a utility acting toward customers or a government imposing a tax, or where party must treat all alike as matter of practical necessity, such as riparian owner using water as against downriver owners. Fed.Rules Civ.Proc.Rule 23(b)(1)(A), 28 U.S.C.A.

[3] Federal Civil Procedure ⚷165
170Ak165 Most Cited Cases

While text of rule allowing certification of class action were questions of law and fact common to class members predominate and class action is superior to other methods of resolution does not exclude from certification cases in which individual damages run high, drafters of rule had dominantly in mind vindication of rights of groups of people who individually would be without effective strength to bring their opponents into court at all. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[4] Federal Civil Procedure ⚷161.1
170Ak161.1 Most Cited Cases

Policy at very core of class action mechanism is to overcome problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights; class action solves this problem by aggregating relatively paltry

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potential recoveries into something worth someone's, usually an attorney's, labor. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5] Federal Civil Procedure ⚷161.1
170Ak161.1 Most Cited Cases

Settlement is relevant to certification of proposed class action. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] Compromise and Settlement ⚷67
89k67 Most Cited Cases

[6] Federal Civil Procedure ⚷161.1
170Ak161.1 Most Cited Cases

While district court which is confronted with request for settlement-only class certification need not inquire whether case, if tried, would present intractable management problems, for proposal is that there be no trial, other specifications of rule establishing requirements for certification, which are designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention in settlement context; such attention is of vital importance, for court asked to certify settlement class will lack opportunity, present when case is litigated, to adjust class, informed by proceedings as they unfold; abrogating *In re Asbestos Litigation*, 90 F.3d 963; *White v. National Football League*, 41 F.3d 402; *In re A.H. Robins Co.*, 880 F.2d 709; *Malchman v. Davis*, 761 F.2d 893. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[7] Federal Civil Procedure ⚷21
170Ak21 Most Cited Cases

Federal rules take effect after extensive deliberative process involving many reviewers, and text of rule thus proposed and reviewed limits judicial inventiveness, as courts are not free to amend rule outside process Congress ordered, which is properly tuned to instruction of Rules Enabling Act that rules of procedure shall not abridge any substantive right. 28 U.S.C.A. § 2072(b).

[8] Compromise and Settlement ⚷55
89k55 Most Cited Cases

[8] Compromise and Settlement ⚷68
89k68 Most Cited Cases

[8] Federal Civil Procedure ⚷177.1
170Ak177.1 Most Cited Cases

[8] Federal Civil Procedure ⚷1696
170Ak1696 Most Cited Cases

[8] Federal Civil Procedure ⚷1708
170Ak1708 Most Cited Cases

Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[9] Compromise and Settlement ⚷67
89k67 Most Cited Cases

[9] Federal Civil Procedure ⚷161.1
170Ak161.1 Most Cited Cases

Rules provisions which establish prerequisites to certification of class action and types of class actions which are maintainable focus court attention on whether proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives, and that dominant concern persists when settlement, rather than trial, is proposed. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

[10] Compromise and Settlement ⚷67
89k67 Most Cited Cases

[10] Federal Civil Procedure ⚷161.1
170Ak161.1 Most Cited Cases

Safeguards provided by criteria for qualification of action as class action are not impractical impediments, or checks shorn of utility, in context of proposed settlement class; standards set for protection of absent class members serve to inhibit appraisals of chancellor's foot kind, or class certifications dependent upon court's gestalt

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judgment or overarching impression of settlement's fairness, and if fairness inquiry controlled certification and permitted class designation despite impossibility of litigation, both class counsel and the court would be disarmed. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[11] Federal Civil Procedure ⚷181
170Ak181 Most Cited Cases

Requirement for certification of class action that common questions of law or fact predominate over any questions affecting only individual members was not met in proposed class action which sought to achieve global settlement of current and future asbestos-related claims; benefits asbestos-exposed persons might gain from establishment of compensation scale was not pertinent to predominance inquiry, fact that all members had been exposed to asbestos products was insufficient to meet predominance standard, as different members were exposed to different products for different amounts of time in different ways, and differences in state law compounded those disparities. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[12] Federal Civil Procedure ⚷165
170Ak165 Most Cited Cases

Inquiry into whether common questions of law or fact predominate over any questions affecting only individual members of class, as will allow certification of class action, tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[13] Compromise and Settlement ⚷55
89k55 Most Cited Cases

[13] Federal Civil Procedure ⚷1696
170Ak1696 Most Cited Cases

Inquiry appropriate under rule which prohibits dismissal or compromise of class action without approval of court and notice to all class members protects unnamed class members from unjust or unfair settlements affecting their rights when representatives become fainthearted before action is adjudicated or are able to secure satisfaction of their individual claims by compromise. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[14] Compromise and Settlement ⚷55
89k55 Most Cited Cases

[14] Federal Civil Procedure ⚷1696
170Ak1696 Most Cited Cases

It is not mission of rule which prohibits dismissal or compromise of class action without approval of court and notice to class members to assure class cohesion that legitimizes representative action in the first place, and if common interest in fair compromise could satisfy predominance requirement for certification, that vital prescription would be stripped of any meaning in settlement context. Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[15] Federal Civil Procedure ⚷165
170Ak165 Most Cited Cases

Requirement for certification of class action that common questions of law or fact predominate over any questions affecting only individual members is test readily met in certain cases alleging consumer or securities fraud or violations of antitrust laws, and also may, depending upon the circumstances, be satisfied in mass tort cases arising from common cause or disaster. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[16] Federal Civil Procedure ⚷181
170Ak181 Most Cited Cases

Requirement for certification of class action that named parties will fairly and adequately protect interests of class was not met in proposed class action which sought to achieve global settlement of current and future asbestos- related claims; named parties sought to act on behalf of single giant class rather than on behalf of discrete subclasses, goal of class members who were currently injured of receiving generous immediate payments conflicted with interest of exposure-only plaintiffs in ensuring ample, inflation-protected fund for the future, and proposed settlement had no structural assurance of fair and adequate representation for diverse groups and individuals affected. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

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[17] Federal Civil Procedure ⚷164
170Ak164 Most Cited Cases

Requirement for certification of class action that named parties will fairly and adequately protect interests of class serves to uncover conflicts of interest between named parties and class they seek to represent. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[18] Federal Civil Procedure ⚷164
170Ak164 Most Cited Cases

In order to satisfy requirement for certification of class action that named parties will fairly and adequately protect interests of class, class representative must be part of class and possess same interest and suffer same injury as class members. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[19] Federal Civil Procedure ⚷164
170Ak164 Most Cited Cases

Adequacy-of-representation requirement for certification of class action tends to merge with commonality and typicality criteria of rule, which serve as guideposts for determining whether maintenance of class action is economical and whether named plaintiff's claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence, and adequacy heading also factors in competency and conflicts of class counsel. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

****2234** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. Never intending to litigate, the settling parties--petitioners and the representatives of the plaintiff class described below--presented to the District Court a class-action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos-manufacturing companies that are petitioners in this suit, but who (1) had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so-called "exposure-only" claimants, alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.

The exhaustive agreement, *inter alia,* (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

***592** The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the

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court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. The Third Circuit ultimately vacated the District Court's orders. Although the objectors maintained that the case was not justiciable and that the exposure-only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court nevertheless homed in on the settlement's terms in examining aspects of the case under Rule 23 criteria. The Court of Appeals explained that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. The court therefore ordered the class decertified.

Held:

1. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. This Court therefore declines to resolve objectors' assertions that no justiciable case or controversy is presented and that the exposure-only claimants lack standing ****2235** to sue. Cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66-67, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170. The Court follows this path mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right. P. 2244.

2. The sprawling class the District Court certified does not satisfy Rule 23's requirements. Pp. 2245-2252.

(a) Rule 23 gained its current shape in a 1966 revision. Its subdivisions (a) and (b) enumerate criteria that must be met for a class to be certified. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23(b)(3), a class must satisfy the requirements of Rule 23(a), among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23(b)(3) criteria ***593** that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." To alert Rule 23(b)(3) class members to their right to "opt out," Rule 23 requires "the best notice practicable under the circumstances." Rule 23(c)(2). Finally, Rule 23(e) specifies that a class action cannot be settled without the court's approval, and that notice of the proposed compromise must be given to all class members in such manner as the court directs. Pp. 2245-2247.

(b) Because settlement is relevant to the propriety of class certification, the Third Circuit's statement that Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement" bears modification. But the Third Circuit did not, in fact, ignore the settlement. The court homed in on settlement terms in explaining why it found absentees' interests inadequately represented. The Third Circuit's inspection of the settlement agreement in that regard was altogether proper. Whether trial would present intractable management problems, see Rule 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial. But other specifications of the Rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23(c) and (d). And, of overriding importance, courts must be mindful that they are bound to enforce the Rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Rule 23(e) 's settlement prescription was designed to function as an additional requirement, not a superseding direction, to the class-qualifying criteria of Rule

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23(a) and (b). Cf. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176-177, 94 S.Ct. 2140, 2151-2152, 40 L.Ed.2d 732. The dominant concern of Rule 23(a) and (b)--that a proposed class have sufficient unity so that absentees can fairly be bound by class representatives' decisions-- persists when settlement, rather than trial, is proposed. Those subdivisions' safeguards provide practical checks in the settlement context. First, their standards serve to inhibit class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. Second, if a Rule 23(e) fairness inquiry controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. Federal courts, in any case, lack authority to substitute ***594** for Rule 23's certification criteria a standard never adopted by the rulemakers--that if a settlement is "fair," then certification is proper. Pp. 2247-2249.

(c) Rule 23(b)(3)'s predominance requirement is not met by the factors relied on by the District Court and the settling parties: class members' shared experience of asbestos exposure; their common interest in ****2236** receiving prompt and fair compensation, while minimizing the risks and transaction costs inherent in the tort system's asbestos litigation process; and the settlement's fairness. The benefits asbestos-exposed persons might gain from a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. In contrast, the Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives; the Rule 23(e) prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy Rule 23(b)(3)'s predominance requirement, that vital prescription would be stripped of any meaning in the settlement context. The predominance criterion is not satisfied by class members' shared experience of asbestos exposure, given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions. No settlement class called to the Court's attention is as sprawling as the one certified here. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great. The certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design. Pp. 2249-2250.

(d) Nor can the class approved by the District Court satisfy Rule 23(a)(4)' s adequate representation inquiry. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370-2371, n. 13, 72 L.Ed.2d 740. Representatives must be part of the class and possess the same interest and suffer the same injury as the class ***595** members. *E.g., East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896-1897, 52 L.Ed.2d 453. In this case, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure- only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 331, 100 S.Ct. 1698, 1706-1707, 64 L.Ed.2d 319. The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the

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District Court's finding that petitioners' assets suffice to pay settled claims. Although this is not a Rule 23(b)(1)(B) "limited fund" case, the settlement's terms--*e.g.,* no inflation adjustments, only a few claimants per year permitted to opt out at the back end, and loss-of-consortium claims extinguished--reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated under a proper understanding of their representational responsibilities. That assessment is on the mark. Pp. 2250-2251.

(e) In light of the conclusions that the class does not satisfy the requirements of common issue predominance and adequacy of representation, this Court need not rule, definitively, on the adequacy of the notice given here. The Court recognizes, however, the gravity of the question whether class-action ****2237** notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. P. 2252.

(f) The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it. P. 2252.

83 F.3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which ***596** STEVENS, J., joined, *post*, p. 2252. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen M. Shapiro, for petitioners.

Laurence H. Tribe, Cambridge, MA, for respondents.

***597** Justice GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal-injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I
A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See *Georgine v. Amchem Products, Inc.,* 83 F.3d 610, 618, and n. 2 (C.A.3 1996) (citing commentary). A United States Judicial Conference ***598** Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits

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> beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction ****2238** costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See *id.,* at 3, 27-35; see also *id.,* at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

***599** In the face of legislative inaction, the federal courts--lacking authority to replace state tort systems with a national toxic tort compensation regime--endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See *In re Asbestos Products Liability Litigation (No. VI),* 771 F.Supp. 415, 422-424 (Jud.Pan.Mult.Lit. 1991) . [FN1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

> FN1. In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See *In re Asbestos and Asbestos Insulation Material Products Liability Litigation,* 431 F.Supp. 906, 910 (JPML 1977); *In re Asbestos Products Liability Litigation (No. II),* MDL-416 (JPML Mar. 13, 1980) (unpublished order); *In re Asbestos School Products Liability Litigation,* 606 F.Supp. 713, 714 (JPML 1985); *In re Ship Asbestos Products Liability Litigation,* MDL-676 (JPML Feb. 4, 1986) (unpublished order); *In re Leon Blair Asbestos Products Liability Litigation,* MDL-702 (JPML Feb. 6, 1987) (unpublished order).

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks--later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action--cochaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of ***600** 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee. [FN2] Although the MDL Panel order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving ... future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also *Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246, 266 (E.D.Pa.1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the

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future).

FN2. The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' ****2239** counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." *Id.,* at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos- related claims--claimants the parties ***601** to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." *Id.,* at 294; see also *id.,* at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province--plaintiffs without already pending lawsuits. [FN3]

FN3. It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties--CCR defendants and the representatives of the plaintiff class described below-- presented to the District Court a complaint, an answer, a proposedsettlement ***602** agreement, and a joint motion for conditional class certification. [FN4]

FN4. Also on the same day, the CCR defendants filed a third-party action against their insurers, seeking a declaratory judgment holding the insurers liable for the costs of the settlement. The insurance litigation, upon which implementation of the settlement is conditioned, is still

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pending in the District Court. See, *e.g., Georgine v. Amchem Prods., Inc.,* No. 93-0215, 1994 WL 502475 (E.D.Pa., Sept.2, 1994) (denying motion of insurers to compel discovery).

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. [FN5] Untold numbers of individuals ****2240** may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos- containing products of ***603** CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

FN5. The complaint defines the class as follows:
"(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).
"(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13-14.

The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims--claims that do not fall within the four described diagnostic categories--may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the

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stipulation specifies the range of damages CCR will pay to qualifying claimants. ***604** Payments under the settlement are not adjustable for inflation. Mesothelioma claimants--the most highly compensated category--are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims. [FN6] The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

FN6. Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary"; mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses ****2241** to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw ***605** from the settlement after ten years. A small number of class members--only a few per year--may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL-CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F.R.D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. *Ibid.* [FN7]

FN7. These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group." Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos

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in the late 1940's and was diagnosed with mesothelioma in May 1994, after expiration of the opt-out period, see *infra,* at 2241, 2242. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the Federal District Court's antisuit injunction. Casimir Balonis died in October 1996. See Brief for Balonis Respondents 9-11.

***606** In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see *Carlough v. Amchem Products, Inc.,* 834 F.Supp. 1437, 1467-1468 (E.D.Pa.1993), and he approved the settling parties' elaborate plan for giving notice to the class, see *Carlough v. Amchem Products, Inc.,* 158 F.R.D. 314, 336 (E.D.Pa.1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. See 157 F.R.D., at 325, 331-332. He also found that adequate notice had been given to class members, see *id.,* at 332-334, and that final class certification under Rule 23(b)(3) was appropriate, see *id.,* at 315.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement, [FN8] see *ibid.,* a matter no one debates. The ***607** Rule 23(a)(2) and (b)(3) requirements ****2242** of commonality [FN9] and preponderance [FN10] were also satisfied, the District Court held, in that

FN8. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

FN9. Rule 23(a)(2) requires that there be "questions of law or fact common to the class."

FN10. Rule 23(b)(3) requires that "the [common] questions of law or fact ... predominate over any questions affecting only individual members."

"[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." *Id.,* at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3), [FN11] and that, as Rule 23(b)(3) demands, [FN12] the class settlement was "superior" to other methods of adjudication. See *ibid.*

FN11. Rule 23(a)(3) states that "the claims ... of the representative parties [must be] typical of the claims ... of the class."

FN12. Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement. [FN13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular,

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objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single ***608** class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly formed class.

FN13. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See *id.,* at 317-319, 326-332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See *id.,* at 318-319. Reasoning that the representative plaintiffs "have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any,* or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." *Id.,* at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See *Georgine v. Amchem Products, Inc.,* 878 F.Supp. 716, 726-727 (E.D.Pa.1994).

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See 83 F.3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." *Id.,* at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for the [class-action] certification." *Ibid.* Turning to the class-***609** certification issues and finding them dispositive, the Third Circuit declined to decide other questions.

****2243** On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, cert. denied, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) (hereinafter *GM Trucks*), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F.3d, at 799-800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F.3d, at 625. But cf. *In re Asbestos Litigation,* 90 F.3d 963, 975-976, and n. 8 (C.A.5 1996), cert. pending, Nos. 96-1379, 96-1394. While stating that the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F.3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See *id.,* at 630-634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See *id.,* at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See *id.,* at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See *id.,* at 626, 628. "These factual differences," the Third Circuit explained, "translate

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[d] into significant legal differences." *Id.,* at 627. State law governed and varied widely ***610** on such critical issues as "viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." *Ibid.* [FN14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, *ibid.,* barred a determination, under existing tort law, that common questions predominated, see *id.,* at 630.

FN14. Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15 percent of current mesothelioma claims arise in California, where the statewide average recovery is $419,674--or more than 209 percent above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5-6, n. 5 (citing 2 App. 461).

The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). *Ibid.* Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: " '[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.' " *Ibid.* (quoting 157 F.R.D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F.3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See *ibid.* They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing ***611** science and medicine, rather than freezing in place the science of 1993." *Id.,* at 630- 631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See *id.,* at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives ****2244** could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question: "both look to the potential for conflicts in the class." *Id.,* at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." *Ibid.*

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." *Ibid.* The court elaborated most particularly, however, on the unfairness of binding exposure-only plaintiffs who might be unaware of the class action or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See *id.,* at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. *Id.,* at 634.

The Third Circuit, after intensive review, ultimately ordered decertification of the class and vacation of the District Court's antisuit injunction. *Id.,* at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." *Ibid.* He added that in his view, named exposure-only plaintiffs had no standing to pursue the ***612** suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." *Id.,* at 638.

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We granted certiorari, 519 U.S. 957, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U.S.C. § 1332(a).

[1] As earlier recounted, see *supra,* at 2242, the Third Circuit declined to reach these issues because they "would not exist but for the [class-action] certification." 83 F.3d, at 623. We agree that "[t]he class certification issues are dispositive," *ibid.;* because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66-67, 117 S.Ct. 1055, 1068-1069, 137 L.Ed.2d 170 (1997) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that ***613** Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend ... the [subject-matter] jurisdiction of the United States district courts"). [FN15]

FN15. The opinion dissenting in part does not find the class- certification issues dispositive--at least not yet, and would return the case to the Third Circuit for a second look. See *post,* at 2253, 2258. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure- only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see *Metro-North Commuter R. Co. v. Buckley,* 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 *et seq.,* interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

****2245** III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 375-400 (1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

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[2] ***614** In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696-697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U.S.C.App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3) , the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be ***615** excluded. See 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed.1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379-400. Rule 23(b)(3) "opt-out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt-in") device. See 7A Wright, Miller, & Kane § 1753, at 28-31, 42-44; see also Adv. Comm. Notes, 28 U.S.C.App., p. 695.

Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C.App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet ****2246** two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Ibid.* Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action...." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

> ***616** "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory

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Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C.App., p. 698. They elaborated:

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." *Ibid.*

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." (footnote omitted)). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F.3d, at 633.

[3][4] ***617** While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997).

To alert class members to their right to "opt out" of a (b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173-177, 94 S.Ct. 2140, 2150-2152, 40 L.Ed.2d 732 (1974) (****2247** individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the Rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U.S.C.App., p. 699.

In the decades since the 1966 revision of Rule 23, class-action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their ***618** "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L.Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, *e.g.,* T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61-62 (1996) (noting large number of such cases in districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.

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In *GM Trucks,* 55 F.3d, at 799-800, and in the instant case, 83 F.3d, at 624-626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. See, *e.g., In re Asbestos Litigation,* 90 F.3d, at 975(C.A.5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions § 11.28, p. 11-58 (3d ed.1992)); *White v. National Football League,* 41 F.3d 402, 408 (C.A.8 1994) ("adequacy of class representation ... is ultimately determined by the settlement itself"), cert. denied, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); *In re A.H. Robins Co.,* 880 F.2d 709, 740(C.A.4) ("[i]f not a ground for certification *per se,* certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied *sub nom.* ***619***Anderson v. Aetna Casualty & Surety Co.,* 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); *Malchman v. Davis,* 761 F.2d 893, 900 (C.A.2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S.Ct. No. 1 CXIX, CLIV to CLV (Aug.1996) (Request for Comment). In response to the publication of this proposal, voluminous public comments--many of them opposed to, or skeptical of, the amendment--were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, *e.g.,* Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the Rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. ****2248** The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." 83 F.3d, at 626 (quoting *GM Trucks,* 55 F.3d, at 799). That statement, petitioners urge, is incorrect.

[5] We agree with petitioners to this limited extent: Settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see *supra,* at 2243, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' ***620** interests inadequately represented. See 83 F.3d, at 630-631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

[6] Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Rule 23(c), (d). [FN16]

FN16. Portions of the opinion dissenting in part appear to assume that settlement counts only one way--in favor of certification. See *post,* at 2252-2253, 2258. But see *post,* at 2255. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class-action certification should be granted more readily than it would be were the case to be

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litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more, not less, caution on the question of certification.

[7] And, of overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge ... any substantive right." § 2072(b).

[8][9] Rule 23(e), on settlement of class actions, reads in its entirety: "A class action shall not be dismissed or compromised ***621** without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. *Eisen,* 417 U.S., at 176-177, 94 S.Ct., at 2151-2152 (adequate representation does not eliminate additional requirement to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

[10] The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments--checks shorn of utility--in the settlement-class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind--class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b) , and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation ****2249** to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1379-1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, *e.g., Kamilewicz v. Bank of Boston Corp.,* 100 F.3d 1348, 1352 (C.A.7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U.S. 1204, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

***622** Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted--that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why--with or without a settlement on the table--the sprawling class the District Court certified does not satisfy Rule 23's requirements. [FN17]

FN17. We do not inspect and set aside for insufficient evidence District Court findings of fact. Cf. *post,* at 2254, 2256-2257. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

A

[11] We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact ...

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predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos- exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see *supra,* ***623** at 2237-2238, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement. [FN18]

FN18. In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context-- just as in the context of Rule 24(b)(2) governing permissive intervention-- "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles,* 476 U.S. 54, 76-77, 106 S.Ct. 1697, 1711, 90 L.Ed.2d 48 (1986) (O'CONNOR, J ., concurring in part and concurring in judgment).

[12][13][14] The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518-519. [FN19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340-341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that ****2250** vital prescription would be stripped of any meaning in the settlement context.

FN19. This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See *Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246, 318 (E.D.Pa.1994); see also *id.,* at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants...." 157 F.R.D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied ***624** by that shared experience, the predominance criterion is far more demanding. See 83 F.3d, at 626-627. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma....

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Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

"The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.,* at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See *id.,* at 627 (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985)).

[15] No settlement class called to our attention is as sprawling as this one. Cf. *In re Asbestos Litigation,* 90 F.3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and ***625** their varying medical expenses, smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U.S.C.App., p. 697; see also *supra,* at 2245-2246. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways." Adv. Comm. Notes, 28 U.S.C.App., p. 697. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. *Ibid.* But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number. See Resnik, From "Cases" to "Litigation," 54 Law & Contemp.Prob. 5, 17-19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design.

B

[16][17][18][19] Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370- 2371, n. 13, 72 L.Ed.2d 740 (1982). "[A] class representative ****2251** must be part of the class and 'possess ***626** the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)). [FN20]

FN20. The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 2370, n. 13, 72 L.Ed.2d 740 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See *id.,* at 157-158, n. 13, 102 S.Ct., at 2370-2371, n. 13. Like the Third Circuit, we decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

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As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 331, 100 S.Ct. 1698, 1707, 64 L.Ed.2d 319 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and expossure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F.R.D., at 291. Although ***627** this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see *supra,* at 2240-2241, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 982 F.2d 721, 742-743 (1992), modified on reh'g *sub nom. In re Findley,* 993 F.2d 7 (1993).

The Third Circuit found no assurance here--either in the terms of the settlement or in the structure of the negotiations--that the named plaintiffs operated under a proper understanding of their representational responsibilities. See ***628** 83 F.3d, at 630-631. That assessment, we conclude, is on the mark.

****2252** C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. *Id.,* at 633; cf. *In re Asbestos Litigation,* 90 F.3d, at 999-1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category--future spouses and children of asbestos victims--could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F.3d, at 633-634, we recognize the gravity of the question whether class action notice sufficient

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under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos ***629** exposure. [FN21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed.1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

FN21. The opinion dissenting in part is a forceful statement of that argument.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

Justice O'CONNOR took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "[s]ettlement is relevant to a class certification," *ante,* at 2248, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, ***630** and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

These difficulties flow from the majority's review of what are highly fact- based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions, ****2253** and their judgments are to be reviewed by the court of appeals only for abuse of discretion. See *Califano v. Yamasaki,* 442 U.S. 682, 703, 99 S.Ct. 2545, 2558-2559, 61 L.Ed.2d 176 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion ... with respect to matters involving the certification" of class actions. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979); cf. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990) (district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. *E.g., Georgine v. Amchem Products, Inc.,* 83 F.3d 610, 626 (C.A.3 1996) (holding that "*considered as a litigation class,* " the class cannot meet Federal Rule of Civil Procedure 23's requirements (emphasis added)).

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There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently ***631** close to warrant further detailed appellate court review under the correct legal standard. Cf. *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 486, 117 S.Ct. 1491, 1501, 137 L.Ed.2d 730 (1997). And I shall briefly explain why this is so.

I

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace--over the past 40 or 50 years--but the most severe instances of such exposure probably occurred three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6-7 (Mar.1991) (Judicial Conference Report); App. 781-782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787-788 (4th ed.1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 129 B.R. 710, 936-937 (E. and S.D.N.Y.1991). About half of the suits have involved claims for pleural thickening and plaques--the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. *In re School Asbestos Litigation,* 789 F.2d 996, 1000 (C.A.3 1986); see also Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10-11.

***632** Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments. See Judicial Conference Report 2 (" 'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments--if ever obtained--can be collected" (quoting Rand Corporation Institute for Civil Justice)); *id.,* at 13 ("The transaction ****2254** costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease." "[O]f each asbestos litigation dollar, 61 cents is consumed in transaction costs.... Only 39 cents were paid to the asbestos victims" (citing Rand finding)); *id.,* at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally")); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, *supra,* at 389-395.

Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the cochairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. *Georgine v. Amchem Products, Inc.,* 157 F.R.D. 246, 266-267 (E.D.Pa.1994); App. 660-662. ***633** These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F.R.D., at 268, 287. "The negotiations included a substantial exchange of information" between class

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counsel and the 20 defendant companies, including "confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. *Id.,* at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. *Ibid.* In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." *Id.,* at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." *Ibid.* The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement ***634** was not a relevant (and, as I would say, important) consideration.

Second; the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Ante,* at 2249 (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, *e. g., In re A.H. Robins Co.,* 880 F.2d 709, 740(C.A.4), cert. denied *sub nom. Anderson v. Aetna Casualty & Surety Co.,* 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); *In re Beef Industry Antitrust Litigation, 607 F.2d 167, 177-178 (C.A.5 1979),* *****2255** *cert. denied* sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Assn., *452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27, pp. 11-54 to 11-55 (3d ed.1992).*

Nor do I understand how one could decide whether common questions "predominate" in the abstract--without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective--"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23(b)(3), 28 U.S.C.App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to ***635** rest on the certification question." *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); see also 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1785, p. 107, and n. 34 (1986). I am not saying that the "settlement counts only one way." *Ante,* at 2248, n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability ... to make informed certification decisions." *In re Asbestos Litigation,* 90 F.3d 963, 975 (C.A.5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not

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certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," *ante,* at 2249, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316.

The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue--a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance ***636** of (a) the common fact of exposure, (b) the common interest in receiving *some* compensation for certain rather than running a strong risk of *no* compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. *Ibid.*

Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is *how much* these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. *Id.,* at 292.

These differences might warrant subclasses, though subclasses can have problems of their own. "There can be a cost in creating more distinct subgroups, each with its own representation.... [T]he more subclasses created, the more severe conflicts bubble to ****2256** the surface and inhibit settlement.... The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court--reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact- specific Rule 23 determinations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

***637** Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation- protected fund for the future." *Ante,* at 2251.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, *supra,* at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference Report 34-35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled' " (citation omitted)). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests

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of no class members are sacrificed.

But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." 7A Wright, Miller, & Kane, Federal Practice and Procedure § 1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the " 'real and present danger' " described by the Judicial Conference Report above. The majority's use of the ***638** lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, *ante,* at 2251, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to a variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F.R.D., at 292. For these reasons, and others, the District Court found that the distinction ****2257** between present and future plaintiffs was "illusory." *Id.,* at 317-318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To choose one more brief illustration, the majority chastises the settlement for extinguishing loss-of-consortium claims, *ante,* at 2251, 2252, but ***639** does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F.R.D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. *Ante,* at 2250-2252. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation ... while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F.R.D., at 316 (citation omitted); see also *id.,* at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the ... defendants"); ***640** *id.,* at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the

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present tort system" and will "result in the CCR defendants paying more claims at a faster rate, than they have ever paid before"); *id.,* at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL-CIO (and its Building and Construction Trades Department), which represents a " 'substantial percentage' " of class members, 157 F.R.D., at 325, and which has a role in monitoring implementation of the settlement, *id.,* at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. *Id.,* at 312-313, 336. Every notice emphasized that an individual did not currently have to be sick to be a class member. And in the end, the District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. *Id.,* at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' ****2258** conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District ***641** Court. *Ante,* at 2252. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See *Reiter,* 442 U.S., at 345, 99 S.Ct., at 2334; *Yamasaki,* 442 U.S., at 703, 99 S.Ct., at 2558-2559.

II

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeals on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

117 S.Ct. 2231, 521 U.S. 591, 138 L.Ed.2d 689, 65 USLW 4635, 37 Fed.R.Serv.3d 1017, 28 Envtl. L. Rep. 20,173, 97 Cal. Daily Op. Serv. 4894, 97 Daily Journal D.A.R. 8025, 97 CJ C.A.R. 1314, 11 Fla. L. Weekly Fed. S 128

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- 1997 WL 13206 (Appellate Brief) BRIEF OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL (Jan. 15, 1997)

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Thirtieth Anniversary Issue

*383 ASBESTOS: A MULTI-BILLION-DOLLAR CRISIS

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In past issues of the Harvard Journal on Legislation, authors have delved into the persistent problem of asbestos litigation. In Volume 20, Louis Treiger explored legislative proposals before the Ninety-Seventh Congress in his article, Relief for Asbestos Victims: A Legislative Analysis. Bruce H. Nielson's note in Volume 25 explored the potential of class actions to address the needs of victims of asbestos and other mass torts.

In this Article, Harvard Law Professors Edley and Weiler revisit the asbestos litigation problem and suggest new solutions. Rejecting traditional legal strategies as unworkable, the authors propose a legislative approach that combines the scope of a class action with the consistency of an administrative system. Their proposal envisions a central fund to which claimants can apply without the need to show fault. Clear medical guidelines are applied, and damage awards and legal fees are strictly controlled. Finally, the authors suggest administrative and judicial alternatives that closely resemble the legislative ideal, should legislation be politically impossible.

Federal and state courts are clogged with 100,000 asbestos suits, and that number is rising every month. These suits pose a series of seemingly intractable policy problems:

***384** . Many victims of asbestos exposure are mortally ill from cancer or severe respiratory diseases but must wait years before their claims are resolved--often after the victims have died.

. Tens of thousands of these tort claims have been made, many successfully, by individuals who are understandably worried about their exposure to asbestos but who are not now and never will be afflicted by disease.

. The primary early targets of asbestos litigation--the major suppliers of asbestos and asbestos-related products sixty years ago--paid billions of dollars in tort damages. Then, facing many more billions of dollars in prospective tort liability, more than a dozen major American corporations went bankrupt. Others had to cut back severely on their growth and development programs.

. Lawyers then cast the litigation net further to find corporate pockets deep enough to satisfy the vast numbers of pending and future tort claims. Judicial legerdemain helped fill that gap with doctrinal innovations that imposed liability on firms (or their insurers) whose "misdeed," for example, was buying asbestos-related companies in the 1960s and early 1970s--after the human tragedy but before the litigation disaster.

. One key constituency has not been a victim of the asbestos tragedy: lawyers. Of the $7 billion already spent on claims, sixty percent--more than $4 billion--has been spent on fees and expenses of the plaintiff and defense bars. This figure does not account for the large amounts expended by our already overburdened civil justice system.

Throughout the 1980s, many state legislatures passed statutory reforms to their common law standards of product liability and medical malpractice. In the 1990s, the battle over tort reform has shifted to Washington, where the American Tort Reform Association and the American Medical Association are locked in a standoff with

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the American Trial Lawyers Association. During the 1992 presidential election campaign, former President George Bush and former Vice President Dan Quayle--in an unsuccessful effort to divert the public's attention from our declining economic productivity and spiraling health care costs--continually harped on a "litigation explosion" they attributed to personal injury lawyers wearing "tasseled loafers." [FN1]

***385** We believe that the explanation for the lack of action on Capitol Hill is not simply political gridlock: there are serious intellectual disagreements regarding the nature of the tort problem, and what, if anything, should be done about it. [FN2] We are law professors, not "lawyer-bashers." We acknowledge that tort litigation imposes substantial and often unwarranted economic harm on defendants. However, tort litigation also provides indispensable redress for victims and protection for the public.

Despite conflicts about tort reform in general, there is a consensus among scholars and judges on one point: asbestos litigation presents a tort problem with a unique history, present state, and future course. It is a problem that cries out for major reform.

As a result of corporate actions dating back to the 1930s and 1940s, the American legal system spent approximately $7 billion on asbestos litigation in the 1980s and early 1990s. Many billions of dollars more will be spent well into the next century. The early stages of this litigation spiral displayed the tort system's virtues--hard-working, imaginative lawyers discovering the evidence, and sympathetic, creative judges overcoming a variety of legal obstacles posed by this innovative toxic tort. In the 1970s, tort lawyers identified corporate (and others') responsibility for the asbestos tragedy, and, in the 1980s, escalated their filings until responsible elements of the business community were ready to endorse and fund a more accessible, equitable, and generous system of relief for asbestos victims.

Currently, however, we know that sixty percent of liability funds continue to be spent not on asbestos victims, but on lawyers, expert witnesses, and others involved in disputes over who will pay and who will be compensated. Some workers who were severely injured by asbestos exposure are unable to document their claims or get their cases resolved before they die. At the same time, much of the money that actually reaches claimants goes to people who do not and will not suffer any physical impairment. Furthermore, the ultimate social cost of asbestos litigation is considerably greater even than direct expenditures on tort claims. In the intensely competitive international economy in which we now live and work, there are no ***386** true "deep pockets." Economic dislocation from spiraling litigation drives firms to bankruptcy or its brink, and imposes substantial financial burdens on the present shareholders, employees, pensioners, and communities of asbestos defendants.

A drastic overhaul of the current legal approach to asbestos is long overdue. Members of Congress should turn their attention away from the present debate about products liability's impact on small plane manufacturers and the impact of medical malpractice on obstetricians. These are debates involving two distinct, intellectually plausible, and emotionally powerful viewpoints. Far more worthy of congressional attention and action is an asbestos tragedy with human, financial, and legal costs that dwarf those created by other examples of medical and product liability. There is no serious disagreement within the scholarly or judicial arenas that the current asbestos regime is inadequate and in need of reform. Under the current system, remedying the effects of asbestos could cost many billions of dollars. But it need not.

How might Congress reform asbestos litigation? We favor an administrative mechanism, under which compensation of victims would reflect benefit ranges applied through informal adjudication, with access to court preserved only for appellate review of the legality of administrative action. Awards would be financed primarily by asbestos defendants (including their successors and insurers), expenditures on attorneys would be sharply limited, and unimpaired claimants would be the last to be compensated. All pending and future state tort litigation would be preempted.

If, however, our new President and Congress cannot be galvanized, our courts must continue to fill the void. Judges must remake traditional doctrines to deal with the costs of second-generation asbestos litigation just as

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boldly as they did in the 1970s and 1980s, when they first fashioned tort remedies for asbestos exposure.

The judicial approach we favor involves the use of class action techniques to emulate the key features of a sound administrative solution. A group of plaintiff and defendant attorneys recently negotiated an initiative along these lines. It involves a settlement class action of all future asbestos claims against a group of defendant companies operating under the umbrella of the Center for Claims Resolution, a non-profit entity formed specifically to pursue negotiated alternatives to protracted litigation. The proposed*387 settlement, now pending in the Eastern District of Pennsylvania, is an effort to resolve most claims through a streamlined, non-tort procedure. Impaired claimants would be paid promptly, and the claims of the unimpaired would be deferred unless and until an impairment develops. "Evergreen" funding by the participating companies would ensure eventual payment of all claims by impaired claimants, but total payments for a given year are limited (based on historical claims resolution rates) to make the resulting economic burden manageable. Attorneys' fees would be capped. A right of eventual recourse to litigation is preserved for at least some claimants, but only after full effort to resolve the case through less contentious and costly alternatives.

I. ASBESTOS: THE HUMAN TRAGEDY

A. Asbestos Use

When asbestos first appeared on the market in the late nineteenth century, it was touted as a miracle substance--able to withstand punishing forces of fire, corrosion, and acid, while also versatile enough to weave into textiles, line automobile brakes, retard shipboard fires, and bind rockets together. As United States District Court Judge Jack B. Weinstein remarked, "[t]heatrical audiences were once comforted by the thought that huge asbestos curtains between the audience and stage protected against the spread of fire." [FN3] In its most important use, asbestos was the designated substance incorporated in Navy warships to protect American seamen from fires caused by enemy bombers and submarines in World War II.

Early in the twentieth century, however, evidence began to emerge that these benefits from asbestos use were secured at the price of serious dangers to workers. Those who mined asbestos and manufactured asbestos products for use as insulation in ships, factories, and the like were at risk. [FN4] Because asbestos-produced disease has a lengthy latency period--anywhere from *388 ten to forty years [FN5]--it took decades to generate epidemiological evidence of the risks this substance poses to human beings. [FN6] Gradually, medical scientists documented the fact that asbestos exposure can produce a number of respiratory disorders: asbestosis, mesothelioma (a rare malignant cancer), and lung cancer (particularly in combination with smoking).

Evidence of at least some of these risks--in particular, of asbestosis, suffered by asbestos workers exposed to high concentrations of this substance-- was beginning to emerge in the scientific literature by the 1930s. [FN7] From the point of view of the plaintiffs' bar, the true disgrace of the asbestos story is their belief that senior executives of some of the country's leading producers--particularly Johns-Manville--were not only aware of these risks, but took active steps to suppress knowledge of the danger in order to protect the sales of their product.

It is by no means clear that a substantial drop in sales was an inevitable outcome of disclosure. There were employers who took some steps to reduce exposure risks. Asbestos was a life-saving as well as a life-threatening substance, and there was no substitute readily available, especially for ships in the nation's war effort. [FN8] But if all those who were aware of the risks (including United States Government officials) had heeded the warnings in the medical literature, many protective devices and techniques could have been adopted to reduce occupational hazard levels drastically.

Instead, from the 1940s through the 1960s, millions of American workers were exposed to asbestos with little or no precautions. [FN9] As a consequence, several hundred thousand Americans *389 were fated to suffer asbestos-related diseases, and many thousands to die, beginning in the 1960s and continuing well into the next century. [FN10]

B. An Out-of-Date Morality Play

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It is important to remember this oft-told tale of the "outrageous misconduct" on the part of many companies and the government. [FN11] Some plaintiffs' lawyers continue to pound the ***390** table in courtrooms and legislative hearing rooms. They tell their listeners that too much blood has been spilled by corporate misconduct for us ever to deprive plaintiffs of the full force of tort retribution by substituting an administrative compensation program, however socially "efficient" the latter might seem.

Whatever those lawyers say about the events that took place in the 1930s and 1940s, this country and its economy need a more analytical perspective about what reforms are appropriate in the 1990s. It was not tort litigation that discovered the asbestos tragedy, it was medical science. The true hero of that story is not the plaintiffs' bar, but Dr. Irving Selikoff. And the first legal response came not via tort litigation, but through workers' compensation and occupational safety and health regulation: two administrative programs that largely removed asbestos from the workplace by the early 1970s--well before the first major jury verdicts were announced.

The importance of tort litigation was its role, beginning in the mid-1970s, in revealing the failure of a number of major corporations to warn workers of the severe risks to which they were exposed. Also crucial was tort's role in meting out the kinds of legal sanctions--approximately $7 billion in claims expenditures [FN12] and sixteen corporate bankruptcies so far [FN13]-- that should make business executives think twice before following the same path as their asbestos manufacturing predecessors. The tort system, surely, has succeeded in delivering society's punitive response to the events of the 1930s and 1940s.

In any case, the original responsible executives have left their firms--in fact, most are dead. Also, many of the firms most involved--Johns-Manville for example--have themselves gone through bankruptcy proceedings (at severe financial loss to their shareholders) and are thus protected from further tort litigation. The firms now paying the price of the 100,000 suits pending, ***391** which will pay for the further 100,000 suits predicted for the future, have only peripheral connections to the original disaster--often just as insurers of or successors to the firms initially involved.

Moreover, it is not corporations, but rather real people, who pay the price of tort litigation--specifically, the present stakeholders in defendant firms such as employees, shareholders, pensioners, and surrounding communities. And the people with the most compelling stake in reform are the victims of asbestos-related disease. Many of these victims will not be able to recover (at least while they are alive) the kind of compensation they need and deserve precisely because of tort litigation's preoccupation with retelling, and retaliating for, a tale of corporate "misconduct" that took place almost sixty years ago.

The asbestos crisis is more than a story of decades-old corporate failures and a contemporary public health tragedy. It is a Dickensian tale about the limitations of the traditional legal process and a general portrait of governance in this country. The picture thus far is discouraging. Judge Weinstein, the preeminent mass tort adjudicator, and Eileen Hershenov put it well:

To many, particularly those in other countries, it may seem strange that in the United States we leave it to individual courts to provide essentially ad hoc solutions to modern day disasters with their national, social and economic repercussions. In this country, however, three factors have, by default, left the state and federal courts to their own devices: (1) the lack to date of an effective national administrative regulatory scheme capable of controlling undesirable conduct by manufacturers; (2) the absence of a comprehensive social welfare-medical scheme for compensating victims of mass torts, and (3) the lack of adequate state or federal legislation controlling these cases. [FN14]

II. THE INADEQUACIES OF TORT RELIEF

Asbestos presents a distressing picture of the inadequacies of tort litigation as a vehicle for delivering society's resources to needy and deserving claimants. The following features of the asbestos litigation system make these flaws inescapable.

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*392 A. Number of Claims [FN15]

More than 100,000 asbestos claims are now pending in court, and the number grows steadily. Approximately two-thirds of these suits are filed in state courts, the other third in federal courts. In the last half of the 1970s there were 1000 asbestos suits filed in federal courts; in the first half of the 1980s, 10,000 claims; and in the last half of the 1980s, 37,000 claims. In 1990 alone there were nearly 14,000 new federal asbestos suits, three times the fewer than 5000 federal suits filed that year for every other type of product liability case. Yet in recent years, both Congress and the states have concentrated their reform efforts on the product liability "tail," rather than the asbestos liability "dog."

B. Size of Expenditures

Billions of dollars have already been spent on asbestos litigation: the most recent estimate puts the figure at $7 billion. [FN16] Though inevitably speculative, estimates have also been made of the total costs of the asbestos litigation crisis. For example, Judge Weinstein estimated that the total cost for current and future personal injury claims would be $26 to $28 billion. [FN17] Given that there has been no abatement in the flow of and payment for asbestos-related tort claims, it is safe to say that many billions of dollars more will be needed to resolve this human and legal tragedy.

Bankruptcies among asbestos defendants, together with the doctrine of joint and several liability, mean mounting and cumulative financial pressure on the remaining defendants, whose resources are limited. The money spent on unimpaired asbestos claimants and lawyers creates genuine economic risks to workers and pensioners with stakes in the surviving companies. While it is impossible to quantify the magnitude of those risks, the sixteen asbestos-related bankruptcies to date constitute more than one-half of the original twenty-five major asbestos defendants. [FN18]

*393 C. Unimpaired Claimants [FN19]

Unfortunately, though, it appears that up to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired. The cases involve pleural plaques--"freckles on the lungs"--or pleural thickening--forms of physical change that are attributable to asbestos exposure. These plaques may or may not be followed by asbestosis or cancers that would disable or kill the asbestos claimants.

While there are understandable legal and emotional reasons why these premature suits are being filed in huge numbers, their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now.

D. Legal Costs

For both severely and potentially impaired litigants, of every dollar paid by defendants, over sixty cents goes to the lawyers. Adding the overhead costs of both the judicial and insurance systems, asbestos litigation consumes two dollars of society's resources in order to deliver a single dollar to people who were exposed. [FN20]

E. Contingent Fees

The usual target of popular concern about legal costs is the contingent percentage fee paid to the plaintiff's lawyer, which usually ranges from thirty to forty percent of the total settlement or award, sometimes reaching fifty percent. We believe that the contingent fee is generally an attractive feature of our tort system because it is an effective mechanism for making justice available to victims of personal injury. [FN21] In the early stages of *394 asbestos litigation, lawyers who took their chances with these scientifically uncertain and legally difficult cases fully deserved the sizable rewards they won. However, now that the basic legal and scientific issues that

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figure in asbestos litigation are long since resolved, and huge numbers of new asbestos cases can be processed by paralegals on a largely assembly-line basis, the key plaintiffs' lawyers are earning several thousand dollars per hour of work done on these files. [FN22] That money would be far better spent on asbestos victims themselves, as well as on investment in better jobs for present-day workers.

F. Delay

It is unfair, though, to paint plaintiffs' attorneys as the villains in the picture. While legal fees do make up sixty percent of claims expenditures, half of that amount goes to defense attorneys. The underlying problem escalating legal costs is that the current system still creates too many opportunities and incentives for both sides to litigate aggressively in individual cases, even though the aggregate pattern of asbestos claims disposition has largely stabilized. The unhappy consequence is that asbestos litigation uses up a lot of time as well as money. The average time taken to dispose of an asbestos claim is thirty-one months, about twice the length of the typical civil claim. [FN23] Indeed, a side effect of the asbestos litigation explosion is that its huge caseload causes delay not only for asbestos claimants, but also for people bringing other types of legal claims to our already overburdened court system. Delay causes special tragedy for asbestos victims: because their exposures occurred so long ago, justice delayed can truly be justice denied. Too often the claimant is dead before payments are finally made to his or her estate.

G. Searching for Deep Pockets

The individual actors--the corporate and governmental employees who made those fateful decisions about asbestos use decades ago--have long since departed the scene. Their corporate and government successors, conglomerate affiliates, and ***395** insurers are now left with the legal bills. While an abstract economic argument can be made about undoing the unjust enrichment of these entities, the situation actually involves a search for deep pockets to finance needed (and unneeded) compensation for asbestos claims. This is a worthy social policy objective, but tort is not the ideal mechanism with which to achieve it. Nor is it the historical function of judges and juries to act as roving revenue commissioners to fund social insurance programs.

H. Erratic Damage Awards

The most important source of litigation, controversy and delay is legal uncertainty. [FN24] The most significant source of uncertainty in all forms of tort litigation, including asbestos, is the assessment of damages, especially for the inherently subjective, non-financial damage categories of pain and suffering and punitive awards. The absence of any meaningful guidelines for jury assessment of the value of pain and suffering has produced huge inequities. Similarly-situated asbestos victims may receive payments that vary by a factor of ten or more. The fact that juries are still invited to levy huge punitive awards constitutes equally unfair treatment of defendants faced with the arbitrary prospect of multiple punishment for misconduct that took place long ago. [FN25]

III. REFORMING THE SYSTEM

The previous pages synopsize the pathological nature of present-day asbestos litigation. To reform the system, we must lay to rest several myths about tort law.

***396** Myth #1. Tort law must continue to exact society's revenge on corporate malefactors. This is the most important and distorting myth about asbestos litigation. Seven billion dollars of tort punishment meted out in the past decade is more than enough to express society's outrage about any misdeeds that may have taken place a half century ago and to create a powerful deterrent against similar misdeeds in the future. In the future, we must divert the remaining billions of liability dollars to redress the present-day needs of asbestos victims and their families.

If we can put tort retribution behind us, there is reason to hope for a consensus about the ingredients of a fair compensation program. Most leaders of the major defendants have clearly stated their willingness to pay for a fair compensation system, [FN26] among other reasons to protect their businesses from the devastating effects of litigation. Such a system would provide timely and generous benefits to those with significant asbestos-related impairments, even using the existing pattern of tort payments as the basis for calculating benefit amounts. The

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defendants seek to remove the specter of runaway punitive and pain and suffering verdicts in individual cases and to fund guaranteed and accessible compensation with the revenues now being spent on unimpaired claimants and unnecessary legal services for both sides. This program benefits those who need financial relief for tangible asbestos impairments. It also will preserve the economic resources of defendants for the benefit of future victims of asbestos disease, as well as for the workers, pensioners, and communities that rely on the economic viability of the defendant businesses. History's tragedies cannot be undone. It is wrong to let the memory of them stand in the way of fair redress today.

Myth #2. Asbestos-related injuries are torts, which can only be resolved fairly through individualized, full-blown court proceedings. In fact, legal business-as-usual has wasted billions of dollars, delaying and short- changing deserving claims while attorneys and experts prosper.

***397** Myth #3. Courts can handle the problem using massive trials and gigantic batch settlements of hundreds, occasionally thousands, of claims. Actually, this approach inevitably wastes resources on less deserving, unimpaired claimants, threatens further bankruptcies, and does nothing to provide equity among deserving claimants. Experience proves that muddling through simply cannot keep pace with the volume of claims.

Myth #4. Judges lack legal authority to address the crisis now--only Congress and state legislatures can save the day. This, too, is incorrect. Rather than wait for a political solution that may never come, judges can and must act now.

What is to be done? The answer requires consideration of the elements of an ideal solution and appraisal of the institutional capacity of legislatures and courts to approximate that ideal. We briefly describe an administrative compensation mechanism that Congress could enact that would treat claimants fairly and provide economic stability to defendants and their stakeholders. Because political gridlock makes enactment of such legislation highly unlikely, we detail the way courts can and should adopt most of these substantive measures by imaginative use of the variety of judicial powers that have been deployed for other mass tort crises.

IV. A LEGISLATIVE APPROACH

Congress should stop relying primarily on court-centered resolution of claims for asbestos compensation. The ideal solution is an administrative alternative to the current litigation morass.

By combining the better features of workers' compensation, the Black Lung program, the national Childhood Vaccine Injury Act, and Social Security Disability Insurance, Congress could replace costly and inequitable tort adjudication in federal and state courts with a simpler, fairer administrative mechanism incorporating the following elements:

1. Deferral registries for the unimpaired. Claimants without any present disability (for example, just a clinical diagnosis of pleural plaque) would have their claims put on hold until some tangible physical impairment manifests itself. These claimants would not have to fear that the claim would be barred by the statute of limitations or other procedural obstacles.

***398** 2. No proof of fault. Claimants would not need to prove the legal fault of any defendant or exposure to any particular company's product, as is required by tort law. Past asbestos exposure combined with present impairments of the type associated with asbestos would establish eligibility for compensation.

3. Clear, objective medical criteria. Instead of repeated individual trials involving complex medical evidence, an administrative agency would, through rulemaking, establish clear guidelines to define degrees of impairment based on objective clinical tests. As with the "grid" used in social security disability insurance, there could be a safety valve procedure for truly exceptional cases. [FN27]

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4. A schedule of compensatory payments. Instead of repetitive, individualized proceedings to establish the amount of each damage award, a schedule of benefit payments would be created by legislation or public rulemaking. This schedule would build upon the typical experience in asbestos settlements and awards, but would specify a range of appropriate compensation that took into account the financial and non-financial losses of victims of different ages, impairments, and family circumstances.

5. No punitive damages. By removing the threat of cumulative and arbitrary punitive damages awards, an administrative system would equalize treatment of similarly situated plaintiffs and conserve the resources of defendants for compensating impaired claimants.

6. Arbitration of disputes, with meaningful opportunity for appeal. Claimants dissatisfied with administrative disposition of their eligibility or the amount of their benefit award would have prompt arbitration of their objection, in which they could argue that some exceptional circumstance in their case warrants a departure from the medical eligibility criteria or the benefit schedule. The arbitrator's decision would be subject to review by a neutral administrative tribunal, with limited further appellate review in court for clear legal error.

7. Rationalized legal fees. This administrative system would virtually eliminate the contingency element in asbestos claims and greatly simplify calculation of benefits payable. Payment for legal services could thus be set far lower than the present ***399** thirty-three to fifty percent of the unconstrained damage verdicts won under tort law. In view of the compensatory focus of a benefit system, the program should either reimburse legal fees reasonably incurred by successful claimants (as is now done in a number of workers' compensation regimes) or provide professional and semi-professional representation of claimants (as under the National Labor Relations Act).

8. Financing the program. The bulk of funding would come from defendant companies and their insurers. Assessments would be paid periodically, in accordance with projected and actual claims experience, rather than in up-front lump sum payments that would unduly strain defendants' present resources. Distribution of the financial burden among different firms would be based on projections of future liability derived from litigation experience and other factors that reflect differences in asbestos risk creation (thereby recognizing firm differences in responsibility for asbestos risk). Because of the documented interaction of smoking and asbestos exposure, a truly fair compensation program would require contribution from tobacco companies (perhaps through an increase in cigarette manufacturer taxes). [FN28] For the same reason, the significant role of the federal government in promoting the use of asbestos (especially in wartime shipbuilding) would be recognized by a governmental contribution--for example, by absorbing all administrative costs. [FN29]

There are many advantages to such a legislated administrative solution to the absestos crisis. It would be comprehensive and national in scope, rather than piecemeal and subject to the uncertainties and inconsistencies of our federal court system. Most importantly, it would be democratic, reflecting public deliberation about fair resource allocation.

Needless to say, this outline omits a host of subsidiary details about legislative design and administrative implementation. [FN30] ***400** For example, it is not clear if asbestos defendants should be coercively taxed to fund the scheme, or if they should pay a quasi-voluntary "fee" in exchange for legislatively eliminating their potential tort liabilities. Furthermore, it may be necessary to draw upon insurer resources that would be available to satisfy court settlements and tort awards to finance an administrative alternative. We must decide whether almost all claimants could be treated fairly in a matrix or grid system, or whether it is necessary to risk the complexity and disputes of a broad residual discretion to handle "exceptional" cases. Reformers must choose among benefits paid in a lump sum, in installments, or through an actuarially-equivalent annuity. We believe that the experience in other administrative programs can be drawn upon to supply these and many other details. They can be resolved, and the resulting program would be vastly preferable to the current litigation crisis. [FN31]

The significant problem with a legislative solution has less to do with policy design or legal conundrums than

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with politics. It is sobering to contemplate the array of interests clamoring to promote, influence, and derail a legislative proposal. Some of these interests, notably the trial bar, are among the most politically powerful lobbies in Washington. The enactment of any piece of controversial legislation, however meritorious, is uncertain at best. In the face of a massive budget deficit and congressional misgivings about the Black Lung and Social Security Disability administrative schemes, enactment of a sound asbestos compensation mechanism is unlikely. The complex legislative agenda announced by President Bill Clinton, [FN32] much of ***401** which will involve the same congressional committees as any asbestos proposal, likely puts the legislative ideal beyond the realm of the politically possible.

V. A JUDICIAL APPROACH

The fact that the legislative ideal is probably unattainable only reinforces the responsibility of courts to address the crisis with imagination and urgency. Courts must work creatively with current substantive and procedural doctrine to devise a mass resolution of the asbestos crisis. An effective judicial solution should include the key elements of the legislative ideal we have described:

. Determination of entitlement based not on company fault, but on victim exposure and impairment.

. Development of objective medical criteria for determining degree of impairment.

. Scheduling of compensatory ranges to allow some flexibility for unusually serious cases.

. Elimination of future punitive damages.

. Arbitration of disputes instead of jury resolution, with meaningful opportunity for appeal.

. Rationalization and reduction of legal fees; simplification of procedures to assure adequate but low-cost representation.

. Financing the scheme through contributions from a large number of asbestos companies and their insurers.

Judges have shown such creative vision in a number of mass tort cases, especially the tort-driven bankruptcy proceedings involving A.H. Robins (the Dalkon Shield) [FN33] and Johns-Manville (asbestos), the latter led masterfully by Judge Weinstein. These proceedings have adopted several elements of the solution sketched above, including simplified administrative procedures for assessing impairment and calculating benefits, and mechanisms for channeling scarce resources toward current and future claims of a more serious nature. The extraordinary circumstances of bankruptcy forced the judges' hands, but desperate damage control in such a financial crisis is hardly the ideal ***402** setting for a comprehensive solution. We must protect the economic viability of solvent enterprises, enabling them to meet their obligations to both claimants and other stakeholders. Solving the problem for individual bankrupts such as Manville by circumscribing their liabilities only adds to the financial pressure on surviving defendants. [FN34]

Instead, courts should certify broad settlement class actions for purposes of resolving all pending and future asbestos claims against broad groupings of solvent defendants. [FN35] The recently approved Pfizer heart valve settlement [FN36] demonstrates how this procedure can produce the various components of a rational compensation scheme that we have emphasized: providing as much as $200 million to settle potential claims from tens of thousands of heart valve recipients; simplifying eligibility; scheduling different categories of benefits; giving priority in payments to those with severe injuries and needs, as opposed to those with only potential health problems; simplifying claims procedures with corresponding reductions in legal costs; and eliminating multiple punitive damages awards.

Because such class action certification would be used only for purposes of settlement, it would avoid the casino-

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like "bet the company" risks of certification for litigation and trial, with billions of dollars riding on a single jury verdict. Defendants can choose to accept or reject the terms of a negotiated settlement. Rule 23 of the Federal Rules of Civil Procedure requires court approval of the "fairness, adequacy, and reasonableness" of the settlement. [FN37] Judges can thereby block "sweetheart deals" negotiated between defendants, who want to achieve relief from potentially massive long- term liability with a modest up-front payment, and plaintiffs' lawyers, who want to ensure not only their clients' recovery but their own lavish fees. Judges should ***403** not, however, transform the fairness hearing on a proposed settlement into a full-scale trial on the merits. Instead, judges should decide only whether the proposed settlement falls within the parameters of a reasonably negotiated outcome. A complex fairness inquiry is unnecessary if claimants have a meaningful opportunity to opt out of the settlement. Such an opportunity enables plaintiffs to compare the value of the settlement with the value of the tort alternative and to choose accordingly. [FN38] The opportunity for plaintiffs to opt out, combined with the right typically reserved by defendants to nullify the settlement if too many claimants opt out, provides the appropriate incentives for plaintiffs and defendants alike to fashion a mutually beneficial and final resolution.

Several months after we began this Article, certain asbestos defendants represented by the Center for Claims Resolution ("CCR") negotiated with counsel representing asbestos claimants and reached a class action settlement along the lines suggested above. It was motivated by the Multi- District Litigation Panel's pretrial consolidation of the 30,000 pending federal asbestos claims. The settlement, which governs only future federal and state claims (all claims not filed as of January 15, 1993, the filing date of the class action), contains the following key components:

. Instead of litigating all the arguably relevant features of defendant liability, claimants will be entitled to compensation if they satisfy specified criteria regarding exposure to the defendant's asbestos, latency periods, and medical conditions that are typically associated with asbestos.

. Expert medical panels will resolve disputes about whether particular claimants satisfy the criteria. These panels will also determine whether "exceptional" cases that claim to be "substantially comparable" to the standard asbestos diagnoses satisfy the criteria.

. Claims of current medical impairment will be paid promptly. Claims of present indicia of future impairment are not allowed, but when such claims are resubmitted for actual impairment, they will not be time-barred. In addition, claimants who develop asbestosis can collect compensation immediately for that impairment, ***404** but if a malignancy later develops, can refile for the award established for this more severe disease.

. A schedule consisting of minimum and maximum figures of compensation and an average value range are established, all derived from historical settlement and award payments made by CCR members in tort litigation. For example, for mesothelioma the compensation range runs from a minimum of $20,000 to a maximum of $200,000, with the negotiated average value in the range of $37,000 to $60,000. [FN39]

. Individual victims may claim "extraordinary" damages, depending on a combination of age, number of dependents, economic factors, and the degree of exposure to the products of CCR members. [FN40]

. In light of the reduced difficulties and contingencies in representing claimants under this settlement, the maximum attorney fee is held to twenty- five and twenty percent of the compensation received for ordinary and extraordinary compensation claims, respectively.

. On the basis of prior CCR experience, the parties developed annual case- flow caps for "ordinary" claims, "exceptional" diagnostic claims, and "extraordinary" compensation claims. If in any one year the number of claims in a category exceeds that category's cap, the excess claims will be processed in the next year and count against that next year's cap. Because the CCR members are obligated by the settlement to pay all qualifying claims, these case flow ceilings affect only the timing of, not entitlement to, payment. Moreover, if the aggregate settlement amount paid to claimants in any one year falls below the average value range, CCR will make up the difference by paying more claims in subsequent years.

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. In addition to the front-end opt-out right under the class action settlement procedure, any claimant who meets the exposure and impairment criteria and is dissatisfied with the amount of compensation offered has the option of suing in court for tort damages in lieu of accepting the CCR offer. In such a suit, the defendant waives any issues relating to its legal fault, ***405** with the only predicates to recovery being claimant exposure and disease. In return, successful plaintiffs are entitled to collect only compensatory, not punitive, damages. A maximum of one percent of claimants can assert this back-end opt-out right in any one year, and any damages award greater than 150 percent of CCR's last offer is paid over a period of five years.

The negotiators appear to have addressed the major pathologies of the present system and adopted a significantly improved method for delivering compensation to future victims of asbestos exposure. Their success, however, will depend on the court's assessment of the proposed settlement's fairness.

There are several reasons to believe that this settlement secures important gains for both sides. For the benefit of plaintiffs, the settlement guarantees compensation for all impaired claimants through "evergreen funding." It also overcomes several obstacles traditionally imposed by tort doctrine by using medically-defined entitlement criteria. In doing so, it both simplifies adjudication and reduces uncertainty and costs for claimants. Prompt administrative processing also sigificantly ameliorates current litigation delays. In addition, the savings resulting from the cap on legal fees, together with any further savings from competitive pressure on fees, will benefit claimants rather than defendants. The compensation schedule specifies a range of payments within each medical category, permitting some individualization. By also specifying an annual average for the range--based on the current pattern of tort awards--the schedule removes the defendant's incentive to offer an unreasonably low or high award to any particular claimant. The front-end opt- out right allows potential claimants who are dissatisfied with the proposed compensation scheme to avoid the settlement. It thus provides an immediate substantive test of the fairness of the proposal. Finally, the back-end opt-out right for claimants who are dissatisfied with the compensation offered through the administrative mechanism provides a gradual market test as to whether settlement benefits remain preferable to the tort litigation alternative. [FN41]

***406** For defendants, the settlement eliminates unimpaired pleural plaque claims, saving both the compensation these claims have usually garnered and the associated defense costs. The use of tangible medical criteria not only simplifies eligibility determinations but also helps screen out some lung cancer and respiratory cases that are not asbestos-related. The combination of objective medical criteria, exclusion of unimpaired claims, and the elimination of statute of limitations problems reduces the incentives for plaintiffs' counsel to search for marginal claims. Finally, the settlement will provide a very important measure of financial certainty for defendants, by specifying a compensation range and average for each impairment category, [FN42] by eliminating punitive damages awards, and by capping both the annual volume of cases that will receive exceptional compensation and the number of cases that will be handled through the back-end opt- out each year.

There are some important differences between the legislative ideal we sketched earlier and the approach negotiated by the parties to this class action settlement:

. The settlement permits more generous attorneys' fees, although the percentage figures are consistent with those used in the Manville reorganization. But these freely-negotiated caps on attorneys' fees do not preclude competitive pressures generating lower fees if members of the private bar are prepared to bid with smaller percentage rates for the right to represent asbestos victims with less contingent claims under the new system.

. The settlement extinguishes, rather than defers, unimpaired pleural plaque claims until more serious asbestos disease cases are resolved. In effect, the settlement adopts the substantive position that "cancerphobia" actions should be barred. Those claimants, however, will no longer be forced by the statute of limitations in "single-claim" states to bring actions when they are not actually sick and thereby forfeit any recourse to larger compensation when and if serious impairment develops.

. More importantly, a legislated solution would cover current as well as future claims, subject only to minor due

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process limits. It would also cover more than the subset of companies ***407** and insurers participating in the settlement, avoiding the complex problem of rationalizing the indemnification from, and joint and several liability of, the companies and insurers not participating in the settlement.

. A legislated solution would create an administrative rule-making process that would permit adjustments to the medical and compensation parameters if future circumstances demand it. Such adjustments could be regulated to provide reasonable certainty to claimants and defendants, and they would be much easier to accomplish as administrative matters rather than as modifications of an already approved settlement. [FN43]

. Finally, a class action settlement involves the prospect of undesirable delay. Although a trial court deems a proposed settlement reasonable, an overly cautious appeals panel with limited time may not see the wisdom of swift and bold action. This danger was demonstrated in the recent reversal of the negotiated reorganization of the Manville Trust. [FN44] Even an eminently reasonable settlement may take years to work its way through the courts and win final appellate approval. Fortunately, this settlement does provide that it becomes operational--in the sense that CCR will begin processing claims under it--at the conclusion of the front-end opt-out. And CCR defendants have undertaken to resolve more quickly all pending tort claims once they receive assurance about their future liability through approval of the class action settlement.

Notwithstanding these considerations, we firmly endorse the fairness and adequacy of this settlement of future asbestos claims. We also hope that this will be the first step towards comparable relief for every one of the more than 100,000 asbestos claims now pending in federal and state courts.

VI. CONCLUSION

The asbestos crisis can be solved in a way that assures substantial recovery for the sick without bankrupting the businesses that must pay the bill. Whether the solution is administered by ***408** a court or an administrative agency, it must involve certain key elements: reduction in legal costs, limitation of compensation to claimants who are actually impaired, different but fair levels of benefits for people with different losses, and elimination of excessive and redundant financial punishment for defendants.

There are many good reasons to favor an administrative solution formulated by Congress rather than some scheme created by federal or state judges. Most importantly, the administrative state has demonstrated that it can serve as an excellent alternative to traditional forms of legislation and adjudication. Its strength lies in harnessing the ability of bureaucratic organizations to integrate scientific expertise, individual fairness, and public purpose. [FN45]

At the same time, however, even those most enthusiastic about a solution that would take the asbestos crisis out of the judicial system must feel reluctant to ask Congress to enact a new administrative scheme. Passage of any piece of controversial legislation is uncertain at best. With the budget deficit and a host of other social and economic priorities, enactment of a sound administrative scheme for asbestos compensation is unlikely.

The judicial solutions we have discussed are a feasible method of resolving the crisis. This is especially true if, as we believe, resolution by settlement class action of pending and future claims can be fashioned to integrate the compensation priorities and case-handling features of a pure administrative approach.

We have had several goals in mind in analyzing the asbestos problem. Most importantly, we have sought to contribute a legal solution to a social and economic problem that has involved enormous human suffering. As students of governance generally, and of administrative systems, tort litigation, and the law of the workplace specifically, we realize that the solution to the asbestos crisis demands the integration of several conceptual frameworks. We hope that judges, legislators, and the involved parties will find our analysis constructive. Without reform, the present system will only lead to deepening crisis in the courts and further injustice to asbestos victims.

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We benefitted from the very able research assistance of Takemi Ueno and Timothy Wilkins, and from discussions with our Harvard colleague David Rosenberg and Professor Peter Schuck of Yale Law School. In addition, the research reflected in this Article was funded in part by the Center for Claims Resolution (CCR), an organization established to pursue alternatives to asbestos litigation. The views contained herein are, however, entirely the authors' own and do not necessarily reflect those of anyone else, including the CCR or any of its constituent members.

[FN1]. Colman McCarthy, Joseph Rau and the Public Interest, WASH. POST, Sept. 15, 1992, at D15.

[FN2]. See generally AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ENTERPRISE RESPONSIBILITY] (Professor Weiler served as Chief Reporter for this report).

[FN3]. In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 736 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992).

[FN4]. Although certain hazards were becoming known, the full extent of the hazards and the type of response necessary were less clear.

[FN5]. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 185 (1985); Deborah R. Hensler, Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman, 13 CARDOZO L. REV. 1967, 1973 (1992).

[FN6]. BRODEUR, supra note 5, at 12-13.

[FN7]. Scientific documentation of the risk of asbestosis among insulators and other workers handling finished asbestos products, and of the risk of cancer among different types of asbestos workers, occurred some time later. See Hans Weill & Janet N. Hughes, Asbestos as a Public Health Risk: Disease and Policy, 1986 ANN. REV. PUB. HEALTH 171, 173. For a more detailed account, see David E. Lilienfeld, The Silence: The Asbestos Industry and Early Occupational Cancer Research: A Case Study, 81 AM. J. PUB. HEALTH 791 (1991).

[FN8]. BRODEUR, supra note 5, at 66; Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 CARDOZO L. REV. 1819, 1884 (1992); Lilienfeld, supra note 7.

[FN9]. Although the government caused shipyard workers to be exposed to asbestos during the World War II era, recently the government has regulated workplace and environmental exposure. These efforts, together with the development of alternative materials for use in the building trades and other applications, have reduced the proportion of the work force at risk from the effects of excess current exposure to asbestos. For a brief description of the variety of such federal regulatory efforts, see Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991) (reversing an EPA rule that would have eliminated all domestic uses of asbestos).

Researchers at the Rand Corporation have documented the use of asbestos in the United States. During the World War II period, 1935-1950, annual asbestos consumption grew from less than 150,000 metric tons in 1935

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to more than 700,000 metric tons. However, though increased asbestos use is often attributed to the wartime effort, United States consumption never dipped below 600,000 metric tons until after its peak in 1974, when it reached 800,000 metric tons. Immediately thereafter, greater awareness of health risks combined with increased government regulation led to a sharp drop in consumption. By 1985 the annual figure was only 200,000 metric tons. See DEBORAH HENSLER, ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW 5-6 (1992).

Still, asbestos needs continue in a few key industrial areas. See Corrosion Proof Fittings, 947 F.2d at 1220-28 (listing current uses, including rocket engines, battery separators, automobile drum and disc brakes, asbestos-cement pipe products, gaskets, roofing, shingles, and paper products).

[FN10]. A decade ago, expert projections were considerably higher than those noted in the text. In 1982, Doctors William J. Nicholson, George Perkel, and Irving J. Selikoff predicted more than 80,000 excess deaths from asbestos- related cancers alone during the period 1967-2027. See William J. Nicholson et al., Occupational Exposure to Asbestos: Population at Risk and Projected Mortality--1980-2030, 3 AM. J. INDUS. MED. 259 (1982). Recent projections by many of the same scholars, using better data about actual levels of worker exposure, are more conservative. See Herbert Seidman & Irving J. Selikoff, Decline in Death Rates Among Asbestos Workers 1967-1987 Associated with Dimunution of Work Exposure to Asbestos, 609 ANN. N.Y. ACAD. SCI. 300 (1990); David E. Lilienfeld et al., Projection of Asbestos-Related Disease in the United States, 1985-2009, 45 BRIT. J. INDUS. MED. 283 (1988). On the other hand, the great bulk of present claims are by unimpaired individuals who will never become ill, and it is to these individuals--and their lawyers--that the bulk of resources currently flow. See HENSLER, supra note 9, at 6. As we will observe later in the Article, the question of whether and when a physiological condition caused by asbestos exposure amounts to a "disease" is a matter of intense legal debate. Some physiological changes, such as diffuse "plaque," or fibrous spotting of the pleural membrane, cannot be detected without clinical testing and produce no impairment of the person's ability to function in daily life. At the other end of the scale are the asbestos-related cancers which cause death several decades after the fatal exposure.

