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

****

VOLUME II

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General Background

A. Unimpaired Claimants Have Flooded the Courts

1. Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis,* Briefly, Vol. 6, No. 6, June 2002).

2. 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).

3. Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

4. Steven Hantler, *Asbestos Litigation and the Role of the Courts* (The Federalist Society for Law & Public Policy Studies), Apr. 2003.

5. Lester Brickman, Editorial, *The Great Asbestos Swindle*, Wall St. J., Jan. 6, 2003, at A18, *available at* 2003 WL-WSJ 395572.

6. John M. Biers, *Limit on Asbestos Lawsuits Urged; Lawyer: Many Claimants Not Ill*, Times-Picayune, Aug. 10, 2002, at 1, *available at* 2002 WL 25249125.

7. Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1, *available at* 2002 WL 18538000.

8. James A. Henderson, Jr. & 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).

9. Mark A. Behrens, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12, *available at* Westlaw 4/29/02 NLJ A12, (Col. 1).

10. Amity Shlaes, *The Real-Life Tragedy of the Asbestos Theatre*, Fin. Times, May 14, 2002, at 15, *available at* 2002 WL 20299748.

11. Editorial, *Asbestos Suits Mock Justice*, S. Fla. Sun-Sentinel, Apr. 15, 2002, at 18A, *available at* 2002 WL 2959326.

12. Margaret Cronin Fisk, *Jury Awards Six Asbestos Plaintiffs $25 Million Each*, Nat'l L.J., Nov. 12, 2001, at B1, *available at* Westlaw 11/12/01 Nat'l L.J. B1, (Col. 2).

13. Lester Brickman, *Asbestos Litigation: Malignancy in the Courts?*, Civil Justice Forum (Ctr. for Legal Pol'y), Aug. 2002.

14. *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos 39 (Mar. 1, 2002).

15. Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at A1, *available at* 2002 WL 6382801.

B. <u>Mass Screenings Fuel the Filings By Unimpaired Claimants</u>

16. David M. Setter et al., *Why We have To Defend Against Screened Cases: Now Is The Time For A Change*, Vol. 18, No. 20, Mealey's Litig. Rep.: Asbestos (Nov. 12, 2003).

17. Andrew Schneider, *Asbestos Lawsuits Anger Critics; Mass Medical Screenings, Run by Lawyers, Reel in Many Who Don't Feel Ill*, St. Louis Post-Dispatch, Feb. 9, 2003, at A1, *available at* 2003 WL 3554893.

18. Roger Parloff, *Mass Tort Medicine Men,* Am. Law., Jan. 3, 2003, at 98, *available on Westlaw at* 1/2003 Am. Law. 98.

19. David Egilman, Editorial, *Asbestos Screenings*, 42 Am. J. Indus. Med. 163 (2002).

20. *Special Report The Asbestos Crisis: Growing Chorus Demands Change in Law – Political Fight*, Fin. Times, Sept. 9, 2002, at P27, *available at* 2002 WL 26143139.

21. Robert J. Samuelson, Editorial, *The Continuing Legal Fraud Over Asbestos*, Wash. Post, Nov. 20, 2002, at A25, *available at* 2002 WL 102573377.

22. Pamela Sherrid, Special Report, *Lawyers on Trial,* U.S. News & World Rep., Dec. 17, 2001, at 34, and *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341.

23. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243 (2001).

24. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991), *available at* Westlaw 4/1/02 Nat'l L.J. B14, (Col. 2).

C. <u>Payments to the Truly Sick are Threatened</u>

25. *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise).

26. Mark P. Goodman et al., *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, Nat'l L.J., Apr. 1, 2002, at B14.

27. Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, *available at* 2002 WL 2190334.

28. Thomas Korosec, *Enough to Make You Sick: In the Struggle for a Shrinking Pot of Money from Asbestos Litigation, the Sickest Victims are Getting Nickels and Dimes While Lawyers Get Their Millions*, Dallas Observer, Sept. 26, 2002, *available at* http://www.dallasobserver.com/issues/2002-09-26/feature.html (last visited Nov. 14, 2003).

29. Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, Wash. Post., Sept. 25, 2002, at E1, *available at* 2002 WL 100084407.

30. Editorial, *Lawyers for Asbestos Reform*, Wall. St. J., Sept. 17, 2002, at A20, *available at* 2002 WL-WSJ 3406228.

31. Dave Lenckus, *Asbestos Liability Reform Efforts Continue; Push To Prioritize Claimants Draws Support From Some Plaintiffs' Attorneys,* Bus. Ins., Sept. 30, 2002, at 2, *available at* 2002 WL 9518313.

32. Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer, May 30, 2002, at B7, *available at* 2002 WL-STLPI 5934774.

33. Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at A1, *available at* 2002 WL 6382801.

34. Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2001, at A1, *available at* 2002 WL-WSJ 3392934.

35. Quenna 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.

36. *In re Joint E. & S. Dists. Asbestos Litig.*, No. 90CV3973 (E. & S.D.N.Y. Nov. 7, 2001).

D. <u>Bankruptcies Are Placing A Heavy Toll on Workers And Their Employers</u>

37. Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

38. Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003).

39. *The State of the Economy: Hearing Before the Sen. Comm. on the Budget*, 107th Cong. (Jan. 29, 2003) (statement of Michael Baroody, Executive Vice President of the National Association of Manufacturers).

40. *Solving the Asbestos Litigation Crisis*: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary, 107th Cong. (June 4, 2003) (statement of Frederick C. Dunbar, Ph.D., Senior Vice President, Nat'l Econ. Research Assocs.).

41. *Solving the Asbestos Litigation Crisis:* Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary, 107th Cong. (March 5, 2003) (statement of Scott Kapnick Managing Director, Goldman Sachs).

42. Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1, *available at* 2001 WL 28937452.

43. Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22, *available at* 2002 WL-WSJ 3383766.

44. Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, Wall St. J., Dec. 21, 2000, at B4, *available at* 2000 WL-WSJ 26620724.

45. Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Vol. 16, No. 6, Mealey's Litig. Rep.: Asbestos, Apr. 20, 2001.

46. Mark D. Plevin and Paul W. Kalish, *Where are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Vol. 16, No. 15, Mealey's Asbestos Bankr. Rep., Aug. 2001, at 34.

47. Mark D. Plevin et al., *Where are They Now? Part Two: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Vol. 17, No. 20, Mealey's Litig. Rep.: Asbestos, Nov. 15, 2002, at 1.

48. Mark D. Plevin et al., *Don't Bankrupt Asbestos: It's Sad That Bankruptcy Offers The Only Rational Method of Resolving Litigants' Claims*, Legal Times, Mar. 19, 2001, at 65.

49. Quenna 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.

50. Patrick J. Hagan et al., *Totalling Up the Costs of Asbestos Litigation: Guess Who Will Pay the Price?*, 9 Temp. Envtl. L. & Tech. J. 1 (1990).

E. Peripheral Defendants are Being Dragged Into the Litigation

51. Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *available at* 2003 WL-WSJ 3957497.

52. *Special Report The Asbestos Crisis: The Toxic Time-Bomb Exploding Throughout the Corporate World,* Fin. Times, Sept. 9, 2002, at P26, *available at* 2002 WL 26143136.

53. 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.

54. Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *available at* 2001 WL-WSJ 2859560.

55. Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps,* Wall St. J., Apr. 12, 2000, at B1, *available at* 2000 WL-WSJ 3025073.

56. John S. Stadler, *New York Court Ruling Impacts "Peripheral' Asbestos Defendants*, State Focus (Wash. Legal Found., Wash., D.C.), Dec. 20, 2002.

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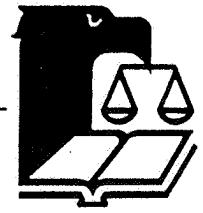
ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL



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PREFACE

Nearly thirty years ago, the Fifth Circuit Court of Appeals in *Borel v. Fibreboard* affirmed a jury verdict that gave asbestos-exposed workers a new remedy beyond workers' compensation. The *Borel* decision marked the beginning of the asbestos litigation, which has become the largest area of product liability litigation in American history.

In 1982, approximately 20,000 asbestos claimants had filed lawsuits. Currently, more than 200,000 asbestos-related cases are pending in state and federal courts, and that number is growing at the rate of more than 50,000 new cases every year. According to a recent estimate, the total number of asbestos claims may reach 2.5 million, and the economic toll of asbestos litigation on businesses could reach $275 billion. Without question, asbestos litigation has become a crisis, flooding state and federal courts with thousands of claims, most of them filed by "unimpaired" claimants who are not sick.

In this article, Griffin B. Bell, former federal appeals court judge and Attorney General of the United States, examines the causes of the asbestos litigation crisis and argues that, because of Congress' failure to act, our legal system must do a dramatically better job of adjudicating and managing asbestos cases. According to Judge Bell, the sheer number of cases, unlike any type of previous litigation, has compelled some courts to value expediency in resolving claims at the expense of fairness and procedural safeguards designed to protect litigants' rights. Nonetheless, Judge Bell asserts that state and federal judges have the ability and resources to help solve the asbestos litigation crisis. He outlines several options for judges to consider when managing their asbestos dockets.

This report, like all of the monographs published by the National Legal Center, is presented to encourage greater understanding of legal issues. It is not intended to influence legislation but to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions or positions of the advisors, officers, or directors of the National Legal Center. This publication is presented purely as an educational public service.

Ernest B. Hueter
President
National Legal Center

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ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL*

I. INTRODUCTION

The Judicial System in the United States is unique. I cherish it. I have spent more than fifty years of my professional career attempting to protect its integrity and ensure its delivery of fairness and justice to our citizenry.

In large part, the Judicial System has functioned as intended, safeguarding the rights afforded by our federal and state constitutions, serving as a forum for individuals to seek redress for injuries, and providing individualized treatment of cases and controversies. Our federal and state judges form the most qualified and committed bench in the world. We are fortunate to live in a country where the rule of law prevails.

There is one respect, however, in which our Judicial System is falling short: the asbestos litigation.

---

* Griffin B. Bell was appointed by President Kennedy to the U.S. Court of Appeals for the Fifth Circuit in 1961. He served on that Court until 1976. In 1977, President Carter appointed Judge Bell to be Attorney General of the United States, and he served in that post until 1979. In 1985-86, he was President of the American College of Trial Lawyers. Judge Bell represented President George H.W. Bush in the Independent Counsel's investigation of the Iran-Contra Affair. Currently a partner at King & Spalding, Judge Bell is active in issues involving the country's Judicial System. A more detailed biography of Judge Bell can be found in the About the Author section on page 49.

Judge Bell acknowledges the co-authorship of this article by Wick Sollers and Mark Jensen. Mr. Sollers is a partner and Mr. Jensen is an associate at King & Spalding's Washington, D.C., office.

In asbestos litigation, the Judicial System fails to guarantee basic elements of justice that we take for granted in other disputes. Courts, understandably, struggle to adapt to and manage the unexpected and unprecedented volume of asbestos personal injury claims. Hundreds of thousands of cases—and counting—have overtaken and incapacitated certain courts since the 1970s, with no realistic end for several more decades. In the history of our legal system, no other type of litigation has been as profuse, long-standing, and difficult to resolve.

In my view, the judiciary must make a choice. Judges need not passively accept the asbestos litigation's debilitating effects on our Judicial System. They have at their disposal a number of judicial tools to help solve this crisis, not the least of which is their intellect and capacity to innovate when justice is compromised. The Supreme Court of the United States is no doubt correct in saying that national legislation may be the most effective means to ensure that sick claimants are compensated fairly and efficiently, but its pleas to Congress go unheeded. I submit that it is time for the judiciary to take bold steps to manage fairly those dockets that are inundated by the crushing load of asbestos cases.

II. THE TORT SYSTEM HAS FAILED TO COPE WITH THE EXPLOSION OF ASBESTOS LITIGATION

A. Asbestos Litigation Has Overwhelmed and Incapacitated Certain Courts

Federal and state courts should not be faulted for their management of the asbestos litigation deluge; it is like no other litigation they have experienced before in either size or longevity. In 1999, the Supreme Court acknowledged the intractable nature of the almost thirty-year-old asbestos litigation. The Court employed unusually strong language in an often-quoted passage, describing the litigation as an "elephantine mass of asbestos cases . . . [that] defies customary judicial administration and calls for national legislation."[1]

The crisis is worsening at a much more rapid pace than even the most pessimistic projections. For example, the RAND Institute for

Civil Justice has been studying asbestos litigation since 1984, when approximately 20,000 cases were pending.[2] RAND estimated, at that time, that the *total* number of cases against asbestos defendants could reach 200,000.[3] Today, there are in excess of 200,000 cases *pending*.[4] In its most recent 2001 study, RAND predicts that the asbestos litigation crisis will worsen,[5] estimating that 500,000 claims have been filed and that the number of claims has risen sharply in recent years.[6] The study concludes that the number of claims yet to be filed could range from 500,000 to 2.5 million.[7]

More than ten years ago, Chief Justice Rehnquist appointed a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, which drafted a report that forecast the crisis we now face. The Committee "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."[8]

In its 1991 report, the Ad Hoc Committee stated a fact that has become even more apparent over the past decade:

> [T]he 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.[9]

Furthermore, the Committee stated that the asbestos crisis affects not only the asbestos litigants, but also "impedes the resolution of other cases in the justice system."[10] The Committee correctly foreshadowed that "the worst is yet to come. . . . [U]nless 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. . . ."[11]

In 1999, eight years later, Chief Justice Rehnquist again noted that the crisis had worsened in the absence of congressional action, writing that asbestos-related claims were having a "massive impact" on the court system.[12]

B. Bankruptcy

The inability of the tort system to manage asbestos cases fairly has resulted in an alarming number of bankruptcies. Some experts estimate that the total economic toll of asbestos liability on businesses will reach *$275 billion*, more than cost estimates for all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks.[13] More than fifty companies suffering from overwhelming asbestos costs have filed for bankruptcy, with North American Refractories Company (NARCO), Kaiser Aluminum, A.P. Green, Harbison-Walker, and Shook & Fletcher the latest to succumb in 2002.[14] As one journalist recently noted, "the prospects for all the remaining [solvent] companies worsen" with each successive bankruptcy.[15]

Bankruptcy courts currently may provide a rational and workable claims administration facility, but they ought not displace the tort system as the primary method for resolving asbestos cases. Bankruptcies have far-reaching, negative consequences for both truly sick claimants and innocent employees and shareholders. However, our incapacitated tort system leaves companies with no viable alternative to declaring bankruptcy.

Bankruptcy judges, and the federal district and appellate judges who review their decisions, find themselves in a unique position to control the asbestos litigation as more companies seek Chapter 11 protection. The varied and often competing interests of innocent employees and shareholders, sick claimants, unimpaireds, future claimants, and lawyers seeking attorney fees all converge within the bankruptcy court's jurisdiction. The expanding list of bankrupt companies is a constant reminder to bankruptcy jurists that they have an important role to play in fashioning comprehensive, innovative, and fair improvements to our failing Judicial System.

C. Most Asbestos Claimants Are Not Sick

The onslaught of asbestos cases is dominated by claims from the "Unimpaired"—plaintiffs without cancer who are not physically sick by any accepted medical standard. The *New York Times* recently reported that the latest surge in asbestos claims includes many healthy plaintiffs: "[v]ery few new plaintiffs have serious injuries."[16] Payment of only those claims filed by plaintiffs who are sick would represent a major step toward solving the litigation crisis.