[FN11]. See, e.g., BRODEUR, supra note 5. This was also the title of Brodeur's journalistic account first published in The New Yorker, and then in expanded book form. See David Rosenberg, The Dusting of America: A Story of Asbestos--Carnage, Coverup, and Litigation, 99 HARV. L. REV. 1693 (1986) (reviewing Brodeur's book). A recent example of plaintiffs' lawyers retelling the same story, supposedly to guide asbestos liability policy for a half century, is Ronald L. Motley & Susan Nial, A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?, 13 CARDOZO L. REV. 1919 (1992).

[FN12]. See Suzanne L. Oliver & Leslie Spencer, Who Will the Monster Devour Next?, FORBES, Feb. 18, 1991, at 75, 79.

[FN13]. The companies that so far have filed for bankruptcy because of asbestos litigation are Amatex, Carey-Canada, Celotex, Eagle-Picher Industries, Forty-Eight Insulations, Johns-Manville, National Gypsum, Raymark Industries, Standard Insulation, UNARCO, and UNR Industries (the parent of UNARCO), see Judicial Conf. Ad Hoc Comm. on Asbestos Litig., Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States 51 n.33 (Mar. 1991) (unpublished manuscript, on file with the Harvard Journal on Legislation) [hereinafter Judicial Conf.], Pacor and North American Asbestos, see Brickman, supra note 8, at 1819 n.2, and H. K. Porter, Nicolet, Brunswick Fabricators, and Hillsborough, see Hensler, supra note 5, at 1972 n.23.

[FN14]. Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. ILL. L. REV. 269, 270.

[FN15]. See generally Hensler, supra note 5, at 1970-72.

[FN16]. Oliver & Spencer, supra note 12, at 79.

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[FN17]. In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 907 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992).

[FN18]. See Judicial Conf., supra note 13, at 29-30.

[FN19]. See generally Peter Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

[FN20]. See HENSLER, supra note 9, at 21 (citing JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS & COMPENSATION PAID IN TORT LITIGATION 74 (1986)).

[FN21]. See ENTERPRISE RESPONSIBILITY, supra note 2, at 274.

[FN22]. See Brickman, supra note 8, at 1834-40 (reviewing attorneys' fees).

[FN23]. Judicial Conf., supra note 13, at 10-11.

[FN24]. See, e.g., George Priest, Measuring Legal Change, 3 J.L. ECON. & ORG. 193, 207 (1987); George Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. LEGAL STUD. 65 (1977).

[FN25]. Indeed, in another context the Supreme Court has written that cumulative punitive damages awards raise important questions of constitutional due process. See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1038-40 (1991). As the Court stated, "[o]ne must concede that unlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Id. at 1043.

[FN26]. See Andrew Blum, Playing Asbestos Hardball, NAT'L L.J., May 18, 1992, at 1 (noting that most companies are willing to settle, but Keene Corp. is an exception); Keene Corporation's Glenn Bailey Calls Judge Weinstein's Asbestos Proposal "A Step in the Right Direction", PR Newswire, May 22, 1992, available in LEXIS, Nexis Library, Currnt File; Todd Woody, As Stemple Sued, Defendants Retreated, RECORDER, Sept. 12, 1991, at 1 (reporting that defendants were ready to settle).

[FN27]. See Heckler v. Campbell, 461 U.S. 458, 460-62 (1983) (describing the 1978 Social Security Disability Insurance "grid" regulations adopted by the Department of Health and Human Services, which deal with claims objectively but still may be tailored for individual circumstances).

[FN28]. See Louis Trieger, Relief for Asbestos Victims: A Legislative Analysis, 20 HARV. J. ON LEGIS. 179, 196 (1983).

[FN29]. Id. at 192-96.

[FN30]. Legislative treatment of Johns-Manville and other bankrupts poses a difficult question. Considerations of legal repose suggest that already- litigated arrangements for future payments--including not only classic tort actions but also those tort claims resolved through a bankruptcy remedy--should not be disturbed. On the other hand, it can be argued that where a legislative remedy promises procedurally or financially better results for all other future claimants, Congress might well want those future claims against bankruptcy funds folded into the global administrative solution. In such a design, the statute would claim whatever assets and income had been set aside for payment of the bankrupt's asbestos liabilities and add those to the pool of resources for all asbestos claims payments under the new, legislated scheme.

[FN31]. See generally COMMITTEE FOR EQUITABLE COMPENSATION, OUTLINE OF BILL TO ESTABLISH AN ASBESTOS COMPENSATION PROGRAM (1990) (detailing proposal by five asbestos

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defendants); Brickman, supra note 8 (detailing one administrative solution). Some of the congressional solutions already proposed include: H.R. 3090, 99th Cong., 1st Sess. (1985); H.R. 1626, 99th Cong., 1st Sess. (1985); S. 1265, 99th Cong., 1st Sess. (1985); H.R. 5966, 98th Cong., 2d Sess. (1984); S. 2708, 98th Cong., 2d Sess. (1984); H.R. 5735, 97th Cong., 2d Sess. (1982); H.R. 5224, 97th Cong., 1st Sess. (1981).

As to the feasibility of constructing a benefit schedule and medical criteria, the extensive experience with litigation and settlements over the past two decades provides hope. For example, the fact that defendants' and plaintiffs' lawyers can often negotiate large batch settlements suggests that it is possible to agree on the value of asbestos tort claims, at least in the aggregate. For a more scientific reading, legislative or rulemaking processes could develop detailed analysis of jury awards and settlement amounts. This might clarify the distortions in the data created by the mystery surrounding most settlements, the details of which are never made public.

[FN32]. WILLIAM J. CLINTON, A VISION OF CHANGE FOR AMERICA (1993).

[FN33]. In re A.H. Robins Co., 88 B.R. 742 (Bankr. E.D. Va. 1988), aff'd, 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

[FN34]. This specific feature of Judge Weinstein's restructuring of the Manville Trust has just produced a partial reversal of his ruling by a divided Second Circuit panel. See In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 982 F.2d 721 (2d Cir. 1992).

[FN35]. For development of the arguments in favor of mass tort settlements (as well as mass tort actions), see 2 ENTERPRISE RESPONSIBILITY, supra note 2, at 383-439; David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 IND. L.J. 561 (1987).

[FN36]. The details of the heart valve litigation and class action settlement are set out in the judicial decision approving the terms of the settlement, Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992).

[FN37]. Fed. R. Civ. P. 23(e); see, e.g., Stoetzner v. United States Steel Corp., 897 F.2d 115, 117 (3d Cir. 1990); Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

[FN38]. This "market test" is not perfect, however. See infra note 41.

[FN39]. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution at ex. B., Carlough v. Amchem Prods. Inc., CA No. 93-CV 0215 (E.D. Pa. Jan. 15, 1993) (compensation schedule) (on file with the Harvard Journal on Legislation).

[FN40]. The negotiated average value for extraordinary mesothelioma claims is set at $300,000, but payments in individual cases can range well beyond that figure. Id.

[FN41]. The front-end opt-out is not a perfect market test of the settlement proposal because some proportion of future claimants, many of whom are currently unimpaired, may be unlikely to exercise the opt-out choice at this time. The back-end opt-out is also flawed to some extent, because the limited number of such tort claims permitted in any one year may make this option less attractive to many claimants than the present unrestricted right to sue if and when they want.

[FN42]. With a fixed compensation schedule, defendants are further protected from unexpected real increases in awards. Conversely, future claimants are protected from reductions in tort awards that may result from legislated tort reform.

[FN43]. The stipulation includes a procedure for agreed-to adjustment in compensation amounts and ranges. Stipulation, Carlough, CA No. 93-CV 0215, at 51-52.

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[FN44]. In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 982 F.2d 721, 750 (2d Cir. 1992).

[FN45]. See generally CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 13-95, 125-30, 187-99, 213-64 (1990).

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Proceedings of the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims

*1819 THE ASBESTOS LITIGATION CRISIS: IS THERE A NEED FOR AN ADMINISTRATIVE ALTERNATIVE?

Lester Brickman [FNa1]

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INTRODUCTION

No litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an "impending disaster" [FN1]--a crisis situation. Even though 100,000 claims have already been resolved, 100,000 new claimants now seek compensation. For each claim resolved, two to three new claims are being filed. More than a dozen major defendant companies have been driven into bankruptcy, thereby reducing the size of the asset pool available to compensate the severely injured. [FN2] ***1820** The seeming unending growth in the number and valuations of claims that courts and juries are producing will inexorably lead to additional defendants' bankruptcies. Those who peer into the future see an estimated cost to defendants ranging from thirteen to thirty billion dollars [FN3]-- valuations wholly inconsistent with the continued solvency of most currently named defendants. [FN4]

Much has already been written about asbestos litigation [FN5] and on the efforts of the Johns-Manville Corporation, the Raybestos-Manhattan Corporation and other asbestos-containing material manufacturers to suppress information regarding the hazards of asbestos inhalation. [FN6] The injuries visited upon thousands of workers occupationally exposed to asbestos products have also been well documented. [FN7] This article does not recapitulate that history. In omitting the historical background of asbestos litigation, I do not mean to contest the public record of suppression or corporate irresponsibility and culpability; neither do I address the appropriateness of rewarding those lawyers who undertook considerable risk by devoting the time and effort to uncovering the facts of the suppression nor the appropriateness ***1821** of imposing liability upon those who actively participated in the suppression.

This article considers whether the tort system can resolve current and future asbestos claims. It argues that an alternative system of claims resolution-- that is, an adminsitrative alternative--may be required and may well be preferable.

Justifying the conclusion that an administrative alternative is preferable calls for an examination of the dynamics of asbestos litigation. What is driving the claims process? Why are valuations increasing? Why are larger numbers of lesser injured and noninjured claimants entering the process? What means of docket control are courts using to deal with ever-increasing caseloads? What impact do these judicial resolutions have on docket problems or the claim process? And what role do contingent fees play in the litigation?

In current asbestos litigation, courts are compensating enormous numbers of claimants injured by exposure to

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asbestos-containing materials. [FN8] Courts--confronted with deserving claimants possibly unable to gain compensation through the tort system because they cannot meet some of its requisite tests--appear to relax these rules so that they can do substantial justice. [FN9] Where claimants, for example, have probably been injured by exposure to a specific defendant's products but cannot prove that injury, some courts allow circumstantial evidence or hearsay testimony to establish the nexus or causality. [FN10] Other courts give plaintiffs' attorneys additional leeway to influence the jury by rhetoric or allow introduction of documentary evidence of corporate bad character--evidence which does not deal with whether the plaintiff is injured, whether defendant's products caused the injury, or whether defendant appropriately warned of the dangers in using its products. [FN11] Some claimants are allowed to introduce documentary evidence of the egregious actions of other actors in asbestos litigation; for example, the Manville Corporation or Raybestos-Manhattan, even though these actors are not defendants in that litigation. [FN12] This evidence taints the named defendants in the minds of jurors who therefore tend to award more compensation to the injured ***1822** claimant. [FN13]

After the bankruptcy of one defendant significantly reduced the pool of assets available to compensate claimants for their injuries, witnesses re- recollected that the bankrupt defendant's products, all previously asserted to constitute the largest amount of product in the workplace, instead constituted a far more meager market share. [FN14] This change in witnesses' testimony--which was readily observable--was tolerated if not welcomed by courts deeply concerned over the diminution of the available asset pool. Indeed, the impact of a series of bankruptcies which significantly reduced the pool of assets available to compensate claimants led some courts to counter by liberally construing the corporate culpability of other defendants and holding successors liable for the actions of subsidiaries undertaken prior to the purchase of the subsidiaries. [FN15] The lack of sufficient resources to compensate injured claimants also led some courts to decide insurance coverage issues by elevating maximization of available resources over policy construction. [FN16] Some courts whose dockets became so overloaded that compensation for seriously injured claimants was being delayed by years and even a decade or more, [FN17] devised strategies to accelerate the process, by consolidating cases into groups of tens, or hundreds, or thousands; in extreme circumstances, the trial process was truncated or substantially dispensed with. [FN18] In some cases, these courts, either by refusing to sever trials or by ordering mass consolidations, have overwhelmed the jury's ability to keep separate the evidence introduced against one defendant from the evidence introduced against another defendant; these actions also effectively allow use of evidence introduced against one defendant to be used against another defendant even though if the latter defendant had been separately tried, that evidence could not have been introduced. [FN19]

***1823** Examined case by case, the judicial responses to the asbestos tragedy can usually be justified by the exigencies of each claim--the need to do substantial justice for those seriously injured by corporate irresponsibility particularly in a milieu in which adequate compensation would not otherwise be available because of the absence or inadequacy of personal insurance and the lack of a national health insurance program.

The focus of this article is on the aggregate effect of these decisions. When viewed in the aggregate, the individual decisions add up to a total that appears to far exceed any simple summation. In the aggregate, there appears to have been a fundamental recasting of the "law" governing asbestos litigation over the past decade. It is not that leading asbestos jurists jointly determined that the absence of a national health insurance program to deal with asbestos-related injury necessitated the creation of a functional equivalent. [FN20] But a functionally equivalent legal regime may be found at the point of convergence of efforts to compensate large populations of workers irresponsibly exposed to asbestos-containing materials through decisions regarding insurance coverage, successor liability, punitive damages, statutes of limitation, evidentiary issues, and mass consolidations.

The decisions creating this legal regime rely upon inconsistent factual premises. For purposes of creating the unprecedented level of funding necessary to compensate large numbers of impaired workers, ***1824** insurance policies were interpreted to maximize liability coverage of asbestos-containing material manufacturers. [FN21] These decisions were premised on a finding that the manufacturers did not know and could not have been aware of the injuries being caused to workers in other industries by exposure to the manufacturers' products. For purposes of making these funds available to claimants, however, manufacturers were found to have known at the time of exposure that their products were causing injury. [FN22] Moreover, the resultant legal consequences have not been determined on the basis of legal standards prevailing during the 1940-1970 period of exposure. Instead, for purposes of assessing manufacturers with liability, the legal consequences of these product sales have been determined by a new set of tort standards, developed in the mid-1970's and further refined in the 1980's, that in some

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cases operated to retroactively impose liability on the manufacturers for acts that took place ten to forty years earlier. [FN23]

Lending impetus to the creation of this legal regime was the fact that many asbestos claimants--including some of the most seriously injured--worked in shipyards during World War II, where they were exposed to respirable asbestos resulting after long latency periods in mesothelioma, [FN24] asbestosis, [FN25] and other diseases. While they were not members of the nation's armed forces, and therefore not eligible for veteran's benefits or medical treatment at government expense, their efforts were a major part of the nation's war effort. Most decision makers would have a natural tendency to be sympathetic to these builders of the ships that transported the United States to victory in the war. Had there been a national health program that would have provided both adequate medical care and income replacement, judges may well have been less inclined to recast the law governing asbestos litigation. But in the absence of such a program, and the insulation of the United States government from liability for its own actions in running the shipyards, [FN26] one cannot take issue with a policy that worthy ***1825** plaintiffs ought not to be denied compensation for injury resulting from corporate or governmental irresponsibility by formalistic rules of evidence and procedure even if that required application of different rules to asbestos cases. [FN27]

Most special "asbestos law" has been formulated in the past decade, and particularly after the bankruptcy of the Johns-Manville Company (now recast as the Manville Corporation). It is my thesis that "asbestos law" underwent a fundamental change after this bankruptcy. Driven by the need to fill the financial void created by the bankruptcy or else have to deny adequate compensation to meritorious claimants, courts and claimants have determinedly imposed Manville's former liability share [FN28] upon others. [FN29]

These efforts contributed to the creation of a perverse incentive structure. As judges succeeded in imposing increased liability and drawing in additional asset pools, plaintiffs' lawyers were motivated by the increased availability of assets to search out ever-increasing numbers of claimants. As judges applied procedural and substantive rules to assure compensation for the injured, plaintiffs' lawyers were motivated to search for lesser impaired and functionally unimpaired [FN30] ***1826** occupationally-exposed workers and others to whom to apply increasingly less rigorous standards. As judges sought to cope with substantial case backlogs by truncating trials and by mass consolidations, plaintiffs' lawyers, driven by the powerful contingent-fee engine, responded by refilling the case pipelines. The more successful courts became in devising ways to more quickly and assuredly compensate the meritorious, the larger the number of unmeritorious claims that were able to enter the system.

Under the dynamic created by the resulting perverse [FN31] incentive structure, judicial efforts to resolve such pressing issues as eligibility of the meritorious for compensation, case volume, and the availability of financial resources have been subverted by the resultant: increased claims by the unmeritorious who are appropriating a larger share of ***1827** the available resources; higher case volumes; increased defense costs; additional defendants' bankruptcies; and depreciation of the value of meritorious claims. [FN32]

In light of the increasing awareness of the aggregate result of asbestos litigation, some jurists have begun to question the wisdom of prior holdings. With the benefit of hindsight, they would seek to recap the punitive damages genie, declare a moratorium on mass consolidations, remove the claims of the unimpaired from the purview of overly-generous juries by use of pleural registries [FN33] and court-appointed medical experts, apply brakes to the runaway contingent-fee engine, and reduce the incentives to keep the case pipeline full. A successful and complete reengineering of asbestos litigation could wind down the litigation over a period of ten to fifteen years though it likely would not avoid additional defendants' bankruptcies.

Success, however, is unlikely. In the highly mobile asbestos-claims market, [FN34] the efforts of one jurist to undo the perverse incentive structure is easily countered by other jurists not similarly inclined. [FN35]

The process set in motion by the myriad decisions constituting the body of "asbestos law" appears to have too much momentum to be redirected. Trend reversal of such magnitude that it would substantially eliminate the claims of the unimpaired, restrict punitive damages, decelerate the rapid rise in claim valuations, remove Russian Roulette as a prime ingredient of some mass consolidations, and ***1828** reduce the incentives of the plaintiffs' bar to convert asbestos litigation into a form of personal annuity, is not likely attainable under the aegis of the current tort system. [FN36] Only an administrative alternative to legislation enacted by the Congress can bring about the requisite changes.

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This Article seeks to explore the need for such an alternative and, in an accompanying article, to posit one.

I. THE NEED FOR LEGISLATION

In September 1990, United States Supreme Court Chief Justice William H. Rehnquist appointed the Ad Hoc Committee on Asbestos Litigation to "address ... the massive and complex issues involved with asbestos litigation" [FN37] and to "consider all necessary administrative steps that may be taken under existing law ... as well as legislative remedies or amendments to the federal rules of practice and procedure." [FN38] The Committee of five district court judges, chaired by Judge Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit, issued a report in March 1991 that was subsequently adopted by the Judicial Conference of the United States. The Committee recommended that Congress enact:

a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes, with the objectives of achieving timely appropriate compensation of present and future asbestos victims and of maximizing the prospects for the economic survival and viability of the defendants. [FN39]

***1829** Like most observers of asbestos litigation, the Committee concluded that the volume of asbestos litigation has reached "critical dimensions ... [and] is becoming a disaster of major proportions ... which the courts are ill-equipped to meet effectively." [FN40] The Judicial Panel on Multidistrict Litigation has reached similar conclusions. [FN41] Indeed, Congress's failure to act to resolve the crisis has been cited as justification for judicial resort to mass consolidations and national disposition techniques. [FN42]

The Committee's call for legislation echoes many similar calls by the courts which have noted "Congress' silence in the face of a desperate need for federal legislation in the field of asbestos litigation." [FN43] Judge William Schwarzer, on leave from the United States District Court in San Francisco and serving as director of the Federal Judicial Center in Washington, D.C., has written that "Congress needs to adopt legislation that creates a national solution, invoking its power over commerce." [FN44]

Congressional inaction in this area is attributable to many factors. [FN45] To some of the leading asbestos jurists, however, the reasons for such inaction are irrelevant; if Congress has not acted, then the ***1830** courts must step in and fill the breach. [FN46]

II. JUDICIAL DECISION MAKING AND THE VOLUME AND EXTENT OF ASBESTOS LITIGATION

Courts have played a role in the rapid growth in recent years of the volume of asbestos claims litigation [FN47]--a growth so rapid as to give rise to the appellation: the "asbestos-litigation crisis." [FN48] To be sure, judicial rulings have resulted in the dismissal of thousands of unmeritorious cases. [FN49] But this has occurred in a context of ever-***1831** widening extension of access to judicial arenas to those claiming injury from exposure to asbestos-containing materials.

The net effect of courts' efforts to deal with asbestos-related injury may be seen to be the creation of an equivalent to a national health insurance program. [FN50] The "program" emanates from decisions apparantly motivated by concerns that:

(i) persons occupationally exposed to asbestos-containing materials have such a compelling case for compensation that the issue of impairment should be relegated to one of secondary importance;

(ii) compensation ought not be limited to workers' compensation;

(iii) to assemble and effectuate the requisite compensation: (a) available insurance proceeds should be maximized irrespective of policy***1832** language; [FN51] (b) as many companies as possible that have ever manufactured, distributed, or used asbestos-containing materials should be held culpable, and, if necessary, to the full extent of their net worth; and, (c) successor liability laws be invoked so as to reach into the deeper pockets of the companies that bought far smaller entities ***1833** that manufactured asbestos-containing materials regardless of the culpability of the purchasing companies;

(iv) punitive damages should be awarded to punish defendants and in some cases to accelerate payments to claimants before the funds available for compensation are depleted by payments to plaintiffs in other jurisdictions;

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[FN52] and

(v) defendants should be barred from raising as a defense in shipyard cases that: (a) during World War II, the United States government required contractors constructing ships to use asbestos-containing materials; and (b) the government knew of the hazards of exposure to asbestos in the workplace and made a conscious decision as part of the war effort not to inform shipyard workers of the hazards of asbestos and the need to take precautions, but is nonetheless immune from suit by the injured workers.

The resulting compensation scheme is funded by the largest pool of money ever assembled in the course of litigation (approximately ***1834** seven to nine billion dollars), [FN53] the availability of which perversely effectuates the extension of eligibility for compensation to lesser impaired and non- impaired persons. [FN54] Moreover, in some jurisdictions, a further perverse effect is the creation of a national asbestos lottery wherein some claimants who roll the trial dice receive nothing while others, including substantial numbers of the unimpaired, hit the jackpot. [FN55] The perverse effects are driven by an overincentivized contingent-fee system, which has provided plaintiffs' attorneys with huge rewards--the more so as they have taken the compensation program to ends neither desired nor contemplated, [FN56] while imposing substantial costs on defendants. In recent years, caseloads have burgeoned--not because of an increase in the numbers of the seriously ill [FN57]--but rather because of the enormous incentives for plaintiffs to enter the lottery and the far more enormous incentives for plaintiffs' lawyers to obtain ever increasing numbers of claimants. [FN58]

A. The Contingent-Fee Engine that Drives the Litigation

The role of contingent fees in the creation of the asbestos-litigation crisis has substantially been ignored. Plaintiffs' attorneys charge contingent fees [FN59] in asbestos cases ranging from twenty-five to fifty percent of the gross amount of plaintiffs' award or settlement. [FN60] Their effective hourly rates in asbestos cases often exceed $1,000; in some ***1835** cases, the hourly rates of return are greater than $2,000 and can be as high as $5,000 per hour. [FN61]

Judges have stated on numerous occasions that they have a special***1836** obligation to police contingent fees. [FN62] However, courts in asbestos ***1837** litigation have abdicated their responsibility to review contingent fees [FN63] and ensure that lawyers have not used their superior knowledge and experience to take undue advantage of clients. [FN64]

By charging contingent fees, lawyers are including a risk premium in the form of a multiplier of their hourly rate in their fee--the greater the risk, the greater the premium. Charging a premium for risk but not assuming any risk is not simply charging a grossly exorbitant fee; it is illegal and unethical as well. [FN65] In a mesothelioma or serious asbestosis case in which there is a clear history of occupational exposure as well as extensive evidence of product identification, there is no risk of nonrecovery. [FN66] To the contrary, a large recovery is assured. When an attorney charges a twenty-five to fifty percent contingent fee, an effective hourly rate of return of several thousand dollars an hour is also assured. Because of the significant abuses of contingent fees and the fact that very few courts in asbestos litigation are ***1838** even aware of what rates lawyers are charging, [FN67] jurists should require that contingent fee retainer agreements be disclosed to the court. [FN68]

Although requiring fee disclosure is but one step in the superintending process, it is a most salutary one. One effect of disclosure would be to arm claimants with the knowledge that could induce bargaining. Moreover, as observed by Judge Jack Weinstein: "Since many attorneys have received their cases as a result of union favor, the unions are in a position to intervene on behalf of their members in insisting on lower fees." [FN69]

Unfortunately, no such fee bargaining on behalf of union members has occurred, even though such bargaining could be expected to yield contingent-fee rates of less than twenty percent and in some cases, ten percent or less. [FN70] The overincentivized contingent-fee engine generates tens of thousands of unimpaired cases, [FN71] results in lawyers overreaching clients, massively overcompensates some lawyers, [FN72] ***1839** and engenders judicial ignorance of contingent-fee rate setting. Indeed, the contingent-fee engine [FN73] that drives asbestos litigation is so powerful that court rules designed to set maximum contingent-fee rates are often simply ignored. [FN74] In addition to enormous effective ***1840** hourly rates of return and the resultant perverse incentive structure, the asbestos-litigation crisis also emanates from (i) explicit rulings creating different subtantive law for asbestos cases;

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[FN75] (ii) evidentiary rulings and appellate opinions upholding these rulings which appear to be the products of a "there is law and there is asbestos law" doctrine; [FN76] (iii) allowing pleural plaque and other unimpaired claims and the attendant lottery despite alternative disposition methods; [FN77] (iv) uncorking the punitive damages genie and then decrying the inability to force that genie back into the bottle; [FN78] and (v) mass consolidations of asbestos claims into mega- cases involving hundreds and even thousands of claims. [FN79]

B. A Separate Law for Asbestos Cases

The New Jersey Supreme Court has created a separate law for asbestos cases. [FN80] In Beshada v. Johns-Manville Products Corp., [FN81] the ***1841** court held that in asbestos cases and only in asbestos cases, [FN82] the state-of-the-art defense asserted by defendants--that at the relevant times they did not know and could not have known of the danger of their products--would not be allowed. [FN83] By deeming culpability irrelevant and imposing liability without fault, the court presumed, as a matter of policy, that manufacturers would become more careful. [FN84] Yet, under Beshada, not only is a manufacturer liable for injury resulting from the use of its products regardless of what it learns about the product's potential hazards, but the manufacturer continues to be liable for hazards about which it could not have learned of at the time of manufacture. Hence, incentives to improve product safety could be reduced, and the costs of introducing new products raised by the delays inherent in searching for all information as to possible hazards, including the information about which it could not have learned. [FN85]

Appellate opinions arguably applying a "there is law and there is asbestos law" doctrine can be found. For example, in O'Brien v. National Gypsum, [FN86] the Second Circuit affirmed a judgment that awarded wrongful death damages against the Celotex Corporation. There was no direct evidence of exposure to defendant's specific products; rather the evidence in support of exposure to Celotex and Raymark products was circumstantial [FN87] and hearsay. The main issue ***1842** on appeal therefore, was whether the testimony of the plaintiff's witnesses should have been excluded as hearsay and whether the failure to do so was reversible error. [FN88] Unless the plaintiff, who had settled with more than a score of defendants, could show that her husband had been in contact with the defendants' products, she could not prevail in the remaining action.

Although the Second Circuit agreed that the circumstantial evidence was hearsay and should have been excluded, the court did not reverse the outcome, finding that the jury could have reached its conclusion without reliance on the circumstantial hearsay evidence. [FN89] According to the court, since the deceased had contracted mesothelioma [FN90] which "is caused only by exposure to asbestos," [FN91] and the deceased's only known exposure to asbestos was during his one-year tenure as an apprentice in the Brooklyn Navy Yard and since Celotex's products were in use in the Yard, then the jury could have reasonably concluded, independently of the circumstantial hearsay evidence, that Celotex's products were one of the contributing causes to the development of mesothelioma.

However, the court's conclusion is not a scientifically clearcut proposition. There is doubt that the predominant form of asbestos causes mesothelioma; [FN92] moreover, exposure to asbestos is not the only ***1843** known cause of mesothelioma. [FN93] Other environmental agents can cause mesothelioma, [FN94] including radiation therapy, [FN95] naturally occurring and manmade mineral fibers such as zeolite (fibers of volcanic origin) [FN96] and glass fibers, [FN97] Cummington-grunerite, [FN98] organic chemicals ***1844** such as ethylene oxide, [FN99] mineral oil, and liquid paraffin. [FN100] Given that the deceased worked only one year in the Naval Yard and several score years in other locations, the circumstantial hearsay evidence was a critical factor in the case.

What is apparent in O'Brien is that a worker occupationally exposed to asbestos-containing materials contracted mesothelioma, a fatal disease usually resulting from asbestos exposure, and his family could maximize compensation only if every possible asbestos defendant were required to contribute. In the absence of a market-share allocation, [FN101] other means of enforcing contribution become necessary. Because applying conventional rules of evidence would not likely maximize compensation, the rules had to be modified. [FN102] Thus, the O'Brien court legitimized the use of circumstantial hearsay evidence to fill a significant gap in many asbestos cases. [FN103] But in adjusting the rules of evidence to meet the exigencies of asbestos cases, that is, in creating a result-driven evidentiary regime, the court failed to create a substitute circumstantial hearsay evidence rule for application to less seriously injured and uninjured claimants to replace the one discarded in a case where the fullest compensation award seemed merited even if not all defendants were likely culpable. [FN104] Once appellate courts demonstrate a willingness to tolerate what are effectively different rules of evidence for asbestos cases, [FN105] trial

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courts inclined by factors already enumerated to be sympathetic, [FN106] were quick to pursue the license granted to assure and maximize awards.

An example of asbestos litigation writ large at the trial court level is Dunn v. Owens-Corning Fiberglas. [FN107] Dunn typifies in many respects what is occurring today in asbestos litigation both in terms of its essential facts and the nature of the evidentiary rulings.

The typical asbestos trial consists of three parts: (i) medical injury; that is, plaintiff seeks to prove that he has been injured by exposure***1845** to asbestos-containing products; [FN108] (ii) product identification, that is, plaintiff seeks to prove that the asbestos-containing materials he was exposed to were manufactured by the defendant; and (iii) product defect, that is, plaintiff seeks to prove that warnings on the products in question were nonexistent or inadequate while defendants assert product information was consistent with the level of scientific knowledge at the time of manufacture regarding the hazards of exposure to asbestos-containing materials (the "state- of-the-art" defense). [FN109] Plaintiff may also seek to introduce documents that were discovered in this and prior cases which counter defendants' state-of-the-art defense and which demonstrate that defendant was a bad actor. [FN110]

As is typical in asbestos cases, the plaintiff in Dunn sued numerous***1846** defendants and settled with most prior to trial. [FN111] Owens-Corning Fiberglas was the only defendant remaining at trial.

Plaintiff asserted that he suffered from asbestos-induced lung disease, that is, asbestosis. [FN112] Consequently, he maintained that he was no longer able to work as an insulator, and, because he suffered shortness of breath, could no longer partake in athletic activity. [FN113] Plaintiff's medical experts testified that plaintiff had pleural plaques and asbestosis. [FN114] Defendant's expert witnesses contended that although ***1847** plaintiff had pleural plaques, he did not have asbestosis and had not been harmed. [FN115] Defendant presented evidence that plaintiff continued to work full-time and led a physically-active life. [FN116] Presiding Judge Constance Baker Motley, sitting by designation, acknowledged that "it is undisputed that plaintiff presently works full time and that he continues to lead a somewhat active life." [FN117]

The jury awarded $1,300,000 in compensatory damages and $25,000,000 in punitive damages, remitted by Judge Motley to $500,000 in compensatory damages and $2,000,000 in punitive damages. [FN118]

As in Dunn, the disputed medical diagnosis of asbestosis [FN119] is a frequent occurrence in asbestos litigation. Defendants' experts often argue that plaintiff, at most, has pleural plaques and is unimpaired while plaintiffs' experts always testify that the plaintiff is impaired and has asbestosis. [FN120] That places the decision in the hands of the jury [FN121] which is often predisposed, or at least convinced, to favor the interests of the worker-claimant against the corporate defendant. [FN122] If the ***1848** truth lies somewhere between the plaintiffs' and defendants' medical experts' testimony--Judge Rubin's experiment [FN123] indicates that it is closer to defendants'--a difference that amounts to hundreds of millions of dollars in higher verdicts.

Of all of the excluded evidence sought to be introduced by the parties in Dunn, perhaps the most dispositive would have been the testimony of a prior juror sitting when the case was first tried a year earlier. [FN124] That witness, a local resident, was prepared to testify that whereas the plaintiff was short of breath and in considerable discomfort while in the courtroom, when inadvertently observed outside the courtroom, he displayed no such symptoms. [FN125]

***1849** Numerous rulings on the admissibility of evidence and trial conduct were made throughout the trial. Of the rulings regarded by the contending attorneys as significant, most were in favor of the plaintiff. [FN126]

A typical feature of plaintiffs' attorneys' asbestos case presentations is an appeal to local prejudice. Defendants are often out-of-state corporations while plaintiffs are often blue-collar workers. [FN127] Thus, in Dunn, plaintiff's counsel argued in summation: "You've got to have the courage to tell this big multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it." [FN128]

When one considers the significant possibility that the plaintiff was unimpaired [FN129] and yet received an after-remittitur award of ***1850** $2,500,000, then Dunn may be viewed as a microcosm of the asbestos-litigation crisis.

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Thus, the O'Brien and Dunn cases are illustrative of asbestos cases in which the existence of injury--or fear of injury--or even a benign but changed condition of a type associated with asbestos exposure coupled with testimony of some occupational exposure to asbestos-containing materials, is combined with liberal rulings on the admissibility of evidence (and on appeal, the appropriateness thereof) to create result-driven asbestos jurisprudence. [FN130]

Notable in this line of cases are the asbestos-in-buildings claims. [FN131] In suits by building owners against manufacturers of asbestos-***1851** containing material for the costs of asbestos removal, [FN132] defendants have sought to introduce evidence of comparative risk. When trial judges allow defendants to introduce evidence of the almost infinitesimal risk of injury [FN133] to building occupants from exposure to asbestos as compared to risks of other injury, [FN134] juries return verdicts in favor of defendants more often than when the evidence is ruled inadmissible. [FN135] Substantial verdicts in favor of plaintiffs including punitive ***1852** damage awards [FN136] occur despite considerable evidence that asbestos-containing products used in buildings generally pose no health hazard. [FN137]

C. Pleural Plaques and the Asbestos Lottery

Substantial inhalation of asbestos commonly results--after a long latency period--in the formation of pleural plaques, which are detectable only by x-ray and do not cause any signs, symptoms or loss of pulmonary function. [FN138] Not infrequently the diagnosis of pleural ***1853** plaque is erroneous. [FN139] Moreover, there is no evidence that these benign fibrous thickenings develop into malignant mesotheliomas or asbestosis or are functionally impairing. [FN140] Nonetheless, pleural plaque claims account for sixty to seventy percent of new asbestos claims filed and represent a substantial percentage of previously filed claims. [FN141] The existence of tens of thousands of such claims [FN142] is accounted for in part by mass screenings of industrial workers. These screenings are financed by plaintiffs' lawyers and usually done with ***1854** the active assistance of local union officials. [FN143] Often, mobile x-ray vans brought to plant sites are used for the screenings. [FN144]

Pleural plaque claims are handled differently in jurisdictions depending upon when the statute of limitations begins to run and whether the jurisdiction has established a formal or informal shunting aside device to deal with unimpaired claimants. Thus, there are: (i) "one disease" jurisdictions in which the statute of limitations begins to run for all asbestos-related injury claims from the time of the pleural plaque diagnosis; therefore, if the claimant manifests a malignancy caused by asbestos exposure ten years after exposure, he would be precluded by the statute of limitations from asserting such a claim; [FN145] (ii) "two disease" jurisdictions which consider any later developing asbestos-caused disease a separate disease, unrelated to the pleural plaque diagnosis in terms of the applicable statute of limitations; [FN146] ***1855** and, (iii) those jurisdictions which enroll the claimant diagnosed with pleural plaques in a "pleural registry," which suspends the running of the statute of limitations in the event of a later developing asbestos-caused disease. [FN147]

This choice of rule is generally made by the courts. [FN148] Enormous differences in the monetary valuations of pleural plaque claims between jurisdictions are a function of the choice of rule applied. In pleural registry jurisdictions, most of these claims have a value of, or near, zero; in jurisdictions permitting immediate suit but also allowing subsequent claims for later manifesting asbestos-related injury, the value of a pleural plaque claim is 0-$15,000; in one disease jurisdictions, the value is substantially higher--by a factor of ten to fifty. [FN149]

A jurisdiction's position on recovery for "fear of cancer" or "enhanced risk of cancer" also impacts on the valuation. [FN150] Courts that allow a claim for damages (even though no ordinarily compensable physical injury has manifested itself) construct a cause of action distinct from the latent disease; it is the probability of the future occurrence ***1856** of such disease which gives rise to the present claim for damages. [FN151] Many courts require the plaintiff to show some physical injury or effect to recover for increased risk. [FN152] Precisely which types of physical injury or effect will be sufficient for an increased risk cause of action has not yet been conclusively resolved. [FN153]

Jurisdictions adopting the two-disease approach obviate the need for increased risk or fear of cancer recovery. [FN154] However, in a one- disease jurisdiction, where the statute of limitations begins to run upon discovery of the pleural change, rather than discovery of the latent disease, suit is brought for increased risk of cancer and/or fear

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of contracting cancer. [FN155] In presenting these claims, plaintiffs' lawyers***1857** argue to the jury: If my client gets cancer next year, or in five or ten years, he cannot come back into court to seek damages. Our medical experts have testified that cancer is not unlikely, but all he can get for that injury is whatever you award him today. For this client, there is no tomorrow.

In one-disease jurisdictions, for every five such claims brought, one or two will result in defense verdicts, one or two will be a plaintiff's verdict in the amount of $10,000-$25,000, and the fifth will hit the asbestos lottery jackpot with a jury verdict of $100,000-$1,000,000. [FN156] No medical, occupational, or personal factors distinguish the claimants that are placed in the pleural registry, from those that go to trial and receive zero verdicts, from those who receive a $1,000,000 verdict. Indeed, the facts making up the claims are often identical: the same claimed exposure, same age, same x-ray readings, same doctors testifying to the same sets of medical facts; all that differs is the verdict.

In Camden, New Jersey, a two-disease jurisdiction, [FN157] the verdict will be 0-$15,000; nearby, in Philadelphia, Pennsylvania, a one-disease jurisdiction, [FN158] before a substantially similar jury, the same case could easily receive a $250,000 verdict. As observed by Judge R.B. Klein of the Philadelphia Common Pleas Court more than eight years ago:

The asbestos litigation often resembles the casinos sixty miles east of Philadelphia more than a courtroom procedure. And just as the casinos are the winners in Atlantic City, the lawyers are the winners in asbestos litigation since the costs of litigation far exceed benefits paid to claimants.

...

... In two cases before this judge, two men had similar physical problems. They each had pleural thickening and some shortness ***1858** of breath. In the case involving the man who most counsel believed to be the sicker of the two, the jury awarded $15,000. For the other plaintiff, the jury awarded $1,200,000. These results make this litigation more like roulette than jurisprudence. [FN159]

Often, judges in these lottery jurisdictions fully recognize these disparities though they are not as explicit as Judge Klein. [FN160] Indeed, they may seek to accentuate the disparities as a form of case management, since the lottery aspect often increases the pressure on defendants to settle.

In Pennsylvania, a single cause of action jurisdiction, in which awards to unimpaired claimants total in the tens of millions of dollars, two recent cases indicate the waning of the Pennsylvania asbestos lottery. In Manzi v. H.K. Porter Co., [FN161] the Superior Court of Pennsylvania held that it was proper for the judge to have charged the jury that if it found that the plaintiff's pleural thickening was not a compensable injury, then the plaintiff was not prevented from returning in the event of a later manifesting injury, since the statute of limitations could not begin to run in the absence of injury. [FN162] While Manzi continues to provide the jury with the option to award plaintiff substantial damages for a pleural plaque diagnosis, its "enactment" ten years earlier, would likely have spared defendants millions of dollars in legal costs and jury verdicts. In Czekaj v. Johns-Manville Corp., [FN163] a trial court panel went a giant step further and held that where plaintiff's medical expert had testified that his asbestos-related thickening was "asymptomatic," there was no cognizible cause of action as a matter of law. This holding, if sustained on appeal, severely depreciates the value of unimpaired claims in Pennsylvania.

***1859** The development and extent of pleural plaque cases are a substantial factor in the perverse incentive structure that permeates asbestos litigation and plays a very substantial role in the asbestos-litigation crisis, [FN164] both in terms of sheer volume and the various costs imposed on defendants including compensatory liability, punitive damages, and defense costs. In Cimino v. Raymark Industries, Inc., [FN165] under the system devised by United States District Court Judge Robert Parker, pleural plaque claims in Texas were valued at $540,000. [FN166] It has been estimated that if this valuation were assigned to each asbestos injury claim now pending, the total value of all claims would exceed sixty-two billion dollars [FN167]--a calculation which does not take into account higher valuations for mesothelioma and acute asbestosis or new claims being filed each month.

The lottery aspects which characterize the pleural plaque cases also apply to other asbestos litigation--most notably to disputed asbestosis claims. [FN168] As noted by District Court Judge Jack Weinstein:

The disparities [in asbestos litigation] are enormous. In New York City, for example, three large trials of similar plaintiffs and defendants were consolidated. One trial of twenty plaintiffs in the Southern District of New York resulted in twenty defense verdicts. A second of thirty-five plaintiffs in Supreme Court, New York County resulted

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in a verdict of $65,000,000 plus punitive damages. A third of sixty-four plaintiffs in the Eastern District of New York resulted in thirteen defense verdicts and fifty-one plaintiffs verdicts for a total of $35,000,000 with no punitive damages. Trials are much like a lottery with substantially higher verdicts in New York City, East Texas and parts of California than other parts of the country. [FN169]

***1860** D. The Litigation Crisis and the Asbestos Disease Mix

Increasing numbers of pleural plaque claims as well as claims of asbestosis brought by unimpaired persons result from the perverse incentive structure that pervades asbestos litigation. To be sure, occupational exposure to asbestos has resulted in extremely serious, debilitating, and fatal injuries, including mesothelioma, moderate and severe asbestosis, and (combined with cigarette smoking) lung cancer. [FN170] However, these serious disease claims constitute only about a quarter of the huge volume of asbestos litigation. Mesothelioma accounts for approximately three to four percent of current cases; [FN171] severe ***1861** asbestosis, five to six percent; lung cancer, five to six percent; other cancers, two to three percent; and moderate asbestosis, ten to twelve percent. The litigation crisis is largely accounted for by other claims--those of the unimpaired and slightly impaired. [FN172] In this category, mild asbestosis claims, which are usually strongly contested by defendants on the issue of the medical diagnosis, [FN173] account for approximately fifteen to twenty-five percent of the total number of claims. Pleural plaque and other unimpaired pleural claims account for forty-five to sixty percent of outstanding claims. These claims, in which the victim can show no impairment, represent approximately sixty to seventy percent of new claims which are being filed at the rate of 1,000-2,000 per month. [FN174] Another two to four percent of claims are accounted for by other disease categories and are often disputed.

***1862** E. Punitive Damages

The increasing propensity of juries to award, and courts to allow punitive damages is another factor in the perverse incentive structure which significantly contributes to the asbestos litigation crisis. [FN175] Punitive damages in asbestos litigation serve multiple purposes. [FN176] His ***1863** torically, punitive damages have been imposed on defendants as punishment and as a deterrent to egregious conduct. [FN177] To be sure, all punitive damage awards punish, but it is doubtful that punitive damages constitute a deterrent in asbestos cases.

Few products containing asbestos are still being manufactured in the United States [FN178]--so there is no further defendant's conduct to deter. [FN179] Additionally, the imposition of multiple and redundant punitive awards in the asbestos litigation context both undermines the purposes of punitive damages and inefficiently allocates limited funds which could be used to compensate other defendants for their injuries. [FN180] While some courts bemoan the tremendous sums awarded, [FN181] no effective mechanism for controlling the size of these awards has been implemented to date.

Since the purpose of punitive damages is not to compensate claimants but rather to punish defendants, the deterrence component ***1864** is an essential element. Take away deterrence and punitive damages become nothing but a windfall for the plaintiff. [FN182] Therefore, absent deterrence as a goal, punitive damages lose their constitutional moorings. [FN183]

But punitive damages awarded in asbestos cases do not and realistically cannot serve as a deterrent. First, current defendants in asbestos cases have not manufactured asbestos for the past fifteen to twenty years, hence, there is no longer any specific conduct to deter. Second, for there to be any general deterrence of egregious conduct, a manufacturer must be able to calculate the (avoidable) consequences of its conduct in order to conclude that the cost of the conduct would greatly exceed the return for engaging in the conduct. Consider, however, that in the asbestos context, this is not a particularly meaningful calculation because it seeks to deter a specific course of conduct by decreeing that a manufacturer already condemned to "death" via bankruptcy for engaging in a course of conduct resulting in enormous compensatory liability, would again be condemned to extinction if the act were particularly heinous. [FN184] "Dying" a second time is certainly inconvenient and while the prospect may accelerate the rate of the "first" death, that hardly constitutes deterrence.

The point was best made by Chief Judge Clark who held in Jackson v. Johns- Manville Sales Corp., [FN185] that

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under Mississippi law, punitive damages were inappropriate in asbestos litigation. In the course of his opinion, Judge Clark made one of the most cogent arguments in the legal literature that the fundamental underpinning of punitive damages--its deterrence aspect--was totally lacking in asbestos litigation.

No manufacturer could engage consciously in wrongdoing that would expose it to such overwhelming strict liability with any reasonable expectation of doing so profitably. On the contrary, the prospect of exposure to massive litigation in strict liability provides the impetus for manufacturers to take affirmative steps to ensure the safety of their products, since mere non-negligent behavior is no guarantee against strict liability.

The significance of punitive damages as a deterrent depends upon the size of the penalty increase relative to the "base penalty" ***1865** exacted by strict liability compensatory awards. Because of the dimensionless character of the prospects for future litigation in this instance, the "base penalty," for all practical purposes, is illimitable. Correspondingly, the significance of punitive damages as a deterrent diminishes to the vanishing point. [FN186]

Punitive damages also do not serve a deterrent function because the current owners of the defendant corporations are often successor corporations of the original producers of asbestos. At the time they purchased the companies, they were unaware and could not have been aware of the liabilities involved. [FN187] One can only be deterred from doing a prohibited act if one knows or reasonably can know that by doing the act, certain negative consequences will ensue. Additionally, punitive damages are traditionally perceived as an exemplary remedy imposed for willful and wanton conduct--not mere negligence. [FN188] A ***1866** successor's purchase of a former asbestos producer may not constitute sufficiently wanton conduct to impose punitive damages on the successor for the actions of its predecessor. [FN189]

While the use of punitive damage awards to punish civil defendants for past actions has withstood constitutional challenge, [FN190] its constitutionality may be undermined by the prevalence of its use in asbestos cases. [FN191] In the asbestos-litigation setting, the same defendants ***1867** are being redundantly "punished" with punitive damages from jurisdiction to jurisdiction. [FN192] The result of these multiple punishments is to deplete the funds available from which to compensate other plaintiffs for their injuries. [FN193]

Rulings allowing punitive damages are often accompanied by assertions that punitive damages are highly inappropriate and confessions of the courts' impotence to slow the runaway punitive damage train. [FN194] The timidness of courts' rulings on punitive damages markedly contrasts with such actions as using sampling techniques as a substitute for jury verdicts, [FN195] mass consolidations, [FN196] and class actions. [FN197] The total of punitive damage verdicts in asbestos cases to ***1868** date is in the hundreds of millions of dollars [FN198] despite the fact that punitive damages serve no valid deterrence purpose, [FN199] and that multiple and illimitable awards of punitive damages for the same wrongful acts--selling asbestos containing materials without adequate warnings--should be held to violate constitutional standards. [FN200] In fact, the availability of punitive damages may well have driven up defense costs by millions of dollars. [FN201] While, absent punitive damages, plaintiffs' attorneys would likely settle certain cases, they are far more likely to litigate these cases when the potential for punitive damages exists. [FN202]

F. Alternatives to an Administrative Alternative: Judicial Innovations

In reaction to Congressional inaction in this area, some judges have sought to implement alternatives to individual adjudication to alleviate their tremendous caseloads. [FN203] A common feature of these ***1869** efforts is the consolidation of a large number of claims (hundreds and even thousands) into a single proceeding and the conversion of part of the proceeding into an essentially administrative format. From a policy perspective, the use of what is essentially an administrative remedy being effectuated by a federal judge raises significant questions. [FN204] The creation of a national health insurance program for workers occupationally exposed to asbestos-containing materials is within the purview of the legislative branch of government; nonetheless, a functionally equivalent national policy is effectively being created and administered by the judiciary with regard to compensation for toxic torts. [FN205] The method of resolution is essentially an administrative proceeding presided over by a judge who is creating and implementing those policies. [FN206] These essentially legislative enactments by courts are being driven, according to the courts, by legislative inaction. [FN207]

Two of the most important judicial innovations in asbestos litigation to date are the Rule 23(b)(1)(B) [FN208] class action and the mass ***1870** consolidation.

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1. Rule 23(b)(1)(B) Class Actions

Rule 23(b)(1)(B) class actions are used when plaintiffs' claims threaten to exceed defendants assets, thereby creating the likelihood that later claimants will be unable to receive compensation for their injuries. [FN209] They have the added utility of being mandatory class actions that do not permit class members to opt out and bring their own separate law suits. [FN210]

The benefits generally attributed to class actions as a procedural technique to replace individual claim adjudication are:

(i) conserving judicial resources by allowing many claims to be heard simultaneously, thereby reducing judicial back-log and preventing the judicial paralysis that could be caused by an individual adjudication of thousands of repetitive claims; [FN211]

(ii) permitting a more expeditious compensation scheme for many plaintiffs; [FN212]

(iii) diminishing transaction costs--by lessening total court costs, defraying the costs of individual representation and enjoying the economies of shared discovery and expert witness costs; [FN213]

(iv) facilitating communication, management, and settlement of claims through the consolidation of representation by one or a small group of attorneys; [FN214]

(v) facilitating the creation of a unified substantive law for asbestos litigation, rather than an ad hoc body of jurisprudence, based on inconsistent jury verdicts which provide unreliable statements of the ***1871** law; [FN215]

(vi) affording an opportunity for the common claims and defenses of an entire class to be adjudicated with finality in one proceeding; [FN216]

(vii) obviating many of the abuses inherent in multiple punitive damages awards; [FN217] and

(viii) providing the judiciary with greater opportunities for supervision and intervention, including court control over attorney fees and litigation expenses, as well as judicial approval of all settlements and dismissals. [FN218]

The most notable obstacle to the use of Rule 23(b)(1)(B) class actions in asbestos litigation is the Anti-Injunction Act [FN219] which prohibits federal courts from staying pending state court proceedings. [FN220] The utility of a 23(b)(1)(B) consolidation is undermined if plaintiffs can simply avoid the federal court and bring their actions in state court. Resources expended on defending state actions and damages awarded in those actions would remove those funds from the pool of resources available for federal claimants. Additionally, any improvements in efficiency would be compromised by concurrent state court actions.

A second difficulty with using 23(b)(1)(B) class actions in asbestos litigation is the problem of unascertained plaintiffs. Since the manifestation of most asbestos-related injuries often takes years, not all potential plaintiff class members will be able to come forward to participate in the litigation. Once the class has closed, those who manifested injuries later would be foreclosed from bringing suit against the class action defendant.

Different jurists have proposed varied solutions to these problems. Judge Jack Weinstein has addressed both of these issues while presiding over the Joint Eastern and Southern District of New York Asbestos Litigation dealing with asbestos defendants Johns-***1872** Manville and Eagle-Picher. [FN221] Under the Anti-Injunction Act, federal courts are permitted to stay state proceedings: (1) when expressly authorized by Congressional statute, [FN222] or (2) "where necessary in aid of the court's jurisdiction," [FN223] or (3) "to protect or effectuate its judgments." [FN224] Judge Weinstein has held that the certification of a national mandatory class falls within the provisions of the Anti-Injunction Act since (1) an injunction of state proceedings was necessary to effectuate a settlement, (2) to protect federal jurisdiction over a pending class action, and (3) to prevent dissipation of the asbestos manufacturer's assets in an inequitable manner. [FN225] In further support of that holding, Judge Weinstein cited the All Writs Act [FN226] as an affirmative grant of such power to the courts, as well as a Congressionally created exception to the Anti-Injunction Act. [FN227] To solve the problem of potential plaintiffs, he framed the class to include future claimants as well. [FN228] Ultimately, however, the Rule 23(b)(1)(B) Eagle-Picher proceeding did not prevail. [FN229]

***1873** 2. Mass Consolidations

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Another judicial innovation is the mass consolidation which is being increasingly resorted to by trial judges to resolve the asbestos-litigation crisis. [FN230] Some mass consolidations, however, may have counterproductive effects and contribute to the creation of a perverse incentive structure. From the moment a court announces that it is considering consolidating its asbestos cases into a mass litigation, some jurisdictions have experienced a significant increase in the rate of new asbestos-claims filings. [FN231]

***1874** Because of the huge volume of cases, "[c]onsolidations have become increasingly necessary in ... asbestos cases...." [FN232] However, "considerations of convenience must yield when consolidations threaten to deny litigants a fair trial." [FN233] The issue of whether to consolidate claims for trial involves a weighing of

the specific risks of prejudice and possible confusion ... [versus] the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one and relative expense to all concerned of the single- trial, multiple-trial alternatives. [FN234]

Factors which support consolidation of asbestos cases include the existence of a common worksite, similar occupation, similar time of exposure, and similar type of disease. [FN235] These criteria were present in varying measure in the Brooklyn Naval Yard Cases. [FN236] When ***1875** properly structured, mass consolidations can result not only in the settlement of a substantial number of the consolidated claims, but also in fair trials for the nonsettling defendants.

The federal Brooklyn Naval Yard consolidation involved dividing the claimants into three classes for trial purposes: those in which over forty percent of claimed exposure to asbestos took place in the Yard (Phase I); those in which fifty to ninety percent of the claimed exposure took place in the Yard (Phase II); and all remaining cases involving claimed exposure to asbestos while working in the Naval Yard (Phase III). [FN237] After a substantial number of settlements, sixty-four Phase I cases went to trial against five defendants. Particular attention was paid to educating the jurors and facilitating the tasks to which they were assigned. [FN238] The care taken in the organization of these trials and the preparation of the jury yielded jury verdicts that reflected differences in disease seriousness [FN239] and such other relevant ***1876** factors as age and life expectancy. [FN240]

Even taking precautions, however, does not assure that significant jury confusion will not occur. As noted by U.S. District Court Judge Charles Butler in granting defendants' motion for a new trial of thirteen asbestos claims that he had consolidated for trial:

It is evident (unfortunately, in hindsight) that despite all the precautionary measures taken by the Court (e.g., juror notebooks, cautionary instructions before, during and after the presentation of evidence, special interrogatory forms) the joint trial of such a large number of differing cases both confused and prejudiced the jury. This confusion and prejudice is manifest in the identical damages awarded in the non-cancer personal injury cases and in the cancer personal injury cases, the relatively short deliberation time as well as in the inflated amount of many of the damage awards and the lack of evidence suporting some of the damages in several cases. [FN241]

A fortiori, mass consolidations which lack the extensive precautions used in the Brooklyn Naval Yard proceeding may be seen to impose an insurmountable burden on jurors to separate the testimony regarding one defendant from the testimony about another defendant. [FN242] This burden can result from: the number of claimants; the diversity of the claims; the diversity of the disease mix; either the lack of a common worksite or a common worksite which represents a minor portion of a claimant's asbestos exposure; the large number of defendants; the diversity of the evidence against the various defendants; ***1877** and the number of crossclaims by third-party defendants. [FN243] Mega-consolidations involving hundreds and thousands of claimants present additional concerns and reflect a view of adjudication that relegates the fairness of the trial--at least from the perspective of the defendants, as secondary to the need to resolve the thousands of outstanding claims--a view that has yet to be sustained on appeal. [FN244]

The most well known asbestos consolidation to date is Cimino v. Raymark Industries, [FN245] In Cimino, United States Chief Judge Robert Parker implemented entirely new procedures for adjudicating asbestos cases en mass in order to alleviate the "fortress mentality" [FN246] exhibited by asbestos defendants to avoid, or at least hinder, litigating asbestos claims. Judge Parker concluded that asbestos defendants were asserting the right to an individual trial in each case and to contest every issue in an effort to stonewall the plaintiffs and force them to drop their suits. [FN247] Armed with this antidefendant posture and a judicial mission, [FN248] Judge Parker designed a master

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plan for administering ***1878** these cases by creating a class of 2,300 oil-refinery workers. [FN249]

In Phase I of the trial, the first jury would determine the common questions of fact: whether the defendants made asbestos-containing products which were defective and unreasonably dangerous; whether the warnings were adequate; the state-of-the-art defense and the fiber-type defense. [FN250] The jury would also determine whether the plaintiffs were entitled to punitive damages during Phase I. [FN251] Based on their determinations of culpability, the jury, by interrogatory, would assign a multiplier to each defendant which would be calculated against the actual damage amounts to determine liability for punitive damages. [FN252]

In Phase II, the juries would examine the worksites in question and use interrogatories to determine the time, place, craft, and amounts of exposure the plaintiffs were subject to at each location. [FN253] The plaintiffs' job descriptions were also considered. [FN254]

During Phase III of the trial, the damage awards would be determined. Judge Parker adopted a sampling method whereby 160 claimants, representing each of the five major diseases identified by the courts as caused by asbestos exposure (i.e., mesothelioma, lung cancer, other cancer, asbestosis, and pleural disease) would be individually tried. The average verdict for each disease category would constitute the award for each nonsample class member. [FN255] While the ***1879** defendants claimed that this scheme was a violation of their due process right to individual trials. [FN256] Judge Parker in essence concluded that the need to adjudicate a vast number of claims warranted depriving the defendants of individual hearings. [FN257]

The valuation assigned under this system (including punitive damages) to each pleural plaque claimant was $540,000, and to those diagnosed with mesothelioma, $1.2 million, for a total award of $1.3 billion. [FN258] The verdicts and assigned values contrasted markedly with the medical evidence introduced by defendants. [FN259] If these valuations were to be effectuated in other jurisdictions, every single asbestos defendant would be driven into bankruptcy, [FN260] including defendants with at most a peripheral relationship to the former asbestos industry.

An example of a mass consolidation that presents the jury with a most formidable and potentially impossible task is the presently ongoing In re Joint Eastern And Southern District Asbestos Litigation ("The Powerhouse Cases"). [FN261] United States District Court Judge Charles Sifton, over the objection of defendants, [FN262] has consolidated 882 claims brought by union workers against approximately fifteen manufacturers of asbestos-containing materials which were used in the construction of electrical power generating stations. Judge Sifton had ruled that the cases would be tried in groups of fifty in a reverse bifurcation, that is, the jury would first determine whether there was asbestos-related injury (medical causation) and if so, the amount of damages; at a later time, the issue of liability would be determined. The Powerhouse consolidation differs in several respects from the Brooklyn Naval Yard consolidation; one major difference is that one of the defendants, Owens Corning-Fiberglas, has been permitted to implead approximately 200 additional third-party defendants including***1880** utilities, site owners, other manufacturers, the construction companies, and contractors who worked on the power plants where the exposure took place, as well as the architects and engineers. The result of the impleader is a two- front war against the manufacturing defendants--the plaintiffs on one front and the third parties on the other, both blaming the manufacturers. [FN263]

The jury's [FN264] task is to determine which of defendants' products plaintiff number one was exposed to and whether that exposure was sufficient to cause an asbestos-related disease (the jury having already decided that plaintiff was injured by exposure to asbestos). Many of the plaintiffs did not work directly with asbestos-containing materials, but rather claim "standby" exposure, that is, they worked along side others who did use asbestos-containing materials.

The jury's task in this consolidation is complicated by the cumulative nature of the occurrence of asbestos-related disease. Since a plaintiff might have been exposed during a three-month or six-month period of work on a powerhouse to the products of several manufacturers, but may also have been exposed to asbestos-containing products at one or more of 50 to 100 other work sites at which this plaintiff worked which are not a part of the litigation as well as to other toxic substances in the workplace and elsewhere that could have caused the *** 1881** injury, it may be that the predominant causative elements of his disease are not powerhouse-site related. The jury will have to assess for each plaintiff what percent, if any, of the disease was caused by exposure to asbestos at the powerhouse site and what percent was caused by other exposure.

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The jury's task is at best a formidable one. Even college-educated jurors with occupational experience in dealing with complex-fact situations would find it extremely difficult to keep their decision process separate regarding plaintiff number one and the multitudinous defendants eligible for assignment of liability, from the evidence regarding plaintiff number two, and number three, et cetera. Vast amounts of evidence will have been introduced. Jury verdict forms will require the jurors to assess liability for each of the parties. If a major effort at settlement bears fruit, then the task confronting the jury could be ameliorated. [FN265] Barring settlements with at least several major defendants, it remains to be seen what will result from imposing such a formidable burden on the jurors.

G. Successor Liability

The use of the doctrine of successor liability has been of critical importance in the creation of a perverse incentive structure and engineering of the asbestos-litigation crisis. Along with decisions imposing liability on insurers arguably inconsistent with policy coverage, successor liability decisions have been instrumental in creating the requisite funding to support the current asbestos-litigation industry.

Most of the major current asbestos defendants participated in the manufacture of asbestos-containing products by virtue of having acquired smaller companies that were engaged in manufacturing such materials. In most instances, the sale of asbestos-containing products accounted for a small percentage of the sales of the parent corporation. [FN266] Had the companies which manufactured asbestos-containing products not been acquired by much larger corporations, asbestos litigation would have been largely confined to the Johns-Manville Corporation and a few other defendants; and, upon the bankruptcy of Manville and other smaller producers, the litigation would likely have never achieved its current status. [FN267]

Two judicial actions expanded the litigation to its current dimensions: ***1882** insurance coverage extension and the use of the successor liability doctrine. By extending insurers' liability to their insureds for asbestos-related injury to include liability insurance in force at the time of the occupational exposure to asbestos, plus liability insurance in force when the asbestos-caused injury was manifested, plus all other liability insurance in force in between--the so-called "triple trigger," [FN268]--courts have created approximately seven to nine billion dollars of insurance coverage. [FN269]

To enable claimants to have access to this coverage, successor corporations were held liable for the acts of their far smaller acquired companies--acts that occurred prior to the acquisitions. This was effectuated by invoking the doctrine of successor liability. [FN270] Under this doctrine, successor companies are held liable not only for acts they did not commit, but also for the consequences of the acts of their acquired companies that they were not aware of at the time of the acquisition and of which they could not have been aware. [FN271] In theory, however, successor liability is not predicated on punishing the acquiring company for its acquisition of a bad actor but rather on ***1883** punishing the acquired company for its bad acts. That is, by imposing liability on the acquiring company for the previous acts of the acquired company, the acquired company is being punished since its market valuation will reflect the liability to be imposed upon any acquiring company. [FN272] However, as applied in the asbestos context, the reality belies the theory. [FN273]

Successor liability in asbestos litigation is simply a windfall for plaintiffs and an essential ingredient in a strategy to maximize available resources to compensate claimants. [FN274] To be sure, a nonmaximizing court could nonetheless apply successor liability--even while recognizing that a windfall is being created, because the alternative is to impose a shortfall. That is, if the successor is not to be held liable for the acts of the acquired company, [FN275] then the claimant must look to the assets of the acquired company. However, those assets are unavailable because of the acquisition. Hence, if the choice is between a shortfall and a windfall for the claimant, courts will and do choose the windfall.

It is possible, however, to create an even-handed outcome by essentially limiting plaintiffs' judgments based upon acts of the acquired company before the date of acquisition, to the amount they would have been able to collect had the asbestos-containing material manufacturer not been acquired by another company. In appropriate circumstances--where the acquiring company did not and could not have reasonably known of the legal

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consequences of the acquired company's previous acts--a court could limit the amount of a judgment against a successor corporation to the increase in the net worth of the acquiror as a consequence of the acquisition plus any profits or losses generated as a consequence of the acquisition, plus whatever insurance coverage the acquired company had in force. An alternative calculation yielding a higher award to claimants would be to limit the at-risk assets to the price of the acquisition adjusted for any profits or losses sustained since the acquisition in addition to whatever insurance coverage of the acquired company was in force. Courts which have devised the procedurally complex mass consolidations or bankruptcy ***1884** trust funds which are becoming the hallmark of asbestos litigation, [FN276] would not regard the task of sequestering the assets of the acquired corporation within the acquiror as an unduly burdensome task.

The windfall aspects of successor liability are magnified exponentially by the allowance of punitive damage awards against the successor for the acts of the acquired company. Simply stated punitive damage awards based upon successor liability are unabashed windfalls. [FN277]

III. FEDERAL RESPONSIBILITY

The need for legislation to create an administrative claim procedure is enhanced by the evidence developed to date of federal responsibility for injury to shipyard workers.

Approximately 4.5 million workers were employed in government and contract shipyards during World War II, building ships for the war effort. [FN278] The government deemed asbestos to be absolutely indispensable in the construction of high-pressure steam-powered ships; indeed, asbestos was termed a "strategic and critical material" to the war effort. [FN279] The War Production Board assumed total control of production and distribution of all asbestos supplies in the United States and simultaneously restricted the use of asbestos to meet military needs. [FN280] Manufacturers failing to comply with the ***1885** War Production Board's requirements could be subject to criminal prosecution. [FN281]

Significant evidence exists that the government knew of the hazards of exposure to asbestos, [FN282] and yet did not provide a safe, well- ventilated workplace, [FN283] nor appropriate equipment protections, such as respirators. In support of the war effort, a conscious choice was made not to inform shipyard workers of the hazards of asbestos and of the need to take precautions. [FN284] This decision appears to have ***1886** been made at the highest levels of government. [FN285] The government violated its responsibilities pursuant to the Federal Employees' Compensation Act, [FN286] and the Walsh-Healey Act [FN287] requiring that it establish and supervise workplace standards with regard for its own employees and contractors' employees.

In light of the extent of government wartime control over the uses of asbestos, Congress must assess the government's burden in providing compensation to injured workers. [FN288] While workmen's compensation programs have insulated the government from shouldering a huge damage burden, the government has so far been compelled to foot only a most minute share of the assessed liabilities under the current system. [FN289] Potential liability nonetheless exists. [FN290] The ***1887** creation of an administrative-claim procedure would relieve the government of its potential liability for claims brought under those statutes, and government payments to the administrative-claim fund would put the financial responsibility on the responsible party.

CONCLUSION

In this article, I have attempted to capture certain salient features of current asbestos litigation. My subject, judicial decisions made with consciousness of the financial deficit created by the Manville bankruptcy, has been described by knowledgeable observers as creating an "impending disaster." [FN291] Post-Manville bankruptcy asbestos litigation has often yielded highly unpredictable, arguably inequitable, and often seemingly arbitrary results. Juries confronted with essentially the same fact situations have reached outcomes ranging from zero recovery to million dollar awards. This "asbestos lottery" has attracted increasing numbers of unimpaired claimants to try their luck; portfolio management principles provide a strong incentive for plaintiffs' attorneys to maintain the flow of claims. Current data, by no means dispositive but at least highly suggestive, indicate that over sixty percent of new claims are on behalf of unimpaired persons.

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Post-Manville bankruptcy decision making, though intended to compensate the truly injured, has led to unintended results. In summary, the aggregative effects of this decision making include:

(i) the creation of substantive and procedural rules comprising a ***1888** special "asbestos law," incrementally fashioned to respond effectively to the needs of seriously injured claimants for compensation;

(ii) the application of this "law" to those less seriously injured and most especially to those unimpaired who are highly motivated to seek compensation because of its availability;

(iii) the use of unsuperintended contingent fees for lawyers that often yield hourly rates of return of $1,000 and more and drive them to search for more claimants and asset pools;

(iv) the increasing prevalence and judicial tolerance for punitive damages as a docket control device and occasionally as a way to accelerate the payment of monies to claimants as a counter to the increasing numbers of defendant bankruptcies; and

(v) the use of mass consolidations and other forms of docket control that accentuate the likelihood of compensating the unimpaired and which may also yield:

(a) higher verdicts per case than in the absence of consolidation;

(b) higher settlement values;

(c) fewer settlements since the simultaneous increase in the number of cases to be settled and in the value per case imposes a financial burden on some defendants beyond their financial capacity thereby reducing the likelihood of settlement and increasing the likelihood of bankruptcy;

(d) effectively unappealable judgments since bonding requirements are often a multiple of the mass consolidation judgment and are therefore such substantial sums of money--in the tens and hundreds of millions of dollars--as to be beyond the financial ability of some defendants;

(e) an imposition of an information burden on jurors beyond the average juror's capacity resulting in group rather than individual decisions that are not reflective of significant factual distinctions among the several or many plaintiffs; and

(f) having juries quite unrepresentative of the community since relatively few potential jurors can sit for a consolidated trial which often runs for at least six or eight weeks, thereby effectively precluding jurors who are professionals, small business owners, and many employed persons (other than school teachers and federal government employees) from serving.

***1889** I have termed these and other facets of current asbestos litigation a perverse incentive structure. This structure has evolved into a massive counterweight to efforts to capture sufficient financial resources to compensate the injured. It is a structure now so integral a part of the asbestos-litigation system that it may be substantially impervious to deconstruction. The conclusion I draw from this analysis is that the goals of compensating the injured, disenfranchising the unimpaired and their agents, and maintaining the financial viability of most of the remaining defendants can best if not only be attained [FN292] by congressional action to create an administrative alternative to litigation. With fidelity to the "sign above the barroom door," [FN293] I have prepared such a proposal. [FN294]

FN[FNa1]. Professor of Law, Benjamin N. Cardozo School of Law (Yeshiva University). This Article is a significantly revised version of a paper I prepared for a colloquy of the Administrative Conference of the United States. My research assistant, Doreen E. Ferrera, has been invaluable in the transformation of the colloquy paper into this Article. I would also like to express appreciation to United States District Court Judge Jack B. Weinstein and to my colleague, Paul Shupack, who have made many helpful suggestions.

Some of the data that I refer to in this Article was obtained during the course of consulting work on contingent fees and punitive damages that I did for an asbestos defendant; however, most of the unpublished empirical data which I refer to was obtained as part of my research for this Article. As noted at the colloquy, because of this and other opportunities I have had to "extensively review empirical data, case files and other materials" on asbestos litigation, the Administrative Conference of the United States asked me to "draft a proposed administrative solution" to the asbestos litigation crisis which the panelists at the colloquy were invited to criticize. Chairman Marshall Breger, Introduction of Lester Brickman, An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims, Transcript of the Administrative Conference of the United States 4 (Oct. 31, 1991). The Administrative Conference provided me with a token honorarium for this effort and for organizing the colloquy; in addition, I received the usual administrative support from my law school.

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FN[FN1]. See Report of the Ad Hoc Committee, Judicial Conference Ad Hoc Committee on Asbestos Litigation, March 1991, at 26 [hereinafter Report].

FN[FN2]. To date, fifteen major asbestos producers have commenced bankruptcy proceedings, and a sixteenth has dissolved. These include: National Gypsum Co., No. 390-337213-SAF-11 (N.D.Tex. filed Oct. 28, 1991); Eagle-Picher Indus., No. 91-00100 to 00107 (S.D.Ohio filed Jan. 7, 1991); Celotex Corp., No. 1001168B1 (M.D.Fla. filed Oct. 18, 1990); Carey Canada, Inc., No. 100168B1 (M.D.Fla. filed Oct. 18, 1990); Pacor, Inc., No. 86-03252G (E.D.Pa. filed July 1986); Forty-Eight Insulations, Inc., No. 85-B-5061 (N.D.Ill. filed Apr. 17, 1985); Amatex Corp., No. 82-05220S (E.D.Pa. filed Nov. 1, 1982); Johns-Manville, Corp., No. 82-B-11656-176 (S.D.N.Y. filed Aug. 26, 1982); UNR Indus., No. 82-B-9841 to -9845 -9849 -9851 (N.D.Ill. filed July 29, 1982). A sixteenth has dissolved. North Am. Asbestos Corp., 179 Cal.Rptr. 889 (Cal.Ct.App.1982).

FN[FN3]. A leading expert in asbestos litigation, Mark Peterson, estimated that defendants would face costs of $13 to $16 billion to indemnify and defend asbestos claims pending as of May 7, 1991. See In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 933 (E. & S.D.N.Y.1991). United States District Court Judge Jack Weinstein has projected that defendant's total costs for future as well as pending claims would at minimum be $19.6 billion, but more plausibly $26 to $28 billion. Id. at 907. On another occasion, Judge Weinstein estimated the tort value of pending and future claims to be $30 billion. See An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims, Transcript of the Administrative Conference of the United States 4 (Oct. 31, 1991) [hereinafter Administrative Alternative]. Dean Paul McAvoy of the University of Rochester Business School estimates a total cost of $50-100 billion. Suzanne L. Oliver & Leslie Spencer, Who Will the Monster Devour Next?, FORBES, Feb. 18, 1991, at 79.

FN[FN4].
Overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of [their] insolvency...."
Findley, 129 B.R. at 751 (citations omitted).

FN[FN5]. See, e.g., THOMAS E. WILLGING, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES (1985); THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION (1987); Linda S. Mullinex, Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation, 32 WM. & MARY L.REV. 475 (1991); David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 IND.L.J. 561 (1987); Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV.J.L. & PUB.POL'Y (forthcoming 1992); Special Project: An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation, 36 VAND.L.REV. 573 (1983); Jack B. Weinstein & Ellen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U.ILL.L.REV. 269, 270 (1991).

FN[FN6]. See, e.g., PAUL BRODEUR, OUTRAGEOUS MISCONDUCT (1985).

FN[FN7]. See generally id.

FN[FN8]. While only a tiny fraction of asbestos claims are litigated, in the range of one percent, Findley,

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129 B.R. at 747, settlement values are driven by judgments.

FN[FN9]. See infra notes 86-137 and accompanying text discussing the specialized legal regime created for asbestos cases.

FN[FN10]. See infra notes 89-106, 130 and accompanying text.

FN[FN11]. See George v. Celotex Corp., 914 F.2d 26 (2d Cir.1990); see also infra notes 19, 127-28 and accompanying text.

FN[FN12]. See King v. Armstrong World Indus., 906 F.2d 1022, 1025 (5th Cir.1990); Fibreboard Corp. v. Pool, 813 S.W.2d 658, 668-71 (Tex.Ct.App.1991); but cf. Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1159-60 (4th Cir.1986). See also infra note 110.

FN[FN13]. Id.

FN[FN14]. See Lester Brickman, The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress, 13 CARDOZO L.REV. 1891, 1894 n. 13 (1992).

FN[FN15]. See generally infra notes 266-77 and accompanying text.

FN[FN16]. See infra note 51 and accompanying text.

FN[FN17]. For example, in Philadelphia, the delay from filing to trial in asbestos cases is approximately eight to nine years. See LEGAL INTELLIGENCE, Aug. 5, 1991, at 20-25.

FN[FN18]. See infra notes 230-65 and accompanying text.

FN[FN19].
This Court, when faced with the problem of nearly one hundred pending asbestos cases on its docket, and more surely to come, made a decision. The congestion these cases caused in this district for all civil litigants gives one a skewed view of how to resolve the problem. The "Try-as-many-as-you- can-at-one-time" approach is great if they all, or most, settle; but when they don't, and they didn't here, thirteen shipyard workers, their wives, or executors if they have died, got a chance to do something not many other civil litigants can do--overwhelm a jury with evidence[--e]vidence that would not have been admissible in any single plaintiff's case had these cases been tried separately. As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed that left the jury the impossible task of ... carefully sort[ing] out and distinguish[ing] the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects.
Cain v. Armstrong World Indus., No. 87 Civ. 1172, slip op. at 18-19 (S.D.Ala. Feb. 18, 1992).

FN[FN20]. The focus of this Article is, of course, on judicial decision making. Any observation of social phenomena is necessarily incomplete; the choice of what to observe must necessarily lead to the exclusion of other related phenomena. Indeed, the choice of what to focus on reflects as much the observer's point of

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view as the "facts" being observed. No doubt, other observers, having different observational standpoints, would choose to focus on different facets of asbestos litigation.
Readers of earlier drafts of this Article have indicated that it may be read to suggest the existence of a critical mass of asbestos jurists sitting down to create a national asbestos compensation policy. That is, by looking upon what courts are doing in the aggregate and focusing on asbestos claims decision making from the perspective of its potential contribution to the creation of an overarching national policy, this Article may be read to say, or at least presume, that some asbestos judges are engaged in a conscious effort to formulate such a national policy rather than seeking to fairly and conscientiously resolve the very large numbers of asbestos-related claims pending in their courts. I mean to do no such thing. Judges, sitting in asbestos cases, are trying to resolve an enormously complex social problem, often without the requisite tools for doing so. In this Article, I have neither set out to find fault with their decision making nor to cast stones, but rather to point out some of the aggregate outcomes of asbestos decision making and to examine those outcomes from a policy perspective.

FN[FN21]. See infra note 51.

FN[FN22]. See infra notes 51 and 271.

FN[FN23]. See Borel v. Fibreboard Prod. Corp., 493 F.2d 1076 (5th Cir.1973), cert. denied, 419 U.S. 869 (1974); Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539 (N.J.1982); see also infra note 109. Retroactive application of tort rules is eschewed when it would diminish defendants' liability. See Russell v. Superior Ct., 230 Cal.Rptr. 102 (Cal.Ct.App.1986) (denying retroactive application to asbestos defendants of law abolishing joint and several liability).

FN[FN24]. Mesothelioma is a fatal cancer of the pleura and peritoneum, caused by exposure to asbestos. Disease manifestation occurs decades after exposure. See ANDREW CHUNG & FRANCIS H.Y. GREEN, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 288 (1988); ALFRED P. FISHMAN, PULMONARY DISEASES AND DISORDERS III, 2034-38 (2d ed. 1988); see also infra notes 93-100.

FN[FN25]. See infra note 112.

FN[FN26]. See, e.g., Eagle-Picher Indus. v. United States, 937 F.2d 625 (D.C.Cir.1991).

FN[FN27]. See Weinstein & Hershenov, supra note 5, at 323 (providing compensation for those injured where cause-in-fact cannot be proven by strict tort standards or where specific individual liability cannot be ascertained "is particularly important [for the judiciary] in the absence of any alternative remedies emanating from the executive or legislative branches.").

FN[FN28]. Manville's pre-bankruptcy share of damages was approximately 30%. In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, app. A at 913 (E. & S.D.N.Y.1991).

FN[FN29].
When the Manville money faucet was shut off, "we [a leading plaintiffs' firm] had five or six verdicts [against Manville] probably totaling in excess of three million dollars" ... even a previously issued check from Manville bounced. The firm had banked on its solid liability case against Manville. With the asbestos giant's funds indefinitely out of reach, the firm had to scramble to retool its practice. "[I]t required a whole rethinking of our case strategy.... [W]e had to find some new targets."

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Karen Dillon, Only $1.5 Million a Year, AM.LAW., Oct.1989, at 38, 40 (quoting Joseph Rice and Ann Kimmel Ritter).

FN[FN30]. Impairment is a significant issue in asbestos litigation. The term "impairment" however has no precise meaning. The American Medical Association defines it as "the loss of, loss of use of, or derangement of any body part, system or function." AMERICAN MEDICAL ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 2 (3d ed. 1988), cited in Norwood S. Wilner, Impairment in Asbestos Litigation [hereinafter Impairment], in DEFENSE RESEARCH INST., THE 1991 ASBESTOS MEDICINE SEMINAR G-2 (Oct. 16-18, 1991). The AMA definition is problematic when applied to asbestos litigation. Consider the issue of whether lung changes such as those appearing on x-rays in the case of pleural plaques constitute a "derangement" of a body part. See infra note 138.
Impairment may also be defined as the loss of capacity to do exercise within certain criteria of normalcy. Impairment, supra, at G-3. Another definition, inability to work at a specified task or trade, imports elements of disability. Id. The distinction between impairment and disability has been drawn as follows:
Respiratory impairment is best deined [sic] as an abnormality of physiologic function that persists after treatment; in short, an inability of the organs of respiration to carry out one or more of the three components of respiratio:n [sic]: ventilation, diffusion, and perfusion. Disability or disablement is best defined as an inability to carry out a specific task or job or, alternatively, the presence of undue distress during the performance of that task or job.
W.K.C. Morgan, Pulmonary Disability and Impairment--Can't Work? Won't Work?, 28 RESPIRATORY CARE 471 (1983), quoted in Impairment, supra, at G-3 n. 3.
Impairment as it relates to asbestos litigation involves the question of injury: what degree of impairment, if any, is required to constitute legal injury. In In re Hawaii Federal Asbestos Cases, 734 F.Supp. 1563 (D.Haw.1990), the court held that in the absence of impairment as variously defined above, the legal standard for injury has not been met:
In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring....
Plaintiffs must show a compensable harm by adducing objective testimony of a functional impairment due to asbestos exposure. A claimant's subjective testimony as to shortness of breath and fatigue without more is not sufficient. In other words, the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by objectively verifiable functional impairment is not enough.
Id. at 1567 (emphasis omitted).
The issue of impairment is of vital concern with regard to pleural plaques. Pleural plaques rarely are impairing. See infra notes 138-40. Thus, in Wright v. Eagle-Picher Industries, 565 A.2d 377 (Md.Ct.Spec.App.1989), the court approved a trial court jury instruction that pleural plaques did not constitute injury under Maryland law. See also Burns v. Jaquays Mining Corp., 752 P.2d 28, 30 (Ariz.Ct.App.1987); Owens-Illinois v. Armstrong, 591 A.2d 544 (Md.Ct.Spec.App.), cert. granted, 595 A.2d 1077 (Md.1991); Ayers v. Township of Jackson, 461 A.2d 184 (N.J.Super.Ct.Law Div.1983), rev'd in part and aff'd in part, 525 A.2d 287 (N.J.1987). It is the allowance of compensation without impairment, that is, the holding that pleural plaques constitute compensable legal injury regardless of impairment, and the allowance of claims of asbestosis by unimpaired persons, see infra notes 119- 25, 129 and accompanying text, that gives rise to the "asbestos lottery," see infra notes 156-59 and accompanying text, and constitutes a critical component of the asbestos-litigation crisis.

FN[FN31]. In terming the resultant incentive structure "perverse," I am applying the value system that asbestos jurists are effectuating as reflected by their individual decisions; that is, it is perverse from the point of view of asbestos jurists.

FN[FN32]. In commenting on the jury verdicts in the federal Brooklyn Naval Yard cases, Judge Weinstein observed: "Families who are in serious difficulty and have established, to a high degree of probability, a substantial amount of fault, received nothing. Other families who have a case in which probabilities are substantially lower and who are in much less need, receive[d] huge sums." Transcript of Proceedings Before Hon. Jack B. Weinstein, at 5-6, In re New York Asbestos Litig., (E.D.N.Y. Jan. 24, 1991) (Tr. No.

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TS 90-9999) [hereinafter Transcript].

FN[FN33]. See infra note 147.

FN[FN34]. Forum shopping is widespread in asbestos litigation. If plaintiffs' lawyers come to regard the efforts of United States District Court Judge Charles Weiner, who has been designated by the Multi District Panel with pretrial authority to resolve the 31,000 asbestos claims pending in federal court, see In re Asbestos Prods.Liab.Litig., 771 F.Supp. 415, 424 (J.P.M.L.1991), as unsatisfactory, they may simply shift the cases to state courts; indeed, some may have anticipated the need and double filed. Typically, claims by Alabama residents for asbestos-related injuries which occurred in Alabama which are barred by the Alabama statute of limitations are brought in Texas.

FN[FN35]. United States District Court Judge Lee Sarokin, after deciding that the repetitive awarding of punitive damages in asbestos cases to New Jersey claimants violated defendants' constitutional rights, reconsidered and vacated his holding. Juzwin v. Amtorg Trading Corp., 718 F.Supp. 1233 (D.N.J.1989). Presumably, he was convinced that the effect of precluding punitive damages in federal court in New Jersey would be to effectively transfer part of New Jersey's claim on asbestos defendant assets to other jurisdictions which did not limit punitive damage awards. 705 F.Supp. 1053 (D.N.J.1989), vacated, 718 F.Supp. 1233 (D.N.J.1989); see also infra note 52.

FN[FN36]. See Report, supra note 1, at 7.

FN[FN37]. See id. at 1.

FN[FN38]. Id.

FN[FN39]. Id. at 27. Alternatively, the Committee recommended federal legislation that would create a procedure for mass consolidation of asbestos claims by courts. The Committee considered appending proposed legislation to the Report, and though it caused a proposal to be drafted, the Committee did not proceed out of concern that the specifics of a draft might divert attention from the Report's main thrust: the need for legislation.
The Report's analysis of current asbestos litigation has been criticized by the defense bar for its failure to discuss the problem of meritless claims-- alleged to constitute well in excess of half of all pending claims and even a higher percentage of new claims--brought by unimpaired claimants. The Report has also been criticized for its failure to acknowledge that defendants often have viable defenses to many asbestos claims. See John D. Aldock et al., A Critical Analysis of the Report of the Ad Hoc Committee on Asbestos Litigation 35-41 (May 7, 1991) (unpublished paper, on file with the author). Moreover, its alternative recommendation (i.e., enacting federal legislation creating a mass consolidation procedure) has resulted in the sounding of a cautionary note by Judge Thomas Hogan in his dissent from the Report.
I must respectfully dissent from the report and its [alternate] recommendations. It is unassailable that there is a national crisis involving asbestos litigation in the state and federal courts. My concern is the underlying premise of the report regarding the use of class action "collective" trials (trials by aggregation of claims) of asbestos cases. It is a novel and radical procedure that has never been accepted by an appellate court. It has been challenged as being constitutionally suspect in denying defendants their due process and jury trial rights as to individualized claimants, as well as conflicting with the court's obligations to apply state law. It would establish a new form of tort liability with far reaching ramifications to other mass tort-cases.... As the Committee recognizes, a national solution is the only answer. Since the aggregation or collective trial method is highly questionable, a logical and viable solution would be the passage by Congress of an administrative claims procedure similar to the Black Lung legislation.

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Report, supra note 1, at 41-42.

FN[FN40]. Id. at 2.

FN[FN41]. See, e.g., In re Asbestos Prods.Liab.Litig., 771 F.Supp. 415 (J.P.M.L.1991).

FN[FN42]. See infra notes 46 and Part II.F.

FN[FN43]. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir.1986) (Clark, C.J., dissenting) ("[T]he Court is frustrated by lack of congressional action."); see also Juzwin v. Amtorg Trading Corp., 718 F.Supp. 1233, 1236 (D.N.J.1989) ("[T]he need for uniform legislation is manifest.").

FN[FN44]. William W. Schwarzer, Punishment Ad Absurdum, CAL.LAW., Oct. 1991, at 116.

FN[FN45]. Among the reasons for this inaction may be the courts' response to Congressional inaction; that is, the mass consolidations being orchestrated by some state and federal courts. See generally infra notes 230-65 and accompanying text. This judicial strategy may have lessened the political pressure on Congress to devise an administrative solution. The judicial line being tread, however, is a fine one. Case-by-case resolution is frustratingly slow to judges with asbestos caseloads in the hundreds and thousands. Some claimants die from asbestos-caused diseases while awaiting their turn in the trial line. On the other hand, judicial innovation, with all its attendant dangers to defendants' rights, coupled with the powerful contingent-fee engine, creates incentives for larger numbers of plaintiffs to advance claims while simultaneously lessening the need for Congressional intervention.

FN[FN46]. As United States District Court Judge Jack Weinstein has noted: "If Congress will not act, the courts and parties must." In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 908 (E.& S.D.N.Y.1991). Judge Weinstein also noted that:
We cannot agree with either the critics of liberal access or with those who argue that we should return to a traditional fault-based tort regime.... The post-war role of the federal courts--particularly when they were exercising their equitable jurisdiction--has been to protect the injured who come before them against those who have caused or are causing unjustified harm. This judicial role is particularly important in the absence of any alternative remedies emanating from the executive or legislative branches.
Weinstein & Hershenov, supra note 5, at 323.

FN[FN47]. "There are many places to put the blame for this disturbing situation, but the court system must assume its part of the responsibility...." Statement of Judge Thomas M. Reavley Before the House Subcommittee on Intellectual Property and Judicial Administration 4 (Oct. 24, 1991) (copy on file with author).

FN[FN48]. As of December 11, 1991, 187,430 claims had been brought against the Manville Personal Injury Settlement Trust which was set up under the Manville bankruptcy reorganization for the disposition of asbestos-related personal injury claims against the Manville Corporation. Telephone Conversation with Judge Jack Weinstein, District Court Judge in the Eastern District of New York (Dec. 12, 1991).
According to records maintained by several defendants, new claims are being filed against asbestos defendants at the rate of 1000-2000 per month. The rate of filings declined in the July-October 1991 period, possibly portending the onset of a concluding phase to asbestos litigation. However, in November and December of 1991 the rate of filings increased substantially and the 1000-2000 average new filings per

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month resumed. Since new filings exceed dispositions by a significant margin, caseloads for most defendants continue to grow, currently amounting to approximately 100,000 claims; 31,000 of those claims are pending in federal courts, with the remainder in state courts. For example, Owens-Illinois has reported that while it disposed of 10,000 cases in 1989, 20,000 new cases were filed; and in 1990 while only 9,000 cases were disposed of, 20,000 more were filed. In the first nine months of 1991, 20,000 cases were disposed of while 10,000 new ones were filed. OWENS-ILLINOIS, INC., PROSPECTUS 48 (Dec. 11, 1991) [hereinafter OI PROSPECTUS]. For the Keene Corporation, the increase in the backlog of claims for year-end 1991 over 1990 was 12,000. See KEENE CORP., 1991 ANNUAL REPORT 16 (1992). This ever-growing backlog--beyond the ability of courts to effectively deal with--coupled with defendants' bankruptcies constitute the asbestos-litigation crisis.

FN[FN49]. For example, the tireworker-asbestos cases involve some instances of blatant fraud; for a telling account, see Oliver & Spencer, supra note 3, at 77-78. Two entrepreneurial Los Angeles attorneys organized the National Tire Workers Litigation Project to litigate the claims of tireworkers exposed to asbestos in the tire-making process. To generate plaintiffs, the attorneys set up screening centers in workplaces nationwide to test for asbestos-related disease. The doctors hired to perform the screenings (one of whom was not licensed to practice in the United States) found asbestosis and pleural thickening in 65% of the workers screened. In contrast, the National Institute for Occupational Safety and Health has found asbestosis in recent studies in only 0.2% of tireworkers and pleural changes in 2.3%. Id. at 77. Some of the techniques used by these attorneys to solicit cases and sell off percentages to others were related in the course of an opinion assessing them with a $10 million punitive damage award in a dispute with one of their expert witnesses. Olfacto Labs v. Crawford, No. 639967-2, slip op. at 6 (Cal.App.Dep't Super.Ct. March 11, 1991) ("This court has never before experienced such deceit, willful disregard of client's protection and rights, overreaching in dealing with other attorneys, indifference to and avoidance of payments of business creditors, and outright disregard of the truth, whether under oath or not."); see also Todd Woody, Judicial Blackmail Cost Firm $10 Million, S.F. LEGAL RECORDER, Mar. 18, 1991, at 7, 10. However, these attorneys have not yet been sanctioned for their fraudulent actions in soliciting tire-worker plaintiffs and participating in the creation of fraudulent medical evidence. Indeed, even while stating that the mass production of claims by these lawyers involved a "steady flow of faulty claims" based on a "professional farce" and were a "fraud on the court," Raymark Indus. v. Stemple, No. 88-1014-k, 1990 WL 72588, at *2, *18 (D.Kan. May 30, 1990), judges have failed to set aside the large settlements that were the fruits of the fraud. Several of the tire worker claims have been dismissed as unfounded. See, e.g., Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir.1990) (dismissing 418 of 451 tireworker cases for lack of any symptoms of asbestos-related disease); Raymark Indus. v. Stemple, No. 88-1014-k, 1990 WL 72588 (D.Kan. May 30, 1990); In re Ohio Asbestos Litig., Mardoc Order No. 38 (May 9, 1989) cited in Aldock et al., supra note 39, at 13 (dismissing 678 maritime docket cases for lack of any evidence of asbestos-related injury); In re Tire Worker Asbestos Litig., No. 88-4703, 1989 U.S.Dist. LEXIS 14717, at *6 (E.D.Pa. Dec. 6, 1989) (Judge Weiner noted that the Third Circuit's affirmance of his ruling dismissing claims based on a "fiber drift" theory could be expected to result in the elimination of 1000 cases from the court's docket). Some tireworker cases have, however, resulted in significant verdicts for plaintiffs. See, e.g., Asbestos, MEALEY'S LITIG. REPORTS, Feb. 2, 1990, at 11-12.

FN[FN50].
To many, particularly those in other countries, it may seem strange that in the United States we leave it to individual courts to provide essentially ad hoc solutions to modern-day disasters with their national social and economic repercussions. In this country, however, three factors have, by default, left the state and federal courts to their own devices: (1) the lack to date of an effective national administrative regulatory scheme capable of controlling undesireable conduct by manufacturers; (2) the absence of a comprehensive social welfare-medical scheme for compensating victims of mass torts; and (3) the lack of adequate state or federal legislation controlling these cases.
Weinstein & Hershenov, supra note 5, at 270.

FN[FN51]. See, e.g., Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C.Cir.1981), cert. denied, 456

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U.S. 951 (1982). The Keene Company, an asbestos defendant, was formed in 1967 and in 1968 purchased Baldwin-Ehret- Hill (BEH), a manufacturer of thermal insulation products, some of which contained asbestos. Id. at 1038 n. 1. Its production of asbestos- containing products ceased in 1972. Id. at 1045 n. 22. During the 1961 to 1981 period, Keene and BEH were insured under a number of insurance policies by several insurance companies. Id. at 1038. In Keene, the court addressed the interpretation of standard policy language; the policy provided liability coverage for sums that the insured became liable to pay as damages for bodily injury resulting during the policy period. Id. at 1039. Thus, the critical question was which of the asbestos-related injuries fell within which policy period. Id. at 1040. The court decided that the policies in force when persons were exposed to Keene's and BEH's products were available. Id. at 1044. Additionally, it decided that policies in force when the actual manifestation of injury occurred, were available. Id. The essential novelty of the case was the definition of injury in such a fashion so as to include a third trigger, the period between exposure and manifestation. Id. at 1058 (Wald, J., concurring).
This period of time included the substantial bulk of the insurance coverage-- not only to Keene but most other asbestos defendants as well. Hence, the holding had enormous financial consequences. Under this "triple trigger," insurance coverage was maximized so as to include all policies issued in the decade or score of years between the time of exposure and the time of injury. For Keene, this meant $423 million of insurance coverage. See KEENE CORP., 1990 ANNUAL REPORT 4 (1991). For other "triple trigger" holdings, see Casey Canada Inc. v. California Union Ins. Co., 748 F.Supp. 8 (D.D.C.1990); USF & G v. Wilkin Insulation Co., 578 N.E.2d 926 (Ill.1991); Lac D'Amiante du Quebec, Ltd. v. American Home Assurance Co., 613 F.Supp. 1549 (D.N.J.1985), vacated as to one defendant, 864 F.2d 1033 (3d Cir.1988); Owens- Illinois, Inc. v. United Ins., No. C5045-84 (N.J.Super.Ct.Div. Apr. 6, 1990). See also Robert G. Berger, The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions, 37 AM.U.L.REV. 285, 305 (1988); Note, Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis, 97 HARV.L.REV. 739 (1984); Charles Maher, Asbestos Extravaganza, CAL.LAW., June 1985, at 60. See also infra note 269.
It is interesting to note that for purposes of amassing the largest possible amount of coverage for asbestos defendants, and hence for claimants, Judge Bazelon, writing for the court, found as a critical element in his decision that while Keene's coverage would not extend to "liability for injuries of which Keene could have been aware of prior to its purchase of insurance," id. at 1044, Keene and BEH at the time of the exposure of claimants to its products "could not have been aware prior to its purchase of insurance" of the injuries to be caused by that exposure. Id. at 1046. Hence, Keene and presumably most other asbestos defendants did not know and could not reasonably have known of the injuries being sustained by those exposed to its products at the time of that exposure and even long thereafter according to Judge Bazelon. Id. at 1044. See also infra note 271.
For purposes, however, of accessing the pool of assets made available to claimants by Keene, Keene and most other asbestos defendants have been repeatedly found to have failed to provide adequate warnings of the dangers of asbestos exposure of which they knew or reasonably should have known at the time of exposure. For instance, in Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990), discussed infra note 188, the court's findings would have rendered much of Celotex's insurance coverage inaccessible, according to Judge Bazelon's holding.

FN[FN52]. No jurist would acknowledge that he or she is using punitive damage awards as a vehicle for accelerating payments to claimants located in their jurisdiction. Indeed, punitive damage awards in asbestos cases are quite rare, although their incidence and relative importance is increasing. See infra notes 175-202 and accompanying text. In the federal Brooklyn Naval Yard cases, while damage awards in the Phase I cases were substantial--totalling $30,659,658.80 for the 52 successful claimants (of the total 65 plaintiffs)--no punitive damages were awarded. In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. 1380, 1386 (E. & S.D.N.Y.1991). In the state Brooklyn Naval Yard Cases which involved virtually identical sets of plaintiffs in virtually identical work settings during the same time period, and which were tried simultaneously, verdicts were more than three times higher than in the federal trial, and punitive damages were also awarded. Id. at 1387. By contrast, in Cimino v. Raymark Indus., 751 F.Supp. 649 (E.D.Tex.1990), punitive damage awards were enormous. See infra notes 245-60 and accompanying text for a more detailed account of Cimino. In asbestos litigation, if even one jurist uses punitive damages as a vehicle for claiming a larger share of the remaining assets for plaintiffs and their lawyers in one jurisdiction, subtle pressures are created on other jurists to compete for a share of the dwindling asset pool

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for deserving claimants in their jurisdiction. Judge Richard Neely stated:
No matter how responsible I or the other members of our courts want to be as state court judges, we are powerless to improve the overall American products liability system or reduce the exposure of West Virginia manufacturers to the caprice or malice of out-of-state courts and juries.
By trying unilaterally to make such improvements, we will succeed only in impoverishing our own state's residents without doing anyone, anywhere, any measurable good. Unless we want to be "suckers," as state judges we must immediately incorporate the latest pro-plaintiff wealth redistribution theories applied in other states into West Virginia's decisional law. If we conceive and apply new wealth redistribution theories before anyone else, we can even garner for ourselves more than our fair share of the national product liability insurance pool. Every jurisdiction then, must ultimately follow the most irresponsible state.
Testimony of Justice Richard Neely of the West Virginia Court of Appeals before the Senate Commerce Committee, Sept. 12, 1991, at 9-10 (on file with author).

FN[FN53]. This figure is an estimate based on awards to date and decisions involving insurance coverage. See supra note 51 and infra note 269.

FN[FN54]. See infra text accompanying notes 138-44 and 170-74.

FN[FN55]. See infra text accompanying notes 156-69.

FN[FN56]. See infra text accompanying notes 59-79.

FN[FN57]. See infra text accompanying notes 170-74.

FN[FN58]. "There are gross abuses of our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent--we have untrammeled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong [and] should be stopped...." Remarks of Ronald L. Motley, in Administrative Alternative, supra note 3, at 15.

FN[FN59]. Quite apart from asbestos litigation, contingent-fee abuses are common. For an analysis of contingent fees yielding hourly rates of return of $1,994-$3,000 despite the virtual complete absence of risk bearing, see Lester Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L.REV. 29, 33 n. 12 (1989) [hereinafter Brickman, Contingent Fees].

FN[FN60]. In In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 867 (E. & S.D.N.Y.1991), Judge Weinstein estimates the prevailing plaintiffs' attorneys' contingent-fee percentage in asbestos cases to be 33-45%. Information about contingent-fee rates is extremely hard to obtain. Most judges do not inquire, most plaintiffs lawyers do not disclose, and most defendants' lawyers do not know plaintiffs' attorneys' contingent-fee rates. See infra notes 63, 67-68 and accompanying text. On the basis of my inquiries, I estimate that fees range from 25-50%. 50% would appear to be common in Texas, 40% in Philadelphia, and 25-40% in New York. See also Dillon, supra note 29, at 43, reporting plaintiffs' attorneys setting fees at 33-40%.

FN[FN61]. To calculate these rates, which were determined with reference to Manville Trust Fund claims, I determined the average Trust Fund recovery and then reconstructed the amount of time that plaintiffs' attorneys devoted to each claim. Prior to the time the trust became insolvent, actual payments of

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$677,445,619 were made to plaintiffs represented by counsel. Findley, 129 B.R. at 956-65. Of this aggregate payment, plaintiff's counsels' fees ranged from $226,600,000-$306,000,000, based on Judge Weinstein's estimate that the prevailing attorneys' fees ranged from 33-45%. Id. at 867. The average liquidated value of each claim amounted to $42,128. Id. at 758. Despite the fact that claims were settled in groups of hundreds and thousands, "[n]o limit on [attorney] fees ... was negotiated to reduce the Trust's payment." Id. at 756.

Even under the reorganized Manville Trust, where average awards were reduced to $25,000 and plaintiffs' attorneys' fees were capped at 25%, plaintiffs' lawyers continued to average $1,500 per hour, compared to the average defendants' lawyers rates of $175 per hour. See id. at 863-64 (citing Testimony of Lester Brickman in Manville Fairness Hearing).

To be sure, these effective hourly rates of return do not take fee-sharing arrangements into account. Asbestos claims are actively traded by lawyers; the top ten plaintiffs' firms receive many of their asbestos cases by referral from other attorneys. See Dillon, supra note 29, at 43. Referral fees of 25- 67% are common.

Motley hired local counsel through an unusual split-the-work, split-the-fee arrangement.... Motley's firm typically takes home only a third of the total lawyer's fees or even less, according to eight co-counsel. "The further the cases are from South Carolina," Motley explains, "the less we take."

Id. at 41.

Hence, the net return to the top firms for asbestos work would be as little as 50% of the hourly rates calculated. However, looked at from the perspective of the client (and of society), the calculated effective hourly rates of return ought not to be discounted. That the client pays a legal fee amounting to $5,000 per hour is not ameliorated by the fact that several attorneys are dividing up the fee.

The following table is a list of the assumptions upon which I have based my hourly rate calculations. On the basis of these estimates, under the pre- reorganized Trust, assuming $60 per hour for paralegal work and $150 per hour for junior attorneys, the comparative handful of senior attorneys were compensated at the rate of a little less than $5,000 per hour. Under the reorganized Trust, the effective senior attorney rate is $2,750 per hour. I have used the considerably lower estimate of $1,500 per hour to be conservative.

ESTIMATED PER CASE TIME (IN HOURS) FOR PROCESSING MANVILLE TRUST CLAIMS

Task	Old Trust		New Trust	
Business Development	(SA)	.25	(SA)	.25
Intake Interview	(SA)	.25	(SA)	.25
	(JA)	.25	(JA)	.25
	(P)	1.00	(P)	1.00
Collecting medical	(P)	3.00	(P)	3.00
and workplace records	(C)	1.00	(C)	1.00
Prepare and submit	(C)	.50	(C)	.50

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claim form	(P)	1.00	(P) 1.00
	(JA)	.50	(JA) .50
Negotiation and	(SA)	2.00	(SA) 1.00
settlement process	(JA)	2.00	(JA) 1.50
Prepare Closing Papers	(SA)	.25	(SA) .50
Disburse Funds	(P)	1.25	(P) 1.75

(SA) = Senior Attorney

(JA) = Junior Attorney

(P) = Paralegal

(C) = Clerk

EXPLANATORY NOTES

a) This analysis assumes that processing a Manville claim bears no share of the tort-system time for the same case against other defendants. Therefore, it underestimates the hourly rate. The estimation also assumes that reaching a settlement with the new Trust is easier because the settlement numbers are largely predetermined while, because of the extended payment payout, closing the settlement will become more complicated.

b) Under the old Trust approximately one in ten claims would go into the tort system; current estimates are that it will be one in twenty. That case, with substantial attorney and paralegal time (twenty attorney hours and twenty-five paralegal hours up to but not including trial) would be allocated under the other cases.

c) This table assumes the attorney has a substantial number of cases and operates efficiently. Consider Dillon, supra note 29, at 42:

Like other high-volume personal injury firms, Ness, Motley handles its cases with factory-like efficiency. The firm relies heavily on paralegals to do much of the work that associates might do in another firm. "We are able to utilize good paralegals to do medical record reviews, drafting answers to interrogatories, medical research, and chasing down [plaintiff's] co- workers."

Id. (quoting Joseph Rice).

d) All medical expenses--including diagnosis and work done by medical professional and paraprofessional personnel--are paid out of the client's, not the lawyer's share of the proceeds.

FN[FN62]. See, e.g., In re Agent Orange Prod.Liab.Litig. 818 F.2d 226 (2d Cir.), cert. denied sub nom. Schwartz v. Dean, 484 U.S. 926 (1987); Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, 778 F.2d 890, 896 (1st Cir.1985); McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir.1985) ("Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts."); Cooper v. Singer, 719 F.2d 1496, 1505 (10th Cir.1983); Allen v. United States, 606 F.2d 432, 435 (4th Cir.1979); Dunn v. H.K. Porter, Co., 602 F.2d 1105, 1108 (3d Cir.1979) ("Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as ordinary commercial contracts ... courts have the power to

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monitor such contracts either through rule-making or on an ad hoc basis.") (citation omitted); In re Michelson, 511 F.2d 882 (9th Cir.), cert. denied, 421 U.S. 978 (1975); Schlesinger v. Teitelbaum, 475 F.2d 137, 141 (3d Cir.) ("[I]n its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees."), cert. denied, 414 U.S. 1111 (1973); York v. Alabama State Bd. of Educ., 631 F.Supp. 78, 87 (M.D.Ala.1986); People v. Nutt, 696 P.2d 242, 248 (Colo.1984); Anderson v. Kenelly, 547 P.2d 260, 261 (Colo.1976); Gruskay v. Simenauskas, 140 A. 724 (Conn.1928); In re Teichner, 470 N.E.2d 972, 983 (Ill.1984) (citing Pocius v. Halvorson, 195 N.E.2d 137, 146 (Ill.1963)); Rosenthal v. First Nat'l Bank of Chicago, 262 N.E.2d 262, 265 (Ill.1970); American Trial Lawyers Ass'n v. New Jersey Supreme Court, 330 A.2d 350 (N.J.1974); In re Cohen, 199 N.Y.S.2d 658, 663 (1960); Lewis v. Morgan, 28 A.2d 215, 217 (N.Y.App.Div.1960), aff'd, 374 U.S. 857 (1963); In re Estate of Thompson, 232 A.2d 625 (Pa.1967).

FN[FN63]. Most asbestos jurists are not aware of the contingent-fee rates charged by plaintiffs' lawyers; indeed, most never request such information. At the oversight hearings on asbestos litigation before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee held on October 24, 1991, several asbestos jurists testified that they neither knew nor inquired into the contingent-fee rates being charged by plaintiffs' counsel. For a rare occasion where such a request was made, see Conway v. Asbestos Corp., No. 81 C 3220, 1991 WL 195800 (N.D.Ill. Sept. 23, 1991) stating:
[T]his court has been much troubled by the fact that it has been given no information at all about the relationship between the total fees received and the total time expended by plaintiffs' lawyers in the numerous asbestos cases that they are handling ... this Court has been entirely frustrated in its several requests for such information. Even though the plaintiffs' lawyers with a large portfolio of such cases surely have the information readily retrievable from their time records, they have never been forthcoming with the facts--instead their submissions in response to this Court's inquiries regularly talk about everything except what this Court has asked.
Id. at *1.

FN[FN64]. See Lester Brickman, Lawyer's Fee Frenzy, WASH. POST, Aug. 16, 1991, at A29.

FN[FN65]. Brickman, Contingent Fees, supra note 59, at 34.

FN[FN66]. A risk peculiar to asbestos cases is a post-verdict pre-collection bankruptcy of a defendant. The degree of risk depends upon the percentage of liability assigned to that defendant in the cases in question, the solvency of the particular defendants, and whether the verdicts have been bonded.

FN[FN67]. See supra notes 60 and 63.

FN[FN68]. In Conway v. Asbestos Corp., No. 81 C 3220, 1991 WL 195800 (N.D.Ill. Sept. 23, 1991), the plaintiff's attorney refused to provide the court with information regarding the hours expended on the case even after numerous requests. Id. at *1. Judge Milton Shadur
reject[ed] each of the pending applications for fees in its entirety. In every instance the settling defendant is only a minor contributor to the total fees realized to date from all defendants, and it appears most likely that the plaintiffs' attorneys will already have been more than handsomely compensated even if they receive nothing at all out of the current incremental recovery.
Id. at *2.

FN[FN69]. In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 868 (E. & S.D.N.Y.1991); see also Raymark Indus. v. Stemple, No. 88-1014-k, 1990 WL 72588, at *9 (D.Kan. May 30, 1990).

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FN[FN70]. Cf. Brickman, Contingent Fees, supra note 59, at 109, 121 n. 366.

FN[FN71]. See supra note 58.

FN[FN72]. See supra note 60. My conclusions regarding effective hourly rates of return in excess of $1000 per hour as related in my Manville testimony and the paper prepared for the Administrative Conference Colloquy have been widely circulated. Interestingly no plaintiff's lawyer in the asbestos litigation has come forward to dispute the essential accuracy of my calculations. Instead, I have been criticized for failing to criticize defendants' lawyers' fees in asbestos litigation (which I have calculated to average $175 per hour) and for failing to acknowledge the indispensible role of contingent fees in funding asbestos litigation. It is not the use of contingent fees in asbestos litigation that I criticize, but the abuses; that is, the virtual complete failure of the courts to exercise superintendance, charging substantial contingent fees in circumstances where there are no contingencies, and, in any event, charging contingent-fee percentages that yield enormous hourly rates of return which are simply not justifiable by the risks being assumed.

Defendants' lawyers billing practices also reflect substantial abuses. See infra note 263; see also Report, supra note 1, at 12-13 (description of federal court trial in Cleveland involving four plaintiffs and forty-one to fifty-eight lawyers which was estimated to have generated transaction costs of between $3 million and $7 million). Most of these billing abuses, however, are much less a matter of concern than those inflicted on plaintiffs. Asbestos defendants are (by now) highly sophisticated consumers of legal services. With monthly billings for asbestos litigation defense for the top ten asbestos defendants ranging from $1 million to over $10 million defendants have a substantial incentive to closely monitor lawyers' billing practices and are, indeed, doing so.

Most defendants with active caseloads have instituted a sophisticated regime of fee billing oversight. The need for such a system is made apparent when one examines a typical monthly bill from a single law firm. Assuming six or more active on-going trials, the bill might total $400,000. The bill will consist of more than 100 pages of densely filled computer print-out with thousands of entries representing each individual component of the bill; for example, R.K. (a lawyer's initials), 10/21/91 (date), 0.3 (hours), review interrogatories (task), $78.00 (at R.K.'s billing rate of $260 per hour). Also identified will be the case name and the file number. From the perspective of a reader seeking fee billing practice information, the bill is unreadable. To cope with "unreadable" bills, defendants have devised software packages which they provide to their attorneys. All services provided by the firm are classified into categories; for example, attending depositions, consulting witnesses, legal research. The provider of the service is listed both by name and by classification; for example, senior attorney, junior attorney, paralegal, clerk. Thus, each task being billed in a case is broken down into discrete components including the nature of the provider. The resultant categorizations easily exceed 50 and could be as high as 70. For example, some defendants have established the following gross billable time divisions: initial response, discovery, depositions, settlement, pre-trial preparation, trial and administrative. Each division is subdivided into three to nineteen categories. Thus, "depositions" are subdivided into the following: preparation of medical expert, co-worker, injured plaintiff, spouse or other relative, economic expert, other expert; and attendance at or conduct of these prepared-for depositions. Hence there are twelve deposition time-charge categories.

Requiring that bills be submitted in this form enables a defendant's computer to read the bill and provide critical information. For example, monitoring can reveal that: (1) senior partners are doing work that associates do in other firms--that is, the number of overqualified hours; (2) fifty attorney hours for a deposition exceed the norm established by a comprehensive analysis of that defendant's total billings; (3) six lawyers are working on a matter while most of the other firms retained by that defendant are using three (on average, the higher the number of attorneys working for a client, the higher the billings will be per matter regardless of the intrinsic "work value" of the various matters); and, (4) one law firm's average defense costs for an "all issues" trial is $100,000 whereas other firms retained by that same defendant average $40,000 and there is no offsetting difference in outcomes.

Defendants are thus exercising increasingly sophisticated controls over their litigation costs--their incentives to do so being clear. In reality, only courts can monitor plaintiffs' attorneys' fees. If they eschew this responsibility, as is currently the case, obviously no one else will perform the monitoring function.

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FN[FN73]. Weinstein & Hershenov, supra note 5, at 326 ("The contingent fee system, the payment of attorneys' fees to the victor and other aspects of our legal system have helped fuel the system.").

FN[FN74]. See, e.g., N.J.CIV.PRACTICE R. 1:21-7(i) which provides, in pertinent part: When representation is undertaken on behalf of several persons whose respective claims, whether or not joined in one action, arise out of the same transaction or set of facts or involve substantially identical liability issues, the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries ... and shall be charged to the clients in proportion to the recovery of each.
Id.
Vast savings would result if, as the New Jersey Rule provides, contingent fees were applied on the aggregate amount in a mass settlement. For example, if 100 plaintiffs with the most serious forms of asbestos disease reached a settlement with five defendants that provided for an aggregate payment of $24 million (or $240 thousand for each plaintiff), under N.J.CIV.PRACTICE R. 1:21- 7(c) which limits contingent fees to 33 1/3 % on the first $250,000, 25% of the next $250,000, and 20% on the excess of $250,000, the contingent fee on the aggregate amount would be $8 million. However, if the fees are calculated pursuant to Rule 1:21-7(i), which would take into account the aggregate nature of the mass settlement, the total fee would be $4,845,833--which would be 39% less.
Yet, Rule 1:27-7(i) is routinely ignored by New Jersey plaintiffs' attorneys and goes unenforced by the courts in asbestos cases. For an analysis of societal attempts to regulate attorney fees and the legal profession's steadfast and generally successful opposition, see Lester Brickman & Jonathan Klein, Use of Advance Fee Retainer Agreements in Bankruptcy: Another Special Law For Lawyers?, 43 S.C.L.REV. (forthcoming 1992).

FN[FN75]. See infra notes 80-137 and accompanying text.

FN[FN76]. In the following pages, I set out to substantiate this hypothesis. The case discussions presented are not intentionally exhaustive but merely illustrative.

FN[FN77]. See infra notes 138-69 and accompanying text.

FN[FN78]. See infra notes 175-202 and accompanying text.

FN[FN79]. See infra notes 230-65 and accompanying text.

FN[FN80]. There are occasions when new substantive law must be created to deal with asbestos litigation. As a consequence of the federal Brooklyn Naval Yard cases (discussed infra notes 236-40), it became necessary to determine how the verdicts would be molded into judgments--specifically how to determine the impacts of the settling defendants and the percentage of respondent's liability allocated to the Manville Personal Injury Settlement Trust created by the Manville Bankruptcy, on the calculation of the amounts due from the non- settling defendants under New York state law. "The process of translating the jury verdicts into judgments in New York is governed by an extremely complex statutory scheme." In re Eastern & S.Dists.Asbestos Litig., 772 F.Supp. 1380, 1384 (E. & S.D.N.Y.1991) However, "[t]he effect and meaning of many of the provisions [recently enacted by New York] remains uncertain." Id. Judge Weinstein's molding of the verdicts involves computational difficulties that would make the eyes of an advanced civil procedure law school class glaze over. See also Record of Proceedings before Justice Helen E. Freedman at 6170- 85, In re New York City Asbestos Litig., (N.Y.Sup.Ct. Feb. 25, 1991) (No. 40000/88). "New York has had no asbestos cases. We are making the law in this case." Id. at 6182.

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FN[FN81]. 447 A.2d 539 (N.J.1982).

FN[FN82]. For instance, the New Jersey Appellate Division has refused to apply the Beshada rule to a strict products liability action regarding prescription drugs:
In areas involving public health there are weighty policy considerations on both sides of any question as to whether strict liability should be applied.... Admittedly, Beshada speaks in broad terms, but absent a direct expression that prescription drug type cases are no longer to be separately treated we do not, nor can we, regard Beshada as effecting a policy change of such dimension.
Feldman v. Lederle Labs., 460 A.2d 203, 208-09 (N.J.Super.Ct.App.Div.1983); see also Andrew T. Berry, Beshada v. Johns-Manville Products Corp.: Revolution--or Aberration--in Products Liability Law, 52 FORDHAM L. REVIEW 786, 791 (1984) ("Beshada is understood best not as a products liability case, but as an asbestos case."). Asbestos litigation is a substantial industry in New Jersey as is the manufacture of ethical drugs. See generally N.J.SUCCESS, Apr. 1985, at 1 (discussing ethical drug industry in New Jersey).

FN[FN83]. Beshada, 447 A.2d at 546.

FN[FN84]. The court also supported its ruling with the rationale that strict liability promotes risk-spreading. Id. at 547-48.

FN[FN85]. Berry, supra note 82, at 793-95.

FN[FN86]. 944 F.2d 69 (2d Cir.1991).

FN[FN87]. The use of circumstantial evidence as a substitute for direct evidence that the claimant had worked with, or in proximity to, a defendant's products is widespread in asbestos litigation. Indeed, the circumstantial evidence relied upon to inculpate the largest possible number of defendants often appears to be quite weak; restrictions on jury speculation on proximate cause issues appears to be minimal if not nonexistant in asbestos litigation. Typically, a plaintiff and his witnesses will identify the products of several of the traditional asbestos defendants as those with which he worked or was in proximity to. Often, most of the defendants so identified will settle before verdict. The problem arises with regard to the other named traditional defendants. When a plaintiff is unable to testify that he worked with or in proximity to a particular defendant's products--that defendant being one or more of a score of defendants--and co-worker testimony is that they had seen that defendant's product in use somewhere at the work site, a jury's inference that the plaintiff worked in sufficient proximity to that defendant's products to cause injury to plaintiff is held to be sufficiently supported by the circumstantial evidence. See, e.g., Slaughter v. Southern Talc Co., 949 F.2d 167, 172-73 (5th Cir.1991); Johnson v. Celotex Corp., 899 F.2d 1281, 1286 (2nd Cir.), cert. denied, 111 S.Ct. 297 (1990); Whatley v. Armstrong World Indus., 861 F.2d 837 (5th Cir.1989); Lockwood v. A.C. & S., Inc., 744 P.2d 605 (1987) (en banc); Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir.1984), reh'g en banc on different grounds granted, 750 F.2d 1314 (1985), aff'd, 781 F.2d 394 (1986). The reliance on circumstantial evidence to substitute for lack of direct evidence that a particular plaintiff had been exposed to that particular defendant's products as a means of inculpating the largest possible number of defendants must be understood in light of witness recollections regarding product exposure that seem to be vitally affected by the solvency of the particular defendants in question. See supra text accompanying note 14.

FN[FN88]. O'Brien, 944 F.2d at 73.

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FN[FN89]. For rejection of the use of circumstantial evidence--that is, that specific asbestos-containing products were in use at the worksite where plaintiff was employed, as a substitute for proof that the plaintiff worked on a regular basis in proximity to where the product was used, see Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480 (11th Cir.1985). The Fourth Circuit held likewise in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir.1986), but then almost immediately receded from its position in, Roehling v. National Gypsum Co. Gold Bond Bldg. Prods., 786 F.2d 1225 (4th Cir.1986).

FN[FN90]. See supra note 24.

FN[FN91]. O'Brien, 944 F.2d at 73.

FN[FN92]. Asbestos exists in a fibrous form. Among the fiber types are crocidolite (blue asbestos) and chrysotile. Chrysotile is widely found throughout the United States and Canada and accounts for approximately 95% of asbestos mined and used commercially. See Editorial, Mineral Fibres and Mesothelioma, 41 THORAX 161 (1986); crocidolite is imported from South Africa, see 2 ENCYCLOPAEDIA BRITANNICA 559 (1966). Many scientists believe that chrysotile asbestos is incapable of causing mesothelioma; others have suggested that it is crocidolite alone which is responsible for the development of mesothelioma. See A.R. Gibbs et al., Non-Occupational Malignant Mesothelioma, 90 IARC SCIENTIFIC PUBLICATIONS 219-28 (1989); Brooke T. Mossman & J. Bernard L. Gee, Asbestos-Related Diseases, 320 NEW ENG.J.MED. 1721, 1727 (1989); J.C. Wagner, The Discovery of the Association Between Blue Asbestos and Mesotheliomas and the Aftermath, 48 BRIT.J. OF INDUS.MED. 399-403 (1991), cited in DEFENSE RESEARCH INST., THE 1991 ASBESTOS MEDICINE SEMINAR A- 14 to A-15 (Oct. 16-18, 1991). In one case, the circuit court reversed in part a district court's order which estopped the parties from litigating the medical causation issue, including the determination that asbestos causes mesothelioma; rather the circuit court maintained that it is a "disputed issue" whether "mesothelioma [can] arise without exposure to asbestos." Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347-48 (5th Cir.1982), rev'g in part, 509 F.Supp. 1353 (E.D.Tex.1981).

FN[FN93]. Gunner Hillerdahl, Pleural Lesions in Crocidolite Workers from Western Australia, 47 BRIT.J.INDUS.MED. 782-83 (1990). Twenty percent of men with malignant mesothelioma have no history of exposure to asbestos. Mossman & Gee, supra note 92, at 1721, 1723. In a review of 123 patients diagnosed with malignant pleural mesothelioma, Sloane-Kettering Cancer Center researchers found that only 16 patients related a history of exposure to asbestos. Fourteen of the patients had a history of previous lung disease; one had received prior radiation, and fourteen had been exposed to industrial dusts and chemicals. Joseph Brenner et al., Malignant Mesothelioma of the Pleura, Review of 123 Patients, 49 CANCER 2431, 2431-32 (1982). This finding, that not all pleural mesotheliomas are related to asbestos is consistent with a review of the literature that from 10-70% of patients with malignant mesothelioma had been exposed to asbestos. Karen Hamm Antman, Malignant Mesothelioma, 303 NEW ENG.J.MED. 200, 200-02 (1980). In a review of malignant peritoneal mesothelioma, the Sloan-Kettering team found no evidence of asbestos linkage. Joseph Brenner et al., Malignant Peritoneal Mesothelioma--Review of 25 Patients, 75 AM.J.GASTROENTEROLOGY 311, 311-12 (1981). In a review of seven cases in which children had been inflicted with mesothelioma, six of the pleura and one of the peritoneum, none of the patients related a history of exposure to asbestos. Joseph Brenner et al., Malignant Mesothelioma in Children: Report of Seven Cases and Review of the Literature, 9 MED. & PEDIATRIC ONCOLOGY 367, 367-73 (1981).

FN[FN94]. A. Phillippe Chahanian et al., Diffuse Malignant Mesothelioma, 96 ANNALS OF INTERNAL MED. 746, 752 (1982); Jack T. Peterson et al., Non- Asbestos-Related Malignant Mesothelioma: A Review, 54 CANCER 951 (1984) (the occurrence of large numbers of apparently non-asbestos-related

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malignant mesotheliomas has led researchers to suggest other environmental agents).

FN[FN95]. Y. Izzettin Baris et al., Environmental Mesothelioma in Turkey, 330 ANNALS N.Y.ACAD.SCI. 423 (1979); Richard J. Stock, et al., Malignant Peritoneal Mesothelioma Following Radio-Therapy for Seminoma of the Testes, 44 CANCER 914, 914-19 (1978).

FN[FN96]. Y. Izzettin Baris et al., An Outbreak of Pleural Mesothelioma and Chronic Fibrosing Pleurisy in the Village of Karain/Urgup in Anatolia, 33 THORAX 181, 192 (1978).

FN[FN97]. Carlton, Toxicity of Mineral Fibers, INSULATION, Apr. 1982, at 32- 36; Stanton & Wrench, Mechanisms of Mesothelioma Induction with Asbestos and Fibrous Glass, 48 J. OF NAT'L CANCER INST. 797 (1972).

FN[FN98]. Terence C. Clark et al., Respiratory Effects of Exposure to Dust In Taconite Mining and Processing, 121 AM.REV.RESPIRATORY DISEASE 959, 966 (1980).

FN[FN99]. NAT'L INST.ORG.SAFETY & HEALTH, ETHYLENE OXIDE: EVIDENCE OF CARCINOGENICITY, CURRENT INTELLIGENCE BULLETIN NO. 35 (May 22, 1981).

FN[FN100]. Peterson et al., supra note 94, at 955.

FN[FN101]. See Sindell v. Abbott Labs., 607 P.2d 924 (Cal.1980) (formulating market share causation rule); but see In re Related Asbestos Cases, 543 F.Supp. 1152 (N.D.Cal.1982) (rejecting market share allocation of liability in asbestos cases); Celotex v. Copeland, 471 So.2d 533 (Fla.1985) (same).

FN[FN102]. See supra note 27.

FN[FN103]. See supra note 87; cf. supra note 46.

FN[FN104]. Defendants "who pay may or may not be liable compared to the [defendants] ... who don't pay...." Transcript, supra note 32, at 6.

FN[FN105]. See Johnson v. Celotex Corp., 899 F.2d 1281, 1286 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990). Johnson is discussed infra note 188.

FN[FN106]. See supra text accompanying notes 23-27.

FN[FN107]. 774 F.Supp. 929 (D.V.I.1991).

FN[FN108]. Often, asbestos trials are bifurcated, that is, trial on the issue of product identification is separated from trial on the issue of medical injury. Reverse bifurcation provides for the issues of injury and medical causation to be tried before the issues of product identification, state-of- the-art defense, and

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punitive damages. The purpose of reverse bifurcation is to induce settlement by fixing the dollar value of the injury before determining liability, thereby substantially eliminating one of the principal uncertainties in the settlement process. "The decision to bifurcate is within the discretion of the trial judge." Celotex, 899 F.2d at 1289; see also Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 283 (2d Cir.), cert. dismissed, 111 S.Ct. 27 (1990); In re Master Key Antitrust Litig., 528 F.2d 5, 14 (2d Cir.1975).

FN[FN109]. The irony of the contentious state-of-the-art defense--and its central issue of whether defendants issued appropriate warnings at appropriate times--is that warnings would not likely have made any difference in workers' use of asbestos-containing products, especially in the various shipyards during World War II. Massive injuries would still have occurred and the need to compensate the injured would still exist. Presumably, in the event that warnings were listed on product containers, they would either have been found inadequate or the legal regime constructed to provide compensation would have differed. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1082 (5th Cir.1973), cert. denied, 419 U.S. 869 (1974); BRODEUR, supra note 6, at 61.

FN[FN110]. Live-witness testimony is also presented, to the same effect. The case against each of the defendants varies according to the nature of the live-witness testimony available against that defendant and the availability of documents. Different plaintiffs' lawyers have amassed different sets of documents for use against different defendants. These documents have become a form of currency. Claims are traded, bartered, and sold by plaintiffs' lawyers in an active secondary market. An attorney who has, through previous discovery, amassed effective documents against defendant A may be brought into a case in which A is a nonsettling defendant in exchange for a percentage of the fee; or he may simply buy up cases in the secondary asbestos-claims market in which A is a non-settling defendant. The documents used against the defendants vary considerably; some are highly inculpatory--describing attempts in the 1930s to 1950s to prevent information from being released regarding the harmful effects of asbestos exposure. By routinely refusing to sever trials, introduction of documentary evidence against defendant B, often results in higher awards against other defendants in that same trial. See supra note 19. Even if defendant B has settled, these same documents are sometimes allowed into evidence and used against defendants who were not involved in such suppression, sometimes by showing that these defendants were members of the same trade associations as the highly culpable defendants or sometimes as part of plaintiff's response to defendants' state-of-the-art defense. Other admitted documents have little or nothing to do with what a defendant knew about the hazards of asbestos at a particular time and relate activities that while irrelevant to the trial issues are nonetheless admitted and used in argument to paint the defendant as a bad actor deserving of punishment. See supra notes 10-11.

FN[FN111]. Settlements were also not reached with Celotex and Johns-Manville which had entered bankruptcy proceedings after the filing of the claim. Typically, the prior settlements provide financing for the suits against the nonsettling defendants.

FN[FN112]. Asbestosis, which generically is a pneumoconiosis, that is, one of the "dust diseases," is a scarring of lung tissue caused by the inhalation of respirable asbestos fibers. WEBSTER'S DICTIONARY 906 (9th ed. 1988). Scarring of the lung tissue from any cause is referred to as interstitial or parenchymal fibrosis. This scarring can result from hundreds of causes and is not identifiable as to cause based solely on x-ray. An absolutely definitive diagnosis of asbestosis can only be made by histological examination of the actual lung tissue and a finding of discrete foci of fibrosis in the walls of the respiratory bronchioles associated with the accumulation of asbestos bodies. However, since biopsies are an invasive procedure and are rarely justifiable, a substitute for a pathological determination is a clinical diagnosis of asbestosis based upon chest x-rays demonstrating interstitial fibrosis plus a sufficient asbestos exposure history. Thus, the clinical diagnosis is one which seeks to ascribe a cause for fibrosis based upon exposure to asbestos even though the x-ray data is consistent with hundreds of possible causes. However, additional x-ray data may be of use. Though it is common to have pleural changes without asbestosis, asbestosis is frequently accompanied by characteristic pleural changes. A finding of pleural changes, along with x-ray

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evidence of interstitial fibrosis, helps differentiate asbestos-related interstitial fibrosis from other forms of lung scarring.
Asbestosis in its mildest form causes no breathing impairment and is detectable only on chest x-ray. In more severe stages, asbestosis may have a substantial impact on the efficiency of the lungs to perform and is progressive and debilitating; most cases of asbestosis, however, are nondebilitating and the majority do not progress. In cases of moderate or severe asbestosis, a restrictive breathing impairment may develop, which can be detected by the use of pulmonary function tests. This is due to the scar tissue replacing functional interstitial lung tissue, that is, air sacs, as well as making the lung itself less elastic. Asbestosis may also impair the gas exchange mechanism, which can be detected by diffusion capacity and arterial blood gas tests. Clinically, the patient may present with fatigue, nonproductive cough, and shortness of breath made worse by exercise. Fine dry rales, or crackles, may be heard at the base of one or both lungs. As the disease progresses, finger clubbing and cyanosis may appear. The most severe cases of asbestosis result in partial or total disability, respiratory failure and death. See John E. Craighead et al., The Pathology of Asbestos-Associated Diseases of the Lungs and Pleural Cavities: Diagnostic Criteria and Proposed Grading Scheme, 106 ARCHIVES OF PATHOLOGY & LAB.MED. 554, 559 (1982); ALFRED P. FISHMAN, PULMONARY DISEASES AND DISORDERS I, 764-65, 837-844 (2d ed. 1988); American Thoracic Soc'y, The Diagnosis of Nonmalignant Diseases Related to Asbestosis, 134 AM.REV.RESPIRATORY DISEASE 363-68 (1991); Irving J. Selikoff et al., Asbestos Exposure and Neoplasia, 188 JAMA 142 (1964); see also In re Joint E. & S.Dists.Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 740 (E. & S.D.N.Y.1991).

FN[FN113]. Dunn v. Owens-Corning Fiberglas, 774 F.Supp. 929, 934, 937 (D.V.I.1991).

FN[FN114]. Id. at 936-37.

FN[FN115]. Id.

FN[FN116]. Id. at 937-38.

FN[FN117]. Id. at 938.

FN[FN118]. Id. at 951.

FN[FN119]. See supra note 112.

FN[FN120]. See Carl B. Rubin & Laura Ringenbach, The Use of Court Experts in Asbestos Litigation, 137 F.R.D. 35 (1991). "It became apparent [in asbestos cases] that the plaintiffs had available a group of experts who always found asbestosis. They were countered by a group of defendant experts who rarely if ever found asbestosis." Id. at 38. To combat this "Battle of the Experts," Judge Rubin appointed medical experts for the court in 65 pending cases. Id. at 37.
Judge Rubin's use of court-appointed experts resulted in a drastic decline in the diagnosis of asbestosis. Although plaintiff's experts undoubtedly would have testified that every single one of the 65 plaintiffs had asbestosis, the court-appointed experts found that 10 had asbestosis (15%), 13 had pleural plaques (20%), and 42 were found to have no asbestos related condition (64.62%). Id. at 45. In the September 1987-September 1990 period, the court-appointed experts testified in 16 cases--in only two of the 16 did the jury find asbestosis (12.5%). Id. at 39-40. The jury verdicts essentially followed the expert testimony.
The findings of the medical experts that Judge Rubin appointed contrast sharply with the testimony of plaintiffs' medical experts and jury verdicts based upon that testimony. These findings may be usefully

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compared with the disease mix data which are substantially based upon plaintiffs' claims. See infra note 174.

FN[FN121]. "It was well within the jury's province to decide to credit the testimony of plaintiff's doctors while discounting that of defendant's." Dunn, 774 F.Supp. at 937.

FN[FN122]. See infra text accompanying note 128. In testifying, Judge Richard Neely stated:
[A]s long ago as 1976 we were beginning to see a "competitive race to the bottom" in product [liability] cases. Typically, in a product liability case, there is an in-state plaintiff, an in-state judge, an in-state jury, in-state witnesses, in-state spectators, and an out-of-state defendant. When states are entirely free to craft the rules of liability anyway they want, it takes little imagination to guess that out-of-state defendants as a class won't do very well.
Testimony of Justice Richard Neely, supra note 52, at 1.

FN[FN123]. See supra note 120.

FN[FN124]. The original jury was dismissed because the original judge became critically ill and a mistrial had to be granted. Dunn, 774 F.Supp. at 940 n. 5.

FN[FN125]. Id. at 940-41. The witness was excluded on procedural grounds. Cf. W.K. Morgan, Clinical Significance of Pulmonary Function Test. Disability or Disinclination--Impairment or Importuning?, 75 CHEST 6, 6 (1979) which states that "it has become apparent that the degree of breathlessness claimed by any particular subject is related to the reason why he or she is consulting the physician. Should the subject be claiming compensation, then he tends to exaggerate his symptoms." See also Cain v. Armstrong World Indus., No. 87 Civ. 1172, slip op. at 7-8 (S.D.Ala. Feb. 18, 1992). In Cain, the court stated:
Each plaintiffs' testimony regarding pain and suffering was remarkably similar.... Without exception, the primary complaint of each plaintiff was that he could no longer do the kind of things around the house or yard (or engage in recreational activities) as he used to because of his shortness of breath. Some complained that their sex lives were affected. All but two of the plaintiffs are over the age of sixty, suggesting that the aging process itself would result in some curtailment of these activities. Several plaintiffs suffer from other illnesses which also contribute to the limitation on their activities. For example, [one] ... is legally blind and suffers from diabetes. [Another] ... is partially paralyzed and cannot speak as the result of a car accident. [Another] ... suffers from chronic obstructive pulmonary disease, a smoking-related illness, heart problems and blackouts, all of which are unrelated to asbestos exposure. Most of the plaintiffs had normal pulmonary function, and none of the plaintiffs was determined by any medical testimony to have suffered any degree of permanent disability due to shortness of breath....
....
.... Viewing the evidence in the light most favorable to the plaintiff, Brown [who was awarded $580,000 in compensatory damages and $3 million in punitive damages] was diagnosed with mild asbestosis, pulmonary function tests show[ing] no impairment in Brown's lung function. At age 59, George Brown at the time of trial was still working forty hours a week as a shipyard worker, an occupation which requires a good deal of physical stamina. By his own physician's testimony, his disease is unlikely to progress and his life expectancy has not been diminished by his disease. His major compaints are that "when I get home from work I'm worn out" and he cannot hunt and fish like he used to and cannot do things around the house like he used to. These complaints are hardly surprising considering his age and work schedule. Brown also testified that he worries about the possibility of contracting cancer.
Id. at 14-15.

FN[FN126]. In addition to the exclusion of the testimony of a prior juror sitting on the same case, the defendant's attempt to put an economist on the stand during the punitive damage phase of the trial was also

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excluded on procedural grounds. Dunn, 774 F.Supp. at 941. Defendant also sought to exclude testimony of plaintiff's witnesses regarding lung cancer, mesothelioma, and heart trouble on the grounds that the plaintiff was not suffering from such conditions and was unlikely to develop them. Id. at 941. Defendant also objected to plaintiff's medical expert's testimony that a benign nodule discovered on plaintiff's lung was potentially malignant, on the ground that the testimony was prejudicial because it allowed the jury to speculate about plaintiff's potential development of various diseases which he was unlikely to contract and allowed plaintiff to go beyond issues framed in the pleadings. Id. Judge Motley overruled the objections and allowed the testimony on the grounds that plaintiff was not trying to recover for an enhanced risk of cancer but rather for emotional distress resulting from fear of developing cancer. Id. at 941-42.
Defendant objected to plaintiff's use of leading questions in examining its medical expert, as well as the experts' testimony on the state of medical knowledge during the first half of this century; these objections were overruled. Id. at 942-43. Plaintiff objected to parts of defendant's cross-examination of the expert; these objections were sustained. Id. at 943. Plaintiff objected to: defendant's cross-examination of plaintiff regarding plaintiff's adherence to safety procedures; defendant's attempt to demonstrate that plaintiff continued to work; defendant's attempt to introduce plaintiff's ownership of numerous houses in an effort to demonstrate that plaintiff was not financially burdened and no longer had significant contacts with the Virgin Islands. Id. These objections were not reversible error since plaintiff was not making a claim for lost wages or livelihood but only for pain and suffering. Id. at 943-44.

FN[FN127]. See supra note 122.

FN[FN128]. Dunn, 744 F.Supp. at 950. Defendant's motion for a mistrial on the basis of this statement was denied. Id. Defendants' claims that a number of the statements of plaintiff's counsel were prejudicial were denied on the grounds that the defendant failed to object at the time the statements were made thereby waiving its objections. Id. In addition to an appeal to local prejudice against out-of-state defendants in favor of local workers, plaintiffs' arguments typically seek to encourage juries to transfer wealth from "wealthy" corporations to comparatively impecunious workers. The arguments--often phrased subtly--encourage the jurors to take advantage of the opportunity to right the wrongs done them by society by rewarding the claimants at the expense of corporate America, a surrogate for American society. Wealth-shifting arguments find especially fertile ground in such locations as Brooklyn, N.Y., Philadelphia, Pa., and Beaumont, Tex. See infra notes 165-69 and accompanying text; see also Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990).

FN[FN129]. See supra note 30 and infra text accompanying notes 138-44.

FN[FN130]. There are numerous other examples of the application of "special asbestos law." Two recent appellate opinions, Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir.1991) and Wundrack v. Armstrong World Indus., No. 91-5523 (3d Cir. Feb. 7, 1992) speak eloquently to the existence of different procedural and substantive rulings in asbestos cases. "Asbestos law" in operation in these cases operates to maximize awards to plaintiffs (both) including allowing gross exaggeration of lost future income (Wundrack); allocates litigation shares among defendants to maximize plaintiffs' recoveries rather than assess defendants' relative liabilities (both); approves excluding a settling defendant from a jury verdict sheet to increase a nonsettling defendant's share of the liability (Wundrack); renders unnecessary evidence of impairment (Glasscock), or direct or even circumstantial evidence regarding proximate cause or proof of loss (both), and even discussion of important and unsettled issues of state product liability law (Wundrack).