Supreme Court and district court judges, plaintiff lawyers who represent truly sick claimants, physicians, and business analysts all have recognized the prevalence of unimpaired claimants.

Justice Breyer acknowledged in the 1990s that many modern asbestos cases do not involve claimants who are impaired, quoting one source who estimated that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment."[17] That situation has only grown worse.

Federal courts responsible for managing asbestos dockets likewise have expressed concern that limited asbestos funds are compensating claimants with less serious injuries. In November 2001, Judges Weinstein and Lifland, who preside over one of the oldest and most significant asbestos bankruptcy trusts, the Manville Trust, "took judicial notice of the continuing media and other campaigns encouraging a flood of new claims." They noted "that there is a continuing rise in the number of claims and that the amount paid pro rata on claims has been reduced from 10 percent to 5 percent of the original value." Judges Weinstein and Lifland observed that "there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries."[18]

Similarly, in January 2002, Judge Weiner, who manages the federal MDL asbestos litigation, observed that asbestos cases filed on the basis of mass litigation screenings "[o]ftentimes . . . are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future."[19]

Other experts and physicians have explained why modern asbestos cases frequently involve claimants who are not sick.

By 1991, it was estimated that more than 50% of pending asbestos claims against the Manville Trust were filed by claimants who alleged having a form of pleural plaques, a fibrosis of the pleural lining of the lung that in most cases does not cause any physical impairment.[20] According to a 1992 article by one legal scholar, pleural claims accounted for "sixty to seventy percent of new asbestos claims filed."[21] As two experts have summarized, "[t]he benign conditions of the pleura that are produced by asbestos are seldom of any lasting importance. . . . Diffuse pleural thickening, which may follow an effusion or may develop without an effusion ever having been detected, is usually asymptomatic. It may rarely cause constriction of the lungs with impairment of function and, in extreme cases, consequent disablement."[22] A federal district court also concluded that "[i]n 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."[23]

The other type of noncancerous, asbestos-related condition is a scarring of the lung tissue known as "asbestosis," a type of interstitial fibrosis. Fibrosis has approximately 150 known causes, only one of which is asbestos exposure. Individuals can have various degrees of asbestosis and, like pleural plaques and thickening, claimants with less severe asbestosis can exhibit no functional impairment or sickness of any kind. In the early 1970s, the federal government, through OSHA, began reducing the acceptable levels of occupational exposure to asbestos. According to one leading asbestos pathologist, these OSHA standards have "markedly decreased the incidence and severity of asbestosis."[24]

Well-regarded experts have explained in simple terms why modern asbestosis cases are less likely to involve physical impairment: "[w]ith the reduction in the amount of exposure, the development of incapacitating fibrosis slows down and the reaction becomes so slight and its spread so slow that no person with otherwise healthy lungs would

develop significant disability before reaching an age when he was likely to die of other causes."[25]

A recent *Fortune* article concluded that "asbestos defendants are very likely now paying compensation for every occupational disease known to man. Incipient or marginal asbestosis, as picked up on an X-ray, bears at least a superficial resemblance to more than 130 other lung inflammations, including scores caused by various airborne particles."[26]

Business analysts have agreed with these assessments. In 2001, A.M. Best reported that "[t]o date, the vast majority of filed claims have been for nonmalignant type exposures, including a large number of asymptomatic claimants."[27] Similarly, in 2001, both the RAND Institute[28] and Tillinghast-Towers[29] accepted estimates that at least 90% of claims are filed by plaintiffs who do not have cancer.

Perhaps the most revealing insight into the nature of many modern asbestos cases comes from certain plaintiff lawyers who represent truly sick claimants. In December 2001, one such prominent plaintiff attorney concluded, in a court filing in the Manville bankruptcy, that many workers filing new claims do not have real asbestos exposure:

> The [Manville] Trust has reported that [] current projections beginning in 2002 call for somewhere between a million and a half and two and a half million future cases.
>
> Of course, none of this means that more people are really getting sick as a result of their asbestos exposure. Rather, we are seeing large numbers of cases from "new" industries where it seems clear that if there is any asbestos exposure at all it is very likely limited in intensity as well as scope, with relatively few workers having real exposure.[30]

This lawyer for sick claimants opined on the potential causes for new claims in an October 24, 2001, letter sent to other asbestos plaintiff lawyers:

> Call it intuition or naivete, but I simply cannot believe that there is significant asbestos exposure from asbestos insulation in situ within textile mills to produce the flood of claims that the [Manville] Trust is now receiving. Whether the explanation is fraud, physician incompetence, or failure of recollection by claimants, I do not know. What I do know is that this claimed epidemic of the 21st Century "asbestosis" cannot possibly be real.[31]

Regardless of the reason for the dramatic numbers of unimpaired claimants, courts have attempted the difficult task of managing them efficiently and fairly. Many courts have succeeded. But some courts have failed in dramatic fashion—and plaintiff lawyers have flocked to those venues. The following section contains an overview of the ways asbestos claims have gravitated to those courts that have relaxed or ignored traditional tort requirements and gatekeeping functions.

III. FAIRNESS HAS BEEN SACRIFICED BY SOME COURTS STRUGGLING TO MANAGE THE ASBESTOS LITIGATION

The most significant casualty of the asbestos litigation crisis is fairness itself. Some courts in which plaintiff lawyers have aggregated thousands of claimants into mass "inventories," consisting of many unimpaired claimants and relatively few sick claimants, have struggled to manage claims fairly.

The selective filing of inventories of nonsick claimants in courts that will not turn these claims away coerces defendants into settling unsubstantiated claims by the nonsick. Certain courts will not scrutinize the unsubstantiated claims, and plaintiff lawyers often will not settle the substantiated claims absent payment for their nonsick inventories. Defendants, on the other hand, often cannot afford the risk of trial—inadequate notice and discovery, unfair combinations of sick and nonsick trial plaintiffs, and the possibility of bet-the-company verdicts in unfriendly jurisdictions can be the stark reality—all of which may threaten not only the defendant's finances, but also its workforce, its share price, and even its viability.

Of course, defendants historically settled cases by the nonsick because they believed at that time (but incorrectly in hindsight) that massive inventory deals would substantially reduce their total asbestos liability. Eventually, each additional bankrupt company learned the same lesson: the inexhaustible pipeline of nonsick claimants refills each time it is purged by another settlement. In some cases, judges and defendants beset with this onslaught of claims have abandoned their roles as watchdogs in an adversarial system predicated on such checks and balances. Courts have become claims processing machines, more concerned with resolving massive numbers of cases than with ensuring integrity in the process or truth in the result.

As one professor has written, the result has been to encourage the filing of even more claims:

> 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.[32]

These traffic jams of cases result, in large part, from the huge amount of money paid to plaintiff lawyers, who use the funds as seed money to recruit large replacement inventories of asbestos claimants. Lawyer advertising and mass screenings, which are most responsible for the proliferation of claims, are funded by the settlements. A new generation of plaintiff lawyers also is attracted by the wealth generated by their predecessors, which creates even more competitive pressure for lawyers to locate plaintiffs regardless of their health and to file claims on behalf of the nonsick.

A. Faced with Thousands of Claims, Certain Courts Have Relaxed Traditional Elements of Tort Claims

Legal principles that normally require proof of causation and injury as conditions of recovery have been suspended in some jurisdictions in the context of the asbestos litigation.

Take, for instance, the traditional tort requirement of "injury." Most jurists and citizens likely would assume that any plaintiff who receives millions of dollars in compensatory damages would suffer from a serious and debilitating medical condition. Not so in a recent Mississippi asbestos case, resulting in one of the largest asbestos awards ever, in which a jury awarded six plaintiffs $25 million each in compensatory damages alone.