FN[FN131]. Currently, the plaintiffs' bar is seeking to do in property damage cases what it has generally succeeded in doing in personal injury cases: imposing virtually unlimited liability on an expanded list of defendants. Damage claims amounting to scores of billions of dollars are being pursued on behalf of both public and private property owners who are seeking compensation for the cost of removing asbestos-containing insulation from various properties. Approximately 60 cases have gone to trial or been settled in

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the past ten years. The first asbestos property damage class action was filed ten years ago. School Dist. of Lancaster v. Asarco, Nos. 82-1414/1415 (Phil.Ct.Common Pleas 1982). Since then twelve more class actions have been filed, one on a nationwide basis and two on a statewide basis; none have gone to trial. See DEFENSE RESEARCH INST., CURRENT ISSUES IN ASBESTOS IN BUILDINGS E-1b (Jan. 23-24, 1992). See, e.g., In re Asbestos School Litig., 104 F.R.D. 422 (E.D.Pa.1984), aff'd in part and vacated in part, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852, 915 (1986) (voluntary class action certified and upheld); Central Wesleyan College v. W.R. Grace & Co., No. 2:87-1860-2 (D.S.C. filed July 17, 1987) (certification argued and pending); Clemson Univ. v. W.R. Grace & Co., No. 2:86-2055-2 (D.S.C. filed Aug. 1, 1986) (dismissed July 18, 1988 on finding that Clemson was alter ego of state and thus no diversity jurisdiction existed); Sisters of St. Mary v. AAER Sprayed Insulation, 445 N.W.2d 723 (Wis.Ct.App.1989) (trial court's denial of class certification affirmed). For examples of other asbestos-in-buildings actions, see, for example, Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co., No. 85-1606 (D.D.C. filed May 17, 1985), rev'd in part, 876 F.2d 119 (D.C.Cir.1989) (tried May 1988, defense verdict; tort claims dismissed by lower court before trial and reinstated for new trial by appellate court); Corporation of Mercer Univ. v. National Gypsum Co., No. C85-126-3-MAC (N.D.Ga. filed Apr. 9, 1985), rev'd on other grounds, 877 F.2d 35 (11th Cir.), cert. denied, 493 U.S. 965 (1989) (tried April 1986, $2.4 million verdict for plaintiff--$403,000 actual damages and $2 million punitive damages; reversed on ground that there is no discovery rule for statute of limitations in Georgia); Kansas City Airport v. W.R. Grace & Co., No. CV86-019615 (Jackson County Mo.Cir.Ct. filed Aug. 21, 1986) (tried March 1991, $14.25 million verdict for plaintiff against Keene--$8 million actual damages and $6.25 million punitive damages; motion for judgment notwithstanding the verdict as to punitive damages granted by lower court and actual damages reduced by Manville payments to $7,776,431.62; appeal pending); City of Greenville v. W.R. Grace & Co., 640 F.Supp. 559 (D.S.C.1986), aff'd, 827 F.2d 975 (4th Cir.1987), reh'g denied, 840 F.2d 219 (4th Cir.1988) (tried January 1986, $8.4 million verdict for plaintiff-- $6.4 million actual damages and $2 million punitive damages, reduced by lower court to approximately $7 million); Spartanburg County Sch. Dist. Seven v. National Gypsum Co., No. 6:83-1744-3 (D.S.C. filed July 23, 1983), vacated and remanded in part, 805 F.2d 1148 (4th Cir.1986), aff'd, 842 F.2d 1292 (4th Cir.1988) (tried August 1985, defense verdict, settled after first appeal with National Gypsum for $141,000, retried April 27-28, 1987, verdict for plaintiff against U.S. Gypsum for $106,107); Lexington County Sch. Dist. Five v. United States Gypsum Co., No. 82-2072-0 (D.S.C. filed Aug. 17, 1982) (tried April 2-9, 1984 and settled April 9, 1984, shortly before going to the jury, for $675,000, almost twice the actual damages claimed); Athens City Bd. of Educ. v. National Gypsum Co., No. CIV-1-85-355 (E.D.Tenn. filed June 3, 1985) (tried January, 1987, $563,000 actual damage verdict for plaintiff; settled on appeal); City of Greenville, Tenn. v. National Gypsum Co., No. CIV-2-83- 294 (E.D.Tenn. filed Sept. 16, 1983) (tried July 1988, defense verdict); Anderson County Bd. of Educ. v. United States Gypsum Co., Civ. No. 3-83-511 (E.D.Tenn. filed August 22, 1983), aff'd, 821 F.2d 1230 (6th Cir.1987) (tried March 1985, judgment for defendants). For a listing of these and all other known asbestos-in-buildings cases, see DEFENSE RESEARCH INST., CURRENT ISSUES IN ASBESTOS IN BUILDINGS A-13 to A-21 (Jan. 23-24, 1992).

FN[FN132]. The basic thrust of the "buildings" cases is that the manufacturers of asbestos-containing materials, selected by architects for use in building construction, failed to warn that their products were sufficiently dangerous that they should not have been used.

FN[FN133]. Asbestos in buildings poses far less of a health risk than most other environmental health hazards, such as tobacco smoke and radon. Richard Stone, No Meeting of the Minds on Asbestos, 254 SCIENCE 928, 930 (Nov. 15, 1991). Asbestos-in-buildings claims are not within the ambit of the proposed legislation set forth in the accompanying piece.

FN[FN134]. Consider the relative risk to school children attending schools in buildings containing asbestos.

Cause Deaths Per Million

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Long-term smoking	1,200
Home Accidents (ages 1-14)	60
Motor-Vehicle Accidents	32
(Pedestrian, ages 5-14)	
Drowning (ages 5-14)	27
High School Football	10
Whooping Cough Vaccinations	1-6
ASBESTOS EXPOSURE IN SCHOOLS	0.005-0.093

B.T. Mossman et al., Asbestos: Scientific Developments and Implications for Public Policy, 247 SCIENCE 294, 299 (Jan. 19, 1990). The relative risk data set forth in this footnote is precisely the kind of data that courts exclude.

FN[FN135]. For examples of plaintiff's verdicts where comparative risk was excluded by way of motion in limine, see, e.g., St. Joseph Hosp. v. The Celotex Corp., No. 186-047 (S.D.Ga.1986) ($500,000 verdict for plaintiff), rev'd on other grounds, 874 F.2d 764 (11th Cir.1989), cert. denied, 493 U.S. 1081 (1990); Corporation of Mercer Univ. v. National Gypsum Co., No. C85-126-3-MAC (M.D.Ga. filed Apr. 9, 1985), rev'd on other grounds, 877 F.2d 35 (11th Cir.), cert. denied, 493 U.S. 965 (1989) (tried April 1986, $2.4 million verdict for plaintiff--$403,000 actual damages and $2 million punitive damages); School Dist. of City of Independence, Mo. v. United States Gypsum Co., No. CV-80405334 (Mo.Cir.Ct. Mar. 13, 1984), aff'd, 750 S.W.2d 442 (Mo.Ct.App.1988); City of Greenville v. W.R. Grace & Co., 640 F.Supp. 559 (D.S.C.1986), aff'd, 827 F.2d 975 (4th Cir.1987), reh'g denied, 840 F.2d 219 (4th Cir.1988) (tried January 1986, $8.4 million verdict for plaintiffs-- $6.4 million actual damages and $2 million punitive damages, reduced by lower court to approximately $7 million). For examples of defense verdicts where motions in limine to exclude comparative risk were denied, see, e.g., Cinnaminson Township Bd. of Educ. v. National Gypsum Co., 552 F.Supp. 855 (D.N.J.1982), aff'd, 882 F.2d 510 (3d Cir.1989); Anderson County Bd. of Educ. v. National Gypsum Co., No. CIV-3-83-511 (E.D.Tenn.1984), aff'd, 821 F.2d 1230 (6th Cir.1987).

FN[FN136]. See supra note 131.

FN[FN137]. See supra note 133; see also Abelson, The Asbestos Removal Fiasco, 247 SCIENCE 1017 (Mar. 2, 1990) (editorial); Brooke Mossman et al., Asbestos: Scientific Developments and Implications for Public Policy, 247 SCIENCE 294 (Jan. 19, 1990).

FN[FN138]. The pleura is a two layer microscopically thin moistened membrane surrounding the lung consisting of the visceral pleura which surrounds the lung and the parietal pleura which lines the inside of the chest cavity. Between the two layers is a small, fluid filled space known as the pleural cavity. The role of the pleura essentially is to prevent friction between the lung and the chest cavity as the lungs expand and contract during breathing. It is not part of the lung itself and plays no role in the exchange of gases in the lung.
Pleural plaques are discrete, localized areas of pleural thickening, usually on the parietal pleura or on the diaphragm. Calcification of these plaques is a common but variable feature. They are considered a marker of asbestos exposure, although not necessarily of asbestos-related disease. Most are a few millimeters

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thick, cause no breathing impairment, and can be detected only on chest x-ray. The vast majority of individuals with plaques suffer no impairment and exhibit no signs, symptoms or loss of pulmonary function. In the rare case of an extremely large or diffuse pleural plaque, there may be a restrictive breathing impairment.

Exposure to sufficient quantities of respirable asbestos fibers can also cause diffuse pleural thickening of the visceral pleura due to the formation of scar tissue caused by asbestos fibers which have drifted to the pleura. There are many causes of pleural thickening, including tuberculosis, trauma to the lungs, pneumonia, and rib fractures. If caused by asbestos exposure, the thickening is bilateral--that is, occurring on both sides of the chest. In most affected individuals, diffuse pleural thickening is mild to moderate, can only be detected on chest x-ray, and causes no impairment of breathing functions and is not progressive. In a small number of individuals, diffuse pleural thickening becomes extensive enough to cause a restrictive breathing impairment and, in the extremely rare case, death. See RICHARD DOLL AND JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985); ALFRED P. FISHMAN, PULMONARY DISEASES AND DISORDERS, 840, 2038-39, 2135-36 (2d ed. 1988); H. CORWIN HINSHAW & JOHN F. MURRAY, DISEASES OF THE CHEST 726-27 (1980); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 244 (2d ed. 1982); American Thoracic Soc'y, The Diagnosis of Nonmalignant Diseases Related to Asbestos, 134 AM.REV.RESPIRATORY DISEASE 363-64 (1986); Gunner Hillerdal, Pleural Lesion and the ILO Classification: The Need for a Revision, 19 AM.J.INDUS.MED. 125-30 (1991); Gunner Hillerdal, Pleural Plaques in a Health Survey Material: Frequency, Development and Exposure to Asbestos, 59 SCANDINAVIAN J. RESPIRATORY DISEASES 257-63 (1978); Ruth Lilis et al., Pulmonary Function and Pleural Fibrosis: Qualitative Relationships with an Integrative Index of Pleural Abnormalities, 10 AM.J.INDUS.MED. 145-47 (1991).

FN[FN139]. Howard Frankin et al., Radiologic Detection of Pleural Thickening, 142 AM.REV.RESPIRATORY DISEASE 1325 (1990).

FN[FN140].

The investigators who initially described the connection between exposure to asbestos and pleural plaques called such lesions "harmless scurrilous beauty marks on the chest film" because they found them neither associated with loss of function or symptoms nor precancerous. An extensive review of the literature 35 years later has revealed nothing to contradict these original impressions.

EDWARD A. GAENSLER, Asbestos-Related Pleural Plaques: Much Ado About Very Little, in DEFENSE RESEARCH INSTITUTE, THE 1991 ASBESTOS MEDICINE SEMINAR H-26 (Oct. 16-18, 1991) (citations omitted). See also ANDREW CHUNG & FRANCIS H.Y. GREEN, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE (1988); P. Harber et al., Pleural Plaques and Asbestos Associated Malignancy, 29 J. OF OCCUPATIONAL MED. 641 (Aug. 1987); Robert N. Jones et al., The Radiographic Pleural Abnormalities in Asbestos Exposure: Relationship to Physiologic Abnormalities, 3 J. THORACIC IMAGING 57-66 (1988); Raimo Kivoluto et al., Pleural Plaques & Neoplasia in Finland, 330 ANNALS N.Y.ACAD.SCI. 31 (1979); Theresa C. McCloud et al., Diffuse Pleural Thickening in an Asbestos-Exposed Population: Prevalence and Causes, 144 AMER.J.ROENTGENOLOGY 8, 9-18 (Jan. 1985). Cf. Rubin & Ringenbach, supra note 120, at 37: "Pleural plaque does not interfere with the lung function, nor does it predispose a person to early death or a functional impairment. It is, however, an abnormal condition and, arguably, compensable." But cf. Irving J. Selikoff et al., Predictive Significance of Parenchymal and/or Pleural Fibrosis for Subsequent Death of Asbestos-Associated Diseases 9-12 (Oct. 1990) (unpublished manuscript filed and docketed in In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 741 (E. & S.D.N.Y.1991)). Additionally, evidence as to whether pleural plaques lead to asbestos-related injury is accumulating as a consequence of the operation of pleural registries. See infra note 147. Observing how many persons enrolled in a pleural registry later file an action for asbestos-related injury yields relevant epidemiological data. While it is yet too soon to make formal observations, preliminary unpublished data indicate that less than five percent of those listed in the registry later file claims for injury. See Remarks of Andrew Berry, in Administrative Alternative, supra note 3, at 19. No attempt has been made to determine how these claimed injuries relate to the prior pleural plaque condition. More formal data gathering needs to be done, as the available data will become increasingly significant with the passage of time.

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FN[FN141]. See infra notes 170-74.

FN[FN142]. See supra note 49, 58.

FN[FN143]. Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *9 (D.Kan. May 30, 1990).

FN[FN144]. See Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588 (D.Kan. May 30, 1990); Oliver & Spencer, supra note 3, at 76-77; Todd Woody, The Rise and Fall of California's Asbestos King, S.F. LEGAL RECORDER, Sept. 11, 1991, at 1. See also CLEVELAND PLAIN DEALER, Dec. 9, 1991, at 2C, a lawyer's advertisement stating "ATTENTION: Railroad Workers and Retirees--X-ray screening to determine the presence of asbestos related lung disease and hearing test to determine occupational hearing loss. Offered at no out of pocket cost to you." The "hearing loss" reference is to hearing loss claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1988). In recent years, tens of thousands of hearing loss claims have been brought. Case assembly methods are similar to some of those used in asbestos litigation. Lawyers solicit and sign up all of the workers in a plant to file such claims, and provide them with a medical examination. A complicating factor from the point of view of employers is presbycusis--hearing loss due to age. Since test results and losses from presbycusis are very similar to the loss from noise-induced hearing loss, it is often virtually impossible to separate out and quantify the hearing loss from presbycusis and the hearing loss from occupational noise exposure. Moreover, under the aggravation doctrine, the employer is liable for a worker's total hearing loss, even if part of it is caused by presbycusis. Moore v. Newport News Shipbuilding & Dry Dock Co., 15 Ben.Rev.Bd.Serv. (MB) 28 (1982); Primc v. Todd Shipyards Corp., 12 Ben.Rev.Bd.Serv. (MB) 190 (1980). The solicitation of hearing loss and asbestos claims in the same advertisement is instructive.

FN[FN145]. See, e.g., Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1137 (5th Cir.1985) (plaintiff must sue for all future injuries in one action within the statute of limitations).

FN[FN146]. "[N]either the statute of limitations nor the single controversy rule should bar timely causes of action in toxic-tort cases instituted after discovery of a disease or injury related to tortious conduct, although there has been prior litigation between the parties of different claims based on the same tortious conduct." Ayers v. Township of Jackson, 525 A.2d 287, 300 (N.J.1987). The plaintiff in this type of jurisdiction is permitted to bring an action for present damages without precluding a later cause of action if the latent disease develops. See, e.g., Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 520 (5th Cir.1984) (under Mississippi law, "[l]ogic and justice require that presently latent injuries must await their separate maturity as a cause of action"); Eagle-Picher Indus. v. Cox, 481 So.2d 517, 520 (Fla.Dist.Ct.App. 1985) ("plaintiff may bring a second action for damages if and when he actually contracts cancer"); Smith v. Bethlehem Steel Corp., 492 A.2d 1286, 1296 (Md.1985) (recovery for asbestos does not preclude later cause of action if cancer develops); see also Peterson v. Instapak Corp., 690 F.Supp. 697, 702 (N.D.Ill.1988); In re Moorenovich, 634 F.Supp. 634, 637 (D.Me.1986); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31 (Ariz.Ct.App.1987); Sheppard v. A.C. & S. Co., 498 A.2d 1126, 1134 (Del.Super.Ct.1985).

FN[FN147]. The term pleural registry is used to describe a formal court rule; where the suspension of the statute of limitations is accomplished by informal means, the term green card applies. A green card is effectively a waiver in futuro by the defendant of the defense of the statute of limitations in exchange for moving the case to the inactive docket. For an analysis of pleural registries, see Schuck, supra note 5. Pleural registries have been established in federal courts in the Northern District of California, the Northern

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District of Georgia, the Northern District of Illinois, the Northern and Southern Districts of Mississippi, the Western District of New York, the Northern District of Ohio, and the Districts of Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, and New Hampshire. State courts, often in the same locales, have followed suit (Cambridge, Massachusetts) or taken a similar lead (Cook County, Illinois). As of the end of 1990, there were 2,912 cases on the Massachusetts Pleural Registry (including both state and federal court cases) and 207 cases on the Connecticut Pleural Registry. Personal Letter (Jan. 10, 1991) (on file with the author). Districts with large asbestos caseloads but no deferral registries include the Eastern District of Pennsylvania and the Eastern and Southern Districts of New York. The Texas state courts also have not established registries and currently schedule cases for group trials according to filing date. See Schuck, supra note 5, at n. 107.
Voluntary agreements to defer unimpaired asbestos claims have also been entered. See Shuck, supra note 5, at n. 4 (listing such agreements entered in Illinois and Massachusetts).

FN[FN148]. See infra text accompanying notes 154-63.

FN[FN149]. See, e.g., Giovanetti v. Johns-Manville Corp., 539 A.2d 871, 874 (Pa.Super.Ct.1988); Doe v. Johns-Manville Corp., 471 A.2d 1252, 1254 (Pa.Super.Ct.1984); Blue v. Johns-Manville Corp., 10 Phila. 23 (Phil.Ct.Com.Pleas Oct. 12, 1983), aff'd, 496 A.2d 848 (Pa.Super.Ct.1985). See also Asbestos, MEALEY'S LITIG.REP., Jan. 10, 1992, at 15-16; Asbestos, MEALEY'S LITIG.REP., June 7, 1991, at 35; Asbestos, MEALEY'S LITIG.REP., Apr. 5, 1991, at 25-26.

FN[FN150]. See Allan Kanner, Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation, 18 RUTGERS L.J. 343 (1987); Barton C. Legum, Note, Increased Risk of Cancer as an Actionable Injury, 18 GA.L.REV. 563 (1984).

FN[FN151]. See Brafford v. Susquehanna Corp., 586 F.Supp. 14 (D.Colo.1984); Davis v. Graviss, 672 S.W.2d 928 (Ky.1984) (possible future development of spinal meningitis is a proper element of damage award). See also Brent Carson, Note, Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief, 60 WASH.L.REV. 635, 647-48 (1985) (recommending a new cause of action for increased risk as a plaintiff's alternative to waiting for a disease to develop to bring suit); Fournier J. Gale III & James L. Goyer III, Recovery for Cancerphobia and Increased Risk of Cancer, 15 CUMB.L.REV. 723, 724 (1985) (describing damages for increased risk of cancer as "present recovery for the probability of future injury.").

FN[FN152]. See, e.g., Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz.Ct.App.1987); Eagle-Picher Indus. v. Cox, 481 So.2d 517 (Fla.Dist.Ct.App. 1985). See also James M. Olson, Shifting the Burden of Proof: How the Common Law Can Safeguard Nature and Promote an Earth Ethic, 20 ENVTL.L. 891, 912 (1990).

FN[FN153]. In Pennsylvania, this matter is particularly uncertain. Until recently, Pennsylvania permitted an award of damages for both increased risk of cancer, see Giovanetti v. Johns-Manville Corp., 539 A.2d 871, 874 (Pa.Super.Ct.1988); Doe v. Johns-Manville Corp., 471 A.2d 1252, 1254 (Pa.Super.Ct.1984), and emotional distress caused by fear of cancer, as long as plaintiff "is able to allege some physical injury or some medically- identifiable effect linked to [his or] her exposure to asbestos particles...." Cathcart v. Keene Indus. Insulation, 471 A.2d 493, 508 (Pa.Super.Ct.1984). However, in Manzi v. H.K. Porter Co., 587 A.2d 778 (Pa.Super.Ct.1991) (discussed infra notes 161-62 and accompanying text), the court allowed a jury instruction permitting the jury to find that pleural thickening is not a compensable injury, although a vigorous dissent claimed that under Pennsylvania law, "[t]he physical impact in the instant case, the existence of which enabled appellant to sue for emotional distress caused by his fear of cancer, was the pleural thickening and pleural plaques, medically- identifiable effects, which had been caused by his

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exposure to asbestos." Id. at 782 (McEwen, J., dissenting). Other jurisdictions have rejected "fear of cancer" claims by holding pleural plaques and thickening non- compensable. See, e.g., Webb v. Pfizer Inc., No. C28-32211 (S.D.Ohio Apr. 21, 1991); Jaquays Mining Corp., 752 P.2d at 30; see also supra note 30. Contra Herber v. Johns-Manville Corp., 785 F.2d 79, 83-84 (3d Cir.1986) (pleural thickening held sufficient to support "fear of cancer" claim).

FN[FN154]. Ayers v. Township of Jackson, 461 A.2d 184, 187 (N.J.Super.Ct.Div.1983) (denying recovery for increased risk of disease for fear that such a recovery would lead to a flood of litigation), aff'd in part and rev'd in part, 525 A.2d 287 (N.J.1987).

FN[FN155]. The single cause of action rule can anomalously bar a claimant who has contracted cancer from recovery because the statute of limitations has expired. See, e.g., Matthews v. Celotex Corp., 569 F.Supp. 1539, 1543 (D.N.D.1983) (plaintiff who had been exposed to asbestos in 1962 and developed cancer was barred from filing suit in 1981, while permitting a patient who was free from cancer to recover based on future probability of cancer). But see Gideon v. Johns-Manville Corp., 761 F.2d 1129, 1137 (5th Cir.1985) (under Texas law, plaintiff presently suffering from asbestosis may recover damages based on the likely development of cancer).

FN[FN156]. From the point of view of plaintiffs' lawyers operating on a contingent fee, the essential strategies and relevant considerations are dictated by the principles of portfolio management. Substantial effective hourly rates of return are obtained by amassing a sufficient caseload to "hit the average" thus accounting for the use of mobile x-ray vans and other mass collection techniques. See supra notes 49, 144.

FN[FN157]. See Township of Jackson, 525 A.2d at 294.

FN[FN158]. See Giovanetti v. Johns-Manville Corp., 539 A.2d 871, 873 (Pa.Super.Ct.1988) (in dicta, the court compared New Jersey law--which recognizes pleural thickening and cancer as separate and distinct injuries giving rise to separate causes of action which accrue only when the particular injury is discovered with Pennsylvania law, which does not create these distinct causes of action); Cathcart v. Keene Indus. Insulation, 471 A.2d 493, 500 (Pa.Super.Ct.1984) (statute of limitations begins to run when plaintiff knows or reasonably should know that he has been injured). But see infra notes 161-63.

FN[FN159]. Blue v. Johns-Manville Corp., 10 Phila. 23, 36, 45 (Phil.Ct.Com.Pleas Oct. 12, 1983) (citations omitted), aff'd, 496 A.2d 848 (Pa.Super.Ct.1985).

FN[FN160]. But cf. Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 320-21 (5th Cir.), modified en banc, 797 F.2d 256, (5th Cir.1986) (while not abandoning the single cause of action rule, the Fifth Circuit recognized its inequity and recommended to the legislature that cancer be treated as a separate cause of action).

FN[FN161]. 587 A.2d 778 (Pa.Super.Ct.1991).

FN[FN162]. While Manzi effectively gives juries the option of circumventing plaintiff's cause of action for fear of cancer which Pennsylvania purports to recognize, id. at 782 (McEwen, J., dissenting), several other jurisdictions had previously rejected the single cause of action rule. See Ayers v. Township of Jackson, 525 A.2d 287, 300 (N.J.1987); see also Eagle-Picher Indus. v. Cox, 481 So.2d 517, 521 (Fla.Dist.Ct.App. 1985). In denying the plaintiff damages for injuries which may never occur, the court in Cox attempted to

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alleviate the drain on the finite sources of the asbestos industry, so that those who later actually develop cancer will be able to recover. See Remarks of Ronald L. Motley, in Administrative Alternative, supra note 3, at 16: "I support ... within the judicial system, efforts to limit the filing of meritless cases so long as there is a guarantee that when those persons become more impaired--there is no such thing as unimpaired ... they will have an opportunity to assert their claim."

FN[FN163]. No. 478 (Phil.Ct.Com.Pleas Nov. 6, 1991).

FN[FN164]. See infra notes 170-74.

FN[FN165]. 751 F.Supp. 649 (E.D.Tex.1990).

FN[FN166]. It is noteworthy that the system adopted in Cimino designated set damage awards for each disease category, without regard for the individual variables (such as age, smoking history, severity, etc.) that would be taken into account under the tort system.

FN[FN167]. Oliver & Spencer, supra note 3, at 79.

FN[FN168]. See supra notes 107-25 and accompanying text.

FN[FN169]. In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 749 (E. & S.D.N.Y.1991). Referring to these state and federal Brooklyn Navy Yard trials, Judge Weinstein stated: "These cases tried ... [in state court] are essentially the same in all respects with the cases tried in this [federal] court. The verdicts there [in state court], were at least four times the size of the verdict here." Transcript, supra note 32, at 5. See also Remarks of Andrew Berry, in Administrative Alternative, supra note 3:

[O]n the variability of the tort system [there] was an asbestos personal injury case that I tried on behalf of a defendant about a year-and-a-half ago; the trial stretched over five or six weeks, a jury of six was to decide, but a jury of twelve was empaneled because the case was going to go a long time and we might lose some people. Unlike many other cases, we didn't lose anybody, so we came to the end of the case, and this was the so-called "all issues case", we were trying whether the defendants ought to pay the plaintiffs and all the issues were in dispute--was the plaintiff sick, did the companies know or should they have known of the hazards of their products of which they failed to warn, were they wanton and reckless, were they liable for punitive damages. And these twelve people sat and listened relatively diligently and, if you try cases, you know that sometimes you have good jury chemistry, and these jurors seemed to like one another, they were seen in varying collections of groups on their way to lunch and back. And it came time for jury deliberations. The trial judge, who was a fair trial judge and gave everybody a fair trial, said, gee, I'd like to let all twelve deliberate. One of the counsels said, I don't think that's right; I would just as soon have six deliberate. So the six alternates were very disappointed. This had been a cohesive group, they had all heard the evidence, they all were charged on a regular basis by the judge to pay attention because they [might] be an alternate, conceivably, in case one of the regular jurors got sick. And they said we'd like to deliberate anyway. And the judge, who was a relatively new judge, said, well, okay. You can use my clerk's room, and you can go deliberate concurrently with the real jurors.

Now ... [t]hese twelve people who had heard the identical evidence for six weeks went into two different rooms. The alternate jurors pretended they were real jurors. We had a knock on the door; they said we've reached a verdict; we've filled out the jury interrogatory form. Every one of the questions was answered in favor of the defendants. On the state of the art, no: the defendants didn't know and they reasonably shouldn't have known. And this was a well-tried case all around; ... experienced lawyers on both sides. And the lawyers, including plaintiff's counsel, discussed this result with them because the real jury had not

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yet returned its verdict. And they said, oh, by the way, if you ever did get to the issue of damages, you're certainly not liable for any punitive damages and this is not a very serious case, we're thinking $20,000-$30,000 after a six week trial.
At about the time that the lawyers representing the defendant companies were congratulating themselves, we got a knock on the door from the real jury. I think the lawyers involved in the case, ... probably thought that the value of the case--again, trading dollars for human misery--was about $100,000, maybe $125,000 in this jurisdiction, in this urban area. And, of course, the other six people who had heard exactly what the first six people had heard, came in with a plaintiff's verdict of $1.3 million and punitive damages.
Id. at 17-18.

FN[FN170]. See generally In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 737-39 (E. & S.D.N.Y.1991).

FN[FN171]. I have been informed by Judge Weinstein that mesothelioma percentages for the current Manville Personal Injury Trust Claims are higher, closer to eight percent. That is likely accounted for by unique circumstances rather than different disease characteristics. Because the New York statute of limitations ran from the date of exposure, not discovery, the claims of most Brooklyn Naval Yard workers were barred. In 1986, New York amended its statute of limitations to allow these previously barred actions. N.Y.CIV.PRAC.L. & R. 214 (McKinney 1990). The resulting large influx of asbestos cases were more mature from point of view of manifestation of latent diseases--hence, the larger percentage of mesothelioma claims in the cohort group.

FN[FN172]. See THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 51-52 (1987), estimating 25-75% of asbestos claimants are unimpaired. In a computation prepared for the Manville Trust reorganization, pending pleural plaques claims were estimated at 54.4%. Findley, 129 B.R. at 946.

FN[FN173]. See supra text accompanying notes 112-23.

FN[FN174]. See supra text accompanying note 48. Reliable data on the incidence of unimpaired claims in asbestos litigation may not be available. The problem is exacerbated by disagreement over the meaning of impairment. See supra note 30. Some studies indicate that 25-75% of all claimants are unimpaired. See WILLGING, supra note 172, at 51-52 (1987). When the Cook County, Illinois pleural registry was established, 462 of the 1,000 pending claims were placed on the deferral registry indicating at least 46% of the claims involved unimpaired pleural plaques. In re Asbestos Cases (Mulligan v. Keene Corp.), No. 1-91-1305, slip op. at 5-6 n. 3 (Ill.App.Ct. Dec. 27, 1991) (citing defendant appellee's brief). While the Manville Trust Fund maintains the most extensive data on the disease mix of asbestos claimants-- which while not coextensive with impairment data, is a close substitute--its figures lack reliability since so many of its disposed claims were settled with little or no confirmation of disease claims. Findley, 129 B.R. at 755-57. Most of the major asbestos defendants maintain records that include disease mix data. However, much of this data is simply extracted from plaintiffs' petitions. According to several defendants, the disease claims set forth in petitions are often inaccurate. Moreover, many petitions state that the claim is for "pleural disease" which could be asbestosis, pleural thickening, pleural plaque or none of these. Other petitions simply state "injury" and make no categorization whatsoever. Typically, defendants' compilations adjust the raw numbers to reflect and categorize imprecise disease designations in petitions and actual experience in medically reviewing disease claims in both litigated and settled cases. Thus, some defendants have refined the data extracted from petitions by transforming "pleural disease" and other nonspecific indications into specific data on the basis of disease mix data extracted from those petitions that have specifically characterized the claim. Other defendants have further refined the disease mix data extracted from petitions by passing the data through a matrix constructed on the basis of prior experience with petition data. Thus, on the basis of prior experience, 20% of asbestosis claims, for example, might be listed as pleural plaque claims, or 25% of pleural plaque claims may be listed as unexposed to asbestos

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(because on the basis of medical review, the x-ray data does not indicate any plaques). The data I have set forth in the text is based upon compilations by several asbestos defendants of information in petitions filed on behalf of plaintiffs.

According to calculations by RAND staff, which are based upon preliminary tabulations by Manville Trust Fund personnel from proof of claim forms provided by plaintiff's counsel, the disease mix for the Manville claimants for the period 1988 through August, 1991 is as follows:

	Percentage	Distributing the 'unknown' claims on the percentage basis of the other claims
Mesothelioma	3	3.8
Lung Cancer	5	6.4
Other Cancer	1	1.3
Asbestosis	51	65.4
Pleural Plaques	18	23.8
None or Unknown	22	--

See Deborah R. Hensler, Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman, 13 CARDOZO L.REV. 1967, 1982, tbl. 1 (1992). Compare this data with an analysis of the 136,250 claims pending against the Manville Trust as of mid-April, 1991. This analysis adjusted the diseases claimed by claimants on the basis of the Trust's experience with disease claims versus actual proof by previous claimants of diseases. Also presented below, for purposes of comparison, is the disease mix data presented in the text.

	Adjusted Manville	Data in Text
Mesothelima	4.2%	3-4%
Lung Cancer	8.0%	5-6%
Other Cancer	2.6%	2-3%
Asbestosis	30.7%	30-43%
Severe Asbestosis		5-6%
Moderate Asbestosis		10-12%

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Mild Asbestosis		15-25%
Pleural Plaque	54.4%	45-60%

See Findley, 129 B.R. at 934.

FN[FN175]. See Statement of Judge Thomas M. Reavley before the Subcommittee on Intellectual Property and Judicial Administration 4 (Oct. 24, 1991) ("There are many places to put the blame for this disturbing situation, but the court system must assume its part of the responsibility.... We have allowed assessment of excessive verdicts and multiple punitive damage awards.").

FN[FN176]. In asbestos litigation, punitive damage awards function as a docket control device. Ninety-nine percent of asbestos claims are settled, see supra note 8. Indeed, acceptable case disposition rates from the point of view of trial judges are dependent upon very high settlement rates. From the point of view of plaintiffs' lawyers, a high settlement rate is necessary to maintain a sufficient cash flow so that the costs of trials can be underwritten entirely by the proceeds of earlier settlements with other defendants in that same litigation. The coincidence of interests of trial judges and plaintiffs' attorneys in this regard and its effect on punitive damage awards is another significant element in the perverse incentive structure that permeates asbestos litigation. On occasion, when one of the traditional asbestos defendants disdains settlement values acceptable to plaintiffs' lawyers and seeks to impose settlement values that, for example, provide little or nothing for unimpaired claimants, the result is a lower settlement rate for that defendant. Thus, a defendant such as the Celotex Corporation, which broke away from the settlement herd and adopted a more aggressive posture, was seen to threaten the interests of both trial judges and plaintiffs' lawyers. Punitive damages are used in such a circumstance to prod the straying defendant to return to the settlement herd. Multiple punitive damages awards against Celotex drove it into bankruptcy. For an analysis of Celotex's settlement matrix, see Asbestos, MEALEY'S LITIG. REP. Feb. 1, 1991, at 1. The matrix put a Celotex share value of $150 on claims involving pleural change; $1,500 on cancer and asbestosis claims involving a smoker; $2,000 on cancer and asbestosis claims involving a nonsmoker; $3,500 on lung cancer claims involving a smoker and $4,500 on lung cancer claims involving a non-smoker; and $5,000 on mesothelioma. At the time of the bankruptcy filing, Celotex had $29.7 million in punitive damages verdicts outstanding. See id. Another traditional asbestos defendant which has opted to impose a settlement matrix is the Keene Corporation. See KEENE CORP., 1990 ANNUAL REPORT 4-5 (1991). Punitive damages in asbestos litigation also function to accelerate payments to claimants in a jurisdiction. See supra note 52.

FN[FN177]. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (the purpose of punitive damages is not to compensate but to "punish reprehensible conduct and to deter its future occurrence") (O'Connor, J., concurring) (quoting Gertz v. Welch, Inc., 418 U.S. 323, 350 (1974)); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981); Aetna Life Ins. Co. v. Lavoie, 470 So.2d 1060, 1076 (Ala.1984), vacated, 475 U.S. 813 (1986), modified, 505 So.2d 1050 (Ala.1987).

FN[FN178]. For a determination that the withdrawal of asbestos-containing materials (O-ring seals) from the market was a significant factor in the crash of the space shuttle, Challenger, see MICHAEL BENNETT, THE ASBESTOS RACKET 65- 87 (1991).

FN[FN179]. See infra text accompanying notes 182-89. See also Magallanes v. Superior Ct., 213 Cal.Rptr. 547, 552 (Cal.Ct.App.1985) ("[T]he objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages, and the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace.").

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FN[FN180]. See supra notes 32, 52 and infra notes 192-93, 217.

FN[FN181]. See infra notes 192-93.

FN[FN182]. See Lenard v. Argento, 699 F.2d 874, 890 (7th Cir.) ("[punitive] [d]amage[s] should not go beyond deterrence and become a windfall"), cert. denied, 464 U.S. 815 (1983).

FN[FN183]. To be considered constitutionally permissible, punitive damages may not be "greater than reasonably necessary to punish and deter." Pacific Mutual Ins. Co. v. Haslip, 111 S.Ct. 1032, 1046 (1991).

FN[FN184]. See infra note 186.

FN[FN185]. 727 F.2d 506 (5th Cir.1984), reh'g, 750 F.2d 1314 (5th Cir.1985) (en banc), certifying questions to Miss.Sup.Ct., 781 F.2d 394 (5th Cir.), cert. denied, 478 U.S. 1022 (1986).

FN[FN186]. Jackson, 727 F.2d at 527. (citations omitted). The Fifth Circuit en banc vacated the lower court's ruling and certified the issue of punitive damages under Mississippi law to the Mississippi Supreme Court, which then declined certification, Jackson v. Johns-Manville Sales Corp., 469 So.2d 99 (Miss.1985). The Fifth Circuit, by a nine to five vote, then held that punitive damages were appropriate in Mississippi asbestos cases. Jackson, 781 F.2d at 407. Despite its ostensible reliance on state law, it was apparent that the court had wide latitude to rule either way. The court's ruling in favor of punitive damages may be fairly characterized as an expression of the majority's personal proclivities. Consider Chief Judge Clark's dissent dealing with the policy implications of imposing punitive damages: [T]he court fails to take into account that what we say here creates new precedent. We are not passing a milepost along a known path leading to a chosen goal. Instead, the court, without a goal, chooses a new path which will compel the way of all litigants who come later. Given this situation, the proper judicial response should be one based on a broad view of the whole question.
Id. at 416 (Clark, J., dissenting).

FN[FN187]. Judge Bazelon expressly so determined in Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C.Cir.1981), cert. denied, 456 U.S. 951 (1982). See supra note 51 for a discussion of Keene; see also supra text accompanying notes 81-85 and infra text accompanying notes 270-72.

FN[FN188]. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280 (1935); see also Acosta v. Honda Motor Co., 717 F.2d 828, 834 n. 7 (3d Cir.1983) ("[p]unitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like which constitute ordinary negligence.").
In Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990) the court sustained verdicts for two plaintiffs totalling $1,350,000 in compensatory damages and $5,800,000 in punitive damages. The majority issued an opinion in which it said, "[t]he jury was free to conclude from this and other evidence presented that appellants knew [or should have known] of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner." Id. at 1288. When the appellants filed a Petition for Rehearing, noting that the court erred in applying a negligence rather than a recklessness standard, the court issued a revised opinion, word-for-word identical, except deleting the bracketed words "or should have known." Compare id. with the originally issued slip opinion, Johnson v. Celotex Corp., No. 89-7484, slip op. at 18 (2d Cir. Mar. 20, 1990) (on file with author).

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Judge Maloney concurred in sustaining the compensatory award but dissented as to the punitives, focusing on the fact that while there was evidence that the defendant knew of the dangers of asbestos to workers in its manufacturing plants, there was no evidence that Owens-Illinois or anyone else knew of the dangers to workers not in asbestos manufacturing plants who worked alongside workers who were installing the manufactured materials. Judge Maloney stated:

Punitive damages, however, are not properly chargeable against a defendant who merely "should have known" of the risk in question. It must be shown that the defendant was aware of the risk, and that he consciously disregarded it.... This record contains no evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s, information establishing, or even predicting, that "bystanders" might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use.... The majority paints with much too broad a brush, as I see it, in its reference to "the dangers of asbestos."

This is hardly the "recklessness ... close to criminality" which we [have] described ... as the standard for awarding punitive damages under New York law. As Judge Friendly there said, "error in failing to make what hindsight demonstrates to have been the proper response--even 'gross' error--is not enough to warrant submission of punitive damages to the jury."

Id. at 1291-92 (citations omitted) (discussing Roginsky v. Richardson- Merrell, 378 F.2d 832 (2d.Cir.1967) as the standard for punitive damages).

FN[FN189]. See Myers v. Keene Corp., No. 82-3922 (E.D.Pa. Aug. 21, 1985), wherein the court reasoned that a successor may only be liable for punitive damages if the successor has a sufficient degree of identity or continuity with its predecessors' officers, directors, and personnel. In Myers, the court did not require the successor to pay punitive damages based on its predecessor's recklessness. See also Brotherton v. Celotex Corp., 493 A.2d 1337, 1340-43 (N.J.Super.Ct.Law Div.1985) (applying the "continuation theory" to impose punitive damages on a successor corporation); but cf. Duca v. Raymark Indus., No. 84-0587 (E.D.Pa. Nov. 6, 1986) (holding the mere acquisition of a company was enough to transfer liability for punitive damages even absent continuity of ownership or management).

FN[FN190]. In Browning-Ferris Indus. of Vermont Inc. v. Kelco Disposal Inc., 492 U.S. 257 (1989), the Supreme Court held that punitive damage awards in civil cases did not implicate the Excessive Fines Clause of the Eighth Amendment. U.S. CONST., amend. VIII. Most recently, the Court held in Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991), that the assessment of punitive damages is not so fundamentally unfair as to constitute a per se violation of the Due Process Clause of the Fourteenth Amendment. Id. at 1041. However, the Court effectively held that the Due Process Clause places limits on punitive damage awards by noting its concern regarding the potential for "extreme results that jar one's constitutional sensibilities" in the fixing of punitive damage awards. Id. at 1043.

FN[FN191]. See In re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); In re Northern Dist. Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F.Supp. 887, 900 (N.D.Cal.1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), vacated, 693 F.2d 847 (9th Cir.1982), cert. denied, 459 U.S. 1171 (1983). See also Dennis Jones et al., Multiple Punitive Damage Awards For a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 ALA.L.REV. 1 (1991).

FN[FN192]. Judges have expressed concern over repetitive punitive damages in the mass tort context for some time: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir.1967); see also Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir.1989) ("We agree that the multiple imposition of punitive damages for the same course of

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conduct may raise serious constitutional concerns...."); In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y.1983) (Weinstein, J.) ("[W]hen a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."). But cf. McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D.Ga.1990); Leonen v. Johns-Manville Corp., 717 F.Supp. 272 (D.N.J.1989).
Despite concerns over multiple punitive damage awards, the courts have been reluctant to remedy the deficiencies under the current scheme. In Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053, vacated, 718 F.Supp. 1233 (D.N.J.1989), Judge Sarokin convincingly made the case that punitive damages in asbestos cases were inappropriate, basing the conclusion inter alia on the view that multiple awards of punitive damages for a single course of wrongful conduct violates the defendants' rights under the Due Process Clause of the Fourteenth Amendment. Juzwin, 705 F.Supp. at 1060-64. However, Judge Sarokin then reconsidered his order in the case striking punitive damages against any defendant who presented competent proof that it had already paid punitive damages for the same course of conduct currently alleged by plaintiffs. Juzwin, 718 F.Supp. at 1236. The court then allowed punitive damage claims to proceed even though "there has been or may be a violation of defendants' due process rights through repetitive awards of punitive damages...." Id.

FN[FN193]. Schwarzer, supra note 44, at 116 ("In mass tort cases such as those involving asbestos, the available assets of the defendants may be depleted long before all plaintiffs are compensated. To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair."). See also Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1330 (5th Cir.1985) (Clark, C.J., joined by Garza, J., Gee, J., Politz, J. and Jolly, J.J., dissenting), aff'd on reh'g, 781 F.2d 394 (5th Cir.) (en banc), cert. denied, 478 U.S. 1022 (1986); Fischer v. Johns-Manville Corp., 512 A.2d 466, 478 (N.J.1986).

FN[FN194]. See supra notes 175, 191-92.

FN[FN195]. Cimino v. Raymark Indus., 751 F.Supp. 649 (E.D.Tex.1990).

FN[FN196]. See infra notes 230-65 and accompanying text.

FN[FN197]. Eagle-Picher Indus. v. Cox, 481 So.2d 517, 521 (Fla.Dist.Ct.App. 1985).

FN[FN198]. No reliable estimate exists of the amount of punitive damages awarded in asbestos cases. Many of the awards are in unreported cases. A survey of punitive damage verdicts in the years 1987-1990 yields the following figures:

1987	$ 75,000,000
1988	$ 10,134,000
1989	$178,130,266
1990	$ 52,503,000 (partial figure)

This data was cumulated by adding the value of all punitive damage awards made to claimants which were reported

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in Asbestos, MEALEY'S LITIG.REP., 1987-90. While this four-year compilation totals more than $315 million, many punitive damages verdicts are remitted to judgment. Probably somewhere in the range of $100-150 million in judgments have been levied against defendants--though this does not mean that this amount has actually been paid out. Several large punitive awards have resulted in bankruptcies; many other punitive damage awards are currently on appeal. Finally, large compensatory and punitive damage awards are used as a basis for settling other cases at or near the top of the trial docket.

FN[FN199]. See supra text accompanying notes 177-88.

FN[FN200]. See supra text accompanying notes 191-93.

FN[FN201]. Defendants do not concede that punitive damages augment settlement costs. In part, this reflects issues of insurance coverage--most policies do not cover punitive damages--and in part, an unwillingness as a matter of settlement strategy to ascribe any value to the availability of punitive damages. Despite defendants' denials, the availability of punitive damages does add both to transaction costs and settlement values.

FN[FN202]. In rejecting settlement offers, plaintiffs' lawyers sometimes state that because of the possibility of punitive damages, they would prefer to "roll the dice." See Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 282 (2d Cir.1990) ("Perhaps some portion of the sums paid in settlements reflect an anticipation of the likelihood and extent of punitive damages that might have been awarded....").

FN[FN203]. Consider the following passage excerpted from a letter by United States District Court Judge Robert M. Parker in discussing how to better administer asbestos litigation:
We now have an opportunity to prove that the federal courts are not impotent. It is incumbent upon us to establish that we are viable as an institution and that we can provide modern solutions for modern problems. If we fail to rise to the task, I fear far reaching consequences.
I deeply believe we are not irrelevant--that we do have a role in our society that is greater than refereeing one-on-one litigation in an expensive and cumbersome manner, or presiding over drug cases, Social Security appeals, and prisoner petitions.
Letter from Judge Robert M. Parker, Eastern District of Texas, to Judge Charles R. Weiner, Eastern District of Pennsylvania (Aug. 1, 1991) (on file with the author).

FN[FN204].
Prominent members of the bench, bar, legal academy, and business community, along with some high profile government commissions, have charged that increased access to the courts and pro-plaintiff tort doctrines have failed to solve the problems they were designed to address and have instead resulted in a civil justice system that is sinking under the weight of mass toxic tort and other product liability cases.
Weinstein & Hershenov, supra note 5, at 275.

FN[FN205]. See supra notes 50, 203.

FN[FN206]. See Remarks of Andrew Berry, in Administrative Alternative, supra note 3:
[H]ow [was] the re-restructured Manville or the aborted Eagle-Picher class action restructuring going to be any different from an administrative system except that the board of directors was probably going to have my colleague, Mr. Motley, and some others, and maybe somebody like me, as well as judges and business people on it, as opposed to a board which would be set up in one of the Federal administrative agencies. If you actually look at the elements of [an] administrative system, the aggregative treatment that the tort

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system now imposes in some areas looks very, very much like an administrative system--you get a big bunch of money together, you set up a schedule of benefits, you figure out how you are going to pay them out, and you do it, except you just do it in Brooklyn or maybe you just do it in Beaumont, Texas. That is not a good way to run a railroad if you have a national problem.
Id. at 60.

FN[FN207]. See supra text accompanying notes 37-46.

FN[FN208]. FED.R.CIV.P. 23(b)(1)(B) class actions are particularly appropriate in these cases as they expressly provide for such classification of numerous claims made against "a fund insufficient to satisfy all claims." Id.

FN[FN209]. For an example of its application, see In re "Agent Orange" Prod.Liab.Litig., 100 F.R.D. 718 (E.D.N.Y.1983), aff'd, 818 F.2d 145 (2d Cir.1987), cert. denied, 484 U.S. 1004 (1988).

FN[FN210]. See id.

FN[FN211]. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.1, at 722 (1985).

FN[FN212]. See, e.g., In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod.Liab.Litig., 526 F.Supp. 887, 894 (N.D.Cal.1981) (the federal courts have an "inherent power which is broader and more flexible than the authority granted in the Federal Rules [and] is derived from the court's duty to achieve expeditious disposition of cases."), vacated, 693 F.2d 847 (9th Cir.1982), cert. denied sub nom., A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).

FN[FN213]. See Roger Bernstein, Judicial Economy and Class Action, 7 J.LEGAL STUD. 349 (1978); Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U.L.REV. 659, 671 (1989).

FN[FN214]. David Rosenberg, Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master, 69 B.U.L.REV. 695, 705 (1989).

FN[FN215]. See Geoffrey Hazard, The Effect of the Class Action Device upon Substantive Law, 58 F.R.D. 307, 312 (1973).

FN[FN216]. See FRIEDENTHAL, supra note 211, § 16.8, at 756.

FN[FN217]. Briggs L. Tobin, Comment, The "Limited Generosity" Class Actions and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts, 38 EMORY L.J. 457, 462-65, 474-79 (1989).

FN[FN218]. See Arthur Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem", 92 HARV.L.REV. 664, 667-68, 680-81 (1979) (discussing need for continual court intervention in class action suits).

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FN[FN219]. 28 U.S.C. § 2283 (1988).

FN[FN220]. The Anti-Injunction Act only prohibits federal courts from enjoining pending state proceedings, not from preventing future state court actions. See Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2 (1965).

FN[FN221]. See In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken) 120 B.R. 648 (E. & S.D.N.Y.1990); In re Joint E. & S. Dists. Asbestos Litig. (White v. Eagle-Picher Indus., Inc.) 134 F.R.D. 32 (E. & S.D.N.Y.1990).

FN[FN222]. 28 U.S.C. § 2283 (1988).

FN[FN223]. Id.

FN[FN224]. Id.

FN[FN225]. Eagle-Picher, 134 F.R.D. at 37; Findley, 120 B.R. at 656. The Eighth Circuit in vacating a Rule 23(b)(1)(B) mandatory class certification award, held that the Anti-Injunction Act barred the district court from enjoining state court proceedings. In re Federal Skywalk Cases, 680 F.2d 1175, 1182 (8th Cir.), cert. denied, 459 U.S. 988 (1982). A Rule 23(b)(1)(B) class certification was also rejected in In re School Asbestos Litig., 789 F.2d 996, 1005-07 (3d Cir.), cert. denied, 479 U.S. 852, and cert. denied, 479 U.S. 915 (1986).

FN[FN226]. 28 U.S.C. § 1651(a) (1988). This section provides "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id.

FN[FN227]. Eagle-Picher, 134 F.R.D. at 37-38; Findley, 120 B.R. at 656.

FN[FN228]. Eagle-Picher, 134 F.R.D. at 34. The class certified in the Eagle-Picher class action was defined as consisting of "all persons who currently, or may at any time in the future, assert or claim to have asbestos- related personal injury or wrongful death claims against Eagle-Picher based upon exposure to its asbestos-containing products." Id. Several constitutional concerns are implicated by the inclusion of future claimants within the named class in asbestos litigation (and other toxic tort litigation as well). Since future claimants' claims have not yet ripened and hence, future claimants have not received actual notice, significant due process issues are involved. Appellate review and perhaps legislation will be required to solve this issue.

FN[FN229]. The uncertainties inherent in the invocation of Rule 23(b)(1)(B) led Eagle-Picher to decline to proceed--fearing that while exposing its entire assets to the class claimants, it would still be subject to tens of thousands of state court claims. Judge Weinstein then attempted to fashion a settlement that would effectively bypass these difficulties but his attempts to convince the leading plaintiffs' lawyers to participate were unsuccessful. Eagle-Picher then filed a Chapter 11 bankruptcy proceeding. See Dana Milbank & Wade Lambert, Eagle-Picher Seeks Shield of Chapter 11, WALL ST. J., Jan. 8, 1991, at A3.

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FN[FN230]. As one jurist has stated: "More justice for more people should be our goal--not less justice for ever fewer people. Nevertheless, we cannot agree with those who would have the courts attempt to treat mass tort cases on a one-by-one basis, as though they were two car accidents." Weinstein & Hershenov, supra note 5, at 276. But cf. Remarks of Ronald Motley, in Administrative Alternative, supra note 3, at 16: "We need a two-year cooling- off period. We need some sort of cessation of the filing of motions for [mass] consolidation."

FN[FN231]. While there is no indication that the federal and state consolidations of the Brooklyn Naval Yard cases increased filings, dramatic increases have been recorded in the now ongoing Baltimore, Maryland consolidation of over 9,000 cases, the largest ever attempted in American civil litigation. See ANDREWS ASBESTOS LITIG. REPORTER, Dec. 20, 1991, at 24343.
Sources say that Judge Levin is sticking to his plan to proceed with a phased trial of the 9,000 cases on February 17, 1992. In the first phase, a jury will address all issues presented by a small number of representative cases plus issues common to all 9,000 cases. Another phase of the trial will address the plaintiffs' punitive damage claims. If the jury finds the defendants liable for punitive damages, it would then proceed to consider evidence concerning the liable defendants' net worth and to assess a punitive damage multiplier for each liable defendant.
Id.
It is important to examine the dynamic involved in the increased filings. Some defendants' lawyers are currently estimating that more than 85% of the 9000 plus cases are being brought by unimpaired persons and that these cases account for a disproportionate share of the new filings. My speculation--and it is only speculation pending further study--is that many people who can claim some occupational exposure to asbestos-containing products but have no impairment and therefore do not feel it worthwhile to file a claim and wait the requisite number of years for their case to advance to trial, nonetheless come forward to file claims when they can gain immediate inclusion in a mass consolidation. In such a consolidation, the individual facts of their claims may well be merged (that is, submerged) into the mass facts. By simply being in the line, they may be able to obtain compensation through a mass settlement or be instant lottery winners by being included in a sampling group. See infra note 255. Moreover, if they end up going to trial it will likely be as part of a group of 10-50 claimants, some of whom will have serious impairments that merit substantial compensation. The unimpaired claimants may anticipate that at least some of them will benefit from the jury's sympathy generated by the seriously impaired claimants. See supra note 19 and infra note 241. This may indeed occur at the expense of the seriously injured. Consider Judge Weinstein's observations regarding the verdicts in the Brooklyn Naval Yard consolidation:
The verdict in this Court indicates that the juries do not, at this moment, necessarily agree with that distinction between pleural cases and the more serious cases because they have granted very high verdicts for the pleural injuries where the amount of incapacity is minimal, if anything, and relatively small verdicts in the mesothelioma cases where the amount of incapacity and harm is very great.
Transcript, supra note 32, at 8.
Finally, there is also the possibility that a small percentage of the unimpaired--perhaps 10-20%--will hit the asbestos lottery and be awarded $100,000 or more. See supra text accompanying notes 156-59; see also Norwood S. Wilner, Asbestos Case Management and the Power of Myth, ANDREWS COMMUNICATIONS SEMINAR 7 (Sept. 1991) (explaining game theory, which predicts that settlement values increase in multiple case situations). Whereas defendants would not be willing to settle for any appreciable amount if these claims were individually litigated, as part of a much larger group, these claimants may well receive far more generous terms. See also Roger H. Transgrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U.ILL.L.REV. 69. The author of Mass Trials, an attorney for one of the defendant's in the Las Vegas MGM Hotel Fire Litigation, notes that
[m]any of the bystander defendants' willingness to settle ... had more to do with the enormous transaction costs and risks created by the mass trial than it had to do with the merits of the claims against them. [The case settlement] is troubling because it is not the result of applying legal principles to defendant conduct but the result of the economics of an extraordinary procedure--the mass trial.
Id. at 85.

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FN[FN232]. In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. 1380, 1387 (E. & S.D.N.Y.1991) (citations omitted); see also Weinstein & Hershenov, supra note 5, at 297 ("If we persist in trying cases on an individual or even small-scale jurisdiction-by-jurisdiction basis, many plaintiffs will die before they are compensated, a great many will wait years, and some may receive nothing as the available monies are dribbled away by earlier awards and transaction costs.").

FN[FN233]. In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. at 1387.

FN[FN234]. Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990) (quoting Arnold v. E. Airlines, 681 F.2d 186, 193 (4th Cir.1982), cert. denied, 460 U.S. 1102 (1983)).

FN[FN235]. See In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. at 1388 (citing In re All Asbestos Cases Pending in the United States District Court for the District of Maryland (D.Md. Dec. 16, 1983)).

FN[FN236]. Id.
Several of these criteria are present in the Brooklyn Navy Yard Cases. A strong geographic nexus tied these asbestos cases together[:] plaintiffs' exposure at one worksite, the Brooklyn Navy Yard. The plaintiffs were represented by a few law firms and sued the same former manufacturers and distributors of asbestos-containing products. Extensive overlap in witnesses, primarily former co-workers attesting to product identification at this worksite and medical and epidemiological experts, saved litigants time and money. The years of exposure spanned the period during which asbestos was utilized at the Navy Yard, beginning in the 1930's through the early 1970's.
Id. However, there is some indication that the jury did not properly distinguish the medical injury claims of the various plaintiffs. See Transcript, supra note 32, at 8.

FN[FN237]. In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. at 1386.

FN[FN238].
At the outset of the trial, each side presented teaching witnesses to educate the jurors generally about asbestos and introduce relevant medical and epidemological studies on its effects. It was anticipated that the same jury would sit in all phases of the trials and therefore special attention was paid to training them.
The jurors were devoted to their work and gave sustained attention to the evidence. They were selected after filling out a searching written questionnaire prepared by counsel and court. Each juror chosen was aware that his or her work would require many months of painstaking effort. Each had a notebook with key documents, a photograph of each injured person and a summary of each case. Each juror took extensive notes using steno pads and pencils supplied by the parties. A photograph of each of the more than hundred and twenty witnesses was made available to the jury to refresh its memory. Summaries of depositions and detailed evidence and witness lists as well as full records of all medical history were sent to the jury room. Interim summations by counsel and short interim changes and explanations during trial were given by the court. Detailed charge sheets of some fifteen pages for each of the seventy-nine cases were filled out by the jurors (a total of more than a thousand pages of questions), enabling them to focus precisely on the issues. Where the law was unclear, alternate questions were put to the jury embodying the different legal theories to avoid the necessity of a retrial. Strict control over experts and extensive video and other depositions were relied on to reduce costs per case and to speed the trials. Much of the documentary evidence was studied by the jury in the jury room, avoiding hundreds of hours of courtroom time. Extensive use of slides, charts and other visual devices assisted the jurors. In all respects able counsel and distinguished expert witnesses on both sides cooperated to lend an air of dignity and clarity to the proceedings. The parties had as fair a trial as the court was capable of giving them.
Id.

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FN[FN239]. See Transcript, supra note 32, at 8.

FN[FN240]. The jury was repeatedly instructed to consider each case individually. Detailed separate verdict sheets were prepared for each plaintiff, greatly minimizing any confusion that might otherwise flow from the consolidation. The time the jury took during deliberations and their sequential requests for medical and other records and reading of testimony in each case attests to their careful and individualized treatment of each cause of action. Their precisely calculated and discriminating verdicts similarly reflect this attention to the variations in the cases. All verdicts were internally consistent and consistent with each other and the evidence.
In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. at 1388.

FN[FN241]. Cain v. Armstrong World Indus., No. 87 Civ. 1172, slip op. at 14 (S.D.Ala. Feb. 18, 1992).

FN[FN242]. After trying the consolidated Cain case, in which the jury's verdict did not appear to distinguish among claimants though their individual claims appeared to vary considerably in terms of age, severity, exposure, et cetera, United States District Court Judge Charles Butler reversed his order consolidating for trial a case with five plaintiffs and twelve defendants. Judge Butler stated:
Although a joint trial of all plaintiffs might promote the interest of judicial economy, the Court is of the opinion that the joint trial of the plaintiffs in each case would be prejudicial since the evidence as to each plaintiff's exposure and injury will vary greatly. Accordingly, the Court will try each plaintiff's claims separately.
Hopper v. Celotex Corp., No. 89 Civ. 00768-B, slip op. at 1-2 (S.D.Ala. June 17, 1991).

FN[FN243]. See Richard A. Chesley & Kathleen Woods Kolodgy, Mass Exposure Torts: An Efficient Solution to a Complex Problem, 54 U.CIN.L.REV. 467, 507 (1985) ("In large scale mass tort actions, it is unlikely that any jury could reasonably determine the damages of hundreds of plaintiffs.") (citation omitted); see also Klager v. Inland Power & Light Co., 1 F.R.D. 114 (W.D.Wash.1939) (court refused to consolidate 32 flood damage claims because it determined that thirty-two separate adjudications of proximate cause and damages would overburden any jury); Comment, Consolidation in Mass Tort Litigation, 30 U.CHI.L.REV. 373, 378-79 (1963) (explaining that convenience factors weighing in favor of consolidation must be balanced against the possibility of prejudice resulting from jury confusion); Report, supra note 1, at 39 (Hogan, J., dissenting).

FN[FN244]. See In re Fibreboard Corp., 893 F.2d 706 (5th Cir.1990). In Fibreboard, although the court expressed understanding of the view that mass trials are the only realistic means to try asbestos cases, it denied certification for a class of 2,990 asbestos claimants. The court maintained that those compelling arguments should be addressed to Congress and State Legislatures, as "[t]he Judicial Branch can offer the trial of lawsuits.... [T]he procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not." Id. at 712 (emphasis added). See also In re Allied-Signal, Inc., 915 F.2d 190, 192 (6th Cir.1990) (nullifying an attempt by Judge Lambros of the District Court for the Northern District of Ohio to create a "national resolution to the asbestos- related personal injury litigation") (citation omitted). In another case, In re Ohio Asbestos Litig., OAL No. 96, 1990 U.S.Dist. LEXIS 15032 (N.D.Ohio July 16, 1990), Judge Lambros sought to establish a national class action in asbestos injury cases, explaining that his court has the largest concentration of asbestos cases in the federal and state court systems--7,000 cases with 13,000 claims pending. Id. at *1. Judge Lambros suggested that the defendants could attain beneficial effects by consolidation that would enable them to expend their economic resources on research and development rather than on processing claims. Id. at *3. This rationale appears to ignore the near insurmountable burdens placed on the jury as well as the enormous potential financial burdens placed on defendants.

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FN[FN245]. 751 F.Supp. 649 (E.D.Tex.1990).

FN[FN246]. Id. at 651.

FN[FN247]. Id. at 651-52.

FN[FN248].
"The great challenge presented to the Court by this litigation is to provide a fair and cost effective means of trying large numbers of asbestos cases. It is not enough to chronicle the existence of this problem and to lament congressional inaction. The litigants and the public rightfully expect the courts to be problem solvers."
Id. at 652.

FN[FN249]. These 2,300 claims were filed as a result of the screening of thousands of oil-refinery workers by Dr. Gary Friedman who owns the Texas Lung Institute in Beaumont, Texas, a corporation which is primarily devoted to screening workers referred by plaintiffs' attorneys and unions. Oliver & Spencer, supra note 3, at 77. The Texas Lung Institute "has earned at least $4 million in revenues since 1984. As an expert witness for the plaintiff, Friedman himself earns an additional $3,500 a day when he testifies." Id. at 78. Among the 2,300 claims filed, the Institute diagnosed 32 mesotheliomas, 1,047 cases of asbestosis, 186 lung cancers, 57 other cancers and 972 cases of pleural thickening. Doctors who reexamined the plaintiffs for the defense found that more than 50% of those reexamined showed no signs of asbestos exposure. Moreover, oil refinery workers have a lower incidence of cancer than does the general population. Id. at 77-78.

FN[FN250]. Cimino, 751 F.Supp. at 653. Judge Parker dispensed with the issue of proof--whether asbestos is inherently dangerous--noting that "every institution, apart from the courts" that has examined asbestos finds it to be so. Id. at 652.

FN[FN251]. Id. at 653.

FN[FN252]. Id. at 657-58.

FN[FN253]. Id. at 653.

FN[FN254]. Id. at 654.

FN[FN255]. Id. at 653. According to defendants, the sample cases selected for trial were weighted in favor of the plaintiffs. Although 1.4% of the whole group had been diagnosed with mesothelioma, 9% of the sample group had mesothelioma. Moreover, Judge Parker did not permit the jury to hear evidence regarding the more than 2,000 cases not in the sample groups. Id. at 665.

FN[FN256]. Id.

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FN[FN257]. Id. For the view that the Cimino aggregation techniques-- sampling cases from the total asbestos claims filed within a jurisdiction, trying the sample and then extrapolating the results of those cases, and applying them to the remainder of the claims without subjecting those plaintiffs to individual trials--have the potential to achieve a higher level of accuracy than is possible in traditional individual trials, see Michael Saks & Peter Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 STAN.L.REV. (forthcoming 1992). The extrapolation to the nontrial group in Cimino meant that such variables as age, smoking, exposure history, severity, degree of impairment, et cetera were not taken into account for the nontrial group. This factor is not discussed in the Saks and Blanck piece which primarily focuses on the accuracy of the Cimino methodology. My focus in this Article is on the validity of the process used by Judge Parker.

FN[FN258]. Oliver & Spencer, supra note 3, at 78.

FN[FN259]. Supra note 249.

FN[FN260]. See supra note 204.

FN[FN261]. 769 F.Supp. 85 (E. & S.D.N.Y.1991).

FN[FN262]. Defendants almost always object to consolidations.

FN[FN263]. A typical trial day involves plaintiff's counsel putting on one of the fifty plaintiffs or a coworker who will testify as a witness. The direct examination takes from one to two hours. Owens-Corning Fiberglas then cross-examines the witness for two to four hours in a tedious site-by-site examination geared at inculpating the other defendants and third-party defendants. A handful of the remaining defendants then cross-examine the witness in an attempt to undo any damage done them by the Owens-Corning Fiberglass cross-examination. Then the third-party defendants, principally the utility companies, question the party or witness, seeking to inculpate Owens- Corning Fiberglas specifically and the other defendants generally, while painting themselves as victims, like the plaintiffs, of the manufacturing defendants. Then there is re-direct, re-cross by Owens-Corning Fiberglas and other defendants and re-cross by the third-party defendants. The day ends with the witness having been exhaustively and tediously examined about every site that he ever worked at in his forty-year career and his exposure to asbestos at each and every site. Trial began on April 1, 1991. Those assembled on a typical day include seven plaintiffs' lawyers, fifteen defendants' lawyers, and fifty to one-hundred third-party defendants' lawyers sitting (and, on a crowded day, standing) behind the rail in the public seating section. The likelihood that at least 10-30% of the lawyers in attendance are superfluous is great. Collectively, the defendants' bill is accumulating at the rate of $15,000 to $30,000 per hour, and including other staff working on the cases, at the rate of $150,000 to $300,000 per day. The Ad Hoc Committee Report refers to a federal court trial involving four plaintiffs but between 41 and 58 lawyers and legal billings of $3-7 million. Report, supra note 1, at 12-13.

FN[FN264]. The twelve jurors consist of postal workers, government workers, and housewives. During the examination, the jurors take notes in one of the three binders they each juggle in their laps. Each has a plaintiffs' binder, a defendants' binder, and a work-site binder. Note taking varies widely by juror; some are copious note takers, while others rarely open their binders. The trial is expected to last through January 1992 for the first 50 of the 882 cases.

FN[FN265]. See, e.g., supra note 19. Settlement by Owens-Corning Fiberglas would yield the greatest

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ameliorative effect on the jury's burden since that would eliminate most third-party claims.

FN[FN266]. See, e.g., OI PROSPECTUS, supra note 43; KEENE CORP., 1990 ANNUAL REPORT 4 (1991).

FN[FN267]. Injury manifestation would, of course, have continued.

FN[FN268]. See supra note 51.

FN[FN269]. Supra note 53. There has been substantial litigation brought by insureds against insurance companies in the course of asbestos litigation. See, e.g., Keene Corp. v. Ins. Co. of N.Am., 667 F.2d 1034 (D.C.Cir.1981), cert. denied, 456 U.S. 951 (1982). A number of such suits are currently underway and may substantially enlarge the pool of money available to claimants. See also OI PROSPECTUS, supra note 48, at 49, in which coverage of $960 million has been determined by an April 1990 summary judgment in one case. In addition, a number of the insurance coverages for asbestos defendants provide for unlimited defense costs until the underlying coverage is consumed. Accordingly, a calculation of the extent of insurance coverage is necessarily tentative and is significantly impacted by pending litigation against insurers.

FN[FN270]. Successors are generally held liable for acts of their acquired companies if the asset acquisition falls into one of four generally recognized categories: "1) the successor expressly or impliedly assumes the predecessor's liabilities; 2) the predecessor and successor consolidate or merge; 3) the successor is a mere continuation of the predecessor; or 4) the transaction is a fraudulent attempt to escape liability for the predecessor's obligations." Keith A. Ketterling, A Proposal for the Proper Use of Punitive Damages Against a Successor, J.CORP.L. 765, 765-66 (1986). See, e.g., Shannon v. Samuel Langston Co., 379 F.Supp. 797, 801 (W.D.Mich.1974). Since these four factors create such a low threshold, some commentators have argued that the form of the acquisition should not dispositively prove whether that successor should be held liable. James A. Barringer, Note, Expanding the Liability of Successor Corporations, 27 HASTINGS L.J. 1305, 1309 (1976). Nonetheless, these are commonly used criteria. See, e.g., Bardere v. Zafir, 477 N.Y.S.2d 131, 135 (N.Y.App.Div.), aff'd, 482 N.Y.S.2d 261 (1984).

FN[FN271]. See supra note 51. That asbestos companies were not aware of the liabilities they were assuming by acquiring these manufacturers is established by the fact of the acquisition. No profit-motivated corporation would have purchased an asbestos manufacturer had it even remotely been aware of the extent of the liability that it was acquiring. Moreover, since most of the relevant acquisitions took place in the 1950s and 1960s, the acquiring companies could not then have known that the acts of the companies being acquired, which took place mainly in the 1940s, 1950s, and 1960s, would come to be judged by radically different legal standards to be created in the 1970s and 1980s. See supra note 23.

FN[FN272]. See Barry Levenstam & Daniel Lynch, Punitive Damages Awards Against Successor Corporations: Deterrent of Malicious Torts or Legitimate Acquisitions?, 26 TORT & INS.L.J. 27 (1990).

FN[FN273]. When successor liability is imposed in a situation where the acquiror did not and could not have known of the liability accompanying the acquisition, the effect is not to punish the bad actor but rather to punish all acquirable companies.

FN[FN274]. Cf. RICHARD NEELY, THE PRODUCT LIABILITY MESS 4 (1988).

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FN[FN275]. Under successor liability, a billion dollar corporation can buy a company for one million dollars and end up with far more than a billion dollars in liability without ever having knowingly contemplated that it was assuming a liability of such magnitude.

FN[FN276]. See supra notes 209-65 and accompanying text.

FN[FN277]. See Kevin F. McCarthy, Comment, Killing the Son for the Sins of the Father: The Impropriety of Punitive Damages Against a Successor Corporation, 1986 ARIZ.ST.L.J. 101, 125 ("Imposing punitive damages on a successor corporation is inconsistent with the role of punitive damages.").

FN[FN278]. JOSEPH A. ARTABANE & CATHERINE R. BAUMER, DEFUSING THE ASBESTOS LITIGATION CRISIS: THE RESPONSIBILITY OF THE U.S. GOVERNMENT 4 (1986). One hundred and thirty-one shipyards operated on a twenty-four hour-a-day, seven- day-a-week schedule, building 7,000 ships and performing 67,000 repairs. Id.

FN[FN279]. On June 7, 1939, Congress enacted the Strategic and Critical Materials Stock Piling Act, whose purpose was to:
provide for the common defense by acquiring stocks of strategic and critical materials essential to the needs of industry for the manufacture of supplies for the armed forces and the civilian population in time of a national emergency, and to encourage, as far as possible, the further development of strategic and critical materials within the United States for common defense.
Strategic and Critical Materials Stock Piling Act, Pub.L. No. 76-117, 53 Stat. 811 (1939) (codified as amended at 50 U.S.C. § § 98, 98h-4 (1988). Asbestos was one of twenty-nine substances regulated by the Act.

FN[FN280]. The War Production Board established a special division termed the Cork, Asbestos & Fibrous Glass Division to: plan, direct, and coordinate the policies and programs of War Production Board to provide and maintain an adequate supply of cork, asbestos and fibrous glass to fill national defense and civilian needs. Such programs are designed to provide for adequate and maximum production, necessary conservation and effective distribution and utilization of [these] products. These functions are executed through gathering fundamental data ... [on] stockpiles...."
CORK, ASBESTOS & FIBROUS GLASS DIVISION, WAR PRODUCTION BOARD, BUDGET ESTIMATE FOR FISCAL YEAR 1944, at 2 (1944), reprinted in ARTABANE & BAUMER, supra note 278, at 32-33. The government assumed substantial control over private shipyards as well. FREDERIC C. LANE, SHIPS FOR VICTORY 108 (1951).

FN[FN281]. Conservation Order M-123, § 1172.1(e), 7 Fed.Reg. 2472 (1942).

FN[FN282]. For example, in 1939, the Surgeon General of the Navy reported:
Asbestosis is an industrial disease of the lungs incident to the inhalation of asbestos dust for prolonged periods.
[W]orkers in the Pipe-Covering and Insulating Shop [of the New York Navy Yard] are exposed to the inhalation of asbestos dust.... Special attention is given to the working conditions in hazardous occupations such as ... asbestos pipecovering.... ANNUAL REPORT OF THE SURGEON GENERAL, U.S. NAVY, CHIEF OF THE BUREAU OF MEDICINE AND SURGERY, TO THE SECRETARY OF THE NAVY CONCERNING STATISTICS OF DISEASES AND INJURIES IN THE UNITED STATES NAVY

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YARD FOR THE CALENDAR YEAR 1939 24 (1941) reprinted in ARTABANE & BAUMER, supra note 278, at 14.
After a survey of one of the government shipyards in 1941, a team of surveying scientists concluded:
[W]ork at the asbestos shop created a very real asbestos hazard, as the dust and fibres were found all over the shop on rafters, machines, benches and on the workmen's clothing. The most dusty processes should be segregated into a well-ventilated room and periodic examinations of the workers' chests should be made.
Industrial Health Survey of South Portland Ship Corp. and the Todd-Bath Iron Works, South Portland, Maine, Sept. 18, 1942, at 11-12, reprinted in ARTABANE & BAUMER, supra note 278, at 15.

FN[FN283]. See Industrial Health Survey of the Bath Iron Works Corporation, Bath, Maine, Sept. 22, 1942, at 12, reprinted in ARTABANE & BAUMER, supra note 278, at 15-16 (reporting that the conditions in one pipecovering shop presented a hazard and the home-made exhaust system therein had "practically no effect as dust spreads in all directions.")

FN[FN284]. See In re Eastern & S. Dists. Asbestos Litig., 772 F.Supp. 1380 (E. & S.D.N.Y.1991) stating that:
During World War II and for the next thirty years thereafter, thousands of [Brooklyn Navy Yard] workers were exposed to dangerous airborne asbestos fibers without being advised of the potential health consequences. The Navy, though aware of the hazards posed by asbestos dust, in its urge to build its warships as quickly as possible, did not inform workers of the dangers and neglected to take available protective precautions. The United States now disclaims liability from behind its shield of sovereign immunity. Those injured have therefore turned to the manufacturers for redress, basing their claims on lack of warning on products or packaging.
Even after World War II, the Government sold asbestos fiber from Government stockpiles; other asbestos-containing materials were supplied to the Government in compliance with Government contract specifications mandating the use of asbestos-containing materials. As late as 1979, U.S. Navy officials maintained that it was impossible to build naval vessels without asbestos.
Id. at 1384.

FN[FN285].
My meeting with Mr. Bard was specifically due to the fact that Captain Fisher had written a letter to Dr. Selby inviting him to make a survey of Navy Yards, with particular reference to health hazards....
....
I told him that I had spoken to you and that you had indicated that President Roosevelt thought that this might not be the best policy, due to the fact that they might cause disturbance in the labor element....
None of our foundaries would pass the necessary inspection to obtain workmen's compensation insurance from any of the insurance organizations. I doubt if any of our foundaries would be tolerated if the State industrial health people were to make surveys of them.
See Memorandum from C.S. Stephenson, Commander, U.S. Navy, to Admiral McIntire, Mar. 11, 1941, at 1. (on file with author); see also Transcript, supra note 32:
The evidence indicated that Government, particularly during the war years, was aware of the fact that the work of these men and women exposed them to asbestos with a serious risk they would be injured or die.
The Government, however, allowed the work to continue without adequate protection of the workers in order to expedite the production of ships for the war and cold war.
The evidence produced indicates that these risks were known to Government officials at least as high as the highest Navy personnel and probably known to the President of the United States.
Id. at 3.

FN[FN286]. 5 U.S.C. § § 8101-8193 (1988).

FN[FN287]. 41 U.S.C. § § 35-45 (1988).

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FN[FN288]. "Well, let me cut through a lot of this and tell you there's no doubt in the Court's mind--the Southern District and Eastern District's Court's mind, anyway, that the Government is primarily responsible as a factual matter." Transcript of Hearing Before Hon. Jack B. Weinstein at 16, In re New York Asbestos Cases, (E.D.N.Y. July 12, 1990) (Tr. No. TS 90-9999).

FN[FN289]. Claims for the indemnification of manufacturers have been brought against the government under the Court of Claims Act, 28 U.S.C.A. § 1491 (West Supp.1991), which confers jurisdiction on the Claims Court to hear contract claims against the United States for sums over $10,000 and under the Federal Tort Claims Act, 28 U.S.C. § § 1346(b), 1965, 1967, & 2671- 2680 (West Supp.1991), which waives the sovereign immunity for tort claims against the United States and confers jurisdiction on federal district courts to hear the claims. A broad exception lies in the "discretionary function" clause, Id. § 2674, which excludes claims based upon an act or omission of an employee of the United States government in the execution of a statute or regulation or discretionary function or duty. This has been held to exclude government liability for its shipyard activities. Eagle-Picher Indus. v. United States, 937 F.2d 625 (D.C.Cir.1991); In re Eastern & S. Dists. Asbestos Litig., 891 F.2d 31 (2d Cir.1989); In re All Maine Asbestos Litig., 655 F.Supp. 1169 (D.Me.1987), aff'd in part and vacated in part, 772 F.2d 1023 (1st Cir.1985), cert. denied sub nom. Raymark Indus. v. Bath Iron Works Corp., 476 U.S. 1126 (1986).

FN[FN290]. The United States Court of Appeals for the District of Columbia Circuit recently reaffirmed the availability of federal court subject matter jurisdiction for claims for contribution from the Federal Government in state court actions. See Eagle-Picher Indus. v. United States, 937 F.2d 625 (D.C.Cir.1991). Defendants may also implead the United States under the Federal Tort Claims Act. 28 U.S.C.A. § 1491 (West Supp.1991). In such cases, the government is liable to the extent a private employer in like circumstances would be liable and its sovereign immunity is waived with respect to federal employees for whom substantive state law grants a right of recovery. See id.; see also In re All Maine Asbestos Litig., 655 F.Supp. at 1170-71. New York substantive law grants such a right of recovery. Gregory v. Garrett Corp., 578 F.2d 871 (S.D.N.Y.1983).

FN[FN291]. See Report, supra note 1.

FN[FN292]. The use of pleural registries would accomplish at least some of these goals. See Peter Schuck, supra note 5. It would not, however, deal with the disputed asbestosis claims. See supra notes 119-25. That could be met by the use of court-appointed medical experts in place of plaintiffs' and defendants' experts. See supra note 120.

FN[FN293]. "Please don't shoot the piano player ... unless you can play the piano."

FN[FN294]. Brickman, supra note 14.

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Agenda E-23 (Summary)
Asbestos Litigation
March 1991

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

AD HOC COMMITTEE ON ASBESTOS LITIGATION

The Ad Hoc Committee on Asbestos Litigation recommends that the Conference:

1. Recommend that Congress consider a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes, with the objectives of achieving timely appropriate compensation of present and future asbestos victims and of maximizing the prospects for the economic survival and viability of the defendants.....pp. 27-35

2. Recommend as a back-up position, that Congress consider legislation to expressly authorize consolidation and collective trial of asbestos cases in order to expedite disposition of cases in federal courts with heavy asbestos personal injury caseloads.....pp. 36

3. Direct the Director of the Administrative Office--

   a. to monitor asbestos litigation in federal courts; to collect materials and information relative to asbestos injuries and litigation, including records of trials with copies of orders, depositions and documents that would be helpful to judges in asbestos trials; and to supply information to judges on asbestos litigation issues when requested;

   b. to make all reasonable efforts to supply additional funds and assistance to meet unusual needs for clerical and administrative personnel created by proceedings in asbestos cases.....pp. 36-37

4. Request the Executive Committee of the Judicial Conference to assign a Committee of the Conference the responsibility to oversee the development of the clearinghouse within the Administrative Office to monitor asbestos litigation and legislation and to report to the Conference on developments and propose remedies.....pp. 37

5. Request the Standing Committee on Rules of Practice and Procedure to direct its Advisory Committee on Civil Rules to study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation.....pp. 37-39

See dissenting statement by Judge Thomas Hogan.....pp. 41-43

Agenda E-23
Asbestos Litigation
March 1991

REPORT OF THE JUDICIAL CONFERENCE

AD HOC COMMITTEE ON ASBESTOS LITIGATION

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Ad Hoc Committee on Asbestos Litigation met three times since the members were appointed in September 1990. The first meeting of the committee was held in Marco Island, Florida October 25, 1990. The following two meetings of the committee were held in Washington, D.C. on December 10, 1990 and January 17, 1991. All members have been active participants in the deliberations of the committee.

The committee was also assisted by the staffs of the Administrative Office of the United States Courts and the Federal Judicial Center, including James E. Macklin, Jr. (AO); James G. Apple, (FJC); Thomas Willging, (FJC); Alan Hirsch, (FJC); Arthur White, (AO); Robert S. Peck, (AO); Abel Mattos, (AO); Paul Summitt, (AO); and Karen Kremer, (AO).

I. Introduction

The committee has struggled with the problems confronting the courts of this nation arising from death and disease attributable to airborne asbestos industrial materials and

products. The committee has concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively.

After extensive study, the Institute for Civil Justice of the Rand Corporation in 1985 observed, with respect to how the civil justice system handles asbestos claims, that--

> The picture is not a pretty one. Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.[1]

The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments - if ever obtained - can be collected.

It is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.[2]

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

It is easy to describe the problems. It is not so easy to fashion an appropriate remedy in the context of our federal system.

The committee firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem in both federal and state courts and creating a national asbestos dispute resolution scheme that permits consolidation of all asbestos claims in a single forum -- whether judicial or administrative -- with jurisdiction over all defendants and appropriate assets.

The committee recognizes that virtually all of the issues relating to a so-called "national solution" are primarily matters of policy for the Congress on which the Judicial Conference would ordinarily be reluctant to take a position. It involves special treatment of an area of tort liability traditionally within the province of the states, and the Conference has generally declined to take a position on legislative proposals, such as product liability, that alter state law in favor of uniformity. Accordingly, while the committee has identified a number of

issues Congress m want to consider, it has refully avoided suggesting that the Conference take a position on the specifics beyond consolidation. The committee has concluded that the Conference should recommend that Congress consider a national asbestos dispute resolution scheme and await specific legislative proposals for further evaluation and comment.

In the event Congress elects not to provide a national treatment for asbestos claims, the committee recommends to the Conference that a fall-back position be approved to improve the ability of the federal courts with heavy asbestos caseloads to meet the challenge upon them.

Finally, the committee makes several recommendations relating to Administrative Office support for the current effort to process asbestos litigation in the federal courts and recommends a review of mass tort issues in general by the Advisory Committee on Civil Rules.

In making these recommendations the committee relies on the fact that the federal courts are fast becoming participants in a major disaster for victims and asbestos business interests that must be faced, and faced now, by the courts and by Congress. At the same time, or failing congressional action, the federal judiciary must itself act now to achieve the best performance possible from the system under current law.

II. Asbestos: Undeniably Dangerous

Asbestos is a dangerous substance which has caused an epidemic of occupational disease among workers exposed to it

since its widespread use in industry during and after World War II.[3] A 1970 Senate Report on the Occupational Safety and Health Act stated that asbestos is a "material which continues to destroy the lives of workers . . . Because nothing has been done about the hazards of asbestos, even after the association of asbestos and lung cancer was first reported in 1935, 20,000 out of the 50,000 workers who have since entered one asbestos trade alone - insulation work - are likely to die of asbestosis, lung cancer or mesothelioma. Nor is the potential hazard confined to these workers, since it is estimated that as many as 3.5 million workers are exposed to some extent to asbestos fibers, as are many more in the general population."[4]

Since the 1970s asbestos has been the subject of much regulation and has either been banned or declared hazardous by numerous federal agencies. In a study of asbestos-containing materials in public schools published in 1988, the Environmental Protection Agency (EPA) declared asbestos "extremely hazardous."[5] Subsequently the EPA established a broad ban, beginning in 1990, on the manufacture, processing, importation, and distribution of materials or products that contain asbestos.[6]

Other federal and state agencies warn of the dangers of asbestos. The commentary on regulations promulgated by the Occupational Safety and Health Administration in 1986 stated that "OSHA is aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure. The diseases

caused by asbesto xposure are life-threaten g or disabling. The U.S. Chronic Hazard Advisory Panel on Asbestos reported to the Consumer Product Safety Commission in 1983 that "the Commission should regard asbestos at all levels of exposure as a potential human carcinogen".[8]

At a public hearing in 1984 the National Institute for Occupational Safety and Health (NIOSH) reported its conclusion that "asbestos is a carcinogen capable of causing, independent of smoking, lung cancer and mesothelioma."[9] The EPA and NIOSH together in 1986 stated unequivocally that "asbestos is a known human carcinogen for which no level of exposure is known to be without risk. Single exposures may even present a health risk to some individuals."[10] The Second Annual Report of the New York State Asbestos Advisory Board, issued in 1990, emphasized that "great care and enormous caution" must accompany efforts to remove asbestos from buildings in New York to avoid "a new epidemic of asbestos related disease in the citizens of New York State."[11]

Estimates vary as to the number of persons who have been exposed to asbestos through occupational activities. In 1978 the U.S. Department of Health, Education and Welfare estimated that between eight and 11 million workers were exposed since World War II.[12] One insurance company estimated that since the 1940s, more than 13 million workers have been exposed.[13] The Fifth Circuit, in *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), cited a 1982 independent report prepared for the U.S.

Department of Lab that placed the number of Americans significantly exposed to asbestos at 21 million.[14]

In 1981 a leading medical expert on asbestos related disease, Dr. Irving Selikoff, estimated that there would be 200,000 asbestos disease deaths before the year 2000.[15] Dr. Selikoff now believes that the number of deaths will be substantially higher than he first predicted.[16]

III. Asbestos Caseload: A Growing and Unacceptable Backlog

An asbestos case attorney wrote to this committee that "one point on which plaintiffs' counsel, defense counsel and the judiciary can agree is that the present way in which we have attempted to resolve asbestos cases has failed." We believe that assessment is undeniable.

A. Volume

The tide of asbestos personal injury and wrongful death litigation in federal and state courts in the 1970s and 1980s continues to rise unabated and has not begun to crest.

In the federal court system alone during the five-year period beginning with statistical year 1984 (SY) and ending with statistical year 1989, 39,812 asbestos cases were filed, while 5,387 cases were pending from previous years. An additional 13,687 federal cases were filed in the one-year period ending June 30, 1990, an average of 1,140 per month.[17] Overall, 6.28 percent of all civil filings in the federal court system in 1990 were asbestos related.[18] In individual districts these figures

are even more compelling. For example, in the Eastern District of Texas, 34.1 percent of 1990 civil filings were asbestos related.

The nation has recognized that courts are under extreme pressure because of the increased volume of criminal cases. It may be helpful to compare the volume of asbestos cases being filed with criminal case filings. Nationwide, federal asbestos case filings in 1990 were almost a third of 1990 criminal filings.

In several districts there were significantly more new asbestos filings than there were criminal filings, ranging from 454 percent in the Eastern District of Texas to 174 percent in the Eastern District of Virginia.

Not only is asbestos a significant part of the caseload in many federal judicial districts, but substantially more cases are filed than are terminated, producing an enormous and ever-increasing backlog. According to the most recent available statistics, in 1990 there was a backlog of 30,401 federal asbestos cases, a 20 percent increase over the previous year. *The current national ratio of asbestos filings to terminations in the federal court system is 1.85 to 1; for every asbestos case terminated, nearly two new cases are filed.*[19] At the present rate of filings and terminations in the federal courts there will be 48,086 cases pending at the end of three years.

Complete information about asbestos litigation in the state courts is not available. The information that is available, however, suggests that the asbestos litigation problem in many state courts is at least as acute as it is in the federal courts. In 1989 Judge Marshall A. Levin, a state court judge in Baltimore, Maryland, who has been assigned all pending asbestos cases there, estimated the number of asbestos cases pending solely in Baltimore at 3,500. By March 1990 that number had increased to 6,000, with plaintiffs' attorneys moving to transfer another 3,000 cases from other Maryland courts.[20] An informal survey of counsel for the major asbestos manufacturers suggests that the number of state asbestos case filings nationwide is approximately twice that in the federal courts.[21]

The statistics also reveal a change in the nationwide demographics of asbestos litigation. In 1984, when the Federal Judicial Center held its first asbestos conference, asbestos litigation in the federal courts was largely concentrated in only four district courts.[22] Since that time, however, asbestos cases have infiltrated virtually every federal district. Asbestos litigation must therefore be viewed as a national problem rather than merely a local or regional one, especially with the number of Americans affected.

Despite the dispersal of asbestos cases, a small number of districts still bear the burden of a majority of the litigation. The latest available statistics from the Administrative Office reveal that of the 30,401 cases pending in the 94 federal

district courts, six districts have more than 1,000 asbestos cases each. For example, the Eastern District of Pennsylvania has 4,909 cases pending. Another seven districts have more than 500 such cases, and an additional 12 districts have more than 200. A total of 36 districts of the 94 districts in the federal court system have more than 100 cases pending.

B. Delay

The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases.

The Civil Justice Reform Act of 1990 sets 18 months (approximately 540 days) as a target for processing civil cases.[23] On average, courts meet that standard for non-asbestos litigation. For example, between SY 1983 and SY 1989, 446 days (almost 15 months) was the average time from filing to disposition for "other personal injury" cases.[24] On average, even the more complicated non-asbestos products liability cases meet the 18-month standard, spanning an average of 543 days from filing to disposition for the same period.

Asbestos litigation, however, does not come close to meeting the 18-month standard. Prior to SY 1987, the average period from filing to disposition in ten courts with heavy asbestos caseloads was 773 days (or almost 26 months).[25] In SY 1987 to SY 1990 in those same ten courts, the time from filing to disposition grew to 860 days (almost 29 months). Looking at all

courts for the pe d between SY 1983 and SY 89, asbestos cases took an average of 926 days (or almost 31 months) from filing to disposition.

In part, the delay is caused by the complexity of asbestos litigation. The 1985 Rand study noted that "a typical asbestos case involves a claim against an average of 20 defendants who file cross-claims against each other, a lengthy discovery process, including record searches and specialized medical exams, . . ."[26] Thirty or more legal issues can be presented in the course of a single asbestos case.[27] The long latency period of asbestos caused disease complicates issues of causation. Identification of the particular products causing the diseases can be difficult. When the lack of a warning of dangerousness (which depends upon when the defendant should have known) is contested, the plaintiff must introduce extensive and ancient evidence.

One example of the complexity of these cases is the *Cimino v. Raymark Industries*[28] trial in the Eastern District of Texas. During the pendency of *Cimino*, the court signed 373 pretrial and trial orders, there are 529 pages of docket sheets and over 3,000 depositions were taken. The trial transcript had 25,348 pages, 271 expert and 292 fact witnesses testified, and 6,176 exhibits consisting of 577,000 pages were received in evidence.

During the pendency of the *Cimino* litigation, 488 of the original plaintiffs died. Under these circumstances, the principle of "justice delayed is justice denied" has added meaning.

For asbestos claimants who survive until a trial date, delays of two to three years may result in inadequate resources for medical care or for family living expenses during an extended period of disability. Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in *Cimino*, at least seven defendants had declared bankruptcy (as a result of asbestos claims generally).

The parties in asbestos cases are not the only parties affected by the asbestos docket. Districts with heavy asbestos caseloads necessarily experience increased delays in other civil matters. The demands inherent in asbestos litigation continue to deplete limited judicial resources that otherwise would be available for other litigants in the federal courts.

C. Costs

The recently concluded Cleveland, Ohio consolidated asbestos trial *Reeves v. American Export Isbrandsten*,[29] provides a good example of the enormous costs resulting from asbestos litigation. The trial ultimately involved four plaintiffs and 117 defendants and third-party defendants, and lasted approximately one month.

At one point there were 58 lawyers in the courtroom; the smallest number of lawyers in the courtroom at any one time during the trial was 41. Presiding Judge Thomas Lambros estimated the transaction costs for this one trial as between three and seven million dollars.

Other recent asbestos cases provide similar insights into the transaction costs involved. In *Cimino*, 58 lawyers participated in the presentation of the evidence during the 133 days of trial. In *In re School Asbestos Litigation*, 231 lawyers are listed as counsel of record. There were 100 lawyers listed as counsel of record in the recently concluded Brooklyn Navy Yard asbestos trial in the Southern District of New York.[30]

The transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease. The 1984 Rand Corporation study of asbestos litigation expenses stated that of each asbestos litigation dollar, 61 cents is consumed in transaction costs, i.e., witness and attorneys' fees, of which 37 cents represents defendant litigation costs. Only 39 cents were paid to the asbestos victims.[31] There is no indication that the situation has improved.

Eagle-Picher Industries Inc., now in Chapter 11 bankruptcy proceedings, reported that during 1989 its litigation and attorneys' costs for the approximately 137,000 claims pending against it were $119.7 million.[32]

The enormous costs associated with asbestos litigation affect not only the parties but communities and other individuals across the nation. Among the approximately 25 major asbestos defendants, 11 have filed for bankruptcy.[33] These corporations employ thousands of workers and have plants throughout the United States.

The nature of the asbestos litigation described above -- the large volume of cases and the resulting delays and costs -- have resulted in a denial of justice and fundamental unfairness to litigants. Justice is denied because claims cannot be evaluated and either dismissed, paid, or litigated in a reasonable time frame. Unfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims. This situation demands immediate remedy.

IV. Asbestos Litigation: Unsatisfactory Resolution

Judges have diligently sought new procedures for resolving asbestos cases more quickly, including the development of aggressive case management systems and innovative trial techniques. Unfortunately, this "trial and error" method of adjudicating asbestos claims has only proved the inability of the courts to meet the demands of the expanding asbestos caseload. As the discussion to follow will demonstrate, it is clear that our existing system cannot respond adequately to the unique demands of asbestos litigation. It should not be said that the asbestos problem would disappear if judges would only work harder and apply appropriate case management techniques.

A. Current Asbestos Litigation Techniques

The current methods of handling asbestos cases in the federal courts may be classified under the following headings: (1) standard pretrial and trial management; (2) consolidation; (3) class actions; (4) collateral estoppel; (5) alternative dispute resolution (ADR); and (6) inactive dockets.

1. Standard Pretrial and Trial Management

Judges who oversee large asbestos dockets have developed standard pretrial techniques in an attempt to manage the flow of cases. Judge Charles Weiner, the asbestos case manager in the Eastern District of Pennsylvania, is able to call upon over 20 active and senior judges in the district to handle asbestos cases on a priority basis. In addition to mandating standard, abbreviated pleadings, such as complaint, answer, and discovery requests, Judge Weiner meets regularly with counsel and handles on a regular basis all motions and discovery requests. Applying these sophisticated case management techniques, Judge Weiner and his colleagues have disposed of more than 2,000 cases through 1990. Despite this efficiency, however, the number of pending cases in that district is approximately 5,000. There was a 45 percent increase in the number of pending cases in the SY 1990; there were 1,241 new filings and only 614 terminations in that year. That court was not able to complete terminations of cases filed in 1986 until 1989; Judge Weiner expects to complete all of the 1987 cases early in 1991. Thus, case disposition time in that district now will require approximately three years.

In the Northern District of Ohio, Judge Thomas Lambros created a case management program called the Ohio Asbestos Litigation (OAL).[34] Adding to the standardized discovery and pretrial scheduling formats, OAL included a computer-based case evaluation system that matched cases by common characteristics (e.g., age, disease, work site) and displayed a range of settlement values from prior settlements or trials.[35] Use of these evaluations produced settlements at a relatively early stage in the pretrial process. Between June 1983 and June 1989, the court terminated 3,082 cases. Despite these successes, however, only 56 cases were terminated in the Northern District of Ohio in SY 1990, and that district still has a hugh backlog of cases.

Other judges with large asbestos case dockets have similarly created case management programs to deal with the voluminous paperwork and unnecessary duplication of motions and discovery and to speed the course of trials. These judges have also crafted standard rulings to govern repetitive legal issues, employed such techniques as bifurcation, trifurcation, and reverse bifurcation and trifurcation of issues for trial, and provided notebooks for jurors at trial with witness photographs, testimony summaries and copies of all exhibits.[36] Such procedures have streamlined existing litigation, but have not resolved the problem of the growing backlog of cases.

2. Consolidation

A major case management tool that judges have used in asbestos litigation is consolidation for pretrial and trial under Fed. R. Civ. P. 42(a). This rule allows the trial judge to manage the docket in a way that benefits not only the courts, but also the parties and counsel, by avoiding unnecessary duplication. Consolidations have been used in a number of asbestos cases, and have met with the approval of the appellate courts. See, e.g., *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985); *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357 (E.D. Pa. 1982), aff'd *sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3rd Cir. 1985). In *Hendrix*, the court noted that the asbestos claims in that case "present precisely the kind of tort claims a court should consider consolidating for trial."[37] However, this case involved the consolidation of only four cases, which is an inadequate response to the growing number of cases now pending in the federal courts.

Judge Robert Parker's experience in trying asbestos cases in the Eastern District of Texas included experimentation with various trial groupings to deal with the massive caseload in that district. As of 1984, the asbestos caseload in the Eastern District of Texas was already over 1,000. Judge Parker first consolidated groups of three to six cases. He then steadily increased the number of cases that could be aggregated into one trial. In 1984, in *Newman v. Johns-Manville*,[38] an unpublished

case, he consolidated 30 cases and tried four bellwether cases to verdict. All 30 cases settled without the need for individual damage hearings for the other 26. Such small consolidations, however, did not permit Judge Parker to keep up with the volume of asbestos cases being filed in his district.

Another innovative type of consolidation that failed was a "trial in the round" in which multiple juries heard the common evidence and then separated to hear individual damage claims. However, this technique proved unmanageable.

Judge Weinstein in New York currently consolidates asbestos cases for trial; the latest one involved 65 plaintiffs and 24 defendants. The trial of this group lasted 90 days. Judge Weinstein estimated that trying these cases individually would have required 1,300 days.

Judge Lambros in the Northern District of Ohio also recently concluded a month-long consolidated trial which originally started with 20 plaintiffs. For future trials in that district he has divided all pending asbestos cases into "clusters" according to claim profiles.[39]

However, local consolidation of cases for trial under existing rules has not provided any long-term solution to the asbestos problem. At current disposition rates, and assuming filings remain constant, the pending federal asbestos caseload will increase more than fifty percent within three years.

3. Class Actions

Virtually every federal judge who has tried to cope with a substantial asbestos docket agrees that this litigation impasse cannot be broken except by aggregate or class proceedings with issues of liability and damages being resolved for the entire class or subclass. The potential advantages of aggregation are evident: (1) avoidance of duplication of many asbestos litigation issues; (2) uniformity of decision-making; (3) reduction of costs and (4) expedited disposition of large numbers of cases.

It is unrealistic to believe that individual trials can provide relief. The local trial of an individual asbestos claim takes so long that trying each claim separately would require all the civil trial time for the foreseeable future to the exclusion of all other cases in districts with heavy asbestos dockets.

Courts have pursued class action certification under Fed. R. Civ. P. 23. However, courts of appeals generally have not been amenable to class actions in mass tort cases. One reason for this reluctance has been the view that tort claims require individualized proof of claims.[40] One commentator observed that "in toxic tort cases, the class action is seen as undermining causation requirements by relying on aggregate rather than individual proof. The calculation of damages, including compensatory, punitive, and future claimant damages is highly problematic...."[41] Thus, federal courts have narrowly construed the Rule 23 prerequisites, with attempts to use the rule rejected

for failure to meet the requirements of commonality, typicality, predominance, superiority, and other Rule 23 requirements.

The earliest attempt to use class action certification in asbestos cases was in 1974 in *Yandle v. PPG Industries*, 65 F.R.D. 566 (E.D. Tex.). Other asbestos cases where class actions have been rejected are *In re William Temple*, 851 F.2d 1269 (11th Cir. 1988), and *Waldron v. Raymark Industries, Inc.*, 124 F.R.D. 235 (N.D. Ga. 1989). However, there have been two recent cases where partial class action certification has been approved by appellate courts, one arising in the Fifth Circuit and the other in the Third Circuit. A Rule 23(b)(3) opt-out class action certification by Judge Robert Parker was affirmed in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986). That same year Judge James McGirr Kelly of the Eastern District of Pennsylvania, in the school asbestos litigation, certified an opt-out class for compensatory damages under Rule 23(b)(3) and a mandatory class for punitive damages under Rule 23(b)(1)(B). The Third Circuit permitted the opt-out class but rejected the 23(b)(1)(B) certification.[42]

In early 1990, Judge Parker certified a class action (*Cimino, supra*) consisting of 3,031 cases, which was reduced to 2,298 by the time of trial. His first efforts were stopped by mandamus from the Fifth Circuit, *In re Fiberboard Corp.*, 893 F.2d 706 (5th Cir. 1990), on the ground that Texas law required trial

of individual claims and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), required the federal court to follow that rule of decision.

Most recently, Judge Parker has employed the most radical solution to the large number of asbestos cases in his district by applying class action and consolidation concepts under Civil Rules 23 and 42 to try cases using representative plaintiffs in five major disease categories.[43] If approved on appeal, this procedure could provide an advanced mechanism for coping with large asbestos dockets, although a class action trial of between 1,000 and 3,000 cases will be necessary soon thereafter in the Eastern District of Texas.

Although appellate courts have rejected use of class action proceedings in the context of asbestos cases, that format has great appeal. Harvard law professor Arthur Miller has suggested that class actions were devised for precisely these kinds of cases:

> The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund ... and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.[44]

In other mass tort actions, class action proceedings have been used successfully to reach disposition. See *In re "Benedictin" Products Liability Litigation*, 102 F.R.D. 239, 241 (S.D. Ohio 1984), and *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 721 (E.D.N.Y. 1983). Class action

proceedings have the advantages of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds.

4. Judicial Panel on Multidistrict Litigation

Attempts have also been made to obtain aggregation of cases by the Judicial Panel on Multidistrict Litigation. Transfer was denied five times between 1977 and 1987.[45] The 1977 consideration (involving 103 asbestos cases from 19 judicial districts) was rejected on the grounds that there were too many factual questions unique to each case, that "the only questions of fact common to all actions relate to the state of scientific and medical knowledge at different points in time concerning the risks of exposure to asbestos," and that there was "virtually unanimous opposition of the parties to the transfer...."[46] The Panel has just recently directed a show cause order for a hearing on May 30, 1991 to consider centralization of pretrial proceedings of all federal actions not in trial.[47] We note that this committee, by its recommendations, does not intend to affect or restrict in any way the actions of the Panel under 28 U.S.C. § 1407 or reduce the Panel's jurisdiction or authority.

Even if the Panel acts, such action will not affect the committee's recommendations. The Panel would centralize actions for pretrial purposes only, and while the action may indirectly affect the underlying trials, it will still be necessary to provide a mechanism for resolving these trials in an expeditious manner.

5. Collateral Estoppel

One of the first attempts by the judiciary to confront some of the problems related to asbestos litigation involved collateral estoppel or issue preclusion. Collateral estoppel has long been recognized as a device that "promotes judicial efficiency by precluding the unnecessary relitigation of issues that prior proceedings have determined."[48] One commentary noted in 1983 that "the use of collateral estoppel theoretically is a natural way to streamline the monstrous docket of asbestos product cases encompassing numerous similar issues."[49] The same report noted, however, that "the critical application of collateral estoppel to these cases has been difficult, and the courts have been dubious of extending it." The reluctance of the courts to apply collateral estoppel in asbestos litigation is illustrated by the Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982),[50] which reversed Judge Parker's attempt to use collateral estoppel to preclude relitigation of common issues.

The trial of asbestos cases has involved the unnecessary relitigation of certain issues, such as product danger and general causation. Precluding these issues by the application of collateral estoppel or by legislative fact finding as in New Jersey [see *In re Asbestos Litigation*, 829 F.2d 1233 (3rd Cir. 1987), *cert. denied sub nom. Owens-Illinois, Inc. v. Danfield*, 485 U.S. 1029 (1988)] would enable trial courts to deal more efficiently and effectively with the asbestos caseload by

removing these two significant issues that are present in most, if not all, asbestos cases.

6. Alternative Dispute Resolution (ADR)

One of the first attempts to use alternative dispute resolution procedures was by Judge Parker in the case known as *Jenkins II*.[31] The ADR procedure established in 1986 included a three-stage process for handling newly filed claims, which encouraged negotiation for settlement and then arbitration if settlement failed. The system, designed to process 60 cases a month, resolved only about 30 cases per month. Several defendants withdrew from the process and new case filings were averaging 200 cases per month. It was ultimately abandoned and declared a failure.

Experiments with alternative dispute resolution procedures in other districts have been similar to Judge Parker's experiences. A major limitation of voluntary ADR programs is that they leave the control of the process in the hands of the parties. A party who is not satisfied with the outcome, rate, or timing of dispositions can demand a trial before the court, typically with a jury. In that event, the time invested in ADR adds to the delay in the case.

Another indication of the limitations of ADR as a way out of the current litigation crisis is the experience of the Manville Personal Injury Settlement Trust, created out of the bankruptcy reorganization of the Johns-Manville Company in response to asbestos lawsuits. The Trust was intended to investigate and

settle asbestos related claims without the need for additional litigation. To date, the Trust has only settled 25,000 out of more than 140,000 claims and depleted its funds, which originally totaled approximately $1.7 billion. The remaining claims, now in various courts, have an estimated total value of six billion dollars.[52] The Manville experience indicates that the volume of the litigation, the limited assets of the defendants, and the slowness of existing procedures prevent ADR from having a major role in resolving asbestos proceedings.

7. Inactive Dockets

Another device that was created specifically to address problems of asbestos case management is the inactive asbestos docket. Claims can be filed or registered after the first sign of injury, but the court defers action until the onset of a disability or dismisses the claim with leave to reinstate. This procedure enables the plaintiff to toll the statute of limitations without making a direct claim on scarce judicial resources. Judges Rya Zobel in the District of Massachusetts, Alan Nevas in the District of Connecticut, and Spencer Williams in the Northern District of California (handling the Hawaiian asbestos docket), among others, have employed this management tool. Judge Lambros in the Northern District of Ohio has recently introduced a priority system in which the "non-impaired" cases are assigned a deferred status and removed from the docket with right of reinstatement.

In some states, however, such a procedure might not be possible because state law recognizes the validity of these "non-impaired" claims. In a number of states, fear of cancer is recognized as a compensable injury, and such non-impaired asbestos cases continue to compete with those involving claimants who are actually physically harmed.[53]

B. Conclusion

No adequate procedures exist to enable the justice system to deal with the unique nature of asbestos cases. The delays and burdens on the judicial system caused by the massive number of claims result in a denial of access to justice to Americans throughout the country. Asbestos litigation not only denies justice to asbestos plaintiffs because of delays and costs, but also to defendants who must dwell in the forbidding realm of potential but uncertain liability. Furthermore, it impedes the resolution of other cases in the justice system, and may discourage others from filing cases in which the courts should properly afford relief. In the final analysis, the committee has concluded that congressional action is necessary to enable the courts to meet the unique problems presented by asbestos litigation.

V. The Impending Disaster

The preceding paragraphs discuss the burdens and costs of ongoing asbestos litigation, burdens and costs being borne by plaintiffs, defendants, and the judicial system itself. We have described in the current state of asbestos litigation a very

great problem, even a crisis, for many Americans. However, the worst is yet to come. The committee believes it to be inevitable that, unless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources for payment of these claims will be exhausted in a few years. That will leave many thousands of severely damaged Americans with no recourse at all. Aggrieved citizens will further burden public finances for welfare and health care. That is a foreseeable, though to some extent still avoidable, disaster.

VI. Recommendations

In the context of the above discussion, the Ad Hoc Committee on Asbestos Litigation recommends that the Judicial Conference:

A. RECOMMEND CONSIDERATION OF A NATIONAL LEGISLATIVE SOLUTION

> Recommendation 1: That the Judicial Conference recommend that Congress consider a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes, with the objectives of achieving timely appropriate compensation of present and future asbestos victims and of maximizing the prospects for the economic survival and viability of the defendants.

The committee strongly urges the Judicial Conference to recommend that Congress consider a legislative dispute resolution system to resolve asbestos personal injury disputes. The national scope of the problem must be recognized. The committee has concluded for numerous reasons that the current federal and state judicial systems are unable to cope satisfactorily with the

increasing demands of asbestos litigation in a manner that is fair and equitable to all parties. The Third Circuit noted in 1987 that "[a]sbestos litigation poses a serious problem for American tort law, . . . with its inefficiencies, high costs, and inconsistent judgments." *In re Asbestos Litigation*, 829 F.2d 1233 (3d Cir. 1987). Time has proved this distinguished court not only right, but modest in its assessment.

The expansive use of asbestos materials in the United States in this century and the very nature of asbestos-caused disease largely account for the problems and underscore the need to adopt a rational method to resolve asbestos related claims. The millions of Americans exposed to dangerous asbestos fibers are now located all over the country. The committee reviewed reports that suggest that minimum exposure to any airborne asbestos fibers is dangerous. Disease from exposure takes years to develop, apparently depending on individual resistance, amount of exposure, type of asbestos materials, and other factors. Virtually all of the diseases associated with asbestos exposure are progressive in nature, moving from minor affliction, to disability, to death, in total disregard of the lethargic judicial machinery in place to resolve underlying claims. Indeed, the simple determination of appropriate compensation for asbestos victims often becomes bogged down as the ravages of the disease progress. Death often overtakes events with no response forthcoming from the system. The committee simply refuses to

accept the continuation of such a result routinely visited upon the victims of a national public health disaster.

At the same time, the number of defendants--and thus the amount of assets available to satisfy claims--is limited. As noted above, there are approximately 25 major asbestos defendants. Some do not even currently engage in business activities involving asbestos. The lapse of time between exposure and disease interjects the undesirable, albeit unavoidable, result of penalizing current investors, operators, and employees for the acts of others committed years ago. These defendants are confronted with the prospect of legal claims of unknown proportions in numerous geographical courts applying different state laws. The survival and economic viability of these businesses affect the livelihood of thousands of workers in plants and installations throughout the country, as well as the potential compensation of present and future claimants. The committee believes that any system that wastes assets in this context is a tragedy of major proportions.

The cases are scattered across the country. The claimants in both federal and state courts look to state law for the remedy in individual cases. Different states often afford different remedies and levels of recovery to claimants. The cases are complex and time consuming. As noted above, a 1985 Rand study found that a typical asbestos case involved an average of 20 defendants and numerous cross-claims, lengthy discovery, including record searches and specialized medical exams, multiple

conferences between attorneys and the judge, and judicial participation in settlement efforts. Repetitive use of the same evidence and relitigation of the same issues is common. The result is a total inability of either the federal or state court systems to manage the processing of claims, to ensure uniform consistent recovery to claimants, to protect present and future claimants from exhausted resources, or to apply fair and sound procedures for the aggregation, apportionment, preservation, and management of assets at risk.

Already, almost half of these defendants have filed for bankruptcy. It is desirable to have in place a system for a timely, consistent resolution of massive numbers of asbestos claims, with a minimum in transaction costs (now approximately two of every three dollars), maximum payment to deserving claimants (now approximately one in every three dollars), and consolidation and management of assets to enhance appropriate compensation for present and future asbestos victims and the economic viability of defendants.

These are the major factors that led the committee to recommend a national system for resolving asbestos claims which at the very least permits consolidating all asbestos claims in a single forum -- whether judicial or administrative -- with jurisdiction over all defendants and assets at risk.

The committee wants to re-emphasize that it believes the Judicial Conference can make a major contribution to dealing with asbestos claims by recognizing the problem and recommending

congressional action to establish a national asbestos claims resolution system. The committee also concludes that some of the issues which have surfaced in the course of its extensive review of asbestos litigation, albeit admittedly matters of policy for Congress upon which the Conference should not take a position, should simply be brought to the attention of the Congress by way of this report. Subjects the committee feels should be examined by Congress in formulating the details of a national system to resolve asbestos claims include:

1. Consolidation.

Permitting the consolidation of all asbestos claims, federal and state, into a single administrative or judicial forum with jurisdiction over all plaintiffs and all defendants would save costs, grant uniform benefits, provide for future claimants, and afford sufficient management control to devise an adequate payment plan consistent with conservation of corporate assets.

In this context, the authority of the Judicial Panel on Multidistrict Litigation could be expanded to allow the Panel to transfer actions for trial as well as for pretrial proceedings.

2. Provisions to Deal with All Assets at Risk.

Authorization to consolidate asbestos cases should be accompanied by a provision to bring all assets at risk within the jurisdiction of the single forum. Congress should consider provisions for allocating appropriate assets for current claims, ensuring availability of assets for future claims, striving for fair contribution, apportioned as much as practicable to the

defendant's responsibility for the harm caused, and recognizing the interest in the economic survival and viability of the defendants. For example, Congress could consider whether a trust fund approach in the context of available assets might ensure compensation to asbestos victims at just levels, while permitting defendants to project and cover their liability as a part of their ongoing cost of doing business. Similarly, provision for delayed payment could be considered. In this context, sensible provisions dealing with joint and several liability and settlement policy might be addressed.

3. Special Areas of Tort Law for Examination.

a. Review the Role of Punitive Damages in Asbestos Claims.

Many of the states, but not all, provide for punitive damages in personal injury cases to varying degrees. In a considerable number of individual cases, punitive damages have been awarded against defendants in asbestos cases.[54] Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages. In addition,

defendants' litigation tactics may be dictated by potential exposure to punitive damages to the detriment of timely disposition of the litigation. Congress might well review the role of punitive damages in the mass tort context. Two approaches Congress might consider are provisions to limit or eliminate exposure to punitive damages or to channel punitive damage awards into a trust fund to fund compensatory damages for other asbestos victims.

b. Review the Appropriate Treatment of General Causation in Asbestos Cases.

Despite what some believe to be overwhelming medical evidence and the extensive regulatory scheme directed at asbestos, current law requires that general causation, the potential of asbestos exposure to cause the injuries complained of, must be proved in each case. Collateral estoppel does not apply, and defendants continue to litigate the issue. The result is unnecessary added delay in the trial of asbestos cases and a substantial increase in the transaction costs of the litigation. Congress might want to examine in some depth the evidence related to general causation in asbestos cases to see if it justifies a legislative determination that airborne asbestos fibers are absolutely dangerous, allowing principles of absolute liability to apply. Alternatively, Congress could authorize a procedure for a single determination on this issue that would resolve this.

issue for all asbestos claims. Once determined in this fashion, all future cases on the issue of causation would focus solely on the exposure of specific plaintiffs to airborne asbestos fibers.

4. Provisions for Determination and Allocation of Actual Damages, such as Recovery Tables.

Congress might desire to review proposals that promote timely compensation for medical expenses and lost wages, and encourage consistency within classes of claimants, such as standard recovery tables for various asbestos related diseases and severity levels.

5. Provisions for Dealing with Disease Progression.

Congress should consider some provision for dealing with disease progression in a timely and inexpensive fashion. Possibly, this could take the form of a truncated application based on minimum medical consultation once the initial finding of asbestos related disease is made. When the disease becomes disabling, or at the time of maximum recovery, the benefit due would be decided.

6. Provisions to Protect Future Claimants.

Because asbestos related injuries have a latency period that may last as long as 40 years, a large number of individuals have claims against asbestos manufacturers and distributors that are not yet ripe for adjudication. Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a "real and present danger that the

available assets will be exhausted before those later victims can seek compensation to which they are entitled." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). To deal with this problem, Congress might consider (1) authorizing appointment of counsel by the court on behalf of future claimants in any consolidated asbestos claims scheme adopted, making the resulting judgment the exclusive remedy for any future claims; (2) permitting extrapolation of damages based on expert testimony as to types and numbers of future claimants and on awards made to present plaintiffs; and (3) requiring treatment of available assets to take into account future claimants.

7. Provisions to Safeguard the Trust.

Congress might consider various devices to ensure availability of assets as required to meet legitimate claims, such as providing for sanctions against fraudulent transfer of assets to avoid payment of asbestos claims, escrow accounts, trusts, and the like.

The committee does not intend for these issues to be exhaustive of the various problems and potential solutions likely to arise as Congress considers the complex issues surrounding consolidation and disposal of current and future asbestos injury claims. The committee would encourage judges, both federal and state, with experience relevant to disposal of mass tort claims to share their ideas and comments with Congress.

B. RECOMMEND A BACK UP PROCEDURE FOR THE FEDERAL COURTS

Recommendation 2: Recommend as a back-up position, that Congress consider legislation to expressly authorize consolidation and collective trial of asbestos cases in order to expedite disposition of cases in federal courts with heavy asbestos personal injury caseloads.

If no national solution can be obtained, the costs and burdens of federal asbestos litigation could be lessened and the disposition of these cases expedited if Congress would expressly authorize class action or collective trials. Such legislative authorization would obviate present objections to that procedure under Rule 23. While this congressional action would permit the federal courts to deal with their pending cases, it should be emphasized that passage of such legislation will not achieve a national solution. Indeed, prompt disposition of federal cases may prejudice the chances of plaintiffs in state court cases, as well as of future claimants, to obtain deserved compensation.

C. ADMINISTRATIVE OFFICE SUPPORT IN ASBESTOS LITIGATION

Recommendation 3: That the Judicial Conference direct the Director of the Administrative Office--

a. to monitor asbestos litigation in federal courts; to collect materials and available information on the legal issues; to collect studies relative to future claims and asbestos litigation in state courts; to compile sets of distinctive orders used by federal judges in asbestos trials; and to supply information to judges on asbestos litigation issues when requested; and

b. to make all reasonable efforts to supply additional funds and assistance to meet unusual needs for clerical and administrative personnel created by proceedings in asbestos cases.

This self-explanatory recommendation is intended to obtain Judicial Conference endorsement for a proposal to provide appropriate Administrative Office support needed by the courts to deal effectively with current and future asbestos claims. It includes both litigation related material and clerical support.

The Asbestos Information Act of 1988 made the Environmental Protection Agency a depository for information and documents in order to assist plaintiffs in identifying the appropriate defendants for their cases and in obtaining information available only through civil discovery. The Administrative Office should determine the contents of the information on file at the EPA and publish that information for the benefit of judges and attorneys.

The Administrative Office should establish a depository for sample court orders and other court documents, including depositions and exhibits, in asbestos cases which would be available to the entire federal judiciary.

D. MONITORING ASBESTOS LITIGATION

Recommendation 4: That the Executive Committee of the Judicial Conference assign to a committee of the Conference the responsibility to oversee the development of the clearinghouse within the Administrative Office to monitor asbestos litigation and legislation and to report to the Conference on developments and propose remedies.

E. CIVIL RULES AMENDMENTS STUDY

Recommendation 5: That the Judicial Conference request the Standing Committee on Rules of Practice and Procedure to direct its Advisory Committee on Civil

Rules to study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation.

Notwithstanding the committee's proposals for legislative action, the committee review of management problems presented by asbestos cases indicates that a study of Rule 23 might be considered by the Advisory Committee on Civil Rules. There are three reasons for this conclusion. First, legislative changes of the type recommended in the report to deal with asbestos cases may not be approved by Congress. Second, there is no reason to conclude that current Rule 23 exhausts potential procedural techniques for appropriately facilitating class actions. And third, there may be other mass tort situations in which the use of an enlarged class action device would be desirable.

Many courts and commentators consider the 1966 revision of Rule 23, particularly in light of the Notes of the Advisory Committee, as foreclosing the use of class actions in virtually all tort cases involving individual claims for damages. The experience of the last 25 years in dealing with mass tort litigation suggests that there may be some situations in which class actions for at least some issues would be desirable. The committee makes no specific recommendation as to what changes should be made in Rule 23, if any, recognizing the important due process concerns and policy considerations that are implicated and the need to evaluate any revisions from a broader perspective than only asbestos litigation. Nevertheless, the informal

moratorium declared many years ago on possible revision of Rule 23 should be lifted, with serious study given to some modification.

The committee recommends that the Judicial Conference request the Standing Committee on Rules of Practice and Procedure to direct its Advisory Committee on Civil Rules to undertake such a study of Rule 23 in the context of mass torts.

Respectfully submitted,

Thomas M. Reavley

Thomas M. Reavley, Chairman
David D. Dowd, Jr.
Thomas F. Hogan*
John F. Nangle
Robert M. Parker
Sam C. Pointer, Jr.

*See separate statement submitted by Judge Hogan.

SEPARATE DISSENTING STATEMENT
OF
JUDGE THOMAS F. HOGAN
TO
REPORT OF THE JUDICIAL CONFERENCE
AD HOC COMMITTEE ON ASBESTOS LITGATION

I must respectfully dissent from the report and its recommendations. It is unassailable that there is a national crisis involving asbestos litigation in the state and federal courts. My concern is the underlying premise of the report regarding the use of class action "collective" trials (trials by aggregation of claims) of asbestos cases. It is a novel and radical procedure that has never been accepted by an appellate court. It has been challenged as being constitutionally suspect in denying defendants their due process and jury trial rights as to individualized claimants, as well as conflicting with the court's obligations to apply state law. It would establish a new form of tort liability with far reaching ramifications to other mass tort cases.

This recommendation, aside from the constitutional question, as a practical matter may well prove impossible to execute. See generally, the references to the Cimino trial (passim). Trial by aggregation of claims and then the extrapolation of the damages by the court has been recognized by the Committee itself as being "the most radical solution . . . ." See Report at 21. As mentioned, it has never been approved by any appellate court. Yet the Committee recommends the Judicial Conference of the United States endorse such a controversial procedure for enactment by the Congress.

This contortion of traditional tort concepts and class action procedures may well cause untoward results. An example of this concern is highlighted by the extrapolated verdicts in Cimino. Claimants with pleural "disease" were a recognized class. The average extrapolated award by the court exceeded one half million dollars per pleural "disease" claimant. This contrasts to the average nationwide settlement value of such claims of a few thousand dollars each.

As the Committee recognizes, a national solution is the only answer. Since the aggregation or collective trial method is highly questionable, a logical and viable solution would be the passage by Congress of an administrative claims procedure similar to the Black Lung legislation. If that is what the Committee is recommending in its discussion of an administrative resolution, then I endorse such an objective. However, I cannot endorse "the back-up position" - recommendation 2 - and I cannot agree with recommendation 1 and the discussion thereafter except as it may apply to a national administrative claims scheme modelled on the Black Lung program.

Additionally, the Multi-District Panel is now set to fully explore the possibilities of transferring all of the federal cases to a single district court for pretrial purposes and for establishment of national or local registries for pleural claimants. I believe the report should have recommended that the Judicial Conference hold in abeyance its action on this report until the Multi-District Panel proceedings are completed and the

impact of such is known. If successful, the Multi-District approach could greatly lessen the present burden on the federal courts. I would hope that it would have an opportunity to complete its work and the Judicial Conference receive its report before taking action on this Committee's report.

I urge the Conference to look carefully at the recommendation concerning the consolidation and collective trial of asbestos cases using plaintiff sampling techniques. This is a crisis, but it does not justify sweeping away traditional tort and class action concepts and possibly infringing on the due process and jury trial rights of the litigants.

There already exists a model to follow in the Black Lung program. If there is to be any Conference action, it is hoped the Conference would suggest that Congress consider such an approach. Although I do not endorse many of the statements in the report, I have no objection to the report's other recommendations.

Respectfully submitted,

Thomas F. Hogan

Thomas F. Hogan

References

1. *See* D. Hensler, et al., Asbestos in the Courts, The Challenge of Mass Toxic Torts iii (Foreward) (Rand Corp. 1985) (hereinafter "Challenge").

2. *See* I. Selikoff, Disability Compensation for Asbestos-Associated Disease in the United States (1981); P. MacAvoy, et al., "The Economic Consequences of Asbestos-Related Diseases", Yale Univ. School of Org. and Man., Working Paper No. 27 (Jan. 1982).

3. The form of asbestos which is recognized as posing a health hazard is "friable asbestos" or asbestos which is capable of releasing fibers into the atmosphere which can be ingested by humans in the process of breathing. "Friable asbestos material" is defined in Title 40 of the U.S. Code of Federal Regulations as "any material that contains more than 1% asbestos by weight and that can be crumbled, pulverized, or reduced to powder, when dry, by hand pressure." 40 C.F.R. 141. Friable asbestos causes the diseases of asbestosis, resulting from the scarring of lung tissue by asbestos fibers; mesothelioma, a cancerous tumor in the

membrane lining the lungs; lung cancer; and pleural disease, manifested by a thickening of the pleura of the lungs. It has also been linked to gastrointestinal and other forms of cancer.

4. S. Rep. 91-1282, 91 Cong., 2nd Sess., reprinted in [1970] U.S. Code & Ad. News 5175, 5179.

5. U.S. Environmental Protection Agency, *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress*, at 5 (Feb. 1988).

6. *See* Asbestos ban and phasedown regulations promulgated by the Environmental Protection Agency in Jul. 1989, 40 C.F.R. 763.160 *et seq.*; Environmental Protection Agency, *Managing Asbestos in Place, A Building Owner's Guide to Operations and Maintenance Programs for Asbestos-Containing Materials*, Jul. 1990 at 2. *See also* 40 C.F.R. *763.60 et seq.* relating to reporting requirements by persons who manufacture, import, or process asbestos. Asbestos as a hazardous substance has also been the subject of regulations issued by the U.S. Consumer Products Safety Commission, the U.S. Food and Drug Administration, the U.S. Mine Safety and Health Administration, the U.S. Occupational Safety and Health Administration, the U.S. Office of Personnel Management, the U.S. Department of Treasury (import certifications), and the U.S. Department of Transportation, and

has been the subject of a special report by the U.S. Department of Justice.

7. 51 Fed. Reg. 22615 (No. 119, Jun. 20, 1986).

8. Letter of transmittal dated July 21, 1983, Chronic Hazards Advisory Panel on Asbestos, *Report to the U.S. Consumer Product Safety Commission* (Jul. 1983).

9. Public Hearing on Occupational Exposure to Asbestos, Appendix G, at 176 (Statement of the National Institute for Occupational Safety and Health) (Jun. 21, 1984).

10. USEPA and NIOSH, *A Guide to Respiratory Protection for the Asbestos Abatement Industry*, at 2 (1986).

11. State of New York Asbestos Advisory Board, *Second Annual Report*, at 2-3 (Feb. 1990).

12. National Cancer Institute and National Institute of Environmental Health Sciences, Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors 1-2 (1978), cited in Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573 (1983) (hereinafter "Special Project") at 580 n.13.

13. Occupational Health Hazards Compensation Act of 1982: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess. 132 (1982) (statement of Mr. Harry Martens, executive vice-president, Commercial Union Insurance Companies), *cited in* Special Project, *supra* note 12, at 580 n.13.

14. 750 F.2d at 1323 n.15; *see also* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 524 (5th Cir. 1984).

15. Selikoff, *supra* note 2.

16. This belief was expressed to a staff member of the Federal Judicial Center by Dr. Selikoff in a telephone conversation in December 1990.

17. The figure for new 1990 filings includes 2,781 cases removed from state courts in northern Ohio and subsequently remanded back to those courts in the current statistical year. Even discounting those cases, which were the subject of hearings and motions, the monthly average for new filings reached 909 cases.

18. Excluding the anomalous removal and remand situation in the Northern District of Ohio (*see* note 17 *supra*) asbestos filings still accounted for five percent of all federal civil filings.

19. If the subsequently remanded cases in the Northern District of Ohio are included, the filings-to-termination ratio rises to 2.3 to 1.

20. ADR Report, *New Developments* at 19 (Vol. 4, No. 19, Jan. 18, 1990). The Sept. 22, 1990 edition of the *Baltimore Sun* reported at page 5a that Judge Levin had consolidated 9,000 asbestos related cases for a trial expected to begin April 29, 1991.

21. The informal survey was conducted by telephone by a staff member of the Federal Judicial Center. The difficulty in obtaining up to date data about current state court caseload is demonstrated by a telephone conversation between a staff member at the Federal Judicial Center and a spokesperson for the Manville Trust. The spokesperson advised that she could not give any estimate of the number of lawsuits filed against the Trust, state or federal, because the cases were being filed at so fast a rate that the counsel's office could not keep up with them.

22. Dist. of Mass.; E. Dist. of Pa.; So. Dist. of Miss.; E. Dist. of Tex.

23. Pub. L. No. 101-650, 104 Stat. 5089 (to be codified at 28 U.S.C. § 473(a)(2)(B)).

24. These figures and those following were derived from the Integrated Data Base created by the Federal Judicial Center's Research Division, using data compiled by the Statistics Division of the Administrative Office of the U.S. Courts.

25. T. Willging, Trends in Asbestos Litigation 64 (Fed. Jud. Ctr. 1987) (hereinafter "Trends").

26. Challenge, *supra* note 1, at 28.

27. For a comprehensive analysis of the issues involved in asbestos litigation, see Special Project, *supra* note 12.

28. Civil Action No. B-86-0456 CA (E.D. Tex.).

29. N. Dist. of Ohio, Civil Action Nos. C86-2330, C86-821, C86-2559, C86-4601.

30. In re Joint Eastern & Southern Districts Asbestos Litigation (N.Y.), TS-90-9999.

31. J. Kakalik, et al., Variation in Asbestos Litigation Compensation and Expenses 91 (Rand Corp. 1984) (hereinafter "Variations"); Rand Corp., *Annual Report* 54. (Apr. 1, 1990 - Mar. 31, 1991).

32. Rein and Kirby, *Is There a Way Out of the Asbestos Mess?* Legal Times (Wash., D.C.), at 30 (Sept. 24, 1990).

33. The following major asbestos companies have filed for bankruptcy since 1982 due to asbestos claims: Johns-Manville Corporation, UNR Industries, Amatex Corporation, Raymark Industries Inc., Forty-Eight Insulations, UNARCO, Standard Insulation, Celotex, Carey-Canada, National Gypsum, and Eagle-Picher Industries, Inc. Eagle-Picher Industries, Inc. was the most recent asbestos casualty, filing for bankruptcy on January 7, 1991.

34. The OAL began on May 18, 1983 when Judge Lambros moved the United States District Court for the Northern District of Ohio to transfer all pending asbestos cases to his docket. This was accomplished by General Order No. 67 and OAL Order No. 1, filed June 1, 1983. The case management program was created by Ohio Asbestos Litigation Case Management Plan and Case Evaluation and Apportionment Process, filed December 16, 1983.

35. *Id.*

36. *See e.g.*, Judge Parker's handling of the trial in Cimino v. Raymark Industries, Inc. *supra* note 28, Opinion and Order dated Nov. 12, 1990. *See generally*, T. Willing, Asbestos Case Management; Pre-Trial and Trial Procedures (Fed. Jud. Ctr. 1985); Trends, *supra* note 25, at 47-54.

37. Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1497 (11th Cir. 1985).

38. Civil Action No. M-79-124-CA (E.D. Tex.).

39. *See* OAL Case Management Clusters dated Nov. 29, 1990; OAL Order No. 120, filed Dec. 26, 1990.

40. *See* Mullenix, *Beyond Class Action and Consolidation: Post-Aggregative Procedure in Asbestos Mass Tort Litigation*, at 57 (unpublished manuscript) (to be published in Wm. & Mary L. Rev.).

41. *Id.*

42. In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986).

43. *See* Opinion and Order, Cimino v. Raymark Industries, Inc., *supra* note 28, at 7; (*see also* Supplemental Order).

44. A. Miller, An Overview Of Federal Class Actions: Past, Present And Future 45 (1977).

45. In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F. Supp. 906 (Jud. Pan. on MDL 1977); In re Asbestos School Products Liability Litigation, 606 F.Supp. 713 (Jud. Pan. on MDL 1985); In re Asbestos Products Liability Litigation, Docket Nos. 416 (1980), 676 (1986), and 702 (1987) (Jud. Pan. on MDL) (unreported).

46. 431 F. Supp. 906 (Jud. Pan. on MDL 1977).

47. *See* In re Asbestos Products Liability Litigation (No. VI) (Docket No. 875, Jan. 17, 1991) (Jud. Pan. on MDL).

48. Special Project, *supra* note 12, at 659.

49. *Id.* at 660.

50. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981) *rev'd*, 681 F.2d 334 (5th Cir. 1982) (dangerousness of the product and the duty to warn remained as issues plaintiff had to prove where defendants were not parties to prior asbestos litigation).

51. Jenkins II was so named because it was an outgrowth of the original case of Jenkins v. Raymark Industries, Inc. reported at 782 F.2d 468 (1986) in which the Fifth Circuit approved certification of Rule 23(b)(3) opt-out class action of asbestos cases from the Eastern District of Texas. That case involved 755 plaintiffs. It was ultimately settled for $137 million after 16 days of trial. *See* Mullenix, *supra* note 40, at 30.

52. Wash. Post. at H1, H6 (Jul. 15, 1990).

53. *See* Dempsey v. Hartley, 94 F. Supp. 918, 920-921 (E.D. Pa. 1951); Hughes v. GAF Corp., 528 A.2d 173 (Pa. Super. 1987).

54. No exact statistics are available on the extent of punitive damage awards in asbestos cases. The Rand Corporation reported in 1984 that in a sample period between 1980 and 1982 punitive damages totaling $4,934,000 had been awarded. *See* Variations, *supra* note 31, at 70. In an asbestos case tried in the U.S. Virgin Islands in the fall of 1990, the verdict included a $25 million punitive damage award to one plaintiff against one defendant. The total verdict was $26.3 million. *See* Wash. Post, B1, B4 (Nov. 29, 1990).

Appendix A
Asbestos Litigation
March 1991

The committee would like to express its appreciation to several individuals who assisted the committee in discussions of possible legislative solutions. Although these individuals are not responsible for the content of the report, their assistance and expertise in the areas of mass torts and constitutional law were of invaluable assistance to the committee. These individuals are: Mary Kay Kane, Hastings College of Law (Reporter to the committee); William W Schwarzer, Director, Federal Judicial Center; Edward H. Cooper, University of Michigan Law School; Eric Green, Boston University School of Law; Geoffrey C. Hazard, Jr., Yale Law School; Francis McGovern, University of Alabama School of Law; Arthur Miller, Harvard Law School; Jack Ratliff, University of Texas School of Law; Judith Resnik, University of Southern California Law Center; Thomas Rowe, Duke University Law School; Edward F. Sherman, University of Texas School of Law; and Linda Silberman, New York University School of Law.

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1984

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SANTA MONICA, CA. 90406

THE
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The Institute for Civil Justice, established within The Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policy-makers with the results of empirically based, analytic research.

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Foreword

As I wrote in the Foreword to the preceding volume of the Institute's study of asbestos litigation, the resolution of disputes regarding asbestos-related diseases has become one of the critical problems facing the American civil justice system. Indeed, given the suffering and death involved and the fact that such diseases may be the harbinger of an emerging class of substance-related diseases, the problem becomes one of major importance to our entire society.

Knowledge of causation, incentives to prevention, methods of treatment, and the awarding of compensation are key issues surrounding this class of diseases. The issues of how much (if any) and how efficiently compensation is awarded are a crucial test of our society's ability to resolve the aftermath of this kind of disease. But they are not the only test. We also must understand the extent to which the existing compensation scheme deters behavior that jeopardizes the public health.

The resolution of disputes regarding compensation for asbestos-related diseases is now testing the ability of our civil justice system in both these dimensions. In those cases in which causal links have been established between asbestos and disease, and victims of that disease have been properly identified, does our system compensate the victims or their survivors *adequately* and *efficiently*? Does the system establish a context in which a similar catastrophe is *less likely* to occur?

The rancorous debate over the compensation question rages about us. However, until the first of the Institute's asbestos studies was published late in 1983, even the most rudimentary facts regarding the amounts of compensation awarded, the costs of awarding compensation, and the compensation that plaintiffs retain net of their legal costs were anecdotal and fragmentary or altogether unknown. Our studies in this series, aimed at informing the debate, present facts and estimates regarding this critical aspect of the problem: levels of compensation and litigation costs to plaintiffs and defendants.

I believe that no one who is involved in or concerned with the resolution of asbestos-related injury claims—whether from the point of view of plaintiff, defendant, or insurer—can be indifferent to the findings of these studies. For the first time, an independent, objective, and comprehensive assessment of the costs of resolution of such claims has been conducted and the results made available to all parties.

In the first report on this study, the authors based their analysis of the aggregate expenses of asbestos-related litigation and compensation levels on data received from defendants and insurers, and on a survey of members of the plaintiffs' bar; the authors examined the questions of the levels of compensation and of litigation expenses, who paid them, and why. The conclusions they presented are essential to the policy debate.

That aggregate knowledge base is augmented in this report by the results of a survey of expenses and compensation paid on individual claims that were tried, settled, or dismissed between January 1980 and August 1982; the claims in the survey include all tried claims and a random sample of claims closed without trial during that time period. This report investigates factors that were associated with variation in the expenses and compensation paid per claim during that time period, such as type of disease. Such information should also prove invaluable to all parties in resolving basic questions of fact and enabling constructive discussions of the adequacy of compensation, the equity or fairness of the amounts paid to claimants with different characteristics, and the degree of efficiency achieved by our civil justice system.

Looking beyond the current situation, I remain convinced that information of the kind the Institute is developing in these studies also will be crucial to future debates over how disputes regarding emerging classes of disease can best be resolved, and thereby to achieving consensus on the values appropriate to associate with *fair* compensation, *efficiently* awarded.

Gustave H. Shubert
Director, The Institute for Civil Justice

Executive Summary

Asbestos-related disease and consequent litigation involve enormous personal and economic stakes: About $1 billion in compensation and litigation expenses had been spent by the end of 1982 on more than 20,000 open and closed asbestos product liability claims. Many times that number of people have been exposed to asbestos, and the potential liability of the defendant firms runs into the billions of dollars. Three major corporations have already filed Chapter 11 bankruptcy petitions, identifying the costs of asbestos litigation as one of the reasons for filing. These costs (both compensation payments and litigation expenses) are a major concern to the claimants, the defendants, their insurers, and the public.

This report is the second of two that examine the money spent to resolve asbestos-related injury lawsuits. Our first report analyzed total litigation expenses and compensation paid for all open claims combined and for all closed claims combined.[1] However, aggregate data did not allow us to analyze differences in expenses and compensation among claims to see how these varied as a function of type of injury and other factors. Consequently, we conducted a detailed survey of plaintiffs' attorneys, defendants, and insurers, to collect information on a sample of claims that were closed between January 1980 and August 1982. This second report analyzes characteristics of individual claims that explain variation in compensation and expenses.

The 513 closed claims in the survey included all 132 tried claims, and a nationally representative, random sample of 381 claims closed before trial by all or nearly all defendants during that time period. The claim sampling procedures were designed and conducted entirely by Rand Corporation staff. Confidentiality agreements with all participants in the study preclude disclosure of specific sources, but we first inspected the contents of several independent defendant and insurer

[1] *Costs of Asbestos Litigation*, Institute for Civil Justice, The Rand Corporation, R-3042-ICJ, 1983.

claims databases. We conducted checks among these databases and are convinced that the list of approximately 21,000 different claims in August 1982 (including about 4000 closed claims) from which we drew the random sample did not exclude any significant set of claims.

This study focuses on asbestos-related product liability litigation; the study does not include costs incurred by the government, expenses and compensation in workers' compensation claims, and costs incurred in reorganization under Chapter 11 of the Federal Bankruptcy Act.

Because much has happened in asbestos litigation since 1982, this study does not attempt to project from 1982 to 1984 or to the future. The system is in transition: Future costs and compensation will depend heavily on the outcomes of the Chapter 11 bankruptcy reorganizations, and on the details of any of the proposed changes in the system of processing these claims that may be implemented. Nor does this study address such matters as the "appropriateness" or "reasonableness" of expenses, the "adequacy" of compensation levels, or "changes" in the tort litigation system. Answering these extremely important questions will require other difficult, time-consuming, and expensive research studies and extensive new information. We believe, however, that the compensation and expense data developed by this study are essential in considering the performance of the current system and any proposed alternatives.

The asbestos calamity may be unique in scale and intensity, or it may be the forerunner of a wave of environmentally based injury claims of unprecedented dimensions. In either case, it is important that policymakers know how much is being spent to deal with it, and for what, and how these costs vary with claim characteristics.

In this executive summary, we first summarize the average characteristics of asbestos claims closed in 1980–1982. Then we discuss the factors that explained the level of compensation received, the likelihood of receiving no compensation, the likelihood of a trial, and the likelihood of receiving punitive damages. Next, we present factors that influenced the level of defense and plaintiff's litigation expenses. Finally, we total the expenditures and examine the ratio between litigation expense payments and compensation (the "overhead" costs incurred in generating one dollar in payment to an injured person).

CHARACTERISTICS OF CLOSED CLAIMS

For the sample claims closed by all or nearly all defendants in the 32 months we studied, the average claimant was 57 years old, 95 percent of claimants were married, 95 percent were male, and nearly all

were smokers or had been smokers at some time in their lives. Three worker classifications accounted for the vast majority of asbestos-related litigation: shipyard workers (37 percent of all closed claims); asbestos-related factory workers (35 percent); and insulation workers (21 percent). Fully 71 percent of the closed claims were filed in five states (California, Massachusetts, New Jersey, Pennsylvania, and Texas); and nationwide, just over half were filed in federal rather than state courts.

Asbestosis accounted for 76 percent of the closed claims,[2] lung cancer for 12 percent, mesothelioma for 5 percent, and all other types of injury for only 3 percent. In addition, no asbestos-related injury was manifest for 4 percent of our sample. Fifteen percent of the claims involved deceased workers.

At least 91 percent of all claims filed that were based on asbestosis, lung cancer, or mesothelioma received compensation, while only about half of the claims for other types of injuries did so. The average total compensation awarded or paid per closed claim nationwide was $54,000 for asbestosis, $83,000 for lung cancer, and $265,000 for mesothelioma. Only a small percentage of the claimants with no manifest asbestos-related injury received compensation; those few that did usually received only a few hundred dollars.

A substantial minority (42 percent) of the closed claims were parts of lawsuits filed by multiple plaintiffs instead of by or on behalf of one plaintiff.

The average time from claim filing to closure was 2 years and 8 months. About a third of the claims were closed in 1 year or less from filing, but 11 percent took 6 years (the longest amount of time reported for our sample of cases).

Although over 300 different defendants have been named on asbestos product liability suits, claims were concentrated on a few defendants. Sixteen corporations are named as defendants on at least half of all the suits. Another 15 or so are involved in one-quarter to one-half of the suits; hence, most defendants are involved in fewer than one-quarter of the cases. Plaintiffs on closed claims sued an average of 15 defendants.

Claims dismissed and later refiled were deleted from the sample, as were claims known to be still substantially open. To be retained in the

[2]The injury data that we obtained from four defendants and insurers included in the asbestosis category a range of disorders, such as pleural plaques and lung fibrosis, with a wide range of degree of severity. Claims were classified as "no injury" if *none* of the four classified the claimant as having an injury.

sample, a claim had to have been closed for all or nearly all defendants. In the final sample of 513 claims, 81 percent were fully closed by all defendants. The remaining 19 percent were closed by nearly all defendants, but were known to be open with respect to an average of 1.6 defendants. Only 13 claims were open for more than two defendants, and no claim was open for more than four defendants. To avoid understating the level of compensation on this 19 percent of the claims, the amount those 1.6 defendants would have paid was estimated and included.

The settled claims that were closed with respect to nearly all defendants had slightly higher compensation than the fully closed settled claims, so including them raised the average compensation somewhat. The average compensation for the fully closed settled claims was $53,000, whereas the average for the entire sample of settled claims was $55,000. The settled claims that were closed for nearly all defendants had essentially the same distribution of types of injuries as the fully closed settled claims. However, the claims closed for nearly all defendants were more likely to be for shipyard workers and less likely to be part of a multiple-plaintiff lawsuit.

We decided to include that 19 percent in the analysis because they were known to be open for an average of only 1.6 defendants (whose compensation we estimated) and because they provided a substantial amount of actual compensation data that enriched the database.