None of the plaintiffs in this case claimed to have missed a day of work due to an alleged asbestos-related disease.[33] Not one claimed any prior medical expenses due to asbestos exposure.[34] None of the claimants had cancer; rather, each plaintiff either alleged a non-impairing pleural condition and/or slight asbestosis. One claimant even admitted at trial that he did not suffer from any shortness of breath and that he exercised by walking three to four miles per day. Nonetheless, the court allowed the jury to consider the "evidence" of injury, after which it returned a $150 million verdict (one of the ten highest jury awards in 2001) for a group of claimants who were not sick from asbestos exposure. The practical result of the award is not simply that the system now has $150 million less with which to compensate asbestos workers who are sick or who will become sick in the future. The verdict, returned in the very courtroom in which mass screening informational meetings had recently been held, also underscored the inability of defendants to resist even the most frivolous cases.

The Manville Trustees, who have the responsibility for monitoring millions of dollars in Trust payments to claimants, recently noted that nonsick claimants are receiving a significant share of the Trust's assets. The Trustees concluded in a letter to the bankruptcy court that the flood of new claims received by the Trust were filed on behalf of unimpaired claimants "whose daily life is unaffected by their past asbestos exposure. Indeed, a large share of the Trust's claimants now have 'injuries' which are imperceptible, even to themselves, without the aid of X-ray or other imaging technology."[35]

Like the element of "injury," some courts have relaxed the traditional tort requirement of "causation" in many asbestos cases. To prove that a defendant's product caused the plaintiff's alleged injury,

the plaintiff naturally must demonstrate that he or she was exposed to the defendant's product. Commonly referred to as obtaining "product identification," the plaintiff lawyer often must find a witness willing to testify that the plaintiff worked around the particular product and breathed its airborne particles.

In theory, the task is tremendously difficult. Predominately older claimants are asked to remember products to which they were allegedly exposed decades ago. Such necessary details include remembering the names of products, their locations at the worksites, and their physical descriptions, including small lettering on bags and packaging colors. In practice, however, plaintiffs invariably identify the product of solvent companies that have available funds to pay inventory settlements. The system rarely accommodates a determination of whether plaintiffs made valid product identification, one of the most basic elements of establishing an asbestos tort.

The harm from the absence of any real check and balance is substantial. Plaintiff lawyers frequently attempt, and succeed, in extracting large "inventory" settlements from defendants by filing an overwhelming number of claims against certain defendant targets. Plaintiff lawyers eventually may obtain product identification, but the mere filing of a large suit often prompts settlement regardless of the factual merits. Defendants are forced to incur the costs of defending cases that may not have a good-faith basis. Preferring not to incur such transaction costs, defendants routinely believe that it is cheaper to settle cases than to litigate, even though the cases may not have merit and have not been substantiated with any evidence, much less with reliable medical evidence. Bedrock tort principles of proof, causation, and damages become a casualty in a judicial process whose objective is to resolve cases above all else.

A federal bankruptcy court recently expressed concern that lawyers may abuse the litigation process by filing asbestos lawsuits without ensuring a reasonable basis for their cases. As an example of one court's attempt to question the plaintiff's prefiling causation investigation, bankruptcy Judge Burton Lifland engaged in the following

exchange with an asbestos plaintiff lawyer (the witness) about the basis for naming Kentile as an asbestos defendant:

Court: How does Kentile get to be a Defendant if the Plaintiff doesn't know he had been exposed to Kentile? Is that invented by the lawyer based upon an insurance coverage? What do you mean you wouldn't know of your own clients?

Witness: It's my understanding that –

Court: What do you know of your own knowledge? How does Kentile get to be a Defendant?

Witness: (No response.)

Court: We are here on a hourly basis. You used up the better part of a minute and a half [] to respond to the Court.

Witness: I am thinking, Your Honor.

Court: It should not be much of a thought here. This is your firm, right?

Witness: That is correct.

Court: This is your area of focus. How about answering the question?

Witness: I am thinking about it, Your Honor. Generally speaking, one would speak with the client and find out to what products he has been exposed to.

Court: So then the clients would know that they were exposed to Kentile in order to make Kentile the Defendant in the suit; is that right?

Witness: That is correct.

***

Q. [by different questioner]: What due diligence have you done to identify Kentile as a Defendant?

A: In the cases—I don't believe that I have spoken with my clients about Kentile in general.[36]

Even more disturbing than the lack of prefiling investigations are widespread allegations that the litigation is punctuated by improper witness coaching, possibly crossing the line into fraud. One prominent law firm inadvertently gave to the defense a memorandum that an employee of the plaintiff law firm had supposedly used to coach plaintiffs to answer questions only as instructed—without any admonition in the memorandum to tell the truth.[37] This same law firm is one of three being sued under RICO for, among other things, allegedly forging plaintiff signatures and manufacturing missing information on plaintiff affidavits, including work histories and product identification information.[38]

Whether it is this unacceptable, alleged behavior, the routine failure to conduct pre-filing investigation into causation, or the continued relaxation of such legal requirements as "injury," the result is the subordination of truth to the expediency of resolving asbestos cases. While this perverse result in the face of overcrowded dockets is understandable, it is not the appropriate balance that our Judicial System should accept.

B. Some State Courts Are Too Overwhelmed to Exercise Gatekeeping Functions and Monitor Medical Evidence

State and federal courts have the authority to assess the reliability and relevance of medical evidence and to monitor the integrity of the judicial process. This commitment, of course, requires judicial energy and time. More than 99% of asbestos cases settle, most commonly in the context of mass inventory deals. Accordingly, courts frequently manage the cases until settlement but believe that they cannot afford to invest the judicial resources to supervise such settlements or monitor medical evidence submitted by plaintiffs pursuant to settlement terms.

Two significant reviews of medical evidence in the asbestos litigation suggest that judicial monitoring of medical opinions is necessary to ensure accurate diagnoses of asbestos-related conditions in cases filed in the courts.

In mid-1996, the Manville Personal Injury Settlement Trust ("the Trust") retained neutral academics to evaluate the results of more than 6,400 audited claims of alleged asbestosis and pleural disease. Once the Trust received the X-rays allegedly supporting the randomly selected claims, those X-rays would be reviewed by up to two of five independent physicians (B-readers) retained by the Trust. The Trust intentionally designed the X-ray review process to operate in favor of confirming the disease allegedly suffered by the claimant and to afford the benefit of any doubt to the claimant.[39] Accordingly, *both* independent B-readers had to disagree with the plaintiff expert's diagnosis before a claim would "fail" the audit and be rejected (if no compensable disease) or reclassified (if a less severe, compensable disease). On the other hand, if either B-reader agreed with the plaintiff expert, or determined that the claimant had a more severe disease, the claim would be paid and, depending on the new diagnosis, paid at the higher level even if more than originally requested by the claimant. A review by the second Trust B-reader was not even conducted if the initial B-reader agreed with the plaintiff expert or diagnosed a more severe disease.

By early 1998, the experts had completed their analysis of the 1996 data and determined that, in approximately *41%* of the cases, both of the Trust's physicians disagreed with the plaintiff experts and found that the claimant either had no disease whatsoever or had a less severe disease than alleged (e.g., nonimpairing pleural disease instead of asbestosis).[40]

The Trust continued to audit medical evidence after 1996, concluding generally that plaintiff law firms disproportionately hired doctors who had consistently poor pass rates for interstitial fibrosis claims.[41] As an example of the over-utilization of doctors who were inclined to find an asbestos-related condition, the former executive director of the Manville Trust analyzed the Manville claims data from the first quarter of 1998.[42] Of more than nine thousand claims submitted by plaintiff lawyers, a mere ten doctors provided X-ray interpretations for 87% of the claims. The average failure rate for these doctors was a striking 59%. The highest volume doctor accounted for

over half of the total X-ray interpretations, failing the audit 57% of the time.[43]

An earlier, 1990 study published in the *Journal of Occupational Medicine* uncovered similar exaggerated medical diagnoses by certain plaintiff experts. A 1986 mass screening had generated legal claims of alleged asbestos-related diseases after 700 to 750 tire workers submitted to X-ray screening at their worksite.[44] Almost 60% (439) of the screened tire workers filed lawsuits claiming an asbestos-related disease, a prevalence of alleged disease that would prove grossly divergent from the study's results. In 1990, four respected radiologists and professors reported the results of a medical study involving these claims.