FACTORS THAT EXPLAINED THE LEVEL OF COMPENSATION

To identify factors that helped explain the level of compensation in 1980–1982, we began by considering total compensation (exclusive of punitive damages) as a function of all factors for which we had data. We used multivariate regression techniques to analyze all claim characteristics simultaneously, so as to see how influential each characteristic was when all other characteristics were held constant.

Our findings should be used cautiously. For one thing, we had no direct data on certain factors that we would expect to influence the level of compensation on individual claims: the severity of asbestosis, the claimant's earning power, the strength of asbestos exposure evidence, and the characteristics of the lawyers on both sides.[3] Nor do we

[3]The claim characteristics that were included in the equation for estimating compensation accounted for 34 percent of the variance among individual claims. While the inclusion of some factors that were not statistically significant would have raised this figure a few percentage points, the fact remains that a substantial amount of the variability

have data on compensation paid from sources other than product liability litigation, such as workers' compensation. Compensation paid from other sources probably differs for claims with different characteristics (such as different types of workers) and may influence the amount of product liability compensation paid.

Our average compensation data should also be used cautiously in estimating compensation levels, which may change in the future in light of changes in the nature and distribution of injuries on closed cases, changes in the average number and type of defendants involved, changes in the structure of settlement negotiations, and changes resulting from the Chapter 11 bankruptcy filings by some defendants. Our estimates are based on data from a sample of cases closed before August 26, 1982. More recent and future claims compensation may differ.

As expected, the type of injury was a major influence on the amount of compensation paid. Claimants with lung cancer or mesothelioma received substantially more than those with asbestosis. For asbestosis, the average compensation differed sharply among worker types. We hypothesize that at least part of that variation was due to variation in severity of asbestosis injury which resulted from unequal exposure to asbestos among worker classifications. As a consequence, we explored the interaction of the injury and type-of-worker variables. Our discussions with defendants suggested that the asbestosis they were seeing in claims by factory workers was less severe than that of both insulation and shipyard workers. We found that, holding all other factors equal, the average compensation paid for asbestosis was highest, intermediate, and lowest for insulation workers, shipyard workers, and factory workers, respectively.[4]

Consider a claimant of average age (57 years), who had named the average number of defendants (15) in a single-plaintiff lawsuit that was settled before trial in 1982. As shown in Table S.1, if such a claimant was an asbestos-related factory worker with asbestosis, he or she received an estimated average of $55,000 in compensation; if an insulation worker with asbestosis, or any type of worker with lung cancer, over $100,000; if a worker of any type with mesothelioma, $319,000.

The averages in Table S.1 must be adjusted if the claim characteristics differ from those specified. First, whether or not trial began for a

in the compensation levels among individual claims cannot be fully explained by the claim characteristics that were available for this study. However, by social science research standards, explaining 34 percent of the variance is quite respectable.

[4]Note that worker classification influences compensation for a number of reasons; it should not be used in claim negotiations in lieu of medical evidence about the severity of injury.

Table S.1

AVERAGE COMPENSATION PAID FOR CLAIMS RECEIVING COMPENSATION, BY TYPE OF INJURY AND WORKER CLASSIFICATION IN 1982, FOR LIVING CLAIMANTS AGE 57, WHO NAMED 15 DEFENDANTS IN A SINGLE-PLAINTIFF LAWSUIT THAT WAS SETTLED BEFORE TRIAL

Type of Injury and Worker Classification	Average Compensation Per Claim Settled Before Trial
Asbestosis	
Asbestos-related factory worker	$ 55,000
Other type of worker	58,000
Shipyard worker	75,000
Insulation worker	106,000
Lung cancer	119,000
Mesothelioma	319,000
Other type of injury	95,000

given claim was highly significant in explaining the level of compensation: All other factors being equal, a claim that began trial received 2.28 times the compensation of a similar claim that was settled before trial. (This is exclusive of any punitive damages awarded at trial.) Second, all other things being equal, claims involving death received only 88 percent of what they would have received had they not involved death. Third, the average compensation per claim rose at the rate of 5 percent per year from 1980 through 1982. Fourth, the peak compensation went to people 54 years old. All other factors being equal, older (over 75) and younger (under 40) claimants are estimated to have received only about three-quarters or less of what the average 57-year-old claimant received. Fifth, compensation per claim tended to increase with the number of defendants on the claim: All other factors being equal, claims with more defendants than average resulted in a maximum increase in compensation of about 15 percent. And sixth, compensation per claim tended to decrease as the number of plaintiffs in a single lawsuit increased. All other factors being equal, the largest multiple-plaintiff lawsuits resulted in an estimated average compensation per claim that was about 70 percent of the compensation for a single-plaintiff lawsuit.

Two notable variables were not statistically significant in explaining the level of compensation: type of court (federal or state) and region of

the country. We did not explore differences within states. Three variables that might affect compensation—smoking, marital status, and gender—were excluded from the analysis because of the small number of closed claims in our sample that involved females, nonsmokers, and unmarried people.

FACTORS THAT EXPLAINED ZERO COMPENSATION

Only 9 percent of the claims closed in 1980–1982 received zero compensation. Three factors were influential; the single most important one was a person's being classified as having "no injury."[5] A second important factor was the injury's being something other than asbestosis, lung cancer, and mesothelioma, the three most often associated with asbestos. For *some* of these other types of injuries, usually some other cancer or other lung disease, it may be more difficult to establish a link with exposure to asbestos. Only about half the claimants with these other types of injuries received compensation.

The asbestos-related experience of the plaintiff's lawyer was also important in helping explain whether compensation was paid. The proportion of claims that received no compensation was 23 percent for lawyers who had closed only one claim in our sample, 8 percent for lawyers who had closed two to five claims, and a mere 1 percent for lawyers who had closed more than 20.

FACTORS THAT EXPLAINED THE LIKELIHOOD OF TRIAL

Relatively few claims went to trial. Several claim characteristics were related to the likelihood of trial. Those that were statistically significant were the type of injury, the state in which the claim was filed, and the presence of a large number of plaintiffs in one lawsuit. Variables that were not significant were age, marital status, sex, life status, smoking, type of court (federal or state), number of defendants per claim, and worker classification.

Claims in our sample with no manifest asbestos-related injury *never* went to trial. When all other factors are held equal (using a logistic

[5]Injury classification data were obtained from four large defendants and insurers. Claims were classified as "no injury" if *none* of the four classified the claimant as having an injury.

regression technique), mesothelioma claims were at least twice as likely to go to trial (14 percent) as claims with any other type of injury (7 percent or less).

The percentage of closed claims that were tried varied markedly from state to state. In California and New Jersey, it was 1 percent or less. The rates were much higher (8 percent and 16 percent, respectively) in two of the high-claim-volume states, Texas and Pennsylvania. Fewer claims had been closed in Missouri, but about a third of them went to trial. In the other states combined, about 6 percent began trial. Finally, claims sampled from among large lawsuits with at least 50 other plaintiffs *never* went to trial.

FACTORS THAT EXPLAINED PUNITIVE AWARDS

Punitive damage awards appeared to be more frequent in asbestos cases than in product liability cases generally, but they were still rare. Punitive damages totaling $4,934,000 were awarded to 19 plaintiffs, involving less than 1 percent of all claims closed between January 1, 1980, and August 26, 1982. The awards ranged from $4,000 to $1,000,000, and averaged $260,000 per plaintiff who received one. Even though punitive damages were awarded in 18 percent of the asbestos trials that went to verdict, the $255,000 average total compensation for all tried claims included an average of only $37,000 in punitive damages.

The 19 plaintiffs receiving a punitive award were insufficient for us to perform a multivariate analysis, but we carefully reviewed their claims to see what characteristics might be related to the receipt of punitive damages. The only salient observation was that two-thirds of the claims that received punitive awards were in Pennsylvania; the rest were in six other states. In Pennsylvania, 34 percent of the claims that started trial between January 1, 1980, and August 26, 1982, resulted in punitive awards.

FACTORS THAT EXPLAINED DEFENSE LITIGATION EXPENSES

The total defense expense was $37,000 for the average closed claim,[6] of which allocated expenses (legal fees and related expenses) were 78 percent, unallocated expenses (claims processing and management

[6]The 95-percent confidence interval for the estimated average defense expenses using the sample data ranges from $35,500 to $38,500.

expenses) were 19 percent, and organization-versus-organization litigation expenses (usually concerning insurance coverage) were 4 percent.

Since the average closed claim involved 15 defendants and $37,000 in defense litigation expenses, the average total defense expense by *one* defendant to close a claim with one plaintiff was approximately $2,500. A smaller defendant and its insurers typically spent an average of at least $1,000 per closed claim in total expenses. Some of the larger defendants (those named on a larger percentage of the claims, who generally paid higher compensation) usually spent more than the average. Each case requires certain threshold litigation expenses; although those expenses rise with increased compensation, *they do not rise in proportion to increased compensation.* Hence, in general, the higher the average compensation paid by a defendant, the higher the expense will be, but the lower the ratio of expense to compensation.

The ratio of allocated expense to compensation paid on asbestos claims was higher than for three other tort areas: product liability generally, malpractice, and auto accidents. The auto accident area was lowest, probably because it had such a high volume of claims, most of which were closed without a lawsuit being filed. Malpractice claims had ratios higher than auto claims, but only about two-thirds as large as the asbestos ratio. Product liability claims, most comparable in subject matter to asbestos claims, had an overall ratio of 0.35—lower than the asbestos ratio of 0.45. The numerous defendants in the average asbestos claim, each with its own legal expenses, may explain much of the higher asbestos ratio when compared with that for medical malpractice and product liability generally. In the average asbestos case, responsibility for a $64,000 compensation payment was divided among 15 defendants, most of whom paid an average of less than $5,000 each. In other tort areas, the average defendant paid larger compensation, and expenses were a lower percentage of compensation, because expenses do not increase as fast as compensation payments.

We analyzed defense expenses as a function of all factors for which we had data. We used multivariate regression techniques to analyze all characteristics simultaneously, to shed light on the influence of each claim characteristic when all other characteristics were held constant.[7] Again, since our data were derived from 1980–1982, we caution readers that defense expenses for more recent and future claims may differ from these figures, especially if changes occur in the efficiency and manner of processing asbestos claims.

[7]The claim characteristics that were included in the equation for estimating defense expenses accounted for 77 percent of the variance among individual claims. This percentage of explained variation is very high for research on legal behavior.

As expected, the type of injury and worker category influenced the amount of defense expenses. Consider an average claimant who had named the average number of defendants (15) in a single-plaintiff lawsuit that was settled for compensation before trial in 1982. As shown in Table S.2, such claimants with mesothelioma generated the highest average defense expenses, $57,000, while such claimants with no manifest asbestos-related injury generated the lowest, an estimated $18,000 per claim.

The dollar amounts in Table S.2 must be adjusted when claim characteristics differ from those specified. First, all other things being equal, defense expenses were 13 percent greater for cases involving dead claimants than for cases with living claimants. Second, whether or not trial began for a given claim was highly significant in explaining defense expenses. All other factors being equal, a claim that began trial had 3.13 times the defense expenses of a claim that was settled before trial. Third, the average defense expenses per claim rose at the rate of 1 percent per year from 1980 through 1982. This is lower than the rate of inflation and lower than the 5 percent per year growth in levels of compensation. Perhaps defendants were becoming more efficient at processing these claims as time went on. Fourth, defense expenses per claim increased substantially with the number of defendants on the claim, because each defendant usually had its own defense

Table S.2

DEFENSE EXPENSES BY TYPE OF INJURY AND WORKER CLASSIFICATION IN 1982, FOR LIVING CLAIMANTS WHO NAMED 15 DEFENDANTS IN A SINGLE-PLAINTIFF LAWSUIT THAT WAS SETTLED BEFORE TRIAL

Type of Injury and Worker Classification	Average Defense Expenses Per Claim
Asbestosis	
Asbestos-related factory worker	$35,000
Other type of worker	34,000
Shipyard worker	40,000
Insulation worker	49,000
Lung cancer	40,000
Mesothelioma	57,000
Other type of injury	33,000
No manifest asbestos-related injury	18,000

lawyer and other litigation expenses. All other factors being equal, lawsuits with larger numbers of defendants than average resulted in a maximum estimated increase in defense litigation expenses of about 60 percent. Doubling the number of defendants added almost 50 percent to the total defense litigation expenses. The reason these additional defendants did not double the expenses was that the same 16 large defendants were named on at least half of all claims. Additional defendants were usually smaller defendants, who made lower average compensation payments and incurred lower defense litigation expenses. Fifth, defense expenses per plaintiff tended to decrease as the number of plaintiffs on a single lawsuit increased. All other factors being equal, the largest multiple-plaintiff lawsuits resulted in estimated defense expenses per claim that were less than two-thirds of the defense expenses for a single-plaintiff lawsuit.

Certain variables were not statistically significant: the claimant's age, sex, marital status, smoker status, whether the claim was filed in federal or state court, and region of the country.

FACTORS THAT EXPLAINED PLAINTIFF LITIGATION EXPENSES

Asbestos cases are almost always handled on a contingency fee basis by plaintiffs' lawyers (i.e., attorney fees are a percentage of total compensation). The percentage is usually increased if the claim goes to trial. The plaintiff's litigation expenses other than attorney fees generally consist of travel and stenographic expenses for depositions and trials, medical examinations, and expert witness fees.

During 1980–1982, legal fees in tried cases were typically 33 to 45 percent of total compensation; the average fee was about 39 percent. In tried cases, other expenses ranged from 1 to 12 percent of recovery, but were generally about 6 percent. Plaintiff's legal fees as a percentage of compensation were lower for settled cases; they typically ran from 28 to 40 percent, averaging 34 percent. Other expenses on settled claims averaged approximately 5 percent of recovery, though on occasion they were much higher or lower.

Thus, the estimated average plaintiff litigation expenses (including both legal fees and other expenses) amounted to 39 percent of total compensation for all 1980–1982 closed claims combined.

AVERAGES FOR TRIED CLAIMS

The average total compensation paid for the claims that began trial between January 1, 1980, and August 26, 1982, was $255,000; the median was $123,000; and the maximum was $2,300,000. These figures include compensatory damage awards, punitive damage awards, if any, and pretrial settlements paid by any defendants on the claim who elected to settle before other defendants went to trial; they do not include any changes in compensation that may result from appeals of some of the awards.[8] Considering all tried claims, 95 percent of the claimants received at least some compensation in pretrial settlement or trial award or both. The average total compensation for those who received at least some money was $269,000.

The average total compensation for the 53 percent with plaintiff's verdicts was $388,000. The 18 percent that were settled by all defendants after trial began received about half as much, an average of $189,000. Claims with defense verdicts accounted for 29 percent of the trials during this time span. In 82 percent of trials that led to defense verdicts, some defendants had settled before the trial began (paying a combined average of $62,000 per claim).

AVERAGES FOR CLAIMS CLOSED BEFORE TRIAL

Claims closed for all defendants before trial began accounted for 95 percent of all claims closed between January 1, 1980, and August 26, 1982. Of these claims, 91 percent received compensation that ranged up to $1,400,000, had a median of $33,000, and averaged $60,000. Total compensation for claims closed before trial began, including those with and without compensation, had a median of $27,000 and averaged $55,000.

AVERAGES FOR ALL CLOSED CLAIMS COMBINED

When we combine claims tried and claims closed before trial,[9] the average compensation paid between January 1, 1980, and August 26, 1982, was $64,000.[10]

[8]Because trial verdicts may be reduced after appeal or settled for less than the verdict, our estimate of compensation for claims that began trial overstates, to an unknown extent, the compensation actually received in this class of claims. The awards for 24 percent of the claims for which trial began are being appealed.

[9]Data were analyzed for tried claims separately from claims closed before trial. The separate results were then combined, weighted by the number of each of these two types of claims in the total universe of all closed claims (including those in and not in the sample).

[10]The 95-percent confidence interval for the estimated average compensation using the sample data ranged from $58,000 to $70,000.

Plaintiff's legal fees and expenses for all tried claims averaged $114,000 (for tried claims that received some compensation, the average was $120,000, or 45 percent of average total compensation). For all claims that closed before trial began, the average was $21,000 (for settled claims that received some compensation, the average was $23,000, or 38 percent of total compensation).

Defendants' legal fees and expenses for all tried claims averaged $125,000, 49 percent of what they paid in total compensation. For all claims that closed before trial began, the average was $33,000 or 60 percent of what they paid in total compensation.

For all claims closed by any method, the average legal fees and expenses were $25,000 on the plaintiff's side (39 percent of total compensation) and $37,000 on the defendant's side (58 percent of what they paid in total compensation). Plaintiff expenses rose steadily with the level of compensation because of the usual contingency fee arrangement; so did defense expenses, but not as fast. Defense expenses as a percentage of compensation declined from over 100 percent of low compensation claims to less than 20 percent of high ones.

For claims settled for about $150,000 or less compensation, and for tried claims that were awarded about $400,000 or less, the expenses for all defendants combined exceeded expenses for the plaintiff. For claims with larger amounts of compensation, the plaintiff averaged higher litigation expenses than those of all defendants combined.

As shown in Fig. S.1, all defendants and insurers combined paid a total of $101,000 for the average closed claim, including both total compensation paid and defense legal fees and expenses. After deducting legal fees and expenses incurred by both sides, the plaintiff received an average net compensation of $39,000 or 39 percent of the $101,000 total. The plaintiff received considerably more if the claim was tried ($141,000 after payment of all legal fees and expenses for tried claims, versus $34,000 for claims closed before trial).

These figures may be better understood by considering the total amount that defendants, insurers, and plaintiffs paid for every *one dollar* in net compensation that went to the plaintiff. For every $2.59 paid by defendants and insurers, defense litigation expenses were an estimated $0.95, plaintiff's litigation expenses were an estimated $0.64, and the plaintiff received $1.00—39 percent of the $2.59 total. That percentage increased with the level of total compensation, from less than 20 percent of the total defense payout for claims with low total compensation, up to 49 percent for those with average compensation over $500,000.

The extent to which the sample is representative of claims closed in the sample time period is shown when we compare the results from the

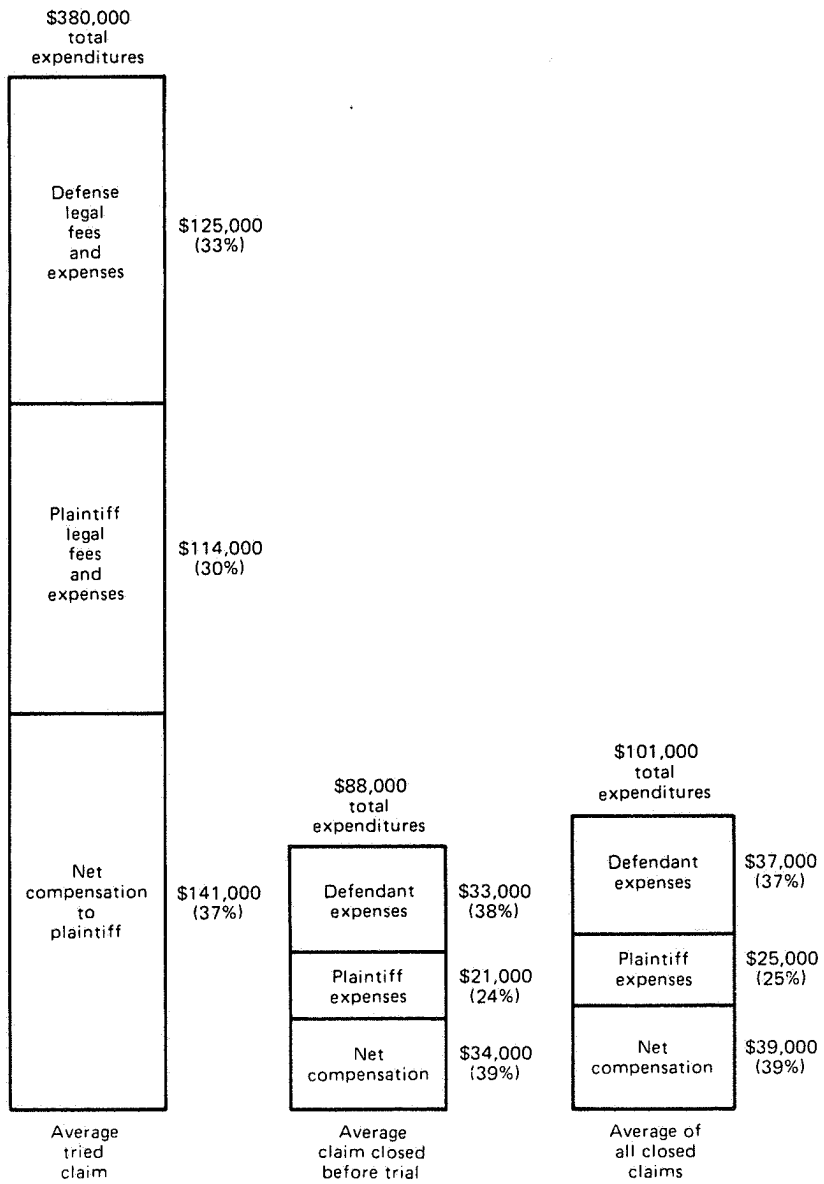

Fig. S.1—Average total expenditures per claim for asbestos product liability claims closed between January 1, 1980, and August 26, 1982

sample data for 1980–1982 and the aggregate data for *all* closed claims described in our previous report. *The results using these two different research approaches are essentially the same.*[11] The average total compensation using aggregate data was $60,000; for sample closed-claim data it was $64,000. After deducting the plaintiff's expenses, the average percent of total compensation plus defense expenses that the plaintiff received was 37 percent using aggregate data and 39 percent using sample closed-claim data. In addition, the distribution of other claim characteristics for the sample is very similar to the distribution of claim characteristics for the universe of all claims closed in 1980–1982.

IMPLICATIONS

In summary, the heart of the asbestos litigation problem is its huge scale. Much human suffering is involved. Tens of thousands of current and future injury claims are worth billions of dollars. The sheer numbers stretch the ability of some courts to handle the claims, threaten the economic survival of some defendants, and ultimately threaten the ability of the injured parties to receive fair compensation.

Because the asbestos problem is immense and because it may influence public reactions to other major health and legal problems, many different responses have been proposed. Several generic lines of reform have been suggested by various people: increased coordination and efficiencies within the existing tort system; establishment of a joint claims facility for settlement negotiation without filing a lawsuit; arbitration; and government-mandated compensation systems.

We believe that any rational course of action must be based on facts such as those developed by this study.

[11]The first method sought aggregate data on total compensation and defense expenses through August 26, 1982, on all closed claims combined from all major defendants and insurers. A number of plaintiffs' attorneys were interviewed regarding average contingency fees and other litigation expenses. The second method sought individual claim data on compensation, defense allocated expenses, and plaintiff's expenses from all major defendants, insurers, and the plaintiffs' lawyers for a random sample of claims closed between January 1, 1980, and August 26, 1982. The two methods used different data, with the exception of defense unallocated expenses (such as for claims processing), insurance coverage litigation expenses, and plaintiff's litigation expenses.

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This research would not have been possible without the cooperation of the 34 plaintiffs' attorneys, 17 major defendant organizations, and 12 major insurers who provided data on a confidential basis. For all of their efforts, we are extremely grateful.

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I. INTRODUCTION

This report is the second of two that examine the money spent to resolve asbestos-related injury lawsuits: who pays it, who receives it, and for what purposes.[1] In our first report, we analyzed the total litigation expenses and compensation paid based on data for all open claims combined and all closed claims combined, using aggregate data from defendants and insurers, and information secured from 27 plaintiff's lawyers. However, aggregate data did not allow us to explore and analyze variation in expenses and compensation as a function of such factors as the type of injury. Consequently, we conducted a detailed survey of claim characteristics, expenses, and compensation paid on a sample of individual claims that were tried, settled, or dismissed and not refiled between January 1980 and August 1982. The claims in the survey included all tried claims, and a random sample of claims closed before trial during that time period. This second report describes characteristics of individual claims that lead to variation in compensation and expenses.

It might be supposed that these costs have long since been systematically documented. Not so. There is no shortage of rhetoric concerning the billions of dollars that are expected to change hands over the next three decades during which the asbestos tragedy is expected to unfold, but very few hard data are in the public domain that document the volume or nature of these expenditures. This report, like the first one that appeared in 1983, provides such data. Of course, financial shorthand can never express—and must never be permitted to obscure—the depth of human suffering from which the numbers arise; but professional, impartial cost analysis can help trace the practical effects of the manner in which American society is dealing with a major challenge to its civil justice institutions and procedures.

The asbestos calamity may be unique in scale and intensity, or it may be the forerunner of a wave of environmentally based injury claims of unprecedented dimensions. In either case, it is important that policymakers know how much is being spent to deal with it, and for what, and how these costs vary with claim characteristics. This study contributes to that understanding.[2]

[1]The first was *Costs of Asbestos Litigation*, Institute for Civil Justice (ICJ), The Rand Corporation, R-3042-ICJ, 1983.

[2]Other previous studies of asbestos litigation were reviewed in Sec. I of our first report.

GUIDE TO THIS REPORT

This section describes our research approach and sketches the tangled context in which spending occurs for asbestos product liability litigation. No issue or subissue is analyzed in detail. The purpose here is simply to identify the major elements of the conflict, briefly describe their nature and significance, and relate them to the central questions to which this financial research is addressed. Section II presents data on the characteristics of closed claims and on the actual compensation paid and expenses incurred by plaintiffs, defendants, and insurers in 1980–1982. After laying this groundwork, our analysis will focus on explaining the variation in total compensation in Sec. III. Sections IV, V, and VI, respectively, analyze claim characteristics that help explain why certain claims receive no compensation, identify which claims proceed to trial instead of being closed before trial, and identify which claims result in punitive awards. Sections VII and VIII analyze the variations in defense and plaintiff litigation expenses. Finally, Sec. IX totals the expenditures and examines the *ratio* between litigation expense payments and net compensation (the "overhead" costs incurred in generating one dollar in payment to an injured person).

OVERVIEW OF THE ASBESTOS LITIGATION PROBLEM

Asbestos product liability litigation is a large and complex problem because asbestos exposure usually occurred over a long time period beginning many years ago, because the injuries and causation are complex, because large numbers of people have been injured, and because the law that controls their compensation is complex and evolving.[3] This section outlines those complications so that the cost data that are the main contribution of this report may be understood in context.

[3]For readers who are unfamiliar with product liability litigation, the following is a greatly simplified sketch of its legal aspects. Personal injury suits brought by workers and others exposed to asbestos are almost always based on the legal theory of strict liability. These plaintiffs must demonstrate that they were exposed to asbestos or a product containing asbestos that was manufactured or provided by the defendant, and that they have suffered from a disease caused by such exposure. In most jurisdictions, they must be prepared to show that the defendant knew or should have known that the exposure to asbestos subjected them to a health risk. They must show that the defendant either failed to warn them of the risk or that the warning was inadequate, and that the failure to provide an adequate warning was responsible for their injuries. Plaintiffs who can demonstrate each of these elements nevertheless may not prevail if they are barred by a statute of limitations, or may find their cases postponed with respect to certain defendants by a bankruptcy court stay issued with respect to a defendant seeking Chapter 11 reorganization.

The asbestos litigation problem is largely one of scale. There is little difficulty in processing single lawsuits and paying their associated expenses and compensation, but the nation is now looking at tens of thousands of current and future injury claims worth billions of dollars. The sheer numbers strain the capacity of some courts to handle the claims, and threaten some defendants' economic survival. Even the viability of some insurers may be threatened, if the insurance coverage litigation now before the courts turns out badly for them. Ultimately, these factors also threaten the ability of plaintiffs to receive just compensation.

The asbestos litigation problem has at least three major dimensions, each of which we will review briefly:

- The high volume of asbestos exposure, injuries, and claims
- The complexity of the claims
- The billions of dollars in compensation and expenses at stake

Large Number of Exposures and Claims

Properties and Uses of Asbestos. Asbestos is a fibrous mineral that is mined. It is strong, flexible, and resistant to fire, heat, and corrosion. It is an excellent insulator and is also used in asbestos-cement products (e.g., pipe), brake linings, roofing products, and flooring products. It has been used in millions of buildings in the United States and in hundreds of millions of automobiles.

Large Numbers of Injured People and Lawsuits. Unfortunately, asbestos also causes disease. Asbestos fibers when inhaled may lead to asbestosis (a clogging and scarring of the lungs that can produce disabling reduced breathing capacity), or mesothelioma (a rapidly fatal cancer of the lining of the chest and abdomen for which one of the known causes is asbestos). Inhalation of asbestos fibers also has been associated with an increased incidence of lung cancer.

A major study completed in 1981 by Irving Selikoff and his associates for the Department of Labor[4] estimated that 21 million U.S. workers are still alive who were significantly exposed to asbestos over the last 40 years, and project 200,000 excess deaths (above the number normally expected in the population) by the end of the century from asbestos-associated disease. Other estimates of the number of deaths allegedly due to asbestos over the next 30 years have recently been

[4]Irving J. Selikoff, M.D., *Disability Compensation for Asbestos-Associated Disease in the United States*, Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City University of New York, June 1981.

made. All are large—from 74,000[5] to 265,000.[6] Far more numerous than cancer deaths are the injuries from asbestosis: Over three-quarters of the closed claims have been based on injury from asbestosis instead of lung cancer or mesothelioma.

We found that approximately 24,000 claimants had initiated lawsuits as of March 1983 alleging injury from exposure to asbestos. Very few had filed ordinary liability insurance claims without filing a lawsuit. Estimates of the number of asbestos lawsuits that will be filed in the next 30 years range from 32,000 to 200,000. By the year 2009, according to a study commissioned by The Manville Corporation, 5963 additional mesothelioma suits, 2660 new lung cancer suits, and 27,150 more asbestosis suits will have been filed.[7] The investment firm of Conning & Company estimates that claims filed by the year 2010 will total between 83,000 and 178,000, which means at least 59,000 new claims above the 24,000 filed as of March 1983.[8] Our extrapolation of the analysis by Paul MacAvoy et al.[9] indicated that 200,000 new lawsuits would be filed.[10]

Large Backlog of Unresolved Claims. Our data show that of the 24,000 claims filed as of March 1983, only about 3800 have been fully closed by all defendants on the claim. Only about 170 claims had been tried as of August 1982. Since that date, settlements and trials have proceeded for most defendants, but almost no claims have been fully closed by all defendants, because of bankruptcy court stays issued with respect to The Manville Corporation (a large defendant named on almost all asbestos claims) and two other defendants who have filed for Chapter 11 reorganizations.

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[5]A. W. Walker, *Projections of Asbestos-Related Disease 1980–2009, Final Report*, Epidemiology Resources, Inc., Chestnut Hill, Massachusetts, August 2, 1982, estimates 18,700 excess mesothelioma deaths and 55,120 excess lung cancer deaths through the year 2009.

[6]Paul W. MacAvoy et al. ("The Economic Consequences of Asbestos-Related Disease," Yale University School of Organization and Management, New Haven, Connecticut, Working Paper No. 27, January 1982) reviewed various epidemiologic study projections and estimated excess mortality due to asbestos through the year 2015 at between 154,000 and 450,000, with the most likely estimate being 265,000.

[7]Walker, *Projections*.

[8]Conning & Company, *The Potential Impact of Asbestos on the Insurance Industry*, Hartford, Connecticut, September 1982.

[9]MacAvoy et al., "The Economic Consequences," used data from Peter S. Barth, *Compensation for Asbestos-Associated Disease: A Survey of Asbestos Insulation Workers in the U.S. and Canada*, Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City University of New York, January 1981.

[10]Calculated by The Institute for Civil Justice from data presented in MacAvoy et al. MacAvoy assumes that 32 percent of excess deaths resulted in litigation in 1975, that the percentage grew 4 percent per year, and that after 1992 all excess deaths will result in litigation.

Complexity of the Claims

A second aspect of the problem is the complexity of the claims. Uncertainty may exist about whether an asbestos-related injury has occurred, and uncertainty usually exists about who or what caused the injury and who should pay how much.

Long Latency Periods. Generally, 15 to 40 years elapse between asbestos exposure and disease manifestation. For example, some shipyard workers are only now filing claims alleging injury from World War II exposure to asbestos. This long latency period often makes it difficult to find or reconstruct needed evidence.

Large Number of Defendants. Asbestos plaintiffs typically do not sue their employers (who are usually protected from tort responsibility by workers' compensation laws), but rather bring suits against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location. Consequently, a case may involve numerous defendants; the average is about 20 for all open and closed claims combined, but it is often uncertain how much each defendant contributed to the exposure (if any). The cost implication is correspondingly major: Usually, 20 defendants means 20 legal defense teams.

Over 300 different defendants have been named on claims, but the litigation is concentrated on only 16 defendants that have been named on half or more of the claims.

Uncertain Causes and Financial Responsibility. Asbestos cases involve injuries that are often hard to identify with certainty, undetectable for decades after exposure, unpredictable from the simple fact of exposure, and arguably caused by other factors (such as smoking) that may produce the same pathology. It is not currently possible to establish precisely how much exposure to asbestos is either necessary or sufficient to cause any of the diseases allegedly associated with it, either with respect to any particular claimant or with regard to the universe of those exposed.

As a matter of course, many plaintiffs' lawyers file claims against any party who might have provided asbestos or asbestos products to a plaintiff's workplace or other exposure location. Resolving these claims therefore requires deciding whose products the plaintiff was exposed to and for how much of the time. But exposure is not the only issue. There may be disputes over which defendants had reason to know that asbestos exposure was a health risk and failed to warn of that risk, and

disputes over the role of smoking or other plaintiff behavior in causing the alleged injuries.[11]

Determining the responsibility of insurance companies is every bit as difficult as determining that of defendants. Complex webs of insurance arrangements have been made, amended, unmade, and then remade by defendants over the decades during which most plaintiffs claim exposure to asbestos. For each defendant in each year, there is normally a separate set of layers of primary coverage, excess coverage, and reinsurance coverage. Also, there are often periods of self-insurance by the defendant, and occasionally insurance by a captive (defendant-owned) insurance company. Each layer of insurance in each year normally involves at least one carrier, and that carrier may or may not have been involved in that or another role during other years. Several major insurance carriers have many insured defendants, some of whom may have different interests, vis-a-vis each other, in any particular case.

The policies that provided coverage contain language that has given rise to protracted litigation concerning the responsibility of the insurance carriers to respond to particular claims. In a nontrivial number of instances, it is even a serious issue whether any policy was in force; neither insureds nor carriers are able to produce papers that they had assumed long ago to be of no further relevance. But even where there is agreement that coverage did exist, there is nothing like accord between many defendants and their insurers, or among the insurers themselves, as to what is covered, when, and by whom. The basic uncertainty over insurance coverage has severely complicated relations between defendants and insurers, and has itself spawned a large number of lawsuits.

Besides that conflict, the federal government's role is controversial. The government was, first of all, heavily involved with shipyards, but some people also allege it to be responsible for worker injuries as a seller of asbestos, as a specifier of workplace safety standards for asbestos, and as a mandator of asbestos use in the military products it contracted for and purchased during and after World War II.

The Chapter 11 Reorganizations. A new set of conditions and problems has been produced by The Manville Corporation, UNR Industries, and Amatex Corporation bankruptcy proceedings. A central issue is whether the bankruptcy court can estimate and provide for future claims as part of a plan of reorganization. But the disruption caused by these bankruptcies has affected many different activities.

[11]Some research has found that susceptibility to lung cancer may increase by four to five times with exposure to asbestos, but by 50 times if the exposed subject also smokes. For a summary of this research, see Selikoff, Table 3.8.

Existing claims have been stayed with respect to defendants who have **filed for Chapter 11 reorganization. Claim-disposition efforts have been proceeding for the other defendants, but the bargaining positions** of both plaintiffs and defendants have been affected in ways not yet fully clear, and attorneys on both sides have been forced to spend substantial time concerned with the interests of existing and future claimants in bankruptcy instead of tort proceedings. The situation is dynamic and the ultimate impact on costs is as yet unclear.

The Concentration of Cases in Few Courts. Our data indicate that slightly over half of the pending cases are in the federal courts. Most of the state actions are pending in a dozen or fewer urban courts. The main factors determining where cases are filed seem to be (a) the degree to which the state law is perceived to be relatively favorable to asbestos plaintiffs, and (b) proximity to major users of asbestos, particularly World War II shipyards, which by themselves account for about half of all outstanding cases. Some major jurisdictions have very few asbestos suits; for instance, in New York the statute of limitations has been construed to run from the point of last exposure, so that the deadline for filing usually falls during the latency period before any disease can be detected. But the courts where the suits are concentrated have them in very large numbers, as in Los Angeles and Philadelphia, for example.

Billions of Dollars at Stake

The amount of future settlements and trial awards is uncertain, but the financial stakes clearly are high. Estimates by others of total compensation over the next 30 years range from $4 billion to $87 billion. The investment firm of Conning & Company estimates that the insurance industry's ultimate liability for asbestos claims will be in the $4 to $10 billion range. MacAvoy estimates that future compensation payments will run between $8 billion and $87 billion, with the "most likely estimate" of the present value of the awards being $38 billion.[12] The wide range reflects the great uncertainty in the estimates. The Manville Corporation, in support of its Chapter 11 bankruptcy filing, has estimated that at least 32,000 additional asbestos-related claims will be filed through the year 2001[13] that could require it to spend about $2 billion (not counting expenditures by any of the other defendants).

[12]See pp. 9–10 of our previous report, *The Costs of Asbestos Litigation*, for details.

[13]The Manville Corporation, "Summary of Asbestos-Related Litigation Projection," delivered to the organizational meeting of creditors of The Manville Corporation, New York, September 9, 1982.

High total litigation expenses compound the financial problem. Prior to our study, no one seriously argued that litigation expenses were less than the plaintiff's net compensation, but some argued that combined defense and plaintiff litigation expenses were 2, 3, or even 4 times the amount the plaintiff received after expenses were deducted.[14] We now know that the correct multiple is about 1½ under the current product liability litigation system.

The financial strain of these asbestos-related injuries and litigation has already resulted in three Chapter 11 bankruptcy filings—with perhaps more to come in the future.

In summary, the heart of the asbestos litigation problem is its huge scale. Much human suffering is involved. Tens of thousands of current and future injury claims are worth billions of dollars. The sheer numbers stretch the ability of some courts to handle the claims and threaten the economic survival of some defendants; and ultimately, these factors threaten the ability of injured parties to receive fair compensation.

POLICY-RELATED ISSUES

How Big and Expensive Is the Asbestos Litigation Problem?

Various policy-related issues arise from the asbestos litigation problem. The first concerns the magnitude of the problem. Before this study, there was abundant rhetoric but little hard information on the amount of compensation paid, how compensation varied with claim and injury characteristics, or how much it cost to resolve these claims. It was clear that the costs were high—but it was not at all clear *how high*. This study sheds light on the issue by documenting what compensation and expenses have been and how they varied with claim characteristics for the period 1980–1982.

Should Any of the Various Proposed Solutions Be Adopted?

Because the asbestos problem is immense and because it may influence public reactions to other major health and legal problems, many responses have been and are being proposed. Several generic lines of reform have been suggested by various people: increased coordination and efficiencies within the existing tort system; establishment of a joint claims facility for settlement negotiation without filing a lawsuit; arbitration; and government-mandated compensation systems.

[14]David Lanter, "Footing the Bill for Toxic Torts," *National Law Journal*, January 31, 1983.

What Will Be the Effect on Other Emerging Product Liability Problems?

The shape that responses to the problems posed by asbestos claims ultimately take is critically important to tens of thousands of injured workers and their families, to the businesses involved in asbestos mining, distribution, and use, to their insurers, and perhaps to the government. The asbestos problem may be unique and hence warrant a unique solution; on the other hand, it may be important as a precedent for other toxic substances, especially if they are determined to have major consequences for public health. Examples of such substances that may or may not pose a major problem in the future include benzene, cadmium, dioxin, formaldehyde, vinyl chloride, and various fungicides and pesticides.

STUDY OBJECTIVE AND RESEARCH QUESTIONS

The objective of this study is to estimate the costs to all parties of resolving asbestos product liability litigation through the court system. Using data from interviews and surveys of defendants, insurers, and plaintiffs' lawyers, the study seeks to answer four major questions:

- How much compensation did plaintiffs receive?
- What were defense litigation expenses?
- What were plaintiff litigation expenses?
- How did various factors affect the size of settlements, trial verdicts, and expenses?

The focus of this study is on asbestos-related product liability litigation; the study does not include costs incurred by the government, costs of claims filed for workers' compensation, and costs incurred in reorganization under Chapter 11 of the Federal Bankruptcy Act.

This study does not project from 1982 data to 1984 or to future costs or compensation. The system is in a transition: Future costs and compensation will depend heavily on the outcomes of the Chapter 11 bankruptcy reorganizations, and on the details of any of the proposed changes in the system of processing these claims that may be implemented. Nor does this study address such matters as the "appropriateness" or "reasonableness" of expenses, the "adequacy" of compensation given the injuries and their effects, or "changes" in the tort litigation system. We believe, however, that cost data are essential in considering the performance of the current system and any proposed alternatives for processing claims.

Two other ICJ studies are addressing the asbestos litigation problem. One describes the alternative methods different courts are using to process these claims. The other is modeling how plaintiffs and defendants make decisions on the value of individual asbestos claims.

RESEARCH APPROACH

We employed two research approaches in this study.

In the first, the results of which appeared in our first report, we sought aggregate data on total compensation and defense expenses through August 26, 1982, on all closed claims combined from all major defendants and insurers. Several plaintiffs' attorneys were interviewed regarding average contingency fees and other litigation expenses. Our first approach, however, did not provide the detailed information about individual claims that was needed to understand how various factors (such as type of injury, type of worker, type of court, and year closed) affected the size of compensation and expenses.

Consequently, in our second research approach, the results of which appear in this report, we sought individual claim data on compensation, plaintiffs' expenses, and defense allocated expenses such as legal fees and related expenses, from all major defendants, insurers, and plaintiffs' lawyers for a nationally representative random sample of claims closed by all or nearly all defendants between January 1, 1980, and August 26, 1982.

The two reports use different data, with the exception of defense unallocated expenses (such as for claims processing and management), insurance coverage litigation expenses, and plaintiffs' litigation expenses.

In collecting data for both research approaches, we received excellent cooperation from most of the major defendants and insurers, and helpful cooperation from some plaintiffs' lawyers. Refer to the "Data Collection and Analysis Methods" subsection below for details of the cooperation received.

CHOOSING THE SAMPLE OF CLAIMS

The sampling procedures were designed and conducted entirely by Rand Corporation staff. The sample includes 513 claims that were tried, were settled, or were dismissed and not refiled. We randomly selected these claims to represent the entire national caseload of asbestos product liability litigation terminated by all or nearly all defendants

between January 1, 1980, and August 26, 1982. We chose this time period because we were concerned that claims closed pre-1980 might differ substantially from more recently closed claims, and because the August 1982 Chapter 11 bankruptcy filing by The Manville Corporation (the largest defendant) seemed to terminate one phase and open a new phase of asbestos litigation. The three Chapter 11 bankruptcy filings have prevented the complete closure of claims against those defendants since 1982.

Before selecting the sample in the fall of 1982, we inspected and cross-checked the contents of several independent defendants' and insurers' claims databases. The results convinced us that the list of approximately 21,000 different claimants, which constituted the population from which we drew the sample, did not systematically exclude any significant set of claims. Confidentiality agreements with all participants in the study preclude disclosure of specific sources.

We eliminated from this list approximately 900 claims that were closed prior to January 1980, and all claims still substantially open in August 1982, leaving about 3200 claims for potential inclusion in the sample. We wanted a sample large enough to be statistically representative but not so large as to be burdensome for the plaintiff, defendant, and insurer respondents from whom we sought data. We concluded that the maximum number of cases for which data collection was practical was approximately 500.

Relatively few claims have been tried. Hence, to ensure that there would be an adequate number of tried claims for separate statistical analysis, we included all of the 132 trials in our database in the sample. (A tried claim is defined as one in which a trial was commenced for at least some defendants, even though other defendants may have settled prior to trial for that claim.) To check the completeness of our trial list, we compared it with the list of 124 claims tried after January 1, 1980, that was published in the *Asbestos Litigation Reporter* (ALR) periodical (October 8, 1982, issue). Our sample contains 22 tried claims not listed in the ALR and includes all but 14 ALR claims: In 13 of the 14, we did not have sufficient information about the specific claim to include it in the survey;[15] in the other case, default judgments were granted against all defendants, none of whom had appeared at trial.

To select the sample of settled and dismissed claims for analysis, we used a standard, computerized random probability sampling procedure. This procedure yielded a sample of 431 nontrial claims from our

[15]Of those 13 cases, the ALR indicated that 10 had settled during trial, one had had a defense verdict, and two had had a plaintiff's verdict.

original list of 3000+ such claims (exclusive of tried claims), with each claim having a 1 in 7 chance of being selected. Claims that were dismissed and subsequently refiled were excluded.

The resulting sample of claims is representative of the population of cases tried or otherwise terminated between January 1, 1980, and August 26, 1982, and has been carefully checked.

After completion of data collection on the 563 sample claims, we observed that 50 nontrial claims were still open for several defendants, rather than being closed for all or nearly all defendants as we thought when we drew the sample. We therefore deleted those claims from the sample, leaving a total of 513 claims for analysis that were closed with respect to all or nearly all defendants.

In the final sample of 513 claims, 81 percent were fully closed by *all* defendants.[16] The remaining 19 percent were closed by nearly all defendants, but were known to be open with respect to an average of 1.6 defendants. Only 13 claims were open for more than two defendants, and no claim was open for more than four defendants. To avoid underestimating the level of compensation on this 19 percent of the claims, the amount those 1.6 defendants would have paid was estimated and included (as described below in this section).

The settled claims that were closed with respect to nearly all defendants had slightly higher compensation than the fully closed settled claims, so including them raised the average compensation somewhat. The average compensation for the fully closed settled claims was $53,000, whereas the average for the entire sample of settled claims was $55,000. The settled claims that were closed for nearly all defendants had essentially the same distribution of types of injuries as the fully closed settled claims. However, the claims closed for nearly all defendants were more likely to be for shipyard workers and less likely to be part of a multiple-plaintiff lawsuit.

We decided to include this 19 percent in the analysis because they were known to be open for an average of only 1.6 defendants (whose compensation we estimated) and because they represented a substantial amount of actual compensation data that enriched the database.

[16]Claims involving structured payments over time were counted as closed, and the present values of the structured payments were included in total compensation.

DATA COLLECTION AND ANALYSIS METHODS

Of the 22 major defendants we approached for data,[17] 17 agreed to participate. We interviewed all of them, and each provided aggregate data on settlements, trial awards, and various types of expenses for *all* of their asbestos litigation cases. Each also provided data on compensation paid and defense allocated expenses for our sample of claims. These 17 participating defendants represent an excellent cross-section of the defendant population. Of the 16 defendants who are named on at least half of all suits filed, 11 participated in this study. We also have detailed information on three of the five other defendants who are named on at least half of all suits filed. Of the approximately 15 defendants named on one-quarter to one-half of all suits filed, six participated. We also have detailed information on 21 defendants who are named on less than one-quarter of the suits. For defendants for whom we lacked data, we made estimates using a combination of published data and confidential data from *comparable*[18] participants. In all, we collected enough information to estimate payments made by all defendants and their insurers.

Of the 18 major insurers we approached, 12 agreed to cooperate. We interviewed them, and they provided both aggregated and claim specific data for their asbestos litigation.

Of the 104 plaintiffs' attorneys whom we approached, 34 provided information.[19] We interviewed five of them regarding plaintiff expenses in general, and surveyed the rest by mail (with telephone follow-up) regarding our random sample of the cases they had filed. We have no indication that the attorneys' legal fees and expenses were biased.[20]

[17]Early in the study, we compiled a list of defendants and their insurers that were thought to be the major participants in asbestos litigation. After our data collection was complete, we identified one additional defendant that was named on at least half of all claims filed, and eight additional defendants that were named on between one-quarter and one-half of all claims filed. Data were not sought directly from these additional defendants.

[18]By "comparable" organizations, we mean ones that we believe are likely to pay similar average compensation per claim and have similar defense litigation expenses per claim. This judgment was based on such factors as the nature of the company's business, the frequency with which it was sued, and other publicly available information.

[19]On 21,000 claims filed for which we had information, 680 different plaintiffs' attorneys were named. Only about two dozen plaintiff's attorneys' firms have large caseloads.

[20]We received information from 11 plaintiffs' attorneys about why they or some of their colleagues refused to cooperate in this research. The variety of reasons given were: They felt that the partial financial support that The Rand Corporation receives from some insurance companies to support The Institute for Civil Justice tainted the study; they felt that Rand may have selected the sample of claims in a biased manner to show minimum plaintiff compensation and maximum plaintiff costs; they feared the study will show that transaction costs are higher than plaintiffs' net compensation and the blame for this situation will be placed on plaintiffs' lawyers, as it has been in the past; since the

Lawyers who provided information included some of those with the largest caseloads and some with small caseloads. These cases are almost always handled on a contingency fee basis. The percentage fees charged by these lawyers were reasonably consistent, and we are confident that our estimates of plaintiffs' legal fees and related expenses are reasonable.

A few individual plaintiff's lawyers have indicated that their sampled claims do not appear to be typical of their caseloads. There are several possible reasons for this apparent difference. First, in a random sample of claims involving over 100 plaintiffs' lawyers, any single lawyer is likely to have a small number of claims in the sample. Thus, while the sample is representative of claims nationwide, it may not be representative of a single lawyer's caseload. For some lawyers, this small number of claims may have lower total compensation than each of those lawyers' average. For others, the sampled claims could reflect larger total compensation than the average for each lawyer. Although the sampled claims may not be average for an individual lawyer, the size of the sample, the checks that were conducted to assure that the population from which it was drawn was substantially complete, and the random selection technique we employed assure that the sample is representative for the nation as a whole. Second, the median compensation[21] paid was substantially less than the average for asbestos claims; thus, the majority of the claims were closed for a below-average level of compensation.[22] And third, settlements achieved by some plaintiffs' lawyers since August 1982 may have varied in amount from those in 1980–1982—for example, they may have been substantially larger or smaller. Thus, although the sample as a whole is unbiased as regards the period 1980–1982, an individual lawyer comparing his claims in the

study will present only cost figures, it will fail to call to public attention the social benefit produced by plaintiffs' lawyers in developing the field of occupational disease; unusual ratios of legal fees to compensation would identify cases in which plaintiffs' lawyers have made substantial mistakes; the parties to some settlements have agreed to keep the amounts secret; the study's inevitable policy consequence will be a recommendation to sidestep the courts as an avenue of compensation; costs divert attention away from the avoidable mass suffering caused by the asbestos industry; the major purpose of the tort system for products cases is not to bestow compensation, to which costs might be relevant, but is rather to require payment to prevent future corporate negligence, an objective to which costs are irrelevant; fee and cost data are misleading unless accompanied by information about lawyer overhead, and that information is private; and finally, compensation fee and cost information are confidential and may not be disclosed without client permission.

[21]Half the claims have compensation below the median. The average is calculated by adding all compensation and dividing by the number of claims.

[22]This also is true of litigation in general. See M. G. Shanley and M. A. Peterson, *Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959–1980*, The Rand Corporation, R-3006-ICJ, 1983.

sample with a working figure he has in mind based on his more recent experience may conclude that the sampled claims differ from his average total compensation.

Because of the sensitivity of litigation compensation and expense data, nearly all participants requested that we treat the information they provided as confidential, that we not identify them in our report, and that we not present data separately for individual participants. So as to obtain complete data from a large number of the major participants, we agreed to these conditions. For most participants, the choice was between good data under confidentiality terms or no data at all.

After we had received the closed-claim survey data, we calculated total compensation for each claim in the sample. We used total compensation on the claim as reported by the plaintiff's attorney or the ALR, if available. For the remainder of the sample, we first added the compensation paid on the claim by participating defendants and insurers, using the survey data. If we did not have total compensation for the claim from the plaintiff's attorney or the ALR, then we estimated the compensation paid by any defendant on the claim for whom we did not have survey data. These estimates were made using compensation data from comparable defendants who participated in this study. The estimates for defendants for whom we did not have survey data took into account: (1) the level of compensation paid by other defendants reporting compensation data for this claim, and (2) the percentage of total compensation paid in the average claim by the defendant whose data were missing, in relation to the percentage of compensation paid in the average claim by other defendants in this specific claim for whom we had compensation data.

Only about 24 percent of total compensation had to be estimated for tried claims, and about 28 percent for settled claims.[23] The main reason for having to estimate such a low percentage of total compensation per claim is that we had closed-claim survey responses for 14 of the top 16 defendants—and those 16 were named on at *least* half of all claims filed and paid 75 percent of all compensation. We also had detailed claim data regarding 27 more defendants, each of whom was named on less than half the claims filed.

We calculated total defense expenses for each claim in the sample by adding the amount spent on legal fees and other legal expenses by each defendant and by the insurers for each defendant on the claim. We used survey data on expenses provided by the defendants and their

[23]We investigated the sensitivity of the average total compensation paid per claim to these estimates. Using a low (or high) reasonable estimate instead of our best estimate resulted in an 8 percent reduction (or increase) in average total compensation.

insurers, if available; otherwise we made estimates. We then added the average amount spent per claim by each defendant and insurer for "unallocated expenses" such as claims processing and management, plus an average amount ($1500) per claim for the prorated expense of the insurance coverage lawsuits.[24]

We estimated defense expenses for defendants who did not participate in our survey. We did so after estimates of compensation were completed for each claim for each defendant, as described above. If a particular defendant was named on the claim, but we did not know the defense expenses incurred, we estimated them by multiplying the actual or estimated compensation paid by the defendant on the claim by the ratio of defense expenses to compensation for that defendant, adjusted for the level of compensation. We obtained that ratio by looking at aggregate compensation and expense data for all claims closed by that defendant. If we could not compute the ratio directly for the defendant, we made an estimate using a combination of published data and confidential data from *comparable* participants in this study. In analyzing the data, we noted that defense expenses rose as compensation rose, but not as fast. We therefore adjusted the overall aggregate ratio of estimated expenses to compensation for a defendant to reflect the way the ratio varies with compensation for all defendants for whom we had actual expenses. If the defendant paid zero in compensation and expenses had to be estimated, we used the expenses paid for that defendant or comparable defendants assuming they paid their usual percentage of the total compensation paid on this specific claim. We reemphasize that we used actual expense data (without any adjustments) for each defendant for each claim when we had the data.

Some defense lawyers sent consolidated bills for each lawsuit, rather than showing legal fees and other expenses separately for each claimant on each lawsuit. We looked at every multiple-claimant lawsuit for every defendant separately, and if this consolidated billing for several claimants occurred and had been assigned to only one claimant (usually the first one listed on the lawsuit), then we prorated the defense expenses among all claimants on the lawsuit.

We calculated total plaintiff's expenses for each claim in the sample as follows. The sum of the individual claimant's legal fees and other legal expenses reported to us by 31 cooperating plaintiffs' lawyers was used for 93 claims in the sample. If the plaintiff's lawyer did not respond to our survey, we made an estimate for the claim based on

[24]See our earlier report on the costs of asbestos litigation for a discussion and analysis of these numbers.

average contingency fees charged and average other expenses incurred on asbestos claims, using data from our survey of other claims and interviews with plaintiffs' lawyers. The estimates used when the plaintiff's lawyer did not respond were 45 percent of total compensation for tried claims (39 percent fees plus 6 percent expenses) and 39 percent for settled claims (34 percent fees plus 5 percent expenses). (See Sec. VIII for details.)

COMPARISON OF RESULTS FROM SAMPLE AND FROM ALL ASBESTOS CLOSED CLAIMS

The extent to which the sample is representative of claims closed in the sample time period is attested to when we compare results from analysis of the sample closed-claim data for 1980 to 1982 with the results from analysis of aggregate data on *all* closed claims described in our previous report. *These two different research approaches yielded essentially the same results.* The average total compensation using aggregate data was $60,000 while the average using the sample closed-claim data was $64,000. After deduction of the plaintiff's expenses, the average percent of total compensation plus defense expenses that the plaintiff received was 37 percent using aggregate data and 39 percent using sample closed-claim data. In addition, as will be seen in Sec. II, the distribution of other claim characteristics for the sample is very similar to the distribution of claim characteristics for the universe of all claims closed in 1980–1982.

II. TABULATIONS OF LITIGATION EXPENSES AND COMPENSATION AS A FUNCTION OF SINGLE VARIABLES

This section presents simple tabulations and statistics for tried claims, settled and dismissed claims, and all claims combined.[1] The data are presented one variable at a time. However, both compensation and expenses are influenced by many variables simultaneously. For example, a single tabulation of trial awards appears to show a rapid increase from 1980 to 1982; however, after considering changes from year to year in the characteristics of claims that are tried, the growth in trial awards is actually more modest. Readers are cautioned against prematurely reaching conclusions about the magnitude of the impact of any single variable on either compensation or expenses. Subsequent sections examine the impact of each single variable, holding all other variables constant.

The pages that follow contain repeated references to "our sample period"; unless otherwise noted, that period is January 1, 1980, to August 26, 1982.

METHOD OF CLAIM DISPOSITION

As shown in Fig. 2.1, about 95 percent of the claims were closed before trial began, with only 8.3 percent receiving no compensation. Of the 4.7 percent that began trial, 18 percent were subsequently settled, the plaintiff won an award 53 percent of the time, and 29 percent resulted in defense verdicts (no compensation awarded as a result of the trial). But most claims with defense verdicts at trial still resulted in compensation, because most of the claims received pretrial settlements from some defendants before the remaining defendants went to trial.

[1]Data were analyzed for tried claims separately from claims closed before trial. The separate results were then combined, weighted by the number of each of these two types of claims in the total universe of all closed claims (including those in and not in the sample).

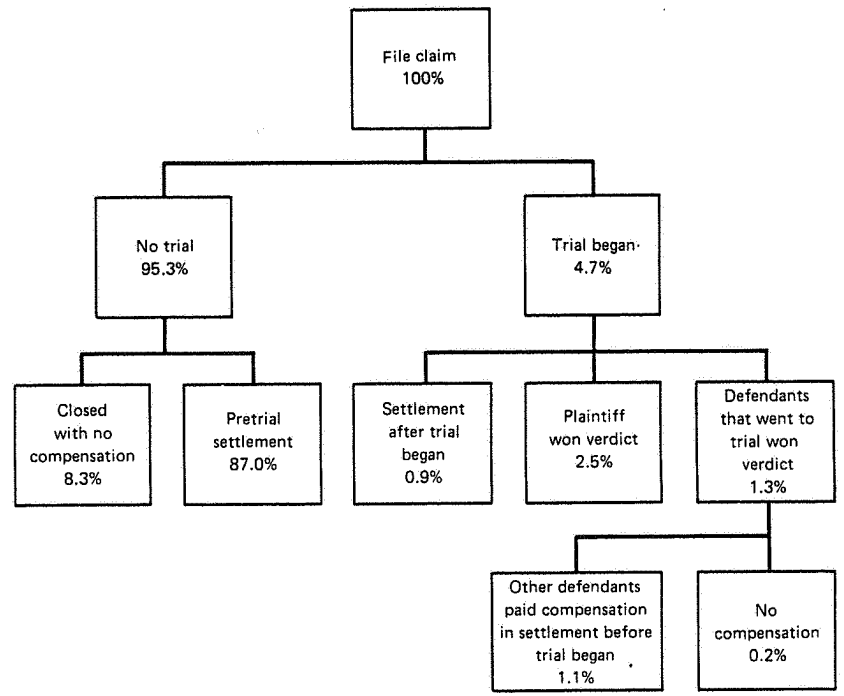

Fig. 2.1—Percent of asbestos product liability claims closed at various stages between January 1, 1980, and August 26, 1982

Tried Claims

The average total compensation paid for the claims that began trial in our sample period was $255,000; the median was $123,000; and the maximum was $2,300,000. These figures include compensatory damage awards, punitive damage awards, if any, and pretrial settlements paid by any defendants who elected to settle before other defendants went to trial; they do not include any changes in compensation that may result from appeals of some of the awards.[2] Considering all tried claims, 95 percent of the claimants received at least some

[2]Because trial verdicts may be reduced after appeal or settled for less than the verdict, our estimate of compensation for claims that began trial overstates, to an unknown extent, the compensation actually received in this class of claims. The awards for 24 percent of the claims for which trial began are being appealed.

compensation in pretrial settlement or trial award or both. The median and average total compensations for those who received at least some money were $132,000 and $269,000, respectively.[3]

The average total compensation for the 53 percent with plaintiffs' verdicts was $388,000. The 18 percent that were settled by all defendants after trial began received about half as much, an average of $189,000.[4] Claims with defense verdicts accounted for 29 percent of the trials during this time span. In 82 percent of trials that led to defense verdicts, some defendants had settled before the trial began (paying an average of $62,000 per claim).

Claims Closed Before Trial

Claims closed before trial began accounted for 95 percent of all claims closed in our sample period. Of these claims, 91 percent received compensation that ranged up to $1,400,000, had a median of $33,000, and averaged $60,000, while only 9 percent received no compensation from any defendant.[5] Total compensation for claims closed before trial began, including both those with and without compensation, had a median of $27,000 and averaged $55,000.[6]

All Closed Claims Combined

Averaging claims tried and claims closed before trial together, the grand total average compensation paid was $64,000 in our sample period.[7] See Tables 2.1 and 2.2 for details.

Plaintiff's legal fees and expenses for all tried claims averaged $114,000 (for tried claims that received some compensation, the

[3]These figures are similar to, but not identical to, those estimated in our earlier report (*Costs of Asbestos Litigation*, R-3042-ICJ) because the amounts paid on tried claims by those defendants that settled before trial began were not known to us on a case-by-case basis when that report was written.

[4]The average compensation and litigation expenses for claims settled after trial began were more like claims tried to verdict than they were like claims settled before trial. Consequently, for subsequent analyses, we grouped together all claims for which trial began.

[5]Our earlier report stated that 18 percent of the closed claims were dismissed or withdrawn. That 18 percent included some claims that were later refiled (these were excluded here) and included dismissed or withdrawn claims for which one or more defendants had already paid some compensation in settlement.

[6]This figure is close to the $53,000 in our earlier report that applied to all claims closed without trial prior to August 26, 1982.

[7]Other studies have estimated that the average compensation is as low as $35,000 and as high as $350,000 per claim. Those studies are based on substantially fewer, and usually much older, data than we had available to us (see Sec. I, "Overview of Previous Studies," in our earlier report, R-3042-ICJ).

Table 2.1

METHOD OF DISPOSITION AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Method of Disposition	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
Tried, defense verdict	51,000	1.3	51,000	29	—	0
Tried, plaintiff verdict	388,000	2.5	388,000	53	—	0
Settlement after trial began	189,000	0.9	189,000	18	—	0
All claims closed after trial began	255,000	4.7	255,000	100	—	0
Settled before trial, with compensation	60,000	87.0	—	0	60,000	91
Closed before trial, no compensation	0	8.3	—	0	0	9
All claims closed before trial	55,000	95.3	—	0	55,000	100
All claims closed by any method	64,000	100	—	—	—	—

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

Table 2.2

PERCENTILE DISTRIBUTION OF COMPENSATION PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Percent of Claims Closed With Compensation Less Than or Equal to Amount Shown at Right	Claims Closed Before Trial	Tried Claims[a]
5%	$ 0	$ 0
10	1,000	10,000
20	12,000	27,000
30	14,000	49,000
40	20,000	79,000
50	27,000	123,000
60	37,000	150,000
70	55,000	225,000
80	80,000	305,000
90	136,000	507,000
95	203,000	1,100,000

[a]Includes all claims for which a trial began, and tried claims on appeal.

average was $120,000 or 45 percent of total compensation). For all claims that closed before trial began, the average was $21,000 (for settled claims that received some compensation, the average was $23,000 or 38 percent of average total compensation).

Defendants' legal fees and expenses for all tried claims averaged $125,000, or 49 percent of what they paid in total compensation. For claims that closed before trial began, the average was $33,000 or 60 percent of what they paid in total compensation.

For all claims closed by any method in our sample period, the average legal fees and expenses were $25,000 on the plaintiff's side (39 percent of total compensation) and $37,000 on the defendant's side (58 percent above what they paid in total compensation). See Tables 2.3 and 2.4 for details.

As shown in Fig. 2.2, the total amount expended by all defendants and insurers combined was $101,000 for the average claim closed in our sample period, including both total compensation paid and defense legal fees and expenses. After deducting legal fees and expenses incurred by both sides, the plaintiff received an average net compensation of $39,000 or 39 percent of the $101,000 expended by defendants and insurers. The plaintiff received considerably more if the claim was tried ($141,000 after payment of all legal fees and expenses for tried claims, versus $34,000 for claims closed before trial).

AGE

As of the date of claim filing or their death, persons injured by exposure to asbestos usually were middle-aged or older. Of 61 percent of the plaintiffs for whom we have age data, only 5 percent were less than 40 years old and only 33 percent were between 40 and 55 years old. Forty-four percent were between 56 and 65, and 18 percent were age 66 or more.[8] The high average age of 57 years for both tried and nontried cases is attributable to the long latency period, often 15 to 40 years, between first exposure to asbestos and manifestation of disease.

The maximum average compensation ($87,000) was received by claimants aged 50 to 59 years. It declined to an average of $41,000 for those over 70 years old. Interestingly, it also was less for younger people—averaging $67,000 for those less than 50 years old. This effect may be due to less severe injuries in younger claimants; it is discussed

[8]The comparable figures for all closed claims combined, including data from those not in our sample, were 8, 33, 43, and 16 percent, respectively. A clerical error caused an incorrect distribution of claimants' ages for all closed cases shown in our previous report, R-3042-ICJ, p. 15.

Table 2.3

METHOD OF DISPOSITION AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]			
	Defense Expenses		Plaintiff Expenses	
Method of Disposition	$	% of Total Compensation	$	% of Total Compensation
Tried, defense verdict	103,000	202	22,000	43
Tried, plaintiff verdict	144,000	37	173,000	45
Settlement after trial began	106,000	56	85,000	45
All claims closed after trial began	125,000	49	114,000	45
Settlement before trial, with compensation	36,000	60	23,000	38
Closed before trial, no compensation	10,000	na	0	na
All claims closed before trial began	33,000	60	21,000	38
All claims closed by any method	37,000	58	25,000	39

NOTE: na = not applicable.
[a]Includes tried cases on appeal.

Table 2.4

PERCENTILE DISTRIBUTION OF LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Percent of Claims Closed With Litigation Expense Less than or Equal to Amount Shown at Right	Claims Closed Before Trial		Tried Claims[a]	
	Defense Expenses	Plaintiff Expenses	Defense Expenses	Plaintiff Expenses
5	6,000	0	36,000	0
10	9,000	< 1,000	42,000	5,000
20	12,000	4,000	56,000	12,000
30	13,000	6,000	66,000	22,000
40	21,000	7,000	77,000	36,000
50	28,000	9,000	90,000	54,000
60	34,000	13,000	119,000	67,000
70	40,000	20,000	151,000	97,000
80	48,000	30,000	172,000	140,000
90	68,000	53,000	222,000	228,000
95	86,000	80,000	270,000	495,000

[a]Includes all claims for which a trial began, and tried claims on appeal.

further in Sec. III. See Tables 2.5 and 2.6 for average compensation and expenses as a function of age, respectively.

MARITAL STATUS

Data on marital status were available for only about two-thirds of the sample. For those claims with data, nearly all claimants were married; only 5 percent were known to be single, divorced, separated, or widowed.[9] Married plaintiffs received an average total compensation of $73,000; the unmarried received $54,000. (See Table 2.7.)

SEX

Almost all claimants were male. Only 1 percent of tried claims and 5 percent of settled or dismissed claims were for females.[10] The number

[9]In cases where survivors filed claims based on the death of a person from asbestos-related disease, we used the marital status of the deceased person prior to death. The comparable figure for all closed claims combined, including data from those not in our sample, also was 5 percent.

[10]In cases where survivors filed claims based on the death of a person from asbestos-related disease, we used the sex of the deceased person. The comparable figure for all closed claims, including those not in the sample, also was 5 percent female.

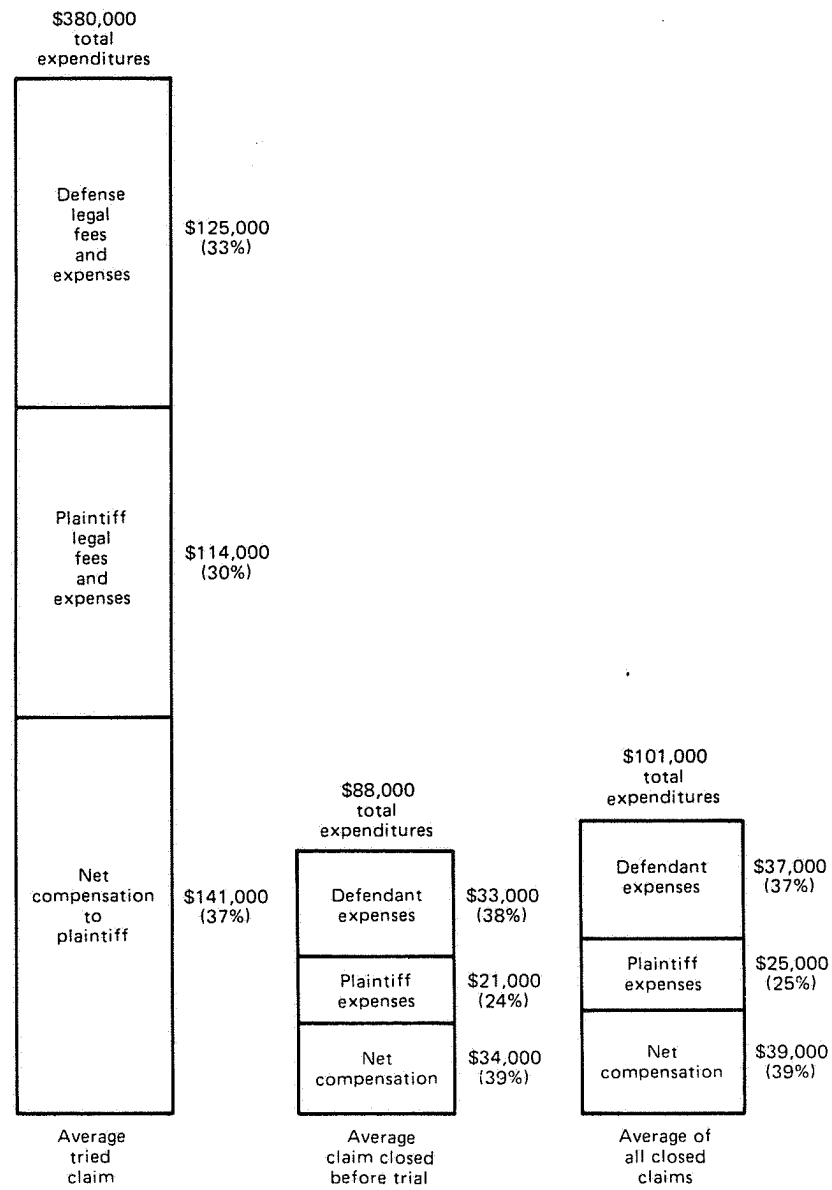

Fig. 2.2—Total expenditures per claim for asbestos product liability claims closed between January 1, 1980, and August 26, 1982

Table 2.5

AGE AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Age	$	% of Claims	$	% of Claims	$	% of Claims
1–39	77,000	4	(c)	2	75,000	4
40–49	62,000	8	298,000	13	43,000	8
50–59	87,000	24	298,000	27	75,000	24
60–69	63,000	21	250,000	25	52,000	21
70 and up	41,000	4	(c)	5	36,000	4
Missing data	53,000	39	227,000	28	47,000	39

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than ten claims in the sample in this category.

of females whose claims were closed was too small, and concentrated in too few lawsuits, to make a valid comparison of average total compensation for males and females.