Overall, the study demonstrated that *only 16 of the 439 claimants that had filed lawsuits, or 3.6%*, exhibited chest abnormalities that may have been consistent with asbestos exposure. The authors concluded that more than half (265, or 60.4%) of the claimants had "what might be considered completely normal chests for their ages."[45] Of the remaining 174 claimants that had chest abnormalities, most of them (158, or 36.0% of the total claimants) had abnormalities that were "nonoccupational in origin and consisted of conditions one might expect in an aged population."[46] Put another way, although the claimants had irregularities on their chest X-rays that resemble asbestos disease, they were caused by something other than asbestos, such as "healed tuberculosis, histoplasmosis, emphysema, discoid stelectasis, effusions, healed rib fractures, scarring due to infection or old inflammatory disease, possible cancer, miscellaneous nonspecific linear markings consistent with cigarette smoking and aging, and heart and vascular diseases."[47]

The authors ultimately observed that "the data from this re-evaluation study suggest the prevalence of disease noted [by the plaintiffs' doctor(s)] is mistakenly high."[48]

Despite these studies, the surprising, practical reality is that defendants almost never have the opportunity or desire to arrange for neutral B-reader panels to conduct comprehensive medical reviews.

Plaintiff lawyers often avoid submitting X-rays by settling claims *en masse* with the leverage of their sick clients.

Many defendants are reluctant to demand X-rays and conduct such audits for fear that plaintiff lawyers will target the company, refuse to settle any claims, and try their most serious cancer cases in plaintiff-friendly jurisdictions. While serious cases are relatively few in number compared to cases filed by the unimpaired, the risk of even a handful of multimillion dollar verdicts often dissuades defendants from a high-profile, contentious fight that could bankrupt the company in the short term. One business analyst has observed, "[i]n a sense, the plaintiffs' attorneys have the asbestos defendants held hostage."[49] Defendants often conclude that rather than question this X-ray evidence, it is cheaper to treat the claims as administrative costs, regardless of merit, than to litigate. This strategy has failed for a number of defendants in the long run, as an endless supply of nonsick claimants have replenished the plaintiff lawyers' client base, leaving bankruptcy as the only realistic option for those companies.

The ultimate result is that potentially superficial and unreliable medical evidence justifies billions of dollars in settlement payments without any oversight or verification from an adversary or the court. It is difficult to conceive of any other compensation system that is more susceptible to abuse and less likely to arrive at accurate results.

C. Due Process Rights Are Sacrificed in the Asbestos Litigation

The axiom that every litigant has a right to prepare his or her case adequately seems so basic as to not require any explanation whatsoever. Unfortunately, in many asbestos cases, basic due process rights have been minimized in the name of resolving cases and clearing court dockets.

The procedural due process guaranteed by the United States Constitution and state constitutions requires that a litigant be afforded the right to prepare and present a full defense.[50] For this right to have any meaning, a party must have adequate notice of court proceedings and a meaningful opportunity to prepare. Similarly, it is impossible to

prepare an adequate defense without the chance to obtain information about the other side's claims and defenses. This concern is magnified in those state jurisdictions that generate the greatest number of litigant complaints about due process violations.

1. Certain Jurisdictions Are Magnets for Huge Numbers of Asbestos Cases

It is no coincidence that a few jurisdictions have become the favorite locations for plaintiff attorneys. A principal reason for this concentration is that juries in these jurisdictions have consistently awarded huge verdicts in favor of plaintiffs against corporations, especially out-of-state corporations. Perhaps the most notorious jurisdictions in this regard are a few Mississippi counties, in which litigation has seemingly become the counties' principal business. Jefferson County, for example, with 9,740 residents, had 21,000 plaintiffs file claims in the county courts from 1995 to 2000.[51] Mississippi juries have returned at least twenty verdicts of $9 million or more since 1995, including at least seven that exceeded $100 million each.[52] Plaintiff attorneys have learned that their chances of obtaining large jury verdicts, and, as a result, their chances of extracting favorable pretrial settlements from defendants, are much greater in jurisdictions that have plaintiff-friendly reputations. In addition to the Mississippi counties, other notoriously pro-plaintiff jurisdictions crowded with asbestos cases include certain locales in Texas, West Virginia, Louisiana, New York, and California.[53]

Not surprisingly, a 2002 Harris Poll found that senior corporate lawyers ranked Mississippi, West Virginia, Alabama, Louisiana, and Texas as the five worst states in the country in terms of the fairness of their tort liability systems.[54] Mississippi is ranked worst or next to worst on all criteria except treatment of class action suits, on which it was not rated because it does not have them. The average economic growth rate from 1995 to 1999 was substantially higher among the ten states ranked highest in the survey (4.8%) than in the bottom ten states (3.8%). Seventy-eight percent of the respondents confirmed that a state litigation environment could affect important business decisions such as where to locate or do business.[55] Obviously, it is in a state's self-

interest to insist that its courts afford fair treatment not only to its citizens, but to its businesses as well.

Large, well-publicized jury verdicts and out-of-court settlements attract additional plaintiff lawyers, both from inside and outside the jurisdictions. These lawyers file claims on behalf of out-of-state clients, relying on liberal rules concerning jurisdiction and venue. In Mississippi, for example, historically it has not mattered how many plaintiffs in a case live out of state, as long as one lives in state.[56] The fact that in-state plaintiffs may reside in different counties also is not an obstacle because venue is proper in a county as long as any plaintiff in the case resides there.[57] These rules attract plaintiff lawyers from other states seeking large verdicts or settlements, whose home states may have limits on punitive damages recovery or other procedural obstacles. It was recently reported that of the 403 plaintiffs involved in litigation filed in Jefferson County, Mississippi, against GAF Corporation, more than half were from Texas.[58]

2. Misuse of Joinder and Consolidation Rules Aggravates the Problem

The willingness of juries in certain jurisdictions to return large verdicts, coupled with the ease of filing suit even as a nonresident, has resulted in a substantial caseload of asbestos actions in these jurisdictions. Overwhelmed by massive numbers of cases, judges in these jurisdictions have liberally interpreted procedural rules regarding the joinder and consolidation of claims in an attempt to manage their dockets.

The result is that some judges permit the consolidation of massive numbers of cases, even involving plaintiffs with largely dissimilar claims. Trial judges exercise broad discretion in determining whether joinder is proper, and, when pressured by massive numbers of claims to resolve, they have used that discretion to permit the joinder of thousands of plaintiffs in a single action.[59] Once again, Mississippi is perhaps the best example of this practice.

Even if plaintiffs cannot meet Mississippi's relatively liberal joinder standards, judges have the option of consolidating separately filed cases for trial if there is a question of law or fact common to the parties.[60] As with joinder, a Mississippi trial court has broad discretion to consolidate actions for trial.[61] For defendants, the end result of such practices often is the prospect of an unfair trial involving numerous plaintiffs from different jurisdictions, who worked in different occupations, at different worksites over long periods of time, alleging injuries ranging from mesothelioma to asymptomatic chest X-ray anomalies.