WORKER CLASSIFICATION

Although workers in many industries are exposed to asbestos, three major worker classifications account for the vast majority of asbestos-related litigation: 37 percent of all closed claims in our sample were filed by shipyard workers, 35 percent by asbestos product factory workers, and 21 percent by insulation workers. Only 7 percent were in other or unknown industries.[11]

An even greater percentage of the *pending* claims (as of August 1982) were brought by shipyard workers (51 percent), while smaller percentages were brought by asbestos product factory workers (12 percent) and insulation workers (14 percent). The "other" and "unknown" groups comprised 13 percent and 10 percent of pending claims.

Insulation workers received the highest average compensation, $105,000 per closed claim, while shipyard workers received $74,000. Asbestos-related factory workers received substantially less compensation, an average of only $28,000. Average compensation and expenses

[11]The corresponding figures for all closed claims combined, including data from those not in our sample, were 39, 33, 20, and 8 percent.

Table 2.6

AGE AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
Age	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
1–39	33,000	43	30,000	39	(c)	(c)	(c)	(c)	29,000	39	29,000	39
40–49	43,000	69	26,000	42	149,000	50	131,000	44	34,000	79	18,000	42
50–59	40,000	46	35,000	40	118,000	40	132,000	44	36,000	48	30,000	40
60–69	39,000	62	25,000	40	142,000	57	113,000	45	33,000	63	20,000	38
70 and up	42,000	102	15,000	37	(c)	(c)	(c)	(c)	36,000	100	13,000	36
Missing data	34,000	64	21,000	40	100,000	44	102,000	45	32,000	68	18,000	38

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than ten claims in the sample in this category.

Table 2.7

MARITAL STATUS AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Marital Status	$	% of Claims	$	% of Claims	$	% of Claims
Married	73,000	60	275,000	63	62,000	60
Unmarried[c]	54,000	3	(d)	6	(d)	2
Missing data	52,000	37	246,000	31	44,000	38

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Single, divorced, separated, widowed.
[d]Fewer than 10 claims in the sample in this category.

for both tried and settled or dismissed cases are shown in Tables 2.8 and 2.9, respectively.

TYPE OF INJURY

A number of diseases are allegedly caused, at least in part, by inhalation of asbestos fibers. However, most research studies on disease incidence and lawsuits have focused on the three main diseases of asbestosis, lung cancer, and mesothelioma. Asbestosis accounted for 76

Table 2.8

WORKER CLASSIFICATION AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Worker Classification	$	% of Claims	$	% of Claims	$	% of Claims
Factory worker (Asbestos-related)	28,000	35	148,000	26	24,000	36
Insulation worker	105,000	21	246,000	39	92,000	20
Shipyard worker	74,000	37	399,000	28	62,000	37
Other type worker	71,000	7	(c)	7	69,000	7

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

Table 2.9

WORKER CLASSIFICATION AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expense		Plaintiff Expense		Defense Expense		Plaintiff Expense		Defense Expense		Plaintiff Expense	
Worker Classification	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
Factory worker (asbestos-related)	16,000	57	12,000	43	64,000	43	67,000	45	14,000	58	10,000	42
Insulation worker	59,000	56	43,000	41	129,000	52	110,000	45	52,000	57	36,000	39
Shipyard worker	45,000	61	28,000	38	187,000	47	176,000	44	40,000	65	23,000	37
Other type worker	44,000	62	28,000	39	(c)	(c)	(c)	(c)	42,000	61	27,000	39

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

percent, lung cancer for 12 percent, mesothelioma for 5 percent, and all other types of injury for only 3 percent for claims closed in our sample period.[12] No asbestos-related injury was manifest for 4 percent of our sample. The injury data were obtained and compared from four defendant and insurance company sources after the claims were closed, and are believed to be reliable. Several disorders ranging widely in severity, such as pleural plaques and lung fibrosis, were included in the asbestosis category.

As shown in Table 2.10, about the same percentage of tried and settled claims involved lung cancer (15 percent versus 12 percent), but tried claims more frequently involved mesothelioma than did settled cases (14 percent versus 4 percent). The Manville Corporation has projected that future lawsuits through the year 2001 will consist of 76 percent asbestosis, 7 percent lung cancer, and 17 percent mesothelioma cases.[13]

The average total compensation paid per closed claim was $54,000 for asbestosis, $83,000 for lung cancer, and $265,000 for mesothelioma

Table 2.10

TYPE OF INJURY AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Type of Injury	$	% of Claims	$	% of Claims	$	% of Claims
Asbestosis	54,000	76	205,000	69	47,000	77
Lung cancer	83,000	12	311,000	15	69,000	12
Mesothelioma	265,000	5	469,000	14	232,000	4
Other type injury	29,000	3	(c)	2	26,000	3
No manifest asbestos-related injury	< 1,000	4	—	0	< 1,000	4

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

[12]These injuries were usually some lung disease other than lung cancer and asbestosis, or some cancer other than lung cancer or mesothelioma.

[13]Testimony of Richard B. Von Wald, Vice President and Corporate Counsel, The Manville Corporation, at the *Oversight Hearings on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims*, Subcommittee on Labor Standards, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C., September 9, 1982, p. 64.

cases. Tried claims received 2 to 4 times as much as settled claims in every injury category. We have no data on severity of injury within the asbestosis category, so we cannot say whether asbestosis was more severe in tried cases, for example, than in settled cases. Compensation for mesothelioma, however, a disease that is usually rapidly fatal, was much higher for tried ($469,000) than for settled claims ($232,000). Plaintiff and defendant average expenses per claim closed are shown in Table 2.11.

At least 91 percent of all claims filed based on asbestosis, lung cancer, or mesothelioma received compensation, while only about half of the claims for other types of injuries did so. Only a small percent of the claimants with no manifest asbestos-related injury received compensation; those few who did usually received only a few hundred dollars. Table 2.12 contains data on the percent receiving compensation by type of injury, and the average total compensation for those claims that received some compensation.

We examined the interaction between type of work and type of injury. Table 2.13 shows that claims by insulation workers were more likely to involve lung cancer and mesothelioma (28 percent) than those by shipyard workers (15 percent) and factory workers (8 percent). For mesothelioma, there were too few claims to make reliable comparisons by type of worker. For lung cancer, the average compensation paid in settlement was similar across categories of workers, ranging from $61,000 to $77,000. For asbestosis, however, the average compensation paid in settlement differed sharply among types of workers, ranging from $23,000 for factory workers up to $92,000 for insulation workers (see Table 2.14). We hypothesize that at least part of that variation was due to variations in severity of the asbestosis injury which resulted from unequal exposure to asbestos among worker classifications. Our discussions with defendants and plaintiffs' attorneys tended to confirm the hypothesis that the asbestosis they were seeing in claims by factory workers was less severe than that of both insulation and shipyard workers. This topic is discussed further in Sec. III.

LIFE STATUS

Most plaintiffs were alive at the time of case closure, but 15 percent of the settled or dismissed claims and 27 percent of the tried claims involved deceased workers.[14] Spouses, dependents, and estates of

[14]The comparable figures for all closed claims, including those not in the sample, were 14 and 27 percent, respectively.

Table 2.11

TYPE OF INJURY AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expense		Plaintiff Expense		Defense Expense		Plaintiff Expense		Defense Expense		Plaintiff Expense	
Type of Injury	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
Asbestosis	37,000	69	21,000	39	119,000	58	91,000	44	33,000	70	18,000	38
Lung cancer	44,000	53	33,000	40	121,000	39	138,000	44	39,000	57	26,000	38
Mesothelioma	74,000	28	109,000	41	160,000	34	212,000	45	60,000	26	93,000	40
Other type of injury	30,000	103	12,000	41	(c)	(c)	(c)	(c)	26,000	100	10,000	39
No manifest asbestos-related injury	8,000	> 800	< 1,000	39	—	—	—	—	8,000	> 800	< 1,000	39

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

Table 2.12

TYPE OF INJURY, PERCENT RECEIVING COMPENSATION, AND AVERAGE TOTAL COMPENSATION PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]			Tried Claims			Settled or Dismissed Claims[b]		
Type of Injury	Average Comp. for All Claims	% Receiving Comp.	Average Comp. for Claims with Comp. Only	Average Comp. for All Claims	% Receiving Comp.	Average Comp. for Claims with Comp. Only	Average Comp. for All Claims	% Receiving Comp.	Average Comp. for Claims with Comp. Only
Asbestosis	$ 54,000	96	$ 56,000	$205,000	96	$214,000	$ 47,000	96	$ 49,000
Lung cancer	83,000	91	91,000	311,000	95	327,000	69,000	91	76,000
Mesothelioma	265,000	94	282,000	469,000	94	497,000	232,000	94	248,000
Other type injury	29,000	51	57,000	(c)	67	(c)	26,000	50	52,000
No manifest asbestos-related injury	< 1,000	19	2,000	—	—	—	< 1,000	19	2,000
All types	64,000	91	70,000	255,000	95	269,000	55,000	91	60,000

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

Table 2.13

PERCENT OF CLAIMS BY TYPE OF INJURY AND WORKER CLASSIFICATION FOR CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Type of Injury	Asbestos-Related Factory Worker	Insulation Worker	Shipyard Worker
Asbestosis	81	70	80
Lung cancer	8	20	10
Mesothelioma	< 1	8	5

NOTES: All other types of injuries (including no manifest asbestos-related injury) account for 7 percent of the claims, and are not shown here. See Table 2.10. All other types of workers account for 7 percent of the claims, and likewise are not shown here. See Table 2.8.

deceased workers received average total compensation of $94,000, as compared with $59,000 for living plaintiffs. Tables 2.15 and 2.16 show total compensation and expenses as a function of life status. It is important to stress that the impact of any single variable can be obscured by the impacts of other variables. For instance, claims for lung cancer and mesothelioma received higher compensation and were much more likely to involve death. Thus, when all other factors are held equal, living plaintiffs receive more instead of less compensation than the representatives of deceased workers.

SMOKER STATUS

Of the 63 percent of the plaintiffs whose smoking behavior was noted in the claim data, nearly all were tobacco smokers or had been smokers for some period during their lifetime. Only 3 percent were nonsmokers, and they received higher average compensation ($116,000, versus $81,000 for smokers as shown in Table 2.17).

STATE

As of August 1982, about 21,000 asbestos-related lawsuits had been filed in at least 48 states, but according to our data, 69 percent were filed in only five states (California, Massachusetts, New Jersey, Pennsylvania, and Texas). By far the highest number, 29 percent of the total, were filed in California. Of the claims closed in our sample period, 71 percent were filed in the same five states, with by far the

Table 2.14

AVERAGE TOTAL COMPENSATION PAID PER CLAIM BY TYPE OF INJURY AND WORKER CLASSIFICATION FOR CLAIMS CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	Factory Worker (Asbestos-Related)			Insulation Worker			Shipyard Worker		
Type of Injury	All Closed Claims	Tried Claims	Settled or Dismissed Claims	All Closed Claims	Tried Claims	Settled or Dismissed Claims	All Closed Claims	Tried Claims	Settled or Dismissed Claims
Asbestosis	$27,000	$151,000	$23,000	$ 97,000	$157,000	$92,000	$ 60,000	$335,000	$51,000
Lung cancer	79,000	(a)	76,000	112,000	(a)	77,000	64,000	(a)	61,000
Mesothelioma	(a)	(a)	(a)	(a)	(a)	(a)	378,000	(a)	(a)
All types combined	28,000	148,000	24,000	105,000	246,000	92,000	74,000	399,000	62,000

NOTES: All other types of injury (including no manifest asbestos-related injury) account for 7 percent of the claims, and are not shown here. See Table 2.10. All other types of workers account for 7 percent of the claims, and likewise are not shown here. See Table 2.8.

[a]Fewer than 10 claims in the sample in this category.

Table 2.15

LIFE STATUS AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Life Status	$	% of Claims	$	% of Claims	$	% of Claims
Living	59,000	85	244,000	73	51,000	85
Deceased	94,000	15	285,000	27	77,000	15

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

most closed in California and New Jersey.[15] In some states where few cases had ever been filed, none had been closed. Among the 23 states where more than 100 claims had been filed, only Hawaii had closed more than half of the total. In most states, fewer than 20 percent of the cases had reached disposition as of August 1982.

Among claims still open in August 1982, the same five states accounted for 69 percent of the pending caseload, with 30 percent of the total pending in California. Because The Manville Corporation was a defendant on nearly all cases filed prior to August 1982, its Chapter 11 bankruptcy filing in that month has prevented complete closure of any significant number of claims since then.

The average compensation and expenses per closed claim are shown in Tables 2.18 and 2.19 for the eight states that had closed the largest number of claims (all other states combined had closed only 14 percent of the total). The average compensation per claim closed varied from less than $25,000 in New Jersey to $145,000 in Hawaii and Pennsylvania. (These state averages do not necessarily mean that the same claim would receive greatly different compensation in different states, because claims in different states have different characteristics and trial rates, as shown in Sec. III.)

TYPE OF COURT

Nationwide, just over half of the closed claims were filed in federal instead of state courts, but in New Jersey and Texas the number was over 90 percent in 1980–1982. In California, Pennsylvania, and South Carolina, over two-thirds of the closed claims were filed in state courts.

[15]One large group settlement in New Jersey involved over 600 claimants.

Table 2.16

LIFE STATUS AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
Life Status	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
Living	35,000	59	24,000	41	127,000	52	108,000	44	31,000	61	20,000	39
Deceased	52,000	55	38,000	40	121,000	42	128,000	45	46,000	60	30,000	39

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

Table 2.17

SMOKER STATUS AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Smoker Status	$	% of Claims	$	% of Claims	$	% of Claims
Smoker at some time during life	81,000	61	244,000	91	69,000	59
Nonsmoker	116,000	2	(c)	6	(c)	2

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

Table 2.18

STATE AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
State	$	% of Claims	$	% of Claims	$	% of Claims
California	49,000	27	141,000	8	48,000	28
Hawaii	145,000	3	(c)	1	140,000	3
Massachusetts	(c)	3	(c)	0	(c)	3
New Jersey	24,000	26	(c)	1	23,000	27
Pennsylvania	145,000	9	206,000	29	133,000	8
South Carolina	40,000	3	(c)	2	41,000	3
Tennessee	59,000	5	330,000	8	38,000	5
Texas	106,000	10	281,000	18	90,000	10
Other	87,000	14	287,000	33	63,000	13

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Ten or fewer claims in the sample in this category.

Table 2.19

STATE AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
State	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
California	42,000	86	18,000	37	229,000	162	63,000	45	39,000	81	17,000	35
Hawaii	67,000	46	58,000	40	(c)	(c)	(c)	(c)	65,000	46	55,000	39
Massachusetts	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)
New Jersey	14,000	58	9,000	38	(c)	(c)	(c)	(c)	14,000	61	9,000	39
Pennsylvania	54,000	37	59,000	41	99,000	48	93,000	45	45,000	34	53,000	40
South Carolina	33,000	83	16,000	40	(c)	(c)	(c)	(c)	31,000	76	16,000	39
Tennessee	41,000	69	25,000	42	114,000	35	148,000	45	35,000	92	15,000	39
Texas	41,000	39	43,000	41	100,000	36	127,000	45	36,000	40	35,000	39
Other	57,000	66	37,000	43	127,000	44	125,000	44	48,000	76	26,000	41

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Ten or fewer claims in the sample in this category.

The average compensation per claim filed was much the same in federal ($63,000) and state courts ($66,000). Claims that were tried but not appealed resulted in average compensation of $167,000, while those known to be under appeal averaged much higher—$632,000 and $495,000 in state and federal appeals courts, respectively. Average compensation and expenses are shown by type of court in Tables 2.20 and 2.21. Data from appealed claims must be interpreted cautiously, since the compensation awarded may be reduced as the appeals progress, and the defense legal fees and expenses will increase.

Table 2.20

TYPE OF COURT AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Type of Court	$	% of Claims	$	% of Claims	$	% of Claims
State, excluding appeals	62,000	41	168,000	32	58,000	41
State appeals, as of August 1982[c]	632,000	< 1	632,000	6	—	0
Federal, excluding appeals	57,000	58	166,000	44	53,000	59
Federal appeals, as of August 1982[c]	495,000	< 1	495,000	18	—	0
All state	66,000	41	242,000	38	58,000	41
All federal	63,000	59	262,000	62	53,000	59

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Tried claims known to be under appeal in August 1982. These average awards may be revised as a result of the appeals.

NUMBER OF DEFENDANTS PER CLAIM

Over 300 different defendants have been named in asbestos product liability suits. A total of 16 corporations are named as defendants in at least half the suits, and another 15 or so in one-quarter to one-half; hence, most defendants are involved in fewer than one-quarter of the cases.

In all open and closed claims combined, plaintiffs sue an average of approximately 20 defendants, frequently because their employers (such

Table 2.21

TYPE OF COURT AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
Type of Court	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
State, excluding appeals	43,000	69	24,000	39	118,000	70	75,000	45	40,000	69	22,000	38
State appeals, as of August 1982[c]	252,000	40	285,000	45	252,000	40	285,000	45	—	—	—	—
Federal, excluding appeals	32,000	56	22,000	39	117,000	70	72,000	43	29,000	55	20,000	38
Federal appeals, as of August 1982[c]	116,000	23	223,000	45	116,000	23	223,000	45	—	—	—	—
All state	44,000	67	26,000	39	139,000	57	109,000	45	40,000	69	22,000	38
All federal	33,000	52	25,000	40	117,000	45	116,000	44	29,000	55	20,000	38

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Tried claims known to be under appeal in August 1982. The defense legal fees and expenses will rise as the appeals progress. The plaintiff legal expenses will rise, and the average plaintiff legal fees may be revised as a result of the appeals, in accordance with contingency fee agreements between plaintiffs and their lawyers.

as shipyards) were supplied with asbestos products by many corporations over their years of employment. Plaintiffs on closed claims had filed suit against an average of 15 defendants.[16] One-tenth filed against six or fewer defendants; one-tenth filed against 30 or more. Tried claims had an average of 14, while other closed claims had an average of 15 defendants. This multiplicity of defendants contributes to the time and cost of resolving these claims.

The average compensation per claim was lowest for those with one to 10 defendants ($37,000) and highest for those with 21 to 30 defendants ($104,000). Total compensation and expenses per claim are shown in Tables 2.22 and 2.23.

Table 2.22

NUMBER OF DEFENDANTS AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Number of Defendants on Claim	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
1 to 10	37,000	41	201,000	25	32,000	42
11 to 20	86,000	38	222,000	60	75,000	36
21 to 30	104,000	11	(c)	8	83,000	12
31 and up	52,000	10	(c)	7	48,000	10

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Ten or fewer claims in the sample in this category.

MULTIPLE PLAINTIFF LAWSUITS

A substantial minority of these claims were in lawsuits filed by multiple plaintiffs. Of all claims closed in our sample period, 21 percent of claims tried and 43 percent of claims closed before trial involved more than one plaintiff. (By a multiple-plaintiff case, we mean a case involving more than one person allegedly having an asbestos-related disease; we do not mean, for example, a case filed by several members of the same family following injury or death of one member of that family.) Multiple-plaintiff lawsuits had a substantially lower average total compensation per claim ($34,000) than individual plaintiff

[16]The comparable figure for all closed claims combined, including data from those not in our sample, was 16 defendants per claim.

Table 2.23

NUMBER OF DEFENDANTS AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Number of Defendants on Claim	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
1 to 10	17,000	46	15,000	41	81,000	40	90,000	45	15,000	47	13,000	41
11 to 20	50,000	58	34,000	40	116,000	52	98,000	44	45,000	60	29,000	39
21 to 30	58,000	56	42,000	40	(c)	(c)	(c)	(c)	53,000	64	32,000	39
31 and up	52,000	100	18,000	35	(c)	(c)	(c)	(c)	45,000	94	16,000	33

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

lawsuits ($88,000). These "group claims" received about half or less of the average compensation per claim paid on "individual claims" in both claims tried and in those claims closed before trial. Much of this apparent difference is actually due to other factors, such as type of injury, as will be shown when all claim characteristics are considered simultaneously in Sec. III. (See Tables 2.24 and 2.25 for information on compensation and expenses for these cases.)

Table 2.24

NUMBER OF PLAINTIFFS ON LAWSUIT AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Number of Plaintiffs on Lawsuit	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
1	$88,000	58	$284,000	79	$74,000	57
2–10	63,000	4	152,000	9	53,000	4
11–25	52,000	12	145,000	12	47,000	12
26 and up	21,000	26	(c)	0	21,000	27

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

YEAR OF CLAIM FILING

Some closed claims in our sample were filed as early as 1975 and 38 percent were filed before 1979; 23 percent were filed in 1979, 22 percent in 1980, and 17 percent in 1981–1982.[17] Claims filed in 1975 and 1976 received the lowest average total compensation, $27,000 and $36,000 respectively, due in part to some large group settlements for relatively low compensation per claim. Claims filed in later years received average total compensation that ranged from $48,000 to $111,000, depending on the year of filing. (See Tables 2.26, 2.27 and 2.28 for details of compensation and expenses by year of claim filing.)

Not surprisingly, the majority of cases pending at the end of 1982—63 percent—were filed during 1981 and 1982. Only 5 percent of the pending caseload had been filed before 1979.

[17]The comparable figures for all claims closed in our sample period, including data from those not in our sample, were 35, 26, 20 and 18 percent, respectively.

Table 2.25

NUMBER OF PLAINTIFFS ON LAWSUIT AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Number of Plaintiffs On Lawsuit	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
1	$50,000	57	$34,000	39	$137,000	48	$126,000	44	$44,000	60	$28,000	38
2–10	37,000	59	26,000	41	86,000	57	68,000	45	32,000	60	21,000	40
11–25	34,000	65	19,000	37	76,000	52	65,000	45	32,000	68	17,000	36
26 and up	12,000	57	8,000	38	(c)	(c)	(c)	(c)	12,000	57	8,000	38

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

Table 2.26

YEAR OF CLAIM FILING AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Year Claim Was Filed	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
1975	27,000	12	—	0	27,000	12
1976	36,000	9	(c)	1	35,000	9
1977	73,000	6	(c)	4	66,000	7
1978	111,000	11	248,000	30	92,000	10
1979	87,000	23	242,000	29	77,000	23
1980	48,000	22	203,000	21	41,000	22
1981	62,000	16	339,000	15	48,000	16
1982	(c)	1	—	0	(c)	1

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

YEARS FROM FILING TO CLOSURE

The average time from claim filing to closure was 2 years and 8 months.[18]

Tables 2.28 and 2.29 show average compensation and expenses per claim closed as a function of the number of years from filing to closure. The average compensation rises as that time increases from 1 to 4 years, but falls off markedly. This apparent decline was due mainly to some large group settlements that were closed for relatively low compensation per claim after 5 or 6 years.

YEAR OF CLAIM CLOSURE

Approximately 3,800 claims had been closed (i.e., had either been tried, settled by all or nearly all defendants, or dismissed and not refiled) by the end of August 1982, when The Manville Corporation filed under Chapter 11 of the federal bankruptcy act. This included

[18]The comparable figure for all claims closed, including data from those not in our sample, was 2 years and 9 months. About a third were closed in 1 year or less from filing, but 11 percent took 6 years (the longest amount of time reported for our sample of cases).

Table 2.27

YEAR OF CLAIM FILING AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Year Claim Was Filed	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
1975	15,000	56	11,000	41	—	na	—	na	15,000	56	11,000	41
1976	19,000	53	15,000	42	(c)	(c)	(c)	(c)	18,000	51	14,000	40
1977	46,000	63	29,000	40	(c)	(c)	(c)	(c)	44,000	67	26,000	39
1978	58,000	52	46,000	41	141,000	57	109,000	44	47,000	51	37,000	40
1979	47,000	54	34,000	39	131,000	54	108,000	45	42,000	55	29,000	38
1980	34,000	71	18,000	38	95,000	47	91,000	45	31,000	76	15,000	37
1981	39,000	63	24,000	39	113,000	33	153,000	45	35,000	73	18,000	38
1982	(c)	(c)	(c)	(c)	—	na	—	na	(c)	(c)	(c)	(c)

NOTE: na = not applicable.
[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

Table 2.28

TIME FROM FILING TO CLOSURE AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Number of Years from Filing to Closure	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
1	60,000	33	278,000	25	52,000	33
2	70,000	26	217,000	35	60,000	26
3	87,000	15	196,000	29	76,000	14
4	126,000	6	527,000	10	95,000	6
5	27,000	9	(c)	1	27,000	10
6	28,000	11	(c)	0	28,000	11

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

about 170 claims that either settled during trial or went to verdict by that date. Most of these claims were tried, settled, or dismissed after January 1, 1980; only about 900 claims were closed in the 1970s. Typically, each one of the major defendant corporations had tried, settled, or secured the dismissal of between 2,000 and 6,000 claims. Most of the filed claims have been partially but not completely settled; we know of at least 16,000 claims that have been closed with respect to one or more defendants.

The vast majority of claims, approximately 20,000 of the 24,000 filed, were still open or partially open as of March 1983. Since The Manville Corporation is a major defendant in nearly all of these claims, its Chapter 11 bankruptcy filing has prevented complete closure of any substantial additional number of claims since August 1982. Other defendants, however, have been settling and trying cases since then.

Our sample includes only claims closed between January 1, 1980, and August 26, 1982.[19] Of those, 15 percent were closed in 1980, 57 percent in 1981, and 28 percent in 1982. The average total compensation per tried claim more than doubled, from $148,000 in 1980 to $358,000 in 1982; the average for claims closed prior to trial was more constant, varying from a low of $47,000 in 1981 to $74,000 in 1980. Again, some

[19]The year of claim closure is defined as the year trial began for a tried claim, the year the most defendants closed a claim that had no compensation, and the year the most compensation was paid for a settled claim. (For the great majority of the claims, the year the most defendants closed the claim was the same as the year the most compensation was paid in settlement.)

Table 2.29

TIME FROM FILING TO CLOSURE AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Number of Years from Filing to Closure	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
1	37,000	62	24,000	40	108,000	39	124,000	45	34,000	65	20,000	39
2	43,000	61	27,000	39	105,000	48	98,000	45	39,000	65	22,000	37
3	49,000	56	35,000	40	134,000	68	87,000	44	40,000	53	30,000	40
4	62,000	49	53,000	42	203,000	39	229,000	44	51,000	54	39,000	41
5	17,000	63	10,000	37	(c)	(c)	(c)	(c)	16,000	60	10,000	37
6	15,000	54	11,000	39	(c)	(c)	(c)	(c)	15,000	54	11,000	39

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Fewer than 10 claims in the sample in this category.

large group settlements with relatively low compensation tended to obscure the rising time trend, which we uncover in our multivariate analysis in Sec. III. (See Tables 2.30 and 2.31 for compensation and expenses by the year of claim closure.)

Table 2.30

YEAR OF CLAIM CLOSURE AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Year of Claim Closure	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
80	76,000	15	148,000	9	74,000	15
81	53,000	57	190,000	50	47,000	58
82	82,000	28	358,000	41	62,000	27

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

PUNITIVE DAMAGES

Punitive damages totaling $4,934,000 were awarded to 19 plaintiffs in our sample period.[20] They ranged from $4,000 to $1,000,000 and averaged $260,000 per plaintiff receiving a punitive damage award. About half the awards were less than $100,000.

Even though punitive damages were awarded in 14 percent of the claims for which trial began, the $255,000 average total compensation for all tried cases included an average of only $37,000 in punitive damages.

Considering only those trials with plaintiffs' verdicts, 27 percent received punitive damages, which constituted $70,000 of their $388,000 average total compensation.

Tried claims with punitive damage awards also had much higher total compensation exclusive of the punitive award ($368,000)[21] than did tried claims that received no punitive award ($192,000).

(See Tables 2.32 and 2.33 for compensation and expenses for claims with and without punitive damages.)

[20]This includes all punitive damage awards in our sample period, with the exception of $35 million for one case in which default judgments were granted against all defendants, none of whom had appeared at trial. (*Stewart et al. v. North American Asbestos Corporation et al.*, McLean County, Illinois Circuit Court, 78-L201).

[21]$628,000 average total compensation less $260,000 average punitive damage award.

Table 2.31

YEAR OF CLAIM CLOSURE AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Year of Claim Closure	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
80	42,000	55	30,000	40	93,000	63	66,000	45	40,000	54	29,000	39
81	33,000	62	21,000	40	118,000	62	85,000	45	29,000	62	18,000	38
82	46,000	56	33,000	40	140,000	39	159,000	44	39,000	63	24,000	39

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

Table 2.32

PUNITIVE DAMAGES AND AVERAGE TOTAL COMPENSATION PAID PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Punitive Damage Outcome	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	% of Claims	$	% of Claims	$	% of Claims
Punitive damages were awarded	628,000	0.7	628,000	14	na	0
Punitive damages were NOT awarded	61,000	99.3	192,000	86	55,000	100

NOTE: na = not applicable.
[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

Table 2.33

PUNITIVE DAMAGES AND AVERAGE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980, AND AUGUST 26, 1982

Punitive Damage Outcome	All Closed Claims Combined[a]				Tried Claims				Settled or Dismissed Claims[b]			
	Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses		Defense Expenses		Plaintiff Expenses	
	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
Punitive damages were awarded	138,000	22	278,000	44	138,000	22	278,000	44	na	na	na	na
Punitive damages were NOT awarded	37,000	61	24,000	39	123,000	64	86,000	45	33,000	60	21,000	38

NOTE: na = not applicable.
[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

III. ANALYSIS OF COMPENSATION PAID

For all claims closed between January 1, 1980, and August 26, 1982, the average total compensation paid was $64,000. (The 95-percent confidence interval for the estimated average compensation using the sample data ranged from $58,000 to $70,000.) The analyses in this section are intended to illuminate how various claim characteristics were related to the amount of compensation paid. Rather than consider one characteristic at a time as in Sec. II, we analyze all characteristics about which we have data simultaneously so as to estimate the independent influence of each characteristic on compensation when all other characteristics are held constant.

The expected compensation at the time a claim is filed is the product of the probability of receiving any compensation times the expected compensation if any is paid. (This section concerns the amount of compensation, if any; Sec. IV concerns the likelihood of receiving any compensation, and discusses claim characteristics that are important in estimating that likelihood.)

To identify the factors that influenced the level of compensation, we began by considering total compensation (exclusive of punitive damages) as a function of all factors for which we had data. These factors included:

- Age
- Marital status
- Sex
- Worker classification
- Type of injury
- Alive or deceased
- Smoker status
- Region
- Type of court
- Number of defendants per claim
- Number of plaintiffs in lawsuit
- Method of claim disposition (pretrial settlement or trial)
- Year of claim closure

To examine how compensation levels varied as a function of claim characteristics, we explored several models using multivariate linear regression techniques. The model with the best statistical fit to the

data is presented here.[1] Standard variable selection procedures based on t and F statistics were used to eliminate some of the potentially explanatory variables when they were not statistically significant, but some nonsignificant variables were kept because of their special interest.

Table 3.1 shows the estimated regression coefficients for the independent variables in the final equation, as well as numerous statistics for assessing the precision of the estimates and the goodness of fit of the equation.[2] Much of the remainder of this section will be devoted to interpreting these results.

Factors that we would expect to influence the level of compensation on individual claims, but about which we had no direct data, are the severity of asbestosis, the earning power of the claimant, the strength of the asbestos exposure evidence, and the characteristics of the lawyers on both sides. Without these, we cannot completely explore variation in the amount of compensation.[3]

The relationship between claim characteristics and the amount of compensation reported here applied during the period 1980–1982. Possible changes over time in the nature and distribution of injuries or types of workers on closed cases, changes over time in the average number and type of defendants involved, and changes resulting from the Chapter 11 bankruptcy filings of some of the defendants may have resulted in changes in compensation levels since then. Thus, recent and future claims compensation may differ from these figures.[4]

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[1]It uses the natural logarithm of compensation as the dependent variable and subsets of the above factors (and their transforms) as independent variables.

[2]Based on the usual tests of goodness of fit, the logarithms of the compensation levels appear to satisfy the linear model assumptions very well. The residual distribution is approximately normal, and there is little evidence of heterogeneity of variance either across different levels of the dependent variable or across types of injury. As a consequence, the t and F statistics reported in Table 3.1 should provide valid tests of hypotheses about the regression coefficients. Approximate 95-percent confidence intervals for the regression coefficients can be calculated by taking the estimated coefficients plus or minus two estimated standard deviations. The constant term in the regression equation has been corrected for the retransformation bias associated with loglinear regression models, i.e., the average of the actual compensation levels in our sample is the same as the average of the compensation values predicted by the model.

[3]The claim characteristics that were included in the equation for estimating compensation accounted for 34 percent of the variance among individual claims. While the inclusion of some factors that were not statistically significant would have raised this figure a few percentage points, the fact remains that a substantial amount of the variability in the compensation levels among individual claims cannot be explained by the claim characteristics that were available for this study. However, by social science research standards, explaining 34 percent of the variance is quite respectable.

[4]For example, open claims have different proportions of each type of worker from those in closed claims (see Sec. II). If the average compensation for each type of worker is used, with the proportions of each type of worker on open instead of closed claims, then the overall average compensation rises from $64,000 to $72,000.

Table 3.1

REGRESSION RESULTS FOR THE LOGARITHM OF COMPENSATION PAID TO PLAINTIFFS IN ASBESTOS-RELATED LITIGATION IN 1980–1982

Characteristic	Coefficient	Estimated Standard Deviation	t
Constant	10.91	.21	52.0
Claimant characteristics			
Asbestosis			
Factory worker	.00[a]		
Insulation worker	.65	.22	3.0
Shipyard worker	.30	.20	1.5
Other	.05	.33	.2
Lung cancer	.77	.21	3.7
Mesothelioma	1.76	.26	6.6
Other injury	.55	.43	1.3
Claimant deceased	−.13	.15	− .8
Age — 57	−.0091	.0058	−1.6
(Age — 57)^2	−.0014	.0004	−3.5
Lawsuit characteristics			
Ln(number of defendants/15)	.16	.09	1.7
Ln(number of plaintiffs)	−.06	.04	−1.7
Claim disposition			
Pretrial settlement	.00[a]		
Tried	.82	.12	6.8
Year closed (0 = 1982)	.05	.06	.9
R^2	.34		
S	1.07		
F	18.2		
N	469		

[a]Indicator variables for settled claims and for asbestosis claims involving factory workers were not included in the regression equation, so that the compensation levels for these categories would serve as a benchmark for measuring increments associated with other categories.

COMPENSATION BY TYPE OF INJURY AND WORKER CLASSIFICATION

As expected, the type of injury proved to be a major influence on the amount of compensation. Claimants with lung cancer or mesothelioma received substantially more than those with asbestosis.

The type of work done by the claimant also was expected to influence average compensation. Recall that the great majority of claimants were shipyard workers, insulation workers, and asbestos-related factory workers. The magnitude of exposure to asbestos (the "cleanliness" of the work environment and the average length of employment) should depend on type of work, and type of work would thus affect the severity of asbestosis. Since we did not have data on severity of the asbestosis for our sample of claims, we have used type of work as a partial surrogate. We did not have information about the earnings of individual claimants; type of work also may serve as a partial indicator of lost earning capacity. The average amount of workers' compensation paid, and the degree to which it offsets tort litigation compensation, may also vary by type of worker. However, we hypothesize that severity of injury has a stronger impact on compensation.

Since we suspected that the severity of asbestosis was related to type of work, we explored the interaction of these variables. Our discussions with defendants' and plaintiffs' attorneys suggested that the asbestosis they were seeing in claims by factory workers was less severe than that of both insulation and shipyard workers. In fact, holding all other factors equal, the average compensation paid to insulation workers with asbestosis was higher than that paid to shipyard workers, which in turn was higher than that paid to factory workers.

Although the severity of asbestosis and the compensation appear to vary by type of worker, compensation for lung cancer and mesothelioma was not expected to do so. In fact, all other factors being equal, we found no significant differences in lung cancer compensation across types of workers. Given the finding for lung cancer, the relatively rare incidence of mesothelioma (only 5 percent of the closed claims), and the severity of that disease no matter what type of worker, we incorporated a single factor for mesothelioma in the analysis.

Consider a claimant who was of average age (57 years), and who had named the average number of defendants (15) in a single-plaintiff lawsuit that was settled before trial in 1982. As shown in Table 3.2, if this claimant was an asbestos-related factory worker with asbestosis, he or she received an average of $55,000 in compensation; a claimant with mesothelioma received an estimated average of $319,000, over 5 times as much. The estimates for other injuries and for other types of workers are less than $100,000, but this value has a relatively high

Table 3.2

AVERAGE COMPENSATION PAID FOR CLAIMS RECEIVING COMPENSATION, BY TYPE OF INJURY AND WORKER CLASSIFICATION IN 1982, FOR LIVING CLAIMANTS AGE 57, WHO NAMED 15 DEFENDANTS IN A SINGLE-PLAINTIFF LAWSUIT THAT WAS SETTLED BEFORE TRIAL

Type of Injury and Worker Classification	Average Compensation Per Claim Settled Before Trial
Asbestosis	
Asbestos-related factory worker	$ 55,000
Other type of worker	58,000
Shipyard worker	75,000
Insulation worker	106,000
Lung cancer	119,000
Mesothelioma	319,000
Other type of injury	95,000

estimated standard deviation because of the small number of such other injury and other worker claims in our sample.

ADJUSTMENT OF COMPENSATION FOR TRIAL

Whether or not trial began for a given claim was highly significant in explaining the amount of compensation received.[5] All other factors being equal, a claim that began trial received 2.28 times the compensation of a claim that was settled before trial. This is exclusive of any punitive damages awarded at trial, which are discussed in Sec. VI.

We investigated whether going to trial made more of a difference for certain types of injuries, since the simple tabulation in Table 2.10 seemed to indicate that it did. However, when all other factors were held equal, the increase in compensation associated with going to trial was virtually the same for asbestosis, lung cancer, and mesothelioma. A formal test of the hypothesis that the increase was the same for all three types of injury showed no significant differences.

[5]Going to trial and receiving higher compensation are interrelated variables that influence each other. One does not wholly cause the other. Instead, it is possible that claims that merit higher compensation are more likely to go to trial, *and* it is likely that claims that go to trial receive higher compensation if all other factors are equal.

We do not fully understand the reasons for the substantial difference in compensation between tried and settled cases, especially since the majority of the tried cases were not on appeal and the figures used in our analysis for these cases were money paid rather than verdicts rendered. Average settlements in litigation generally are some fraction of average trial verdicts because they eliminate the risk of defense verdicts, reduce delay in obtaining compensation, and avoid the expenses of trial. It seems unlikely that these general factors explain so large a difference as we found in asbestos litigation. It may be that the tried cases in our sample were different from the settled cases for characteristics we were not able to measure; some of these characteristics may be the severity of asbestosis, the expertise of the plaintiffs' lawyers, the quality of plaintiffs' witnesses, and the nature of the defendants' behavior. One would expect compensation to be higher in tried cases if injuries were more severe, plaintiffs' lawyers were more skilled, plaintiffs and their families were more likely to be viewed sympathetically by a jury, and defendants appeared more culpable in tried than in settled cases.

ADJUSTMENT OF COMPENSATION FOR DEATH

For personal injury claims in general, claims involving death often receive lower compensation than claims involving severe injury. The difference is presumably due to the injured claimant's cost of future medical care, the cost of future personal care, the bar in some states from receiving compensation for pain and suffering in wrongful death cases, and the like. All other things being equal, we found that claims involving death received 88 percent of what they would have received otherwise; however, the estimated standard deviation of this estimate is relatively high.

ADJUSTMENT OF COMPENSATION FOR TIME TRENDS

Our analyses included year of closure in order to capture any time trend that exists; dollar values were not adjusted for inflation prior to analysis. We estimate that, all other factors being equal, the average compensation per claim rose 5 percent per year from 1980 through 1982. In results presented earlier in this section, we have standardized the data to 1982 compensation levels. To adjust the compensation level to 1981 or 1980, the reader should multiply the 1982 compensation level by 0.95 for 1981 and 0.90 for 1980. We cannot say whether

this 5-percent growth rate will continue. Also, the estimated standard deviation of this estimate is relatively high.

The increase in compensation with time from 1980 through 1982 was essentially the same for both tried and settled claims.

ADJUSTMENT OF COMPENSATION FOR AGE

Compensation varied with claimant age in an interesting manner. We expected that average compensation would decline as age increased, because of such factors as a lower loss of future earnings and a lower remaining lifespan for older people. The decline did occur for people in their sixties and older; the interesting finding was that the peak compensation went to people 54 years old, and those in their forties and younger received less on average. At least three factors may account for this phenomenon. First, asbestosis is the most prevalent injury and it is plausible that young claimants have less severe asbestosis because of having worked fewer years and having worked in "cleaner" work environments. With the passage of time, increasing awareness of the asbestos hazard (and other factors) have led to improved work environments. Second, asbestosis takes time to develop in severity, which may mean that young claimants have less severe asbestosis at the time they receive compensation. We did not have data on the severity of asbestosis injuries, so we cannot confirm these propositions. Finally, average earnings tend to increase with age, and compensation may be less for younger claimants whose ultimate earning potential is less well known.

Table 3.3 displays how compensation (exclusive of punitive damages) varies with age.[6] We have standardized the data so that a claimant with the average age of 57 years has a multiplier of 1.00. To adjust compensation levels shown previously in this section for other ages, the reader should multiply the compensation for the average 57-year-old claimant by the "age multiplier" in Table 3.3. All other factors being equal, 75-year-old claimants are estimated to receive only about half of what 57-year-old claimants receive.

[6]We explored various ways of incorporating the age factor to help explain variation in compensation, and found that the best statistical fit was obtained by using a quadratic function of age to estimate the logarithm of compensation. This form captures the curvilinear relationship between age and compensation described above.

Table 3.3

VARIATION IN COMPENSATION (EXCLUDING PUNITIVE DAMAGES) BY AGE, WITH ALL OTHER FACTORS BEING EQUAL

Age	Age Multiplier[a]
40	0.79
45	0.92
50	1.00
54	1.01
55	1.01
57	1.00
60	0.96
65	0.85
70	0.71
75	0.54

[a]Equals 1.00 for plaintiff of average age 57.

ADJUSTMENT OF COMPENSATION FOR NUMBER OF DEFENDANTS

Compensation per claim tends to increase with the number of defendants,[7] as shown in Table 3.4. We have standardized the data so that a claim with the average number of 15 defendants has a multiplier of 1.00. To estimate compensation for some other number, multiply the compensation for 15 defendants by the "number of defendants multiplier" shown in Table 3.4. All other factors being equal, lawsuits with fewer or more defendants than the average resulted in a maximum estimated difference in compensation of about 15 percent.

ADJUSTMENT OF COMPENSATION FOR NUMBER OF PLAINTIFFS IN SINGLE LAWSUIT

Compensation per claim tended to decrease as the number of plaintiffs in a single lawsuit increased. The number of plaintiffs per lawsuit in the sample ranged from 1 to over 200.[8]

[7]We explored various ways of incorporating this factor, including using linear, inverse, quadratic, and logarithmic terms. The best statistical fit to the data was obtained by using the logarithm of the number of defendants to estimate the logarithm of compensation.

[8]We explored various ways of incorporating this factor, including using linear, inverse, quadratic, and logarithmic terms and using indicators of various categories of

Table 3.4

VARIATION IN COMPENSATION (EXCLUDING PUNITIVE DAMAGES) BY NUMBER OF DEFENDANTS ON CLAIM WITH ALL OTHER FACTORS BEING EQUAL

Number of Defendants on Claim	Number of Defendants Multiplier
5	0.84
10	0.94
15	1.00
20	1.05
25	1.09
30	1.12
35	1.14

Table 3.5 illustrates that variation. A single-plaintiff lawsuit had a multiplier of 1.00. To estimate compensation for a multiple-plaintiff lawsuit, multiply the compensation for a single-plaintiff lawsuit by the "number of plaintiffs multiplier" in Table 3.5. All other factors being equal, the largest multiple-plaintiff lawsuits resulted in an estimated average compensation per claim that was about 70 percent of the compensation for a single-plaintiff lawsuit.

Although plaintiffs in multiple-plaintiff cases received less compensation than did those in single-plaintiff cases, the magnitude of the effect is less than the simple tabulated data in Sec. II appear to indicate. The apparent difference decreases when other variables are considered. To gain a better understanding of this result, consider the following. Because asbestosis is usually less severe than lung cancer or mesothelioma, its average compensation is less. Asbestosis claims are much more likely to be filed as part of multiple-plaintiff cases than are the two types of cancer claims. This fact explains much, but not all, of the lower average compensation per claim for multiple-plaintiff cases. Even if all other variables are the same on two claims, the fact that one is a single-plaintiff lawsuit and the other is part of a large, multiple-plaintiff lawsuit affects the level of compensation. We do not know the reason for this result; perhaps the asbestosis is less severe in multiple-plaintiff than in single-plaintiff cases.

numbers of plaintiffs per lawsuit. The best statistical fit to the data was obtained by using the logarithm of the number of plaintiffs in the lawsuit to estimate the logarithm of compensation.

Table 3.5

VARIATION IN COMPENSATION (EXCLUDING PUNITIVE DAMAGES) BY NUMBER OF PLAINTIFFS ON LAWSUIT

Number of Plaintiffs	Number of Plaintiffs Multiplier
1	1.00
5	0.90
10	0.86
15	0.84
25	0.81
50	0.78
100	0.74
200	0.71

CLAIM CHARACTERISTICS THAT WERE NOT SIGNIFICANT IN EXPLAINING THE LEVEL OF COMPENSATION

Two notable variables were not statistically significant: type of court (federal or state) and region of the country.[9] We did not explore differences within states.

Three variables that might affect compensation—smoking, marital status, and gender—were excluded from the analysis because of the small number of closed claims in our sample that involved females, nonsmokers, and unmarried people. Only 16 of the 513 closed claims in the sample were for people known to have been nonsmokers all their lives. And for smokers, we did not have reliable data on the number of years the plaintiff had smoked, or on the quantity of tobacco used. Nonsmokers may receive somewhat higher compensation, all other things being equal, because smoking has been linked to various lung diseases including cancer. However, nonsmoking was not statistically significant in our analysis and we had insufficient data to confirm the existence of such higher compensation.

[9]Type of worker and region were correlated: Asbestos-related factory workers were most often from the Northeast, insulation workers who had closed claims were most often from the South, and shipworkers with closed claims were most often from the West. The analysis indicates that an apparent regional effect is much more likely to be a type of worker effect.

Only 17 of the 513 closed claims in the sample were for people known to be single, divorced, separated, or widowed. Married claimants may receive somewhat higher compensation, all other things being equal, perhaps because of loss of consortium, greater emotional pain and suffering to the immediate family, or greater financial need. Only 20 of the 513 closed claims in our sample were for females, and these were concentrated in much fewer than 20 lawsuits. Our data appear to show higher compensation to married claimants and lower payments to female claimants, but we have insufficient data to confirm the existence of, or to confidently estimate the magnitude of, any such differences.

IV. ANALYSIS OF CLAIMS RECEIVING NO COMPENSATION

In Sec. III we examined claim characteristics that influenced the amount of compensation received in 1980–1982 for claims on which at least some defendants paid compensation. In this section we consider the extent to which characteristics of the claim influenced whether or not any compensation was paid.

In general, claim characteristics that determine compensation levels may differ from characteristics that influence whether compensation will be paid at all. At the very least, even if a given characteristic influences decisions on both factors, there may be a difference in the magnitude of the influence on these two decisions.

Only 9 percent of the claims closed in 1980–1982 received zero compensation. Three factors influenced that result. The most important was the claimant's being classified as having "no injury."[1] One might expect "no injury" always to mean "no compensation"; in practice that was almost but not quite true. Claims with no manifest asbestos-related injury received *no* compensation from *any* defendant 81 percent of the time. The remaining small percentage of these "no injury" claims received very small amounts of compensation (an average of $2,000 per claim) in settlements paid by one or a few defendants.

The second factor was the claimant's having an injury other than asbestosis, lung cancer, and mesothelioma. For *some* of these other types of injuries, usually some other cancer or other lung disease, it may be more difficult to establish a link between exposure to asbestos and the disease. As shown in Table 4.1, only about half the claimants with these other types of injuries won compensation.

Of the 40 claims in our sample that received no compensation, 12 had no manifest asbestos-related injury and 6 had some "other injury." This leaves only 22 asbestosis, lung cancer, and mesothelioma claims with no compensation, an insufficient number for us to perform a multivariate analysis similar to that done for claims with compensation in Sec. III. Claimants with the latter diseases who received no compensation may have found it difficult to prove exposure to asbestos or to a product containing asbestos that was manufactured or provided by any of the defendants, or there may have been statute of limitations

[1]The injury classification data were obtained from four large defendants and insurers. Claims were classified as "no injury" if *none* of the four classified the claim as having an injury.

Table 4.1

PERCENT OF CLOSED CLAIMS RECEIVING NO COMPENSATION, BY TYPE OF INJURY, FOR CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Type of Injury	All Closed Claims Combined	Tried Claims[a]	Settled or Dismissed Claims
Asbestosis	4	4	4
Lung cancer	9	5	9
Mesothelioma	6	6	6
Other type of injury	49	33	50
No manifest asbestos-related injury	81	—	81
All types combined	9	5	9

[a]A claim was counted as receiving no compensation if the trial resulted in a defense verdict (no compensation) and, in addition, no defendant had paid any compensation in settlement before the trial began. As noted in Sec. III, 29 percent of trials resulted in defense verdicts.

problems. (We do not have exposure and statute of limitations data.)[2]

The third factor was the asbestos-related experience of the plaintiff's lawyer. The proportion of claims that received no compensation was 23 percent for lawyers who had closed only one claim in our sample, 8 percent for lawyers who had closed two to five claims, and a mere 1 percent for lawyers who had closed more than 20. Several explanations are possible. Plaintiff's lawyers with more asbestos experience may be more adept at screening out nonmeritorious claims before they are filed, and may be better able to negotiate about those claims that are filed. Also, plaintiff's lawyers handling large group (multiple-plaintiff) settlements may be able to assure that each plaintiff in the group settlement receives at least some compensation.

[2]Since strong warning labels were not used on asbestos products until the mid-1960s, and since most closed claims involved at least some exposure before that time, a defense based on adequate warnings is more relevant to future claims (involving exposure only after the mid-1960s) than to past closed claims.

V. ANALYSIS OF LIKELIHOOD OF TRIAL

Discriminant analysis was used to determine which claim characteristics were statistically significant in explaining whether or not a claim went to trial. Those that were significant included the state in which the claim was filed, a large number of plaintiffs in one lawsuit, and the type of injury. Variables that were not significant were age, marital status, sex, life status, smoking, type of court (federal or state), number of defendants per claim, and worker classification.

Since the state of filing was so significant, we included in the analysis the four states that had the majority of all closed claims (California, New Jersey, Pennsylvania, and Texas) and the only two other states that had over 10 trials (Missouri and Tennessee). The other 44 states together accounted for only about one-quarter of all trials, and they were combined for the analysis.

Approximately one-quarter of all claims closed between January 1980 and August 1982 originated in large, multiple-plaintiff lawsuits with over 50 plaintiffs each. None of these claims in the sample went to trial. For claims with fewer than 50 plaintiffs per lawsuit, we explored whether an increased number of plaintiffs decreased the likelihood of going to trial. It did not. Thus, only the suits with at least 50 plaintiffs were significant in explaining a reduced likelihood of a claim going to trial.

We then examined the proportion of claims that began trial as a function of the statistically significant claim characteristics, using logistic regression (logit analysis). This is a standard, widely used, multivariate regression technique especially tailored for analyzing proportions.[1] This technique attempts to ascertain and separate the effects of one variable (such as state of filing) from other variables (such as type of injury). The results of this analysis are shown in Table 5.1. Claims in our sample with no manifest asbestos-related injury *never* went to trial. When all other factors are held equal, mesothelioma claims were at least twice as likely to go to trial (14 percent) as claims with any other type of injury (7 percent or less).

The percentage of closed claims that were tried varied markedly from state to state. In California and New Jersey, it was 1 percent or less. The rates were much higher (8 percent and 16 percent of all

[1]Let p denote the probability of going to trial. In logistic regression, the fitted equation is of the form $p = 1/[1 + e^{-(\alpha+\beta x)}]$, where x is a vector consisting of claim characteristics. Maximum likelihood techniques were used for the analysis reported in this section.

Table 5.1

LOGISTIC REGRESSION RESULTS FOR THE PROBABILITY OF TRIAL IN ASBESTOS-RELATED CASES IN 1980–1982

Characteristic	Cofficient	Estimated Standard Deviation	t
Constant	−2.80		
Type of injury			
Asbestosis	.00[a]		
Lung cancer	.10	.33	.3
Mesothelioma	.50	.40	1.3
Other	−.16	.71	− .2
State			
California	−1.51	.39	−3.9
Missouri	2.13	.68	3.1
New Jersey	−1.86	1.04	−1.8
Pennsylvania	1.05	.33	3.2
Tennessee	.21	.43	.5
Texas	.85	.36	2.4
Other states combined	.00[a]		
	Chi square 81.9		
	N 405		

[a]Indicator variables for settled claims and for asbestosis claims involving factory workers were not included in the regression equation, so that the compensation levels for these categories would serve as a benchmark for measuring increments associated with other categories.

closed claims, respectively) in the two high-claim-volume states of Texas and Pennsylvania. Fewer claims had been closed in Missouri, but about a third of them went to trial. In the other states combined, about 6 percent began trial. We used these results to calculate the estimated likelihood of trial for closed claims with various characteristics, as shown in Table 5.2.

We do not fully understand why claims do or do not go to trial. The variation from state to state is probably due to judicial attitudes and lawyer practices generally. Interviews with judges in California and Texas, for instance, reveal that federal judges in the Eastern District of Texas rarely participate extensively in settlement negotiations, while in the Superior Court in Los Angeles, an elaborate technique for judicial participation in settlement discussions has been implemented. The reasons why specific cases within jurisdictions go to trial probably

Table 5.2

ESTIMATED LIKELIHOOD OF TRIAL IN 1980-1982

		Percent of Closed Claims That Began Trial[a]				
State	Percent of Trials in Sample	Asbestosis	Lung Cancer	Mesothelioma	Other Type of Injury	All Closed Claims
California	8	1	2	2	1	1
Missouri	8	34	36	46	30	34
New Jersey	1	< 1	1	2	< 1	< 1
Pennsylvania	29	15	16	22	13	16
Tennessee	8	7	8	11	6	7
Texas	18	13	14	19	10	8
All other states combined	28	6	6	9	5	6
All states combined	100	6	7	14	5	4.7

[a]Claims in the sample involving no manifest asbestos-related injury and claims on lawsuits involving more than 50 plaintiffs never went to trial, and are reported separately.

depend upon factors on which we have no data. Several that may be important are the characteristics and trial histories of the lawyers on both sides of the case, and the personalities and objectives of specific plaintiffs. Factors affecting the likelihood of trial may also shift over time, as attorneys shift strategies for resolving claims and as courts evolve new rules and practices with regard to these claims.

VI. ANALYSIS OF PUNITIVE DAMAGE AWARDS

Punitive damage awards appeared to be more frequent in asbestos than in product liability cases generally, but they were still rare. Punitive damages totaling $4,934,000 were awarded to 19 plaintiffs, representing less than 1 percent of all claims closed between January 1, 1980, and August 26, 1982.[1] The awards ranged from $4,000 to $1,000,000 and averaged $260,000 per plaintiff. As shown in Table 6.1, about half the awards were less than $100,000.

Even though punitive damages were awarded in 18 percent of the asbestos trials that went to verdict (14 percent of the claims for which

Table 6.1

PERCENTILE DISTRIBUTION OF PUNITIVE DAMAGE AWARDS PER CLAIM CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Percent of Punitive Awards That Were Less Than or Equal To Amount Shown at Right[a]	Amount of Punitive Award[b]
10	$ 10,000
20	25,000
30	42,000
40	53,000
50	90,000
60	220,000
70	300,000
80	500,000
90	1,000,000

[a]Including only claims with a punitive award.
[b]These numbers may change as the result of appeals that are under way for many of these claims.

[1]This includes all punitive damage awards in that period, with the exception of $35 million for one case in which default judgments were granted against all defendants, none of whom had appeared at trial. (*Stewart et al. v. North American Asbestos Corporation et al.*, McLean County, Illinois, Circuit Court, 78-L201).

trial began),[2] the $255,000 average total compensation for all tried claims included an average of only $37,000 in punitive damages.

Considering only those trials with plaintiffs' verdicts, 27 percent received punitive damages, and $70,000 of their $388,000 average total compensation was for punitive damages.

Tried claims with punitive damage awards also had much higher total compensation ($368,000)[3] exclusive of the punitive award than did tried claims that received no punitive award ($192,000).

The 19 plaintiffs in our sample who received punitive awards were insufficient for us to perform a multivariate analysis. However, we did review these 19 claims carefully to see what characteristics might be related to the receipt of punitive damages. The only salient observation was that two-thirds of the claims with punitive awards were in Pennsylvania; the other third were in six other states. In Pennsylvania, 34 percent of the claims that started trial between January 1, 1980, and August 26, 1982, resulted in punitive awards.

Differences and changes in state substantive law can greatly influence the award of punitive damages. For example, Pennsylvania, like most states, allows punitive damages in strict liability cases, but New Jersey did not until a state appeals court recently ruled otherwise. And evidentiary decisions may make it more difficult in some jurisdictions to introduce evidence critical to obtaining an award of punitive damages.

Two trials of mesothelioma claims had an average punitive award of about $500,000, whereas three trials of lung cancer claims and 14 trials of asbestosis claims averaged about $200,000 each. The percentages of all tried claims with punitive awards for these three injury categories were nearly the same, ranging from 11 to 15 percent. Punitive damages were never awarded for other types of injuries during this time period.

[2]A separate study by The Institute for Civil Justice of all civil jury verdicts in two jurisdictions has found that 0.9 percent of all civil jury trials in Cook County, Illinois, between 1975 and 1979 resulted in a punitive damage award and that the comparable figure for San Francisco, California, was 3.2 percent. The frequency of punitive damages in all product liability trials in those two jurisdictions was even less.

[3]$628,000 average total compensation less $260,000 average punitive damage award.

VII. ANALYSIS OF DEFENSE LITIGATION EXPENSES

TOTAL DEFENSE EXPENSES

The defendants and their insurers have incurred three major categories of litigation expenses. The first, which we call *allocated expenses*, consists of legal fees and other expenses paid to defense lawyers who are not direct employees of the defendants or their insurers. Other allocated expenses are typically for court fees, medical examinations, travel, stenographic expenses of depositions and trials, and expert witness fees. These expenses are generally allocated to individual plaintiffs' claims (or groups of plaintiffs' claims).

Expenses in the second category, which we call *unallocated expenses*, are usually *not* allocated to individual plaintiffs' claims by either the defendants or their insurers. However, we have included them because they are part of the cost of defending asbestos claims. They typically include claims-processing expenses and expenses for defendant and insurer asbestos-litigation supervisors, administrators, and managers (e.g., claims clerks, claims adjusters, data processors, lawyers who are employees of defendants or insurers who supervise outside counsel, and executives to the extent that they spend their time on asbestos litigation). In this category, we sought data on *all* asbestos litigation expenses that are allocated neither to individual claims nor to an "organization-versus-organization" lawsuit, nor are they incurred in connection with Chapter 11 reorganization.

The third category, which we call *organization-versus-organization litigation expenses*, is predominantly incurred in insurance coverage litigation. The question here does not concern the outcome of individual plaintiffs' claims, but rather organizations suing other organizations to determine who should pay those claims. Most of this litigation is still ongoing and involves nearly all major defendants and their insurers. The past and future costs of this litigation among organizations are relevant to all claims by individual injured parties, including cases that have been closed, cases that have been filed but are still open, and cases that have not yet been filed. These costs would not exist in the absence of the personal injury litigation, and hence are an important related expense item. These lawsuits were discussed in some detail in

our earlier report,[1] where we estimated that the prorated cost was $1500 per claim. This litigation is expensive, but when considered in relation to all other expenses, it is a relatively small amount per claim.

The average total defense expense, broken down into these categories, is shown in Table 7.1. The total was $37,000 for the average closed claim in 1980–1982.[2] Hence, total defense expenses were 58 percent of the average total compensation.[3] They were substantially higher for tried claims ($125,000) than for settled or dismissed claims ($33,000). Of the total defense expenses, allocated expenses were 78 percent, unallocated expenses were 19 percent, and organization-versus-organization litigation expenses were 4 percent.

Since the average closed claim involved 15 defendants and $37,000 in defense litigation expenses, the average total defense expense by *one* defendant to close a claim with one plaintiff was approximately $2,500. A smaller defendant and its insurers typically spent an average of at least $1,000 per closed claim in total expenses. Some of the larger defendants (those named on a larger percentage of the claims, who generally paid higher compensation) usually spent more than the average.

Defense expenses by a defendant and its insurers combined varied widely among defendants from a low of about 29 percent[4] of the total compensation they paid to a high of 209 percent.[5] Defendants on a large number of claims with higher average compensation paid per claim typically have lower expense ratios than the average, and defendants with fewer claims and lower average compensation per claim typically have higher expense ratios than the average. A major reason for the disparity is that every case incurs certain threshold litigation expenses; although those expenses rise as compensation increases, *they do not rise in proportion to increased compensation.* Hence, in general, the higher the average compensation paid by a defendant, the higher the expense will be, but the lower the ratio of expense to compensation.

---

[1]See *Costs of Asbestos Litigation*, Sec. IV.

[2]The 95-percent confidence interval for the estimated average defense expenses using the sample data ranges from $35,500 to $38,500.

[3]Other studies have estimated the average *allocated* defense expense to be as low as 34 percent, and as high as 100 percent, of total compensation paid by defendants. None of these studies is based on extensive data for *asbestos* cases. A word of caution regarding interpretation of some published data for individual corporations also is in order: Data on expenses are usually the total allocated expenses for both open and closed claims combined. The useful comparison, however, is between *closed* claim expenses and *closed* compensation paid.

[4]The average for the three defendants with the lowest percentages for which we had data.

[5]The average for the three defendants with the highest percentages for which we had data.

Table 7.1

AVERAGE DEFENSE LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Type of Expense	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
	$	Percent of Compensation	$	Percent of Compensation	$	Percent of Compensation
Allocated	$29,000[c]	45	$117,000[c]	46	$25,000[c]	45
Unallocated	7,000[c]	11	7,000[c]	3	7,000[c]	13
Organization versus organization	1,500	2	1,500	<1	1,500	3
Total	$37,000[c]	58	$125,000[c]	49	$33,000[c]	60

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]To nearest thousand dollars.

COMPARISON WITH DEFENSE ALLOCATED EXPENSES FOR NONASBESTOS CLAIMS

To evaluate allocated expenses for asbestos litigation defense, one needs a benchmark for comparison. Unfortunately, information on the costs of various types of tort litigation is rare. Further, those who study the defense side of tort litigation usually limit themselves to costs allocated to specific claims; unallocated costs, such as those involved in claims processing, are typically noted only as another, unmeasured component.

We present here the best comparisons available for the size of defense *allocated* expenses relative to compensation. Closed-claim surveys are the best source of information on allocated expenses, and we chose three national surveys to examine. The most appropriate one for studying asbestos is a 1976–1977 closed-claim survey of product liability claims prepared by the Insurance Services Office (ISO). We also used two malpractice surveys: one prepared by ISO for 1974 claims, and another prepared by the National Association of Insurance Commissioners for 1975–1976 claims. Finally, we also used a 1971 U.S. Department of Transportation study of automobile accidents; although not a closed-claim survey, it was based on national data compiled by the Federal Judicial Center.

Table 7.2 compares ratios of allocated defense expense to compensation paid in three tort areas (product liability, malpractice, and auto accidents) with those in the asbestos area. The ratio for asbestos is higher than all the others. The auto accident area is lowest, probably because it has such a high volume of claims, and so many claims are closed without a lawsuit being filed (nearly all asbestos claims are filed as lawsuits). Malpractice claims have higher ratios than auto claims, but are only about two-thirds as large as the asbestos ratio. The product liability study, most comparable in subject matter to asbestos claims, shows an overall ratio of 0.35 compared to the asbestos ratio of 0.45.

The numerous defendants in the average asbestos claim, each with its own legal expenses, may explain much of the high asbestos ratio. In the average asbestos case, responsibility for a $64,000 compensation payment was divided among 15 defendants, most of whom paid an average of less than $5,000 each. In the other tort areas, the average defendant paid larger compensation and expenses were a lower percentage of compensation because expenses do not increase as fast as compensation payments.

Table 7.2

RATIO OF ALLOCATED DEFENSE EXPENSES TO COMPENSATION PAID IN SELECTED TORT AREAS

Tort Area	Years Claims Were Closed	Method of Disposition: Lawsuit: Settled[a]	Lawsuit: Tried[a]	Other Method	All Methods Combined
Asbestos[b]	1980–82	0.45	0.46	N.A.	0.45
Product liability[c]	1976–77	0.34	0.59	0.03	0.35
Malpractice[d]	1975–76	N.A.	N.A.	N.A.	0.28
Malpractice[e]	1974	0.26	0.64	0.05	0.27
Auto accident[f]	1968	N.A.	N.A.	N.A.	0.05

NOTES: This table refers only to defense expense that can be allocated to specific claims and to the total settlement or award. It does not deduct plaintiff expenses from the compensation nor add unallocated costs to expenses. N.A. = not available.

[a]Settlements during trial are included as trials for the asbestos and product liability study, but as settlements in the malpractice study.

[b]Data developed in Sec. VII of this report.

[c]Insurance Services Office, *Product Liability Closed Claim Survey: A Technical Analysis of Survey Results*, New York, 1977, pp. 451–456.

[d]National Association of Insurance Commissioners, *Malpractice Claims*, Milwaukee, Vol. 1, No. 4, May 1977, p. 97.

[e]Insurance Services Office, *Special Malpractice Review: 1974 Closed Claim Survey: Technical Analysis of Survey Results*, New York, 1976, Table 11-2a, p. 59.

[f]U.S. Department of Transportation, *Automobile Insurance and Compensation Study: Motor Vehicle Crash Losses and Their Compensation in the U.S.*, March 1971, Tables 20 and 21, pp. 48–49.

VARIATION IN ASBESTOS DEFENSE EXPENSES

The analyses in this section are intended to clarify how various claim characteristics were related to defense litigation expenses. Rather than consider one characteristic at a time as in Sec. II, here we analyze all characteristics simultaneously so as to estimate the influence of each one when all other characteristics are held constant.

We emphasize that the estimates in this section are based on data from a sample of cases closed as of August 26, 1982. Defense expenses for more recent and future claims may differ from these figures,

especially if changes occur in the efficiency and manner of processing these claims.

To examine how defense expenses varied as a function of claim characteristics, we explored several models using multivariate linear regression techniques. The one with the best statistical fit to the data is presented here.[6] Table 7.3 presents coefficients for the independent variables in the final equation, as well as numerous statistics for assessing the precision of the estimates and the goodness of fit of the equation. The remainder of this section will be devoted to interpreting these results.[7]

The claim characteristics that were included in the equation for estimating defense expenses accounted for 77 percent of the variance among individual claims—a very high percentage for research on legal behavior.

DEFENSE EXPENSES BY TYPE OF INJURY AND WORKER CLASSIFICATION

As expected, the type of injury and worker category influenced the amount of defense expenses. Consider an average claimant who named the average number of defendants (15) in a single-plaintiff lawsuit that was settled for compensation before trial in 1982. As shown in Table 7.4, if such a claimant was an asbestos-related factory worker with asbestosis, the average defense expenses were $35,000. Claimants with mesothelioma generated the highest defense expenses, $57,000.

RELATIONSHIP BETWEEN DEFENSE EXPENSES AND TRIAL

Whether or not trial began for a given claim was highly significant in explaining the amount of defense expenses. All other factors being equal, a claim that began trial incurred 3.13 times the defense expenses of a claim that was settled before trial.

[6]It uses the natural logarithm of defense expenses as the dependent variable and various claim characteristics as independent variables.

[7]Based on the usual tests of goodness of fit, the logarithms of the defense expense levels appear to satisfy the linear model assumptions very well. The constant term in the regression equation has been corrected for the retransformation bias associated with loglinear regression models, so that the average of the defense expenses values predicted by the model is the same as the average of the actual defense expenses in our sample.

Table 7.3

REGRESSION RESULTS FOR THE LOGARITHM OF DEFENSE EXPENDITURES IN ASBESTOS-RELATED LITIGATION IN 1980–1982

Characteristic	Cofficient	Estimated Standard Deviation	t
Constant	10.46	.09	122.2
Claimant Characteristics			
Asbestosis			
Factory worker	.00[a]		
Insulation worker	.33	.09	3.6
Shipyard worker	.12	.09	1.4
Other	−.03	.14	−.2
Lung cancer	.13	.09	1.4
Mesothelioma	.48	.12	4.1
Other injury	−.06	.15	−.4
No manifest asbestos-related injury	−.68	.13	−5.2
Claimant deceased	.12	.07	1.9
Lawsuit Characteristics			
Ln(number of defendants/15)	.56	.04	15.5
Ln(number of plaintiffs)	−.10	.02	−5.8
Claim Disposition			
Pretrial settlement	.00[a]		
Tried	1.14	.05	21.4
Year closed (0 = 1982)	.01	.02	.4
R^2	.77		
S	.48		
F	136.2		
N	513		

[a]Indicator variables for settled claims and for asbestosis claims involving factory workers were not included in the regression equation, so that the defense expense levels for these categories would serve as a benchmark for measuring increments associated with the other categories.

Table 7.4

DEFENSE EXPENSES BY TYPE OF INJURY AND WORKER CLASSIFICATION IN 1982, FOR LIVING CLAIMANTS WHO NAMED 15 DEFENDANTS IN A SINGLE-PLAINTIFF LAWSUIT THAT WAS SETTLED BEFORE TRIAL

Type of Injury and Worker Classification	Average Defense Expenses Per Claim
Asbestosis	
Asbestos-related factory worker	$35,000
Other type of worker	34,000
Shipyard worker	40,000
Insulation worker	49,000
Lung cancer	40,000
Mesothelioma	57,000
Other type of injury	33,000
No manifest asbestos-related injury	18,000

RELATIONSHIP BETWEEN DEFENSE EXPENSES AND DEATH

All other things being equal, defense expenses were 13 percent greater for cases involving dead claimants.

ADJUSTMENT OF DEFENSE EXPENSES FOR TIME TRENDS

To capture time trends, our analyses always included year of closure. We estimate that, all other factors being equal, the average defense expenses per claim rose at the rate of 1 percent per year from 1980 through 1982. This is lower than the inflation rate and lower than the 5 percent per year growth in levels of compensation, perhaps because defendants were becoming more efficient at processing claims as time went on. In results presented earlier in this section, we standardized the data to 1982 expense levels. We cannot say whether this 1 percent growth per year has continued or will continue. Also, it should be noted that the estimated standard deviation of this estimate is relatively high.

RELATIONSHIP BETWEEN DEFENSE EXPENSES AND NUMBER OF DEFENDANTS

Defense expenses per claim increased substantially with the number of defendants, because each defendant usually had its own defense lawyer and other litigation expenses.

Table 7.5 displays how defense expenses varied with the number of defendants, all other factors being equal. We have standardized the data so that a claim with the average number of 15 defendants has a multiplier of 1.00. To estimate defense expenses for other numbers of defendants, multiply the values in Table 7.4 by the multiplier in Table 7.5. All other factors being equal, lawsuits with larger than average numbers of defendants resulted in a maximum estimated increase in defense litigation expenses of about 60 percent.

Note that doubling the number of defendants adds just under 50 percent to the total defense litigation expenses; it does not double the expenses, because the same 16 large defendants are named on at least half of all claims. Additional defendants were usually smaller ones who made lower average compensation payments and incurred lower defense expenses.

Table 7.5

VARIATION IN DEFENSE EXPENSES BY NUMBER OF DEFENDANTS ON CLAIM, ALL OTHER FACTORS BEING EQUAL

Number of Defendants On Claim	Number of Defendants Multiplier
5	0.54
10	0.80
15	1.00
20	1.17
25	1.33
30	1.47
35	1.60

RELATIONSHIP BETWEEN DEFENSE EXPENSES AND NUMBER OF PLAINTIFFS IN A SINGLE LAWSUIT

Defense expenses per claimant tended to decrease as the number of plaintiffs in a single lawsuit increased. In the sample, that number ranged from 1 to over 200. Table 7.6 displays the relationship. A single-plaintiff lawsuit has a multiplier of 1.00. To estimate defense expenses for a multiple-plaintiff lawsuit, one can multiply the defense expenses for a single-plaintiff lawsuit by the "number of plaintiffs multiplier" in Table 7.6. All other factors being equal, the largest multiple-plaintiff lawsuits resulted in estimated defense expenses per claim that were less than two-thirds of the defense expenses for a single-plaintiff lawsuit.

CLAIM CHARACTERISTICS THAT WERE NOT SIGNIFICANT IN EXPLAINING THE LEVEL OF DEFENSE EXPENSES

The following variables were not statistically significant in explaining the level of defense expenses: the claimant's age, sex, marital status, and smoker status; region of the country; and whether the claim was filed in federal or state court.

Table 7.6

VARIATION IN DEFENSE EXPENSES BY NUMBER OF PLAINTIFFS ON LAWSUIT

Number of Plaintiffs	Number of Plaintiffs Multiplier
1	1.00
5	0.86
10	0.80
15	0.77
25	0.74
50	0.69
100	0.64
200	0.60

VIII. ANALYSIS OF PLAINTIFF LITIGATION EXPENSES

Plaintiffs' lawyers almost always handle asbestos cases on a contingency fee basis (i.e., attorney fees are a percentage of total compensation). Hence, for cases that get zero compensation from defendants and their insurers, the plaintiff usually pays no legal fees. Litigation expenses other than attorney fees are generally expenses for travel, stenographic fees for depositions and trials, medical examinations, and expert witness fees. They presumably vary with the difficulty of product identification, the type of plaintiff's injuries, and whether the case was prepared for trial and tried.

We asked the plaintiff's lawyer on each claim in the sample to provide information about total compensation, attorney's fees and other legal costs, and case status.[1] (See "Research Approach," Sec. I.) A total of 104 lawyers were involved in the 563-claim sample. We received completed questionnaires from 32 lawyers (31 percent) from 12 states. (Section I discusses the sample selection process and the reasons for noncooperation.) After we deleted claims that were not fully closed from the sample, we had 31 participating lawyers who provided information on 93 closed claims. Cooperating lawyers included some of those with the highest-volume caseloads, as well as several with small caseloads. The percentage contingency fees charged by the cooperating lawyers were reasonably consistent.

We also interviewed five plaintiffs' lawyers who had extensive asbestos case exposure about the experience of asbestos lawyers generally concerning fees and other litigation expenses. The interview results were consistent with the survey information, as shown in Table 8.1.

We have concluded that legal fees in tried cases were typically 33 to 45 percent of total compensation, and averaged about 39 percent. Other expenses in tried cases ranged from 1 to 12 percent of recovery, but were generally about 6 percent.

Plaintiff's legal fees as a percentage of compensation were lower for settled cases; they typically ran from 28 to 40 percent with an average of 34 percent. Other expenses on settled claims averaged approxi-

[1]The survey questionnaire is shown in Fig. 8.1.

Rand
1700 MAIN STREET
SANTA MONICA, CA 90406

ASBESTOS PLAINTIFFS SURVEY

Plaintiff Identification
Name:
State:
Court:
Court Case Number:
Date Filed:

6-15/

Plaintiff Tort Recovery and Cost Information in This Case

1. Total settlement or damages (before subtracting fees and costs) paid or agreed to be paid by or on behalf of all defendants. If a case is on appeal, report award.

   (a) Settlement..... $ _____ . ____ 16-26/

   (b) Compensatory damages..... $ _____ . ____ 27-37/

   (c) Punitive damages..... $ _____ . ____ 38-48/

2. Total attorneys' fees received or to be received on amounts recorded in Question 1.

   $ _____ . ____ 49-59/

3. Total other costs incurred on behalf of this plaintiff (e.g., medical exams, stenographic expenses, court costs, expert fees, travel, etc.).

   $ _____ . ____ 60-70/

4. Is this case completely closed? (MARK ONE BOX AND FOLLOW ARROWS)

   ☐ Yes ☐ No 71/

   4a. Current Status: (MARK ALL THAT APPLY)

   ☐ Tried, on appeal 72/

   ☐ Not closed with one or more defendants 73/

   ☐ Other, specify: _____ 74/

5. Were any settlements in this case negotiated at or after a judicial pre-trial settlement conference? (MARK ONE ANSWER BOX)

   ☐ Yes ☐ No ☐ Don't Know 75/

Fig. 8.1—Asbestos plaintiffs survey

Table 8.1

AVERAGE PLAINTIFF LITIGATION EXPENSES AS A PERCENTAGE OF TOTAL COMPENSATION PAID BY DEFENDANTS AND THEIR INSURERS

	All Closed Claims Combined		Tried Claims[a]		Settled or Dismissed Claims[b]	
Source of Data from Plaintiff's Lawyers	Legal Fees	Other Legal Expenses	Legal Fees	Other Legal Expenses	Legal Fees	Other Legal Expenses
Closed claim survey (average percentages)	34	5	39	6	34	5
Interviews ("typical" percentages)	28–45	2–8	33–45	NA	28–40	2–8
Best estimate of average percentages	34	5	39	6	34	5

NOTE: NA = not available.
[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

mately 5 percent of recovery, though on occasion they were much higher or lower.[2]

In summary, the average plaintiff litigation expenses (including both legal fees and other expenses) were 39 percent of total compensation for all 1980–1982 closed claims combined.[3]

Table 8.2 displays estimated average plaintiff's litigation expenses per claim closed at various stages. They ranged from zero for claims closed before trial without compensation, to $23,000 per claim settled before trial, up to an average of $173,000 for trials that resulted in verdicts for the plaintiff. Note that trials that resulted in defense verdicts usually had pretrial settlements with some defendants before the remaining defendants went to trial; thus, for tried claims with defense verdicts, the contingency fee and other legal expenses paid by the plaintiff averaged $22,000.

For all closed claims combined, plaintiff's litigation expenses averaged $25,000.[4]

[2]Barth's estimate of the ratio of plaintiffs' legal expenses to total compensation paid by defendants and insurers for settled cases is 37 percent (as presented in Selikoff, op. cit., p. 446).

[3]This is slightly lower than our previous report's "best estimate" of 41 percent, but above that report's "low estimate" of 38 percent. The difference is due to the fact that we had more survey data for use in preparing this second report.

[4]Defense allocated expenses are functionally comparable to plaintiff litigation expenses and are, on average, about the same amount: $29,000 and $25,000, respectively.

Table 8.2

METHOD OF DISPOSITION AND ESTIMATED AVERAGE PLAINTIFF LITIGATION EXPENSES PER CLAIM CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Method of Disposition	$	% of Total Comp.	$	% of Total Comp.	$	% of Total Comp.
Claims Closed After Trial Began						
Tried, defense verdict	22,000[c]	43	22,000	43	—	—
Tried, plaintiff verdict	173,000	45	173,000	45	—	—
Settlement after trial began	85,000	45	85,000	45	—	—
All claims closed after trial began	114,000	45	114,000	45	—	—
Claims Closed Before Trial Began						
Settlement before trial, with compensation	23,000	38	—	—	23,000	38
Closed before trial, no compensation	0	na	—	—	0	na
All claims closed before trial began	21,000	38[d]	—	—	21,000	38[d]
All claims closed by any method	25,000	39	—	—	—	—

NOTE: na = not applicable.
[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.
[c]Compensation consists of pretrial settlements with some defendants, before other defendants won a defense verdict at trial.
[d]All percentages were calculated after rounding compensation and plaintiffs expenses to the nearest thousand dollars.

IX. TOTAL EXPENSES AND COMPENSATION

About $1 billion in compensation and litigation expenses was spent as of the end of 1982 on the more than 20,000 open and closed asbestos product liability claims.

Of the total expenditures by all defendants and insurers combined on the average claim closed in 1980–1982, about one-third was paid by defendants and two-thirds by their insurers (see Table 9.1). The percentage paid by the defendants may change after resolution of the various insurance coverage lawsuits and after exhaustion of insurance coverage for some defendants.

Tables 9.2 and 9.3 provide details on defense and plaintiff expenses for claims with various levels of compensation. Some of these data are displayed graphically in Figs. 9.1 and 9.2, where it can be seen that trial expenses substantially exceed settlement expenses for all levels of compensation. For claims that received no compensation from any of the defendants, defense expenses averaged $59,000 per tried claim and $10,000 per claim closed before trial. Plaintiff expenses rose steadily with the level of compensation because of the usual contingency fee arrangement; so did defense expenses, but not as fast. Defense expenses as a percentage of compensation declined from over 100 percent of low-compensation claims to less than 20 percent of high-compensation ones.

For claims settled for about $150,000 or less compensation, and for tried claims that were awarded about $400,000 or less, the expenses for all defendants combined exceeded the plaintiff's expenses. For claims with higher compensation, the reverse was true.

Figure 2.2 above summarized the average compensation and defense and plaintiff litigation expenses per claim closed between January 1980 and August 1982. (More recent and future expenses and compensation may differ from these figures.) The average total compensation paid per claim by all defendants and their insurers was approximately $64,000 and required total defense litigation expenses of $37,000 (58 percent of total compensation). Thus, the total costs to defendants and their insurers averaged about $101,000 per closed claim. After deduction of plaintiff's litigation expenses of about $25,000 (39 percent of total compensation), the plaintiff received an average of $39,000.

These figures may be better understood by considering the total amount that defendants, insurers, and plaintiffs paid for every *one dollar* in net compensation that went to the plaintiff for claims in the

Table 9.1

PERCENTAGE CONTRIBUTION OF DEFENDANTS AND INSURERS TO TOTAL COMPENSATION PLUS DEFENSE EXPENSES FOR CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

	All Closed Claims Combined[a]		Tried Claims		Settled or Dismissed Claims[b]	
Paying Organization	$	% of Total Compensation	$	% of Total Compensation	$	% of Total Compensation
All defendants combined	$ 34,000	34	$167,000	44	$ 28,000	32
All insurers combined	67,000	66	213,000	56	60,000	68
Total	$101,000	100	$380,000	100	$ 88,000	100

[a]Includes tried cases on appeal.
[b]Dismissed and not refiled.

Table 9.2

AVERAGE LITIGATION EXPENSES FOR VARIOUS LEVELS OF TOTAL COMPENSATION FOR CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Total Compensation	% of Closed Claims in This Range	Average Total Comp. Per Claim	Defense Expense		Plaintiff Expense	
			$	% of Total Comp.	$	% of Total Comp.
Tried Claims						
0	9	0	59,000	na	0	na
1- 10,000	10	5,400	99,000	1830	2,400	44
10,001- 25,000	28	17,000	83,000	490	8,000	46
25,001- 50,000	20	36,000	91,000	250	16,000	44
50,001-100,000	17	75,000	103,000	137	34,000	45
100,001-250,000	13	165,000	105,000	64	73,000	44
250,001-500,000	3	367,000	184,000	50	165,000	45
500,001 and up	1	1,245,000	$231,000	19	$552,000	44
Total	100	$255,000	$125,000	49	$114,000	45
Settled or Dismissed Claims						
0	9	0	10,000	na	0	na
1- 10,000	10	4,200	15,000	360	1,600	38
10,001- 25,000	28	18,000	21,000	117	7,000	39
25,001- 50,000	20	36,000	33,000	92	13,000	36
50,001-100,000	17	74,000	48,000	65	28,000	38
100,001-250,000	13	158,000	68,000	43	62,000	39
250,001-500,000	3	337,000	69,000	20	133,000	39
500,001 and up	1	850,000	116,000	14	332,000	39
Total	100	$55,000	$33,000	60	$21,000	38

NOTE: na = not applicable.

Table 9.3

AMOUNT PLAINTIFF RECEIVED AFTER DEDUCTION OF LITIGATION EXPENSES, FOR VARIOUS LEVELS OF TOTAL COMPENSATION: FOR ALL CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Total Compensation	Average Total Comp. Per Claim	Defense Expenses		Plaintiff Litigation Expenses		Total Expenses and Compensation Paid by Defendants and Insurers	Net Amount Plaintiff Received After Deduction of Litigation Expenses	Percent Plaintiff Received of Total Paid After Deduction of Litigation Expenses
		$	% of Total Comp.	$	% of Total Comp.			
0	0	11,000	na	0	na	11,000	0	0
1- 10,000	4,200	16,000	381	1,600	38	20,000	2,600	13
10,001- 25,000	18,000	22,000	122	7,000	39	40,000	11,000	28
25,001- 50,000	36,000	35,000	97	13,000	36	71,000	23,000	32
50,001-100,000	74,000	50,000	68	28,000	38	124,000	46,000	37
100,001-250,000	159,000	71,000	45	63,000	40	230,000	96,000	42
250,001-500,000	345,000	99,000	29	141,000	41	444,000	204,000	46
500,001 and up	1,113,000	192,000	17	478,000	43	1,305,000	635,000	49
TOTAL	$64,000	$37,000	58	$25,000	39	$101,000	$39,000	39

NOTE: na = not applicable.

Table 9.2

AVERAGE LITIGATION EXPENSES FOR VARIOUS LEVELS OF TOTAL COMPENSATION FOR CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Total Compensation	% of Closed Claims in This Range	Average Total Comp. Per Claim	Defense Expense		Plaintiff Expense	
			$	% of Total Comp.	$	% of Total Comp.
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50,001-100,000	17	75,000	103,000	137	34,000	45
100,001-250,000	13	165,000	105,000	64	73,000	44
250,001-500,000	3	367,000	184,000	50	165,000	45
500,001 and up	1	1,245,000	$231,000	19	$552,000	44
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Settled or Dismissed Claims						
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1- 10,000	10	4,200	15,000	360	1,600	38
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NOTE: na = not applicable.

Table 9.3

AMOUNT PLAINTIFF RECEIVED AFTER DEDUCTION OF LITIGATION EXPENSES, FOR VARIOUS LEVELS OF TOTAL COMPENSATION: FOR ALL CLAIMS CLOSED BETWEEN JANUARY 1, 1980 AND AUGUST 26, 1982

Total Compensation	Average Total Comp. Per Claim	Defense Expenses		Plaintiff Litigation Expenses		Total Expenses and Compensation Paid by Defendants and Insurers	Net Amount Plaintiff Received After Deduction of Litigation Expenses	Percent Plaintiff Received of Total Paid After Deduction of Litigation Expenses
		$	% of Total Comp.	$	% of Total Comp.			
0	0	11,000	na	0	na	11,000	0	0
1- 10,000	4,200	16,000	381	1,600	38	20,000	2,600	13
10,001- 25,000	18,000	22,000	122	7,000	39	40,000	11,000	28
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50,001-100,000	74,000	50,000	68	28,000	38	124,000	46,000	37
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NOTE: na = not applicable.

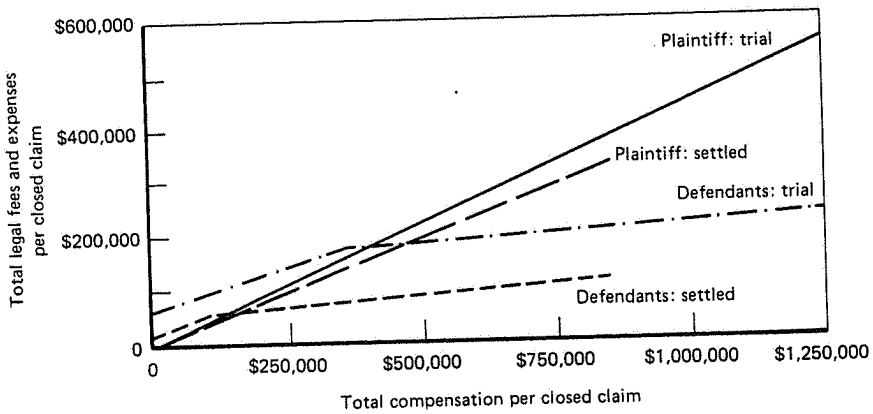

Fig. 9.1—Total legal fees and expenses as a function of total compensation per closed claim

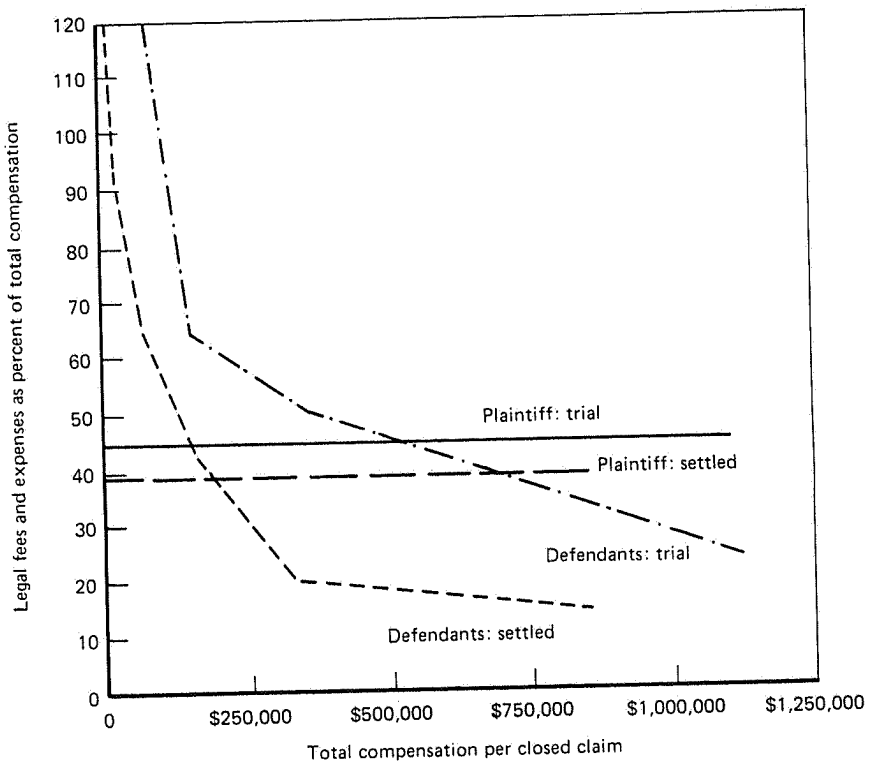

Fig. 9.2—Total legal fees and expenses as a percentage of total compensation per closed claim

sample. For every $2.59 paid by defendants and insurers, defense litigation expenses were an estimated $0.95, plaintiff's litigation expenses were an estimated $0.64, and the plaintiff received $1.00—39 percent of the $2.59 total. That percentage increased with the level of total compensation, as shown in Fig. 9.3, from less than 20 percent of the total defense payout for claims with low total compensation, up to 49 percent for those with average compensation over $500,000.

In summary, the heart of the asbestos litigation problem is its huge scale. Much human suffering is involved. Tens of thousands of current and future injury claims are worth billions of dollars. The sheer numbers stretch the ability of some courts to handle the claims, threaten the economic survival of some defendants, and ultimately threaten the ability of the injured parties to receive fair compensation.

Because the asbestos problem is immense and because it may influence public reactions to other major health and legal problems, many different responses have been and are being proposed. Several generic lines of reform have been suggested by various people: increased coordination and efficiencies within the existing tort system; establishment of a joint claims facility for settlement negotiation without filing a lawsuit; arbitration; and government-mandated compensation systems.

We believe that any rational course of action must be based on facts such as those developed by this study.

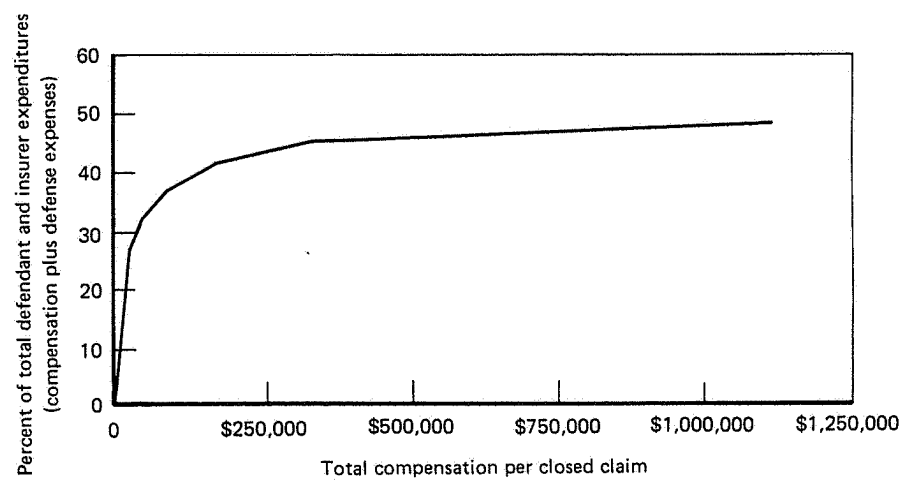

Fig. 9.3—Percent of total defendant and insurer expenditures received by plaintiff after deduction of all litigation expenses

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News & Information

News

MMA Op-Ed: Asbestos Litigation: Taking its Toll in Michigan

Runaway asbestos litigation, if left unchecked, could rob Michigan of thousands of jobs and millions of dollars. In the last few years, lawsuits have exhausted the resources of asbestos producers and now peripheral companies that never produced products with asbestos in them, but bought companies that did, are being targeted. Businesses with "deep pockets," including many Michigan companies both in and outside of the auto industry, are facing mounting claims.

These claims are overloading courts and forcing companies into financial difficulties and bankruptcy. In the last few years, more than 60 companies have filed bankruptcy after asbestos-related claims wiped them out.

One of the major problems with the system now is that claimants who are not sick today and, in fact, may never become sick are filing claims and winning millions of dollars. Make no mistake. These suspect claims are draining funds away from seriously ill victims, who do have a legitimate claim and should have an expectation of relief.

And the victims aren't just the sick who must share settlement funds with those who aren't, but workers across the country. Thousands of employees have already paid for the current situation with their jobs as companies struggle to survive. And, as a double blow, stock values typically plummet, eroding employee retirement funds. One company, embroiled in litigation, lost 90 percent of its Employee Stock Ownership Plan value. Many other retirement accounts have been decimated.

"The elephantine mass of asbestos cases ... defies customary judicial administration and calls for national legislation," said U.S. Supreme Court Justice David H. Souter in an important case.

The economic toll of unrestrained asbestos litigation is expected to reach a staggering $200 billion. It's time for Congress to act and respond to the Supreme Court's repeated calls for a legislative solution. One place to start would be to develop uniform medical criteria to distinguish the sick from non-sick claimants so that the resources available can be focused where they belong — with the real victims of exposure. Additional changes may also be appropriate, but the important thing is to begin to solve the problem now, before more companies, employees and retirees are crushed under the weight of this elephant.

John MacIlroy is president and CEO of the Michigan Manufacturers Association, based in Lansing.

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Wednesday, November 12, 2003

Companies fight costs of asbestos lawsuits

Congress debates setting up trust fund to pay claims; victims fear pot will run dry

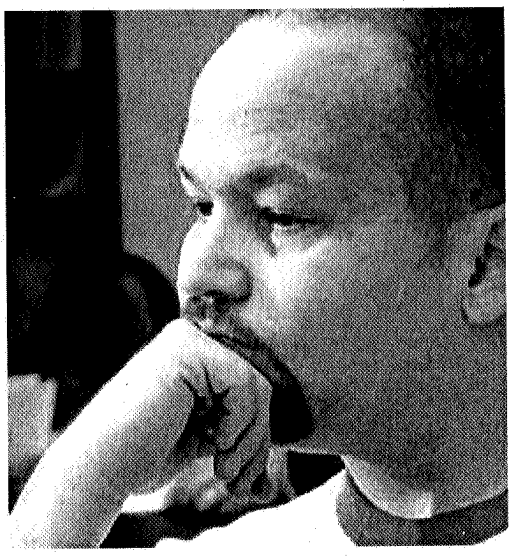
By Lisa Zagaroli / *Detroit News Washington Bureau*

WASHINGTON -- As manufacturers struggle to catch up with the rest of the recovering economy, they're looking to Congress and the courts to rescue them from the skyrocketing costs of lawsuits filed by people who have been exposed to life-threatening asbestos fibers.

Companies large and small say they're being crushed by an onslaught of lawsuits involving the once widely used insulation and fire retardant. As many as 8,400 companies face 600,000 asbestos-related suits, according to some estimates.

They want Congress to take the cases out of the courts and set up a national trust fund to compensate victims. But victims and their lawyers are fighting to keep their right to trial by jury and, because of the long lag time between exposure and illness, are worried that the money will dry up before some people even realize they're sick.

Asbestos largely hasn't been used since the 1970s, but its deadly symptoms often don't show up for two or three decades. When 36-year-old Michael Louden of Warren found out he had asbestos-induced cancer five years ago,



Max Ortiz / The Detroit News

Michael Louden, who has asbestos-induced cancer, feels that justice was done in his case. His lawsuit was settled out of court.

Asbestos by the numbers

▶ 10,000 people are expected to die in the United States from asbestos-related diseases in 2003.

▶ 1,500 asbestos personal injury cases were pending at the end of 2002 in Wayne County; 100 asbestos cases are permitted on Wayne County Circuit Court's docket every other month, or 600 a year.

▶ 267 cases were scheduled for trial in Saginaw County between Oct. 28 and Dec. 16, 2003.

▶ 8,400 companies have asbestos claims filed against them.

▶ 200,000 asbestos claims are pending nationwide and 40,000 new ones are filed every year.

▶ 25,000 asbestos cases were pending

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doctors said he'd been exposed to the deadly fibers between the ages of 1 and 11 at home and school.

Victims increasingly have turned to suing multiple corporations that sold and used asbestos products, ranging from automotive brakes to building insulation, because the companies that mined and made asbestos have gone out of business.

"The plaintiffs go on never-ending searches for companies with deep pockets to replace those that they drove out of business," said Don Lough, assistant general counsel for Ford Motor Co., which had 25,000 asbestos cases pending at the start of 2003.

Other issues also frustrate manufacturers facing asbestos claims. They note that it isn't always obvious where a victim came into contact with the asbestos fibers that were inhaled into their lungs, and that many of the lawsuits are brought by people who may have the earliest signs of exposure (a plaque or thickening of the lungs), but aren't physically impaired.

Louden's attorney, Michael Serling of Birmingham, whose law firm in 1975 was the first in Michigan to file an asbestos suit, contends defendants are grossly exaggerating the percentage of plaintiffs who aren't sick, as well as the backlog of asbestos cases in the courts. He said only 60 asbestos cases nationwide went to trial in all of 2001, while many of the others were settled out of court without a trial.

Some lawmakers in Congress are trying to put an end to the litigation before they adjourn for the year in about two weeks.

A proposed solution is to bypass the traditional court system and set up a trust fund -- one version of the bill calls for $108 billion, roughly half funded by business and half by insurers -- from which all asbestos victims would draw. The amount of compensation would depend on the severity of their symptoms or illnesses.

Trial attorneys say that would deny victims the fundamental right to a trial by jury, but even some of their traditional Democratic supporters aren't standing by them.

"It is obvious ... that the system is broken and needs to be repaired," Sen. Carl Levin, D-Detroit, said in a letter last week to Senate Majority Leader Bill Frist, R-Tenn., and Minority Leader Tom Daschle, D-S.D., who are trying to work out an agreement.

Levin and the business community allege that claimants who were exposed to asbestos but aren't sick are delaying justice for the truly ill by against Ford Motor Co. at the start of 2003, and the company has taken five to trial so far this year.

CyberSurvey

Asbestos liability

Companies large and small say they're being crushed by an onslaught of lawsuits filed by people who have been exposed to life-threatening asbestos fibers. They want Congress to bypass the courts and set up a national trust fund -- financed by business and insurers -- to compensate victims. How do you think asbestos claims should be settled?

- Stick with the judicial system
- Switch to a national trust fund
- Dismiss all but the most serious claims

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clogging up the courts.

But in some states victims have a limited amount of time after they are diagnosed to file suit. In Michigan, they have three years to sue.

Impact on businesses

While the business industry awaits Congress' help, they're also seeking recourse in the courts.

Businesses have asked the Michigan Supreme Court and other states' courts to delay cases that involve people who have shown early signs of asbestos exposure but haven't been impaired by it. The so-called "inactive docket" would free up courts to focus on claims involving sick people, they say, while relieving some of the burden on businesses.

The volume of litigation is "a pretty enormous pressure on our clients," said Robert S. Krause, the Birmingham attorney who on behalf of 66 companies filed the petition before the state Supreme Court, which has set a Jan. 29 hearing.

"You think about all the employment that's been lost by the bankruptcy of those companies, the collective impact is pretty overwhelming. I have to think it isn't doing our economy a lot of good."

Companies such as General Motors Corp., which told the Securities and Exchange Commission that it's been sued by people who claim they were exposed to asbestos in GM brake components, locomotives and on company premises, say that so far they have been able to absorb the costs of litigation without substantially hurting their bottom line.

But others are worried that in the long-term they won't be able to afford to settle or go to trial on cases that could accumulate for years.

Midland-based Dow Chemical Co. said asbestos claims against its Union Carbide subsidiary could adversely affect the financial condition of that company. Dow said its costs that aren't covered by insurance would be about $2.3 billion over the next 15 years.

The business community says at least 60,000 jobs already have been lost nationally due to asbestos-induced bankruptcies at nearly 70 companies, and that the pending suits are harming stock prices and thwarting business' ability to borrow money, expand and hire more people.

Bankruptcies or bailouts?

A poster child for the industry is Southfield-based Federal-Mogul Corp., which declared bankruptcy two years ago under the pressure of thousands of asbestos lawsuits. Federal-Mogul in 1998 voluntarily acquired a British company, Turner & Newall, which had a long history of using and selling asbestos products.

Trial attorney Serling said the argument that too much litigation ruined the company rings hollow.

"It's our belief that an eighth-grade student would have known in the '90s that it wasn't a smart idea to buy an asbestos company," Serling said. "Instead, they're turning this around on the victims of asbestos and saying it's their fault."

Serling pointed out that many of the bankrupt companies aren't going out of business at all. Instead they filed for bankruptcy protection and avoid being sued in the future.

"Eventually the company comes out of bankruptcy and they can't be sued," he said.

"Science knew about the dangers going back to the '30s and '40s, and businesses didn't even put warning labels on their products until the '70s," he added. "The amount of deceit and the amount of misconduct, gross negligence, is staggering."

Asbestos is naturally occurring and is safe in some circumstances, but can be deadly when tiny fibers break away and are inhaled. Several medical conditions ranging from scarring of the lung tissue to cancer have been linked to asbestos, while the rare and deadly tumor called mesothelioma has been directly attributed to it.

Serling's client Louden, who was a metal fabricator before he was diagnosed with cancer, settled out of court just before his trial date in October 2002 with some of the companies responsible for putting asbestos in his childhood home and school. He was satisfied with the two-year turnaround in the lawsuit.

"It really worked for me," said Louden, who is taking drugs to control the growth of tumors in and around his lungs, but isn't able to work due to fatigue and reduced strength. "I've been able to see justice done."

Defensive strategy

Ford's Lough said cases are settled because it's unrealistic to go to trial with "25,000 cases in your inventory," in part because that would involve being in hundreds of courtrooms across the country. Ford has gone to trial on only five cases this year, but has won all five, he said.

"We do enter into reasonable settlements where we can," Lough said. "The simple fact of life is it is so expensive to litigate these cases, and so risky to try these cases when you are being hometowned."

Mark Wilkie, owner of Livonia Building Materials Co., said his drywall company is one of dozens of defendants listed in lawsuits because asbestos was in the joint cement it sold in the 1970s. So far, its insurance company has handled the cases and it hasn't been much of a financial burden.

Still, Wilkie worries the risks might one day affect his bottom line. He notes insurers are becoming more selective about what they cover and some of his suppliers have been crippled by the asbestos litigation.

"It's more than a little ripple effect. You used to be able to make business decisions for business reasons instead of having to do them for defensive reasons."

Wilkie said he's hoping the bipartisan group of senators that is pushing for a compromise will be successful before Congress adjourns for the year. The U.S. Supreme Court also has called on lawmakers to resolve the problem.

Planning for future

Although unions agreed to sit at the table and discuss a national trust fund, it's unclear if they'll buy into any version accepted by corporate America and the insurance industry.

"As flawed as the existing system of asbestos litigation may be, we are unwilling to accept a substitute system that does not ensure fair and swift treatment for the close to 2 million more victims who will still need their

claims resolved," said John J. Sweeney, president of the AFL-CIO. "Our affiliates will be strongly unified in their opposition to a corporate bailout, if that is simply what the business and insurance groups seek to achieve."

Several provisions of the bill are still being worked out, including how much money will be put in the trust fund by businesses and their insurers, whether claims will revert to the courts if the pot runs dry, and how illnesses ranging from lung cancer to exposure without symptoms will be compensated.

"Because of the long lag between exposure and the development of cancer or other asbestos diseases, the asbestos disease epidemic is only now peaking, and will be with us for decades to come," Dr. Laura Welch, medical director of the Center to Protect Workers Rights, a research arm of the AFL-CIO, told senators.

"It is simply not acceptable or fair for the victims to bear the risk if disease and claims exceed current projections. ... These men and women went to work every day, helping build ships for our wars, power plants for our cities, the cars that we drive, and homes and schools for other Americans."

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Sunday, March 31, 2002

Editorial; A

Don't Let Asbestos Cases Bankrupt Automakers

In less than 20 years, the wave of asbestos litigation has driven 28 companies into bankruptcy, almost one-third of them since 2000. Potential claims against American industry now reach an estimated $50 billion.

But as the pool of defendants shrinks, plaintiffs' attorneys are going after promising new targets. Most of them had no role either in manufacturing or selling asbestos. They do, however, have deep pockets -- and the deepest ones of all belong to the Big Three automakers, as The Detroit News' Mark Truby reports today on Page One.

They have been exposed to crippling liability because of last October's bankruptcy of Federal-Mogul Corp., which had acquired companies that made asbestos brake linings used in automobiles.

Most of the claims are being made by workers who were exposed to asbestos fibers and show traces of it, or markers, in their lungs. The vast majority have not contracted lung disease or mesothelioma, a rare and deadly form of cancer associated with the material.

There is no firm scientific evidence to indicate that they will ever become sick, although there is a convincing link between asbestos and mesothelioma. Attorneys can bundle cases, however, and group those who are seriously ill with unimpaired claimants, those who have X-rayed with a marker but are otherwise healthy.

Sympathetic juries have returned several large awards to such groups. Defendants in these cases, seeing no end in sight to the claims, have chosen to seek Chapter 11 protection.

While in bankruptcy, they have the legal right to set aside a pool of funds against current and future claims, which Federal-Mogul has done. That, in turn, has passed the baton to the auto companies as the next big target.

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Is this really an efficient or socially desirable way of dealing with such claims? Some of them are, indeed, legitimate. Auto mechanics, especially, had assumed that asbestos was removed from brake linings when the medical dangers of the substance became known. But they were wrong, and asbestos was still used until relatively recent times.

The automakers claim that the heat generated by operation of the brakes will burn off most of the harmful fibers, a contention vigorously disputed by plaintiffs' attorneys and most doctors. Still, many claimants in these lawsuits are not sick and probably never will be sick.

Most of the companies that went into Chapter 11 had to cut jobs, and some disappeared altogether. Others emerged from bankruptcy in a severely weakened condition.

The U.S. Supreme Court, in a 1997 advisory, urged Congress to address the situation because "the elephantine mass of asbestos litigation demands a legislative solution."

Congress has tried on 10 occasions since 1981 to limit asbestos liability, but each time trial lawyers and their allies succeeded in killing the proposal.

It is time to try again, muster up the grit to take on the trial lawyers and restore some sanity to asbestos litigation.

Those who are genuinely ill should be given compensation. But to drive healthy companies into bankruptcy, including some of Metro Detroit's major employers, serves no one, except a small number of aggressive litigators.

The Issue

Is relief needed for companies threatened by massive asbestos litigation?

---- INDEX REFERENCES ----

COMPANY (TICKER): Federal-Mogul Corp. (FMO)

KEY WORDS: AUTOMOBILE; INDUSTRY; LAWSUITS; BANKRUPTCY; HAZARDOUS; MATERIALS

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NEWS SUBJECT: English language content; Editorial; Content Types; Editorials and Columns; Editorial Page; General News; Corporate/Industrial News; Health; Political/General News; Health; Bankruptcy; Bankruptcy; Corporate Actions; Lawsuits; Legal/Judicial (ENGL NEDI NCAT EDC EDI GEN CCAT GHEA GCAT HLT C16 BCY CAC LWS C12)

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Thursday, January 24, 2002

BIZ; BUSINESS

MORE FIRMS TANGLED IN TIES TO ASBESTOS

TOM WALSH

DETROIT FREE PRESS

Like a swarm of termites, asbestos damage claims have been eating away at two major Michigan companies that never produced or sold the cancer-causing material themselves. It's also happening at dozens of other firms nationwide.

Federal-Mogul Corp. of Southfield, with 52,000 employees and $6 billion in annual sales, filed for Chapter 11 bankruptcy protection last October because of mounting costs to settle asbestos lawsuits. Sadly, the auto parts firm had no asbestos problem until 1998, when it bought T&N, a British auto parts outfit that made building materials using asbestos in the 1970s.

Federal-Mogul knew about T&N's asbestos liability, but thought insurance and plans were in place to handle it. They thought wrong.

Shares of Dow Chemical Co. of Midland plummeted this month after it settled an asbestos suit in Texas against Union Carbide, which Dow bought last year. Dow insists it has adequate insurance to cover asbestos claims against Union Carbide, so not to worry.

Sound familiar? Well, Wall Street is so spooked by the spectacular Enron collapse that it's not believing anybody's soothing assurances. Investment firm A.G. Edwards issued a sell recommendation on Dow stock last week. Dow closed at $26.51 a share Wednesday, down from $35 in early January.

Liability mushrooms

Frank Macher and Charles (Chip) McClure joined Federal-Mogul a year ago as CEO and president, respectively. They were the turnaround team hired after an acquisition spree saddled the firm with $3 billion in debt.

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"We told the board we knew operations. We didn't know anything about asbestos," Macher says. They were in for an education.

Federal-Mogul's asbestos claims jumped from $89 million in 1998 to $178 million in 1999 and $351 million in 2000, "with no end in sight," Macher says.

The reasons were many and complex. Asbestos, used in insulation and construction, was linked to respiratory illness and cancer in the 1970s, when its usage stopped and the lawsuits began. Attempts to contain the litigation broke down in 1999 when the U.S. Supreme Court tossed out a massive class action settlement plan involving scores of companies and trial lawyers. Result: a new wave of lawsuits, not only from sick people but also from many others who claimed exposure but never got sick.

The Supreme Court urged Congress to legislate a solution to the problem.

That's when Macher, a mechanical engineer by trade, became a lobbyist.

Limits sought

"I learned where the name came from," Macher says. "You stand around in lobbies waiting for senators and congressmen to come out of meetings."

Macher and the National Association of Manufacturers pushed hard for a bill to limit legal fees and awards to people who were not demonstrably sick. But a shift in political power in the Senate, followed by Sept. 11, changed priorities in Congress.

Macher and McClure saw that legislative relief on asbestos was nowhere in sight, so they filed for Chapter 11.

As more companies seek bankruptcy protection, pressure builds on remaining companies with asbestos exposure, no matter how minor it might seem. Congress better regroup and address the issue before any more major companies clog our bankruptcy courts.

Contact TOM WALSH at 313-223-4430 or twalsh@freepress.com

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---- INDEX REFERENCES ----

NEWS SUBJECT: English language content; Corporate/Industrial News; Lawsuits; General News; Legal/Judicial (ENGL CCAT LWS GEN C12)

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INDUSTRY: Building Materials (BLD)

PRODUCT: Construction (DCN)

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Sunday, November 3, 2002

Outlook; A

Asbestos suits imperil small Michigan firms

Karen Kerrigan

The big business of asbestos litigation is encroaching upon the livelihood of Michigan's small businesses.

Small companies with as few as 20 employees or less are finding themselves mired in this unending legal morass. The process is so broken and unwieldy that those individuals who have contracted illnesses through asbestos exposure are not being helped. Instead, funds are being parceled out to anyone who has ever been exposed to asbestos in any way -- regardless of whether or not they are sick.

The majority of the people filing claims against asbestos manufacturers are entirely healthy. They may or may not have been exposed to asbestos, yet they show no evidence of asbestos-related diseases. They are joining suits to hedge against possible future illnesses that may not be covered because of statutes of limitations. The result has been a glut of filings, more than 200,000 cases pending today, leading to a depletion of money set aside to deal with truly sick individuals. In short, sick people are not getting the level of help they need, and healthy people are receiving benefits with no guarantee of future assistance if they get sick later.

The avalanche of asbestos litigation has forced more than 50 companies into bankruptcy, 14 of them in the last two years. They simply cannot withstand the crushing financial burden. That means new sources of revenue are being sought to maintain the spigot of funds to carry a growing load of financial claims.

With the pool of big corporate targets drying up, smaller firms are now under siege. They have been targeted as peripheral participants in this unending legal saga.

A peripheral participant is any business whose product or service had some type of relationship to asbestos, no matter how insignificant. Of course, this blows the doors open to many types of small businesses. For example, a business could be liable if it ever sold products containing asbestos, or if a firm provided a work environment with asbestos in it

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-- even if this occurred before asbestos was deemed harmful. These peripheral participants would include a staggering number of hardware stores, construction-related businesses, car repair shops, not to mention plumbers and various other trades.

Small business owners can't afford armies of lawyers. In general, their insurance coverage couldn't handle the loss of a major lawsuit. Many simply elect to pay an undeserved settlement rather than risk losing a large-scale lawsuit and going bankrupt. But still, there have been casualties, and the list is growing.

Many of the asbestos lawsuits are "inventory claims" -- filed on behalf of hundreds or even thousands of claimants. These claims often include only a handful of truly sick asbestos victims. It's hard to fault someone exposed to asbestos who, although currently healthy, does not want to be shut out by statutes of limitations. Yet how do we deal with the opportunists who may or may not have been exposed, but hop on for the ride in hopes of some extra cash?

Sadly, the current mess means that thousands of asbestos-disease victims and their survivors are being victimized again. They are collecting only a fraction of the settlements awarded because the system cannot handle the excessive load created by healthy claimants.

The asbestos litigation problem is certainly not going away. The Los Angeles Times recently estimated that the number of people expected to file injury claims could eventually reach 2.5 million, and "the economic toll of asbestos could run as high as $200 billion, higher than estimates for all Superfund sites combined, Hurricane Andrew or the Sept. 11 terrorist attacks."

Not once, but twice the Supreme Court of the United States has condemned the asbestos litigation quagmire as a problem that is beyond repair by the judicial system. The Supreme Court has strongly urged that Congress pass legislation setting up a system outside the courts to apply medical criteria to each claim and screen out the claims of people who are clearly not suffering from asbestos diseases.

Hopefully Congress will act soon to create such a system. Ideally, legislation would waive the statute of limitations on asbestos claims so those exposed have a safety net in the future if they truly become ill. An orderly system such as this would restore order and fairness to the asbestos claims process. It would also restore justice for those who are truly ill and protect thousands of small businesses from becoming the next victims of the asbestos saga.

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---- INDEX REFERENCES ----

KEY WORDS: LAWSUITS; HEALTH; CHEMICALS; MICHIGAN; SMALL; BUSINESS

NEWS SUBJECT: English language content; Editorials and Columns; Editorial Page; General News; Corporate/Industrial News; Small Business/Entrepreneurs; Small Business & Entrepreneurs; Lawsuits; Legal/Judicial; Health; Political/General News; Health (ENGL EDC EDI GEN CCAT CSMLBS SML LWS C12 GHEA GCAT HLT)

MARKET SECTOR: Industrial (IDU)

INDUSTRY: Heavy Construction (CON)

PRODUCT: Construction (DCN)

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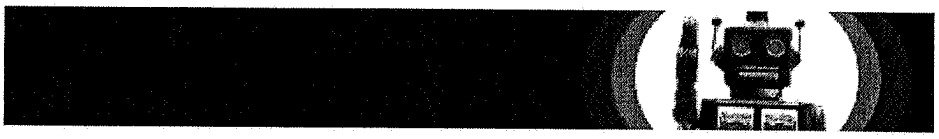

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Asbestos threatens to kill your job

By Peter Ferrara

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The collapse of Enron created great anguish for those workers who held 401(k)s heavily concentrated in Enron stock. What is not recognized is that this tragedy may now be replicated several times over, as a result of ongoing asbestos litigation.

The general public is not aware of the growing plague of asbestos lawsuits and the corporate death toll they have already exacted. But the suits started more than 20 years ago, and by now have already bankrupted, or shortly will, every company directly involved in asbestos manufacturing and distribution.

In fact, more than 500,000 cases have been filed, and insurers have already paid out more than $20 billion, with companies paying billions more. As a result, over 40 companies have been driven into bankruptcy, including such major names as Owens-Corning, W.R. Grace, U.S. Gypsum and GAF.

But the lawsuits are not going away. More than 200,000 claims are still pending, with 50,000 new claims filed in each of the last three years. Analysts estimate that up to 2.5 million claims may be filed in all, with total costs ranging up to $200 billion. That is several times the estimated ultimate liability resulting from the Sept. 11 terrorist attacks, now pegged at $30 billion to $60 billion.

However, because the original manufacturers and distributors are all tapped out, the new suits are going after firms that were not at fault in causing the problem. They merely used the ubiquitous asbestos products according to instructions like everyone else, with no knowledge of the danger.

The Big Three automakers are facing 20,000 suits with more to come because asbestos was used in brake linings. They didn't manufacture the brakes or the asbestos and their customers are not at risk. The plaintiffs are workers employed by other companies who claim handling the brakes during manufacture or repair harmed them.

Claims have also been filed against other, innocent asbestos users such as General Electric, Lockheed Martin, A,T&T, Campbell Soup, Colgate-Palmolive, E&J Gallo Winery, Gerber Products, DuPont, major electric utilities, oil refineries, shipbuilders, construction contractors, retailers, textile mills, finance companies investing in these ventures and even Dow Jones & Co., publisher of the Wall Street Journal.

Virtually every company involved in manufacturing and construction is

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at great risk of being drawn into this litigation tornado. The Rand Corp. lists more than 1,000 companies that have already been sued and estimates it will grow to several times that, coming from over half of the industries in the economy.

The pension problem arises because the Enron practice of matching employee contributions to 401(k)s with corporate stock is widespread among major companies. A recent study found 44 major companies with employees holding more than half of their 401(k) investments in the company's stock.

As a result, if the stock of America's industrial giants is about to nosedive, with some wiped out altogether, due to asbestos claims, the Enron 401(k) disaster is going to be replicated over and over.

Besides the lack of any real fault, these firms are being sued by plaintiffs who are not even sick. About 80-90 percent of the claims today are from those who do not have any current illness, but are seeking compensation for asbestos exposure that may lead to future exposure.

Worst of all, this mess is providing relatively little compensation for those who are truly sick, while the lawyers are reaping vast fees. Plaintiffs in the past have received at best only about 37 percent of the recoveries awarded them by juries. The lawyers have taken about 30 percent for fees, with a third going for other litigation expenses.

But as firms have been driven into bankruptcy, the victims have received even less. For example, the amounts paid by the original asbestos manufacturer driven into bankruptcy, Johns-Mansville, quickly fell to 10 percent of the jury awards after bankruptcy, and then to 5 percent. Moreover, the mounting bankruptcies are eliminating sources of money for future claimants who may develop later illnesses.

This rapidly developing crisis can only be solved by taking this matter mostly out of the civil courts. The federal government should establish an asbestos victims compensation fund. Companies that are found to be truly at fault in causing asbestos illnesses can be required to pay into the fund. Public funds can cover the remaining costs of helping those who actually do become ill due to asbestos.

Virtually every company involved in manufacturing and construction is at great risk of being drawn into this (asbestos) litigation tornado. ... As a result, if the stock of America's industrial giants is about to nosedive due to asbestos claims, the Enron 401(k) disaster is going to be replicated.

Peter Ferrara, executive director of the American Civil Rights Union, is an attorney practicing law in Washington, D.C. and was a member of the Reagan White House Office of Policy Development. Write letters to The Detroit News, 615 W. Lafayette, Detroit, Mich. 48226, or fax to (313) 222-6417 or send e-mail to letters@detnews.com.

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Tuesday, October 2, 2001

BIZ; BUSINESS

ASBESTOS SUITS BANKRUPT ANOTHER: FEDERAL-MOGUL; AUTO SUPPLIER SAYS IT WON'T CUT JOBS, SHUT PLANTS

JAMIE BUTTERS FREE PRESS BUSINESS WRITER

DETROIT FREE PRESS SIDEBAR ATTACHED

Southfield-based auto supplier Federal-Mogul Corp. was forced Monday into bankruptcy by asbestos lawsuits, after it was unable to win federal limits on the hundreds of thousands of lawsuits it faces.

That such a fate could befall a 102-year-old company that never made asbestos (It inherited the liability when it bought British T&N plc, Cooper Automotive and related subsidiaries in 1998.) is a lesson of the dangers inherent in growth through acquisition.

But Federal-Mogul's chief executive and newly elected chairman, Frank E. Macher, insists that the maker of bearings, gaskets and Champion spark plugs won't cut jobs, close plants or lose customers as a result of the filings in the United States and the United Kingdom.

The filingswill legally separate Federal-Mogul's asbestos liabilities from the ongoing profitability of its operations, Macher said.

Several companies have emerged from a Chapter 11 reorganization stronger and more competitive, he said. "We fully intend to join that list," Macher said.

Some have stayed under court protection from creditors for more than five years, but he said he hopes to have a plan worked out with all the creditor groups in two or three years.

Macher was elected chairman of the board Monday, as well, succeeding Steve Miller, who became chairman and chief executive officer of Bethlehem Steel last week.

With 49,000 employees and revenues of $6 billion a year, Federal-Mogul is believed to be the largest auto supplier in the world to seek bankruptcy court protection, a move that debt and equity markets have

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anticipated for months.

Federal-Mogul shares that traded for more that $65 in 1998 fell to 65 cents a share last week and closed Monday at 45 cents.

A long fall

It is a long fall for a company that started on Woodward Avenue in 1899. According to the company's Web site, founders J. Howard Muzzy and Edward F. Lyon experimented with metallurgy, and, in 1910, their Metal Mogul subsidiary supplied 10,000 connecting-rod bearings for the Buick 10.

After decades of evolution, the company settled on the name Federal-Mogul Corp. in 1965.

In 1998, then-chairman and chief executive Dick Snell, like many other supplier executives, pushed the company through a string of acquisitions.

Federal-Mogul spent $6 billion on acquisitions, and its annual revenues tripled from $2 billion a year to $6 billion.

Investors caught the fever, too, and pushed the stock from $22 a share at the end of 1996 to $59.50 two years later.

The thinking was that asbestos costs could be managed by the Center for Claims Resolution, a coalition of defendants that routinely settled almost any claim.

But claims poured in by the thousands.

In 1998, Federal-Mogul paid $89 million on asbestos-related claims and legal fees. The next year, it paid $178 million. It was $351 million last year and on a similar pace this year.

As of June 30, Federal-Mogul subsidiaries still faced about a quarter of a million asbestos-related lawsuits, according to a filing with the Securities and Exchange Commission.

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T&N is a defendant in 65,000 claims. Two U.S. subsidiaries of T&N face 120,000 claims. And two Cooper Automotive subsidiaries, Abex and Wagner, face 41,000 and 29,000 claims.

When the stock plunged a year ago, Snell was fired and given his contractually obligated $4.1 million in severance pay and an annual pension of $422,600.

Board member Robert S. (Steve) Miller, who played big roles in turnarounds at Chrysler Corp. in the early 1990s and Waste Management in the late '90s, filled in as chairman and CEO until Macher and chief operating officer Charles (Chip) McClure were hired in January.

They deployed a two-pronged attack on the asbestos front: Fight cases filed by people who aren't sick yet, and try to get Congress to limit lawsuits to those filed by sick people.

The courtroom strategy was somewhat successful, Macher said. But when codefendants such as USG Corp. and W.R. Grace filed for bankruptcy court protection, it left Federal-Mogul virtually alone with all of the liability.

Macher said he and other board members were making good progress until Democrats regained control of the Senate and legislative priorities shifted.

"No one was willing, at this point, to sponsor" the bill drafted by the National Association of Manufacturers, Macher said.

So it became clear that Chapter 11 was the company's best hope, he said.

A saving grace

Although it is a dramatic step, a voluntary bankruptcy filing can help contain legal costs, said Birmingham-based turnaround consultant Van Conway, rather than arguing hundreds of cases in dozens of jurisdicitons.

"It's a way to get them all in one courtroom," Conway said.

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The keys are whether the business operations are truly profitable and whether customers believe in the effort.

Macher said customers and suppliers have been extremely supportive.

Profits are another story.

In the second quarter, Federal-Mogul reported a loss of $17.5 million, compared to a profit of $49.9 million for the same three months in 2000.

The business operations generated cash in the quarter of $143 million, but $82.4 million was chewed up by asbestos payments.

Aside from the high costs of the asbestos lawsuits was the distraction and misspent energy, Macher said.

"We really should have been spending more time -- if we could have -- on the operation of the business," he said.

Contact JAMIE BUTTERS at 313-222-8775 or butters@freepress.com

BANKRUPTED BY ASBESTOS

Southfield-based Federal-Mogul Corp. joins at least 28 other companies that have filed for bankruptcy in the last 19 years because of asbestos litigation. Federal-Mogul is believed to be the largest auto-parts maker ever to file for bankruptcy.

UNR Industries -- July 1982

Johns Manville -- August 1982

Amatex -- November 1982

Forty-Eight Insulations -- April 1985

Pacor Inc. -- July 1986

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Nicolet -- 1987

Brunswick Fabricators Inc. -- 1988

Raymark Industries -- February 1989

UNARCO -- July 1989

Hillsborough Holdings -- December 1989

Standard Asbestos Manufacturing and Insulation -- January 1990

Celotex -- October 1990

National Gypsum -- October 1990

Eagle-Pitcher Industries -- January 1991

H.K. Porter Co. -- February 1991

Kentile Floors -- December 1992

American Shipbuilding -- November 1993

Keene -- December 1993

Lykes Brothers Steamship -- December 1995

Rock Wool Manufacturing -- November 1996

Rutland Fire Clay -- September 1999

Babcock & Wilcox -- February 2000

Pittsburgh Corning -- April 2000

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Owens Corning -- October 2000

Armstrong World Industries -- December 2000

G.I. Holdings (GAF) -- January 2001

W.R. Grace -- April 2001

USG Corp. -- July 2001

Federal Mogul -- October 2001I

Source: USG Corp.

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Front; A

Judith Gerke, holding her two granddaughters, filed suit after she was diagnosed with mesothelioma, a rare and fatal form of cancer.

Asbestos suits haunt carmakers

Mark Truby

DETROIT -- While asbestos litigation toppled company after company during the 1980s and 1990s -- chasing giants from Johns-Manville to Owens Corning into Chapter 11 bankruptcy -- the auto industry considered it a minor nuisance.

Now the vast asbestos tort battle is rumbling toward Detroit. And the nuisance looks increasingly like a costly legal quagmire that could drag on for decades and adversely impact the U.S. auto industry.

In the past year, Detroit's deep-pocketed automakers and parts suppliers have been deluged by asbestos-related lawsuits, many filed by people who are not sick and may never become seriously ill.

The suits could cost hundreds of millions -- even billions -- of dollars to defend and resolve, analysts estimate, in an industry already facing intense competition and struggling to wring out thin profit margins.

Warning bells sounded when Southfield auto parts conglomerate Federal-Mogul Corp. -- facing an avalanche of asbestos claims -- filed for bankruptcy protection in October.

Then in the final quarter of 2001, asbestos-related lawsuits against General Motors Corp., Ford Motor Co. and DaimlerChrysler AG's Chrysler Group skyrocketed to 3,500 a month, nearly 20 times the rate for the three previous quarters, according to estimates from investment banker UBS Warburg.

Adding to the angst, a jury returned a stunning $53-million verdict last month in a lawsuit against Ford, GM, Chrysler and a number of brake makers. It is believed to be the largest asbestos award to a single plaintiff.

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"It's a huge problem and it's growing," said Chrysler spokeswoman Ann Smith.

While maintaining their legal liabilities are still manageable, all three Detroit automakers have begun bracing investors for a rise in asbestos-related payouts.

"Like other companies in the automotive industry, DaimlerChrysler ... has experienced a growing number of (asbestos) lawsuits," the company noted in a Feb. 20 filing with the U.S. Securities and Exchange Commission. "It is possible the number of these lawsuits will continue to grow and that the company could incur significant costs in the future."

Ford said asbestos plaintiffs are seeking $1.7 billion in damages from the No. 2 automaker. GM is currently spending $10 million a year to defend asbestos cases and said the payouts could grow.

UBS Warburg estimates that the 20,000 current lawsuits pending against Ford, GM and Chrysler will cost $320 million to defend in a best case scenario, and $1.2 billion at worst. And that does not factor in future lawsuits.

Brake suppliers such as Dana Corp., Delphi Corp., Bosch GmbH and Honeywell International Corp. also face thousands of lawsuits.

$200-billion liability

Asbestos, a naturally occurring fiber, was widely used by auto companies and many other industries as an insulator and all-purpose fire retardant through the 1970s. Its heat-resistant properties made it the perfect material for brake pads and shoes.

The use of asbestos waned in the 1980s and 1990s when it became well known that inhaling it could lead to serious respiratory diseases such as asbestosis and mesothelioma, a rare and 100-percent fatal form of cancer that begins in the lining of the lungs.

But the events that pushed the auto industry from the periphery of the asbestos tort imbroglio to the center of it has little to do with the cancer-causing fiber and much to do with the American legal system.

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For years, plaintiffs' lawyers largely ignored the auto industry while targeting asbestos producers and other more culpable businesses. But as companies like Johns Manville, Eagle-Picher and W.R. Grace sought refuge in bankruptcy court, trial attorneys searched for others to pick up the tab.

"It's the search for the solvent bystander," said David Austern, who administers the Manville trust and other asbestos trusts created to pay claimants when companies file Chapter 11. "Virtually all asbestos producers are bankrupt. Fifty-six corporations have gone bankrupt. And there will be more bankruptcies and more lawsuits. I see no end in sight."

Detroit's auto companies are not alone. Dozens of solvent businesses with asbestos liability have seen their caseloads bulge.

"Anybody with asbestos products has a reason to be concerned," said Jim Zamoyski, senior vice-president and general counsel for Federal-Mogul. "Over the years, the first tier got wiped out. The second tier got wiped out. We're actually the third tier and we got wiped out."

The economic toll of the asbestos mass tort is expected to reach a staggering $200 billion, estimates actuarial firm Tillinghast-Towers Perrin -- more costly than either Hurricane Andrew or the Sept. 11 disaster.

Most of the cases dogging Detroit's automakers and their suppliers are filed by mechanics who were exposed to asbestos while changing brakes. Because parts makers assembled the brakes and auto companies like Ford and GM put them on cars, the companies face significant liability. The caseload involving automotive brakes has increased 739 percent since 1999, according to court filings tracked by bankruptcy trusts.

"It's simply a question of who is solvent and do they have liability to your client," said Trey Smith, a Dallas-area lawyer who represents clients exposed to asbestos with serious impairments. "In the past, we had cases where there was brake exposure but didn't pursue them because there was lower hanging fruit on the tree. Now, so many of those companies are bankrupt."

Workers unprotected

Sometimes lost in the outrage over the rising number of unimpaired claims is the human toll asbestos exacts. Hundreds of suits against auto

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companies stem from cases where people have died or become gravely ill after being exposed to asbestos. And the auto industry, like so many others, has undeniably failed to protect workers in the past.

Before workplace asbestos safety procedures became common, Southeast Michigan workers at auto assembly and parts plants routinely inhaled asbestos with little thought about the long-term health implications.

"We didn't know what we were breathing," said Jim Walker, 82, who worked at the Ford Rouge foundry for three decades before retiring in the early 1980s. "All the pipes were covered with white stuff. We covered our mouths with a rag or a cloth or anything we could. I never heard the word asbestos back then."

Robert Hayes, 65, had similar experiences at GM's Clark Street Cadillac plant, where he worked 30 years, mostly as a maintenance supervisor.

"Asbestos was all over the place," Hayes said. "The stuff would be flying around like snow. And back then we didn't have masks, gloves or clothes that you dispose of. The clothes we wore to work, we wore home."

Both men are under doctors' care for asbestos-related respiratory problems. Hayes gave up the three-mile strolls he enjoyed most of his adult life.

"I can't walk two blocks," Hayes said. "I just lose my breath."

Hayes said he is considering filing a lawsuit. Walker has consulted with a lawyer but hasn't filed suit.

Factory workers comprise a small percent of the overall claimants. More common are lawsuits related to brake dust. Thousands of mechanics all over the country have complained that inhalation of asbestos-laden brake dust triggered serious respiratory disease or cancer.

And asbestos brakes remain on millions of cars and trucks in America and are widely available in auto parts stores largely because government efforts to abandon certain asbestos products have failed.

Judith Gerke, 48, of Sacramento filed suit against the automakers and brake suppliers after she was diagnosed with mesothelioma last year.

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"I can barely hold my 3-month-old granddaughter," Gerke said. "The tumor has pushed my heart to the left side of my chest."

Investigators looked back through her life and found her only exposure to asbestos came from her grandfather, an auto mechanic who wore his dusty overalls home.

Gerke said it is outrageous that asbestos brakes are still on the road.

"It's something that is avoidable," said Gerke, who has already outlived her doctors' prognosis -- when she was diagnosed in January 2001 -- that she would live six months.

No physical impairment

Suits involving a serious illness, however, are making up a smaller and smaller slice of the overall picture.

In 1982, only 4 percent of asbestos claimants showed no manifest injuries, according to the Rand Institute for Civil Justice. By 1993, about half of all suits were brought by claimants with little or no physical impairment. By last year, two-thirds of claims provided no evidence of impairment.

The courts in most states allow people with scarring or marking on their lungs -- ostensibly from asbestos -- but no impairment to seek compensation from responsible parties. The rulings stem from concern by the courts that a person exposed to asbestos will develop cancer or respiratory disease 20, 30, even 50 years later and be barred from seeking compensation. Under current state laws, once a diagnoses of asbestos scarring is made, a person typically has a two- or three-year window to file suit.

"This is their one and only chance to go to court and seek compensation," said Suzanne Keys, one of the lawyers who won a controversial $150 million verdict in October in Mississippi for six laborers with mild asbestos-related conditions. "They have to live with an increased chance of dying from lung cancer."

Trial lawyers with Web sites like MillionDollarLungs.com sign clients up by the dozens and file in places like Mississippi, West Virginia and Texas where juries are known to return large verdicts against corporations. Some attorneys park trucks with X-ray equipment outside

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union halls and gathering places and offer free screenings in exchange for the right to represent those who test positive.

"It's like the movie: If you build it they will come," said Steve Kazan, who is leading a dissident group of plaintiffs' lawyers pushing for asbestos tort reform. "I think it's nuts. All it's doing is making a lot of money for lawyers."

Staying under the radar

Many companies pay off the claims whether they have merit or not. In a government filing, GM explained it has settled many lawsuits for strategic reasons, "avoiding defense costs and possible exposure to runaway verdicts."

The proliferation of claims by minimally injured people also has raised concern there will be no money left for people who become sick in the future.

"We are in a situation (where) the funds to compensate the truly sick are limited," said Trey Smith, the Dallas-area plaintiff's lawyer. "It's a triage situation."

The Manville Trust established when Johns-Manville filed Chapter 11 has doled out $2 billion since the early 1980s but now pays victims only five cents on the dollar so the fund doesn't run dry.

Auto companies are cautious about discussing the growing problem of asbestos liability, referring most questions to lawyers hired to defend the cases. Off the record, some admit they fear drawing more attention from the plaintiffs' bar.

"Until you're in trouble, exposing yourself is always a huge risk," said Frank Macher, chairman and chief executive officer of Federal-Mogul. "As soon as you mention the word asbestos you can have a problem."

When Federal-Mogul and a handful of other besieged companies were lobbying Congress last summer to pass laws that could have curtailed asbestos litigation, they found other corporations with liability were reticent to join the effort.

"No other companies were willing to acknowledge they had even a

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scintilla of asbestos problems," Zamoyski said.

In response to questions from The Detroit News, GM issued a carefully worded statement.

"As with other companies that have used asbestos, there has been an increase in the number of claims against GM," it stated. "Although (the increase in claims) has caused the expenses associated with the handling of asbestos claims to increase, it remains manageable."

Science as a defense

Detroit's automakers believe their best chance to thwart the crippling liabilities other industries have faced is to prove asbestos brakes aren't harming mechanics. The companies hired Chicago lawyer David Bernick, a mass tort specialist who was the national defense counsel for Dow Corning during the breast implant litigation.

Bernick hopes to have all suits against the automakers bundled in federal court and then convince a panel of medical experts that brake dust doesn't lead to mesothelioma. A similar strategy paid off hugely in the breast implant litigation.

"Why should this area of litigation be growing when science doesn't support it?" Bernick said.

The automakers tried earlier this year to have the cases transferred from state court to the Delaware federal court handling Federal-Mogul's bankruptcy. U.S. District Judge Alfred M. Wolin declined the request. An appellate court is reviewing the decision.

Plaintiffs' lawyers and many medical experts disagree with the auto industry's contention that asbestos from brakes does not pose a health risk.

"There's no question that brake dust causes cancer," said Dr. Michael Harbut, a Southfield occupational health physician and a well-known advocate for improved diagnosis and treatment of asbestos-related illness. "It's just so absurd to deny it."

The courts have not always bought the argument either. In 1998, a Maryland appellate court upheld an $8-million verdict against Ford. A

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Baltimore jury had previously found the automaker liable for two mechanics who contracted mesothelioma after being exposed to asbestos in brake parts.

Last month, a New York jury returned a $53-million award in a brake case. The family of Stephen Brown, 51, sued Ford, Chrysler and GM along with Honeywell, which makes Bendix brakes, and others. The automakers settled with the Brown family before the verdict.

Honeywell spokesman Tom Crane called the verdict an anomaly and said the company has successfully defended 116 of 120 cases arising from Bendix friction products.

Macher, the CEO of Federal-Mogul, believes the time has arrived for domestic automakers, auto suppliers and other corporations to join together and lobby Congress to change the asbestos tort laws.

Numerous efforts to date have fallen short, in part because of lack of participation from companies afraid of being sucked into a black hole of litigation costs.

"We have to do something to stem the tide," Macher said. "There is a huge transfer of wealth happening. It might be too late for us but not for other companies. They have to stand up and have their company identified and say we need a legislative solution."

Asbestos bankruptcies

The domino effect of Chapter 11 filings of major asbestos defendants -- 56 companies in all -- has led to more suits against the auto industry. Some examples:

* Johns-Manville, major asbestos producer

* Owens Corning, glass producer

* W.R. Grace, chemical giant

* Babcock & Wilcox, boilermaker

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* Federal-Mogul, auto parts maker

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Federal-Mogul Files in Bankruptcy Court After Estimate for Asbestos Liability Soars

By MITCHELL PACELLE
Staff Reporter of THE WALL STREET JOURNAL

Federal-Mogul Corp. sought bankruptcy-court protection after it calculated that its asbestos liabilities next year would balloon to $130 million more than it had expected, said Frank Macher, chairman and chief executive of the auto-parts maker.

The unexpectedly high costs marked the failure of the company's effort to limit payments to claimants by more aggressively fighting lawsuits in court, a tactic already abandoned by many other asbestos defendants. In seeking protection from creditors in U.S. Bankruptcy Court in Wilmington, Del., under Chapter 11 of the U.S. Bankruptcy Code, Federal-Mogul joined 10 other companies that have sought such protection since the start of 2000.

"This is not something we wanted to do," said Mr. Macher in an interview yesterday morning, a day after being named chairman. "The decision was based on the fact that asbestos liabilities weren't going to diminish. In fact, they were going to grow."

In its filing, the Southfield, Mich., company listed assets of $10.15 billion and liabilities of $8.96 billion. Federal-Mogul said its British subsidiaries filed for similar protection in the United Kingdom. As of 4 p.m. in New York Stock Exchange composite trading, shares in the company were at 45 cents, down 20 cents, or 31%.

"I think the company had to do this," said investor Carl Icahn, who had accumulated large positions in the company's stock and bonds, which have plunged in value as its asbestos woes mounted and its core auto-parts business was hurt by the economic slowdown. Mr. Icahn declined to comment on how much he had invested in the company, or how that investment has fared.

"Basically, my investment is in the bonds," said Mr. Icahn, noting his long history of investing in junk bonds. "You never buy at the bottom. You have to have the patience to wait. I think this is going to be a long wait. In this economic environment, the business they're in is a tough business."

In addition to its asbestos problems, Federal-Mogul—which makes engine bearings, pistons, gaskets and seals for auto makers and the spare-parts market—has been hurt by a slowdown in car sales, which is expected to worsen in the wake of the terrorist attacks.

Federal-Mogul picked up its liabilities through the acquisition in 1998 of T&N PLC, a British parts maker. At the time, Federal-Mogul set aside $2.1 billion in cash to cover anticipated claims, but liabilities shot up to $350 million last year from $78 million in 1998.

In hindsight, the T&N acquisition "was a strategic mistake, given the liabilities we have today," Mr. Macher said. "At the time, the liabilities seemed affordable." He joined the company as CEO in January.

Also in January, the company shifted tactics, pulling out of the Center for Claims Resolution, which brokered shared settlements for asbestos defendants. It vowed to fight more claims in court by making claimants prove injury and exposure to its products. But as more of the other defendants sought bankruptcy-court protection, Federal-Mogul found itself picking up a greater share of industry liability. In addition, hopes for legislative relief dimmed when control of the U.S. Senate Judiciary Committee shifted to the Democrats from the Republicans.

The expected cost of settlements next year shot up to at least $380 million from the $250 million originally forecast, Mr. Macher said. "You couldn't see an end in sight."

Through the Chapter 11 process, the company hopes to set a ceiling on its asbestos liabilities. In previous bankruptcy-court reorganizations of major asbestos manufacturers, much of the stock in the restructured companies has gone into trusts to fund future payments to litigants. In more recent cases involving companies that merely used asbestos in their products, the process of deciding how much equity to allot to claimants may be more difficult, lawyers say.