The expansive interpretation by judges of joinder and consolidation rules stems mainly from well-meaning attempts to maintain control over dockets and dispose of cases efficiently. As former Chief Justice Mallett of the Supreme Court of Michigan stated in testimony before Congress:

> Think about a county 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 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.[62]

Imagine Justice Mallett's scenario replicating itself many times over in pro-plaintiff jurisdictions as judges attempt to process thousands of new claims filed each year.

Plaintiff lawyers also have seized upon consolidation as a means of exerting greater leverage on defendants. By combining great numbers of plaintiffs, both sick and unimpaired, plaintiff lawyers create inventories of cases that are more amenable to huge, lucrative settlements. For this reason, plaintiff lawyers push judges, who are already disposed to combine cases in the name of efficiency, to exercise their discretion in consolidating cases.

Permitting large numbers of misjoined claims to proceed to trial jeopardizes defendants' due process rights. Aggregations of sick and nonsick claimants taint the nonsick with a type of "sympathy of association"[63] before the jury, which makes it "more likely that a defendant will be found liable and results in significantly higher damage awards."[64] Similarly, when the claims of numerous plaintiffs with dissimilar alleged injuries and factual situations are tried together, "the maelstrom of facts, figures, and witnesses" is likely to lead to jury confusion and an unfair trial.[65]

3. Some Judges Cede Case Management Decisions to Plaintiffs' Counsel

Other procedural decisions are also prejudicial to litigants. Whether in an attempt to move cases through the system, or for other unexplained reasons, some judges cede control over case management to plaintiff lawyers, prejudicing defendants in the process. For example, certain Texas courts routinely permit plaintiff counsel to select which cases and which plaintiffs will proceed to trial, often mere days before trial. Plaintiff counsel often include at least one serious, high-value case (e.g., the relatively rare sick claimant) in any trial group they choose, ensuring that they maintain the pressure to settle unimpaired cases, while maximizing the potential for a large jury verdict should the case proceed to trial. Indeed, defendants sometimes cannot obtain even basic discovery information about these plaintiffs until the eve of trial, if at all.

A recent opinion by a Texas appellate court illustrates just such a situation. More than 4,000 plaintiffs filed suit against NARCO in Orange County, Texas.[66] In November 2000, three trial settings were identified for fifty plaintiffs. While a group of fifty plaintiffs was severed from the rest in February 2001, four months before trial, it was not until *two weeks* before trial that plaintiff counsel unilaterally selected the specific ten plaintiffs who would go to trial, only then notifying defense counsel.[67]

Even two weeks before trial, fundamental discovery activities, such as obtaining the plaintiffs' medical reports and conducting independent

medical examinations, had not been completed. As a result, the defendants moved for a continuance, but the trial court denied the motion.[68] The appellate court concluded that two weeks' notice was not meaningful notice under the circumstances, and that NARCO's due process rights had been violated as a result.[69] Unfortunately, appellate review is the exception rather than the rule. Because of the pressure to settle, few of these cases go to trial and fewer still make it to an appellate court, making the practice of limiting discovery rights largely unremedied.

The recent *NARCO* case illustrates the confluence of events that can lead to due process violations. Plaintiff counsel files suit in a plaintiff-friendly jurisdiction, on behalf of thousands of plaintiffs. Claims with few, if any, common factual and legal issues are joined together for trial. The trial court permits plaintiff counsel to determine unilaterally which plaintiffs will proceed to trial, with notice provided to the defendants at the eleventh hour. The defendants do not have the opportunity to obtain even the most rudimentary information concerning the plaintiffs' work history, medical status, and the nature of their claims. Taken together, these actions operate to deny defendants the opportunity to prepare adequately for trial and test the particulars of the plaintiffs' claims. Without this opportunity, defendants do not receive the "fair trial in a fair tribunal" that is the basic requirement of due process.

D. Recoveries for the Unimpaired Jeopardize Future Recoveries for the Sick

Commentators have observed that the growth of unimpaired claims threatens recovery for impaired claimants by bankrupting defendants and exhausting asbestos reserves.[70] The bankruptcies can be devastating to current and future impaired claimants, as any recovery against a bankrupt entity can be greatly discounted.[71]

For example, impaired claimants recovering from Johns-Manville can expect to receive a mere 5% of the bankruptcy court's valuation of their claim.[72] "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 those companies who are now solvent."[73]

According to a letter that Manville Trustees sent to Judges Weinstein and Lifland on December 5, 2001, a "disproportionate amount of Trust settlement dollars has gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."[74] Meanwhile, the Trust continues to struggle to meet its obligations to pay sick claimants. Because asbestos defendants have limited resources with which to compensate claimants, "the rush of non-impaired cases diverts the limited resources of defendants away from compensating the victims of asbestos related disease—including, tragically, cancer cases that will be with us well into the next century."[75]

Federal Judge Weiner also has expressed concern that payments to nonsick claimants may jeopardize future payments to workers who are truly ill. Judge Weiner, who manages the federal MDL asbestos litigation, ruled that he would begin giving priority "to the malignancy and other serious health cases over the asymptomatic claims."[76]

One plaintiff lawyer, who represents claimants that mainly have mesothelioma cancer, advocated in a letter to the court overseeing the Manville Trust that "claimants with no asbestos-related impairment or disability (whether 'pleural' or 'bilateral interstitial disease') should not get paid" so that funds are preserved for claimants who are truly sick.[77]

Even business analysts have recognized that future sick claimants will receive less in settlements as bankruptcy trusts continue to reduce payouts and deplete their funds by paying unimpaired claimants.[78]

E. Certain Plaintiff Lawyers May Allocate Settlement Funds without Full Disclosure to Their Clients and Delay Payment on Sick Claims to Leverage Their "Inventory"

Certain plaintiff lawyers may breach their fiduciary duty to their clients by failing to disclose basic information about the lawsuit and allocation of settlement monies to other plaintiffs in their "inventory." Sick plaintiffs often must wait for their settlement money while the plaintiff lawyer uses the sick claims to settle the nonsick claims. Some plaintiff lawyers will not consider settling the sick claims unless the defendant pays on the unimpaired claims. Whether the plaintiff lawyer, in the absence of a settlement offer for his unimpaired claims, actually presents the settlement offer to his sick client, as he is bound to do by lawyer ethics, is open to question.

In February of this year, a group of 2,645 asbestos plaintiffs from Pennsylvania, Ohio, and Indiana filed a class action in Pennsylvania federal court against a group of law firms and lawyers in Mississippi, Texas, and North Carolina alleging that the lawyers had defrauded them.[79] Specifically, the asbestos claimants contend that the lawyers and law firms recruited them for inclusion in "mass actions" in Mississippi and then "betrayed them."[80] According to the federal complaint, the lawyers "viewed their clients as mere inventory that could generate enormous legal fees with relatively little effort."[81]

The plaintiffs allege that the lawyers told them nothing about the lawsuits or the massive settlements, misallocated settlement funds based on undisclosed criteria such as geography, and paid them a few thousand dollars for their injuries while the lawyers amassed tens of millions of dollars in fees and inflated expenses.[82] As a dramatic example of the inequity of jumbo consolidations and settlements, the plaintiffs contend that they never would have approved the settlement had they known that their lawyers gave other similarly situated clients significantly more settlement money, as much as eighteen times more (e.g., $252,000 vs. $14,000), simply because the other clients lived or worked in Mississippi.[83]

The frequency of mass inventory settlements and the number of claimants involved make these allegations alarming, particularly since courts often do not routinely supervise inventory deals. Judges must consider carefully the extent to which they monitor the distribution of settlement funds associated with cases in their courts.

F. Peripheral Companies, Innocent Employees, and Shareholders Also Are Victims in the Asbestos Litigation

Workers that are sick from asbestos exposure clearly are the most needy and deserving of compensation. But other, indirect and less visible victims exist as well. Innocent employees and shareholders of companies only peripherally related to asbestos have been harmed significantly by the financial collapse of their businesses due to asbestos liability.

Virtually all of the original, "traditional" asbestos manufacturers are bankrupt. Counter-intuitively, the number of "nontraditional" asbestos defendants is increasing, even though asbestos and asbestos-containing products were largely removed from the workplace almost thirty years ago. Since the 1980s, the number of asbestos defendants has ballooned from approximately 300 to several thousand today.[84] Any company that manufactured an asbestos-containing product, even if it only contained a trace amount, or that had a small amount of asbestos on its premises in one or two isolated locations, is a potential target in this litigation. Some estimate that almost half the companies on the Dow Jones index will face some form of asbestos liability.[85]

The new wave of asbestos targets includes distributors who sold the products as middlemen between manufacturers and contractors, contractors who worked with asbestos-containing materials, businesses that had asbestos-containing products in their buildings, automobile manufacturers, telephone companies, computer makers, manufacturers of electrical wire and welding rods, consumer product retailers and even food and wine makers. Most of these defendants never manufactured asbestos; yet they are forced to reallocate funds to asbestos claims and away from job growth, research and development, and

other economic investments. Like asbestos payments by traditional defendants, most of the funds paid by newly targeted companies are consumed by lawyers and claimants who are not sick.

Today, it has become commonplace to hear household names involved in asbestos suits. In April 2000, a jury rendered a $34 million verdict against a division of Royal Dutch/Shell oil company. Shell never manufactured an asbestos-containing product, but, like other oil companies, used such a product in its refineries.[86]

Other companies like Campbell's Soup and Procter & Gamble are viewed as deep pockets as well. Both were added to a pending complaint in California Superior Court in San Francisco, alleging that asbestos was found at company factory sites.[87] In another San Francisco court, a former insulator has sued Dow Jones & Company, publisher of the *Wall Street Journal*, claiming asbestos exposure at a *Journal* printing plant.[88]

Sears, Roebuck & Company, one of the first major retailers to be named as a defendant in asbestos-related litigation, is being sued by a former salesman who claims that the floor tiles and roofing products he purchased from Sears in the 1940s caused his cancer.[89] Many of these peripheral defendants, like many of their employees and even the federal government, did not know that asbestos was a dangerous product when it was most commonly used. Yet they face asbestos liability because the most culpable companies who manufactured asbestos—those who allegedly knew the dangers of asbestos before the general public knew—have all declared bankruptcy.

The automobile industry also is not immune. Nontraditional asbestos defendants such as Ford Motor Company and Chrysler Corporation are alleged to have exposed workers to asbestos-containing automobile parts, such as brake pads and linings. Ford, for example, never manufactured or produced asbestos-containing materials; yet it faced $1.7 billion in asbestos liability as of December 2001, two-thirds more than its approximately $590 million in liability from the Firestone tire recall and rollovers of its Explorer sport utility vehicles.[90] Federal-Mogul, an auto parts maker who filed for bank-

ruptcy in October 2001, expects to pay $550 million in asbestos liability in 2004, up from an estimated $338 million in liability in 2000 and $89 million in 1990.[91]

Crown Cork & Seal is another example of a peripherally involved company that never manufactured asbestos-containing materials. It did not even use asbestos-containing materials in its business. This company's limited connection to the asbestos industry was its purchase of Mundet Corporation to supply its cork bottle caps in the early 1960s.[92] Unfortunately, Mundet Corporation also had an insulation business, which was sold 93 days after the purchase.[93] For the 93 days of ownership, Crown Cork & Seal expected to pay more than $100 million for asbestos litigation in 2001 alone.[94] The company recently cut 700 jobs in an attempt to reduce costs.[95]

The rate of new claims is partially dependent upon the number of new defendants sued to pay those claims.[96] Claims have surged as companies file for bankruptcy and plaintiff attorneys feel the pressure to accelerate the filing of claims against newly identified, solvent defendants. Some employees have lost jobs as businesses attempt to cut expenses to account for significant asbestos costs. Innocent shareholders' retirement funds have evaporated after their companies' stock prices plummeted from asbestos liability.

Take Federal Mogul. By the end of 1998, immediately after the 100-year-old company made the mistake of acquiring a company with asbestos liability, the value of Federal Mogul stock in the 401(k) accounts of its 22,000 U.S. employees reportedly was worth $85 million.[97] Then Federal Mogul was targeted as a major asbestos defendant. As bankruptcy threatened by August 2001 solely because of asbestos claims, the value of the stock in retirement accounts had fallen to $15 million, a $70 million decline.[98] Innocent workers, loyal to their company, lost millions of dollars of their hard-earned retirement savings to asbestos settlements that were largely allocated to unimpaired claimants and their lawyers.

In sum, claimants who are sick because of asbestos exposure are the most deserving of compensation for their injuries, although they are

not the only victims in the asbestos litigation. Employees and shareholders of companies that never made asbestos and are only peripherally related to asbestos have suffered as well. These citizens, both asbestos claimants and innocent third parties, rely upon our system of justice to produce rational results in asbestos litigation on the basis of an accurate assessment of the facts. While our Judicial System has failed in that goal, the judiciary has the authority and means to improve drastically its management of these asbestos cases.

IV. A JUDICIAL FIX: STATE AND FEDERAL COURTS HAVE TOOLS TO REMEDY THE BROKEN ASBESTOS LITIGATION SYSTEM

Judges must restore order and fairness to the asbestos litigation. While some courts have failed to manage asbestos cases effectively, I remain convinced that state and federal judges have the ability and resources to help stop the current perversion of the Judicial System. Indeed, I believe that it is the judge's *duty* to fashion judicial solutions when Congress fails to act and miscarriages of justice stand uncorrected. Then, and perhaps only then, will Congress recognize that it has abdicated its responsibility to implement meaningful reform and pass legislation to complement the judiciary's efforts.

The media frequently report on the asbestos litigation *crisis*—whether in the form of another asbestos-related bankruptcy of an otherwise healthy business, plummeting stock prices of companies threatened by more lawsuits, or million-dollar verdicts for healthy plaintiffs in certain jurisdictions. While this unstable and deteriorating situation qualifies as a crisis, it is not an *epidemic*—i.e., a widespread and expanding problem in every state and federal court. The distinction is important and helps determine precisely what type of judicial activity and oversight could be most effective. Many judges, such as Judge Weiner, have faced the problem of deciding asbestos cases fairly and efficiently and largely solved it. Fundamental rules of procedure and evidence do not require change, but they must be fairly and uniformly *enforced* across the country.

Failures of judicial administration in the asbestos litigation are localized failures in a limited number of jurisdictions. Because certain courts attract most of the cases, they have a disproportionate effect on the asbestos litigation as a whole. The concentration of asbestos plaintiffs in these jurisdictions will continue as long as such courts hear the claims of plaintiffs who are not sick and fail to enforce basic rules of fairness. Thus the crisis begins in a minority of courts, but the adverse economic effects spread nationwide.

Reform both from inside and outside these jurisdictions can remedy the problem. Reform may commence by judges applying the same rules to asbestos cases as to any other tort dispute—by way of example, insistence on proof of injury and causation, protection of litigants' due process rights, and recognition of the court's role to act as gatekeeper against illegitimate medical opinions. All courts, including both state and federal appellate courts, must scrutinize cases in problematic jurisdictions for violations of constitutional rights, rules, and procedures. Appellate courts should feel an obligation to act more forcefully and intervene in those problematic jurisdictions where trial courts repeatedly disregard litigants' rights.

The following options provide judges with various approaches to consider when managing their asbestos dockets. These alternatives, many of which have been implemented and/or tested in some manner, are designed to restore basic rights and normalcy to the asbestos litigation that are fundamental in other contexts. These suggestions are not meant to be mutually exclusive or exhaustive; it is hoped that they will stimulate judges to implement other pragmatic reforms that better ensure rationality and justice in the compensation of asbestos victims.

A. Return to Traditional Tort Principles: Insistence on Proof of Injury

Paying claimants who are not sick, an amount in the aggregate that totals hundreds of millions—if not billions—of dollars, is perhaps the most controversial and inequitable characteristic of the asbestos litigation. Traditionally, the tort system would turn away claimants with no

medically significant evidence of injury. The asbestos litigation is an exception, however.

Courts in some jurisdictions, such as in Pennsylvania,[99] Texas,[100] and other states,[101] have expressly limited claims in the absence of asbestos-related impairment. Similar to these courts, my own view is that without some objective, physical impairment, a person has not suffered legal injury and should not be entitled to maintain an asbestos lawsuit. Yet there remain some trial judges who allow workers who have been exposed to asbestos, but who are not sick and may never become sick because of asbestos exposure, to maintain actions for damages. The legal theory is that exposure to asbestos has caused changes in the lungs of these plaintiffs, and while these changes do not affect the ability of these plaintiffs to lead normal, healthy lives, the changes do amount to "legal injury." Accordingly, some claimants who otherwise would not sue unless they became sick may be compelled to file a lawsuit to avoid having their claims barred by the applicable statute of limitations.

In January 2002, Judge Weiner in the federal MDL litigation articulated a sensible strategy for directing compensation away from nonsick plaintiffs toward seriously ill individuals—while simultaneously protecting the rights of the nonsick to receive their day in court if and when they actually manifest some asbestos-related injury.

Judge Weiner alleviated the artificial pressure to file suit by tolling the statute of limitations for claimants who were not impaired. He placed the cases administratively on an inactive docket subject to reinstatement, but indicated that unimpaired claimants would have their day in court when and if they ever developed an asbestos-related disease. Judge Weiner's strategy protects the interests of unimpaired and impaired claimants alike by preserving funds for the truly sick while protecting potential future claims of individuals who may become severely symptomatic years from now. In this manner, if a person exposed to asbestos becomes ill in the future, money will more likely still be available to compensate him or her—rather than already having been exhausted on payments to masses of nonsick plaintiffs. Judge Weiner accepted his duty as a judicial officer by observing in his

ruling: "The Court has the responsibility to administratively manage these cases so as to protect the rights of all the parties, yet preserve and maintain any funds available for compensation to victims."[102]

He further noted that claims based solely on mass X-ray screenings often are brought on behalf of individuals who "are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future." Accordingly, Judge Weiner recognized that merely responding to such claims created "substantial transaction costs" that had the effect of "depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs." Ultimately, as a condition of case reinstatement, Judge Weiner placed the burden on plaintiffs to establish that asymptomatic claimants actually suffer from an asbestos-related disease.[103]

Judge Weiner's ruling requiring a minimum level of medical evidence before allowing cases to proceed is a new judicial tool in the asbestos litigation, but certainly not the first of its kind in the court system generally. In other mass toxic tort contexts, pragmatic judges have imposed deadlines, soon after case filing, by which plaintiffs must submit evidence reasonably supporting their allegations of injury and causation. These orders (known as "Lone Pine" orders, so named after the first case in which they were used) typically require plaintiffs to supply basic information that they should have obtained prior to filing suit, such as a reliable physician's diagnosis of the alleged injury and evidence that the defendant caused it.[104] Failure to comply with the order, or submission of insufficient or unreliable medical evidence, has been grounds for summary dismissal of mass toxic tort claims.[105]

Like Judge Weiner, these judges have exercised their inherent docket management authority to filter out frivolous cases and ensure that legal claims have an evidentiary basis before allowing significant and costly discovery. For example, in one such case involving alleged lead poisoning from construction activities, a Texas trial court ordered that certain plaintiffs submit expert medical reports within a ninety-day window. When the expert reports established only that the plaintiffs had conditions "consistent with lead poisoning" and failed to rule out alternative causes of injury, the court found the medical opinions

unreliable and dismissed the claims before close of discovery, a decision affirmed on appeal.[106] Judges should not allow the asbestos litigation to escape this type of evidentiary scrutiny that courts routinely require in other tort cases.

Similarly, in the medical malpractice context, a number of state legislatures require plaintiffs to file with their complaints expert medical affidavits attesting to the defendant's alleged malpractice. Georgia, for instance, requires the plaintiff's expert to set forth the alleged negligent acts and the specific factual bases for such claims. Connecticut, Florida, Michigan, Minnesota, Missouri, and Nevada all require the plaintiff to conduct similar prefiling due diligence and factual investigation into expert opinions before filing malpractice claims. Reliable medical evidence is essential to ensuring a fair system of compensation for asbestos victims, interested third parties, and defendants.

Judge Weiner's ruling also highlights the practical reality of the asbestos litigation: judges must prioritize cases if they intend to process them fairly and according to constitutional due process requirements. In 1997, the Supreme Court overturned an attempt to resolve large groups of asbestos cases by means of a class action, which effectively required such cases to be decided one-by-one, or at least in small groups of plaintiffs. Yet there could never be enough judges, courthouses, or juries to decide the claims made by the thousands of plaintiffs who are not sick. It is a physical impossibility.

Judge Weiner's ruling recognizes that courts must make difficult decisions about which cases are heard and in which order. His decision may be particularly helpful to state judges, who have the burdensome task of managing the vast majority of asbestos cases. Certain state courts in Illinois, Maryland, and Massachusetts have adopted similar case management strategies by prioritizing claims of sick plaintiffs and placing claims of the nonsick on inactive dockets until an actual impairment develops.[107] Even in those states where healthy plaintiffs are entitled to show "legal injury," courts still have the inherent authority to manage their dockets to hear the claims of sick plaintiffs first.

None of this is to say that these measures will resolve the asbestos litigation in the absence of broader judicial and legislative reform. As long as the same troublesome jurisdictions continue to accept groups of out-of-state cases by the nonsick and compromise basic due process rights, plaintiff lawyers will flock to them, perhaps even more so as additional courts adopt sensible case prioritization practices and adhere to traditional evidentiary requirements.

In sum, Judge Weiner's exercise of his inherent authority over the court's docket is a promising road map for state and other courts to re-establish the requirement of "injury" in asbestos cases—in such a manner that protects the rights of both unimpaired and sick claimants in the future. Widespread adoption of this strategy, especially in certain jurisdictions in Mississippi, Texas, and West Virginia, would be a significant improvement in judicial administration of asbestos cases.

B. Return to Traditional Tort Principles: Insistence on Proof of Causation

The traditional tort requirement of causation, like injury, has been disregarded in the asbestos litigation arena, exposing defendants to liability for asbestos claims unrelated to their operations. The *New York Times* recently noted that "many companies now facing asbestos lawsuits did not make asbestos or use it heavily in their products."[108] Some plaintiff lawyers sue hundreds of these peripheral defendants without first determining if each company exposed their clients to asbestos. The notion that a company should be liable for asbestos-related injuries that they did not cause is contrary to traditional tort law as well as fundamental fairness.

Judges have the authority to question litigants about why they file thousands of claims against thousands of defendants, and to require plaintiff counsel to support their complaints. Judges should expect and receive an evidenced answer that verifies that each plaintiff (or a co-worker) can identify each defendant's product before the court commits to expending judicial resources to manage these claims. By compelling litigants to fulfill their duty to ensure reasonable evidentiary support for their allegations when filing complaints, cases are

more likely to be meritorious and resolved rationally. While not a judicial panacea, a greater commitment to oversight at the time of filing likely would improve judicial economy in the long term and enhance the courts' ability to ensure fairness in the management of asbestos cases. Judicial use of "Lone Pine orders" (discussed *supra*) and similar case management tools would be an effective start. Currently, there are few enforced barriers to entry for even the most frivolous claim.

Without prefiling verification of product identification or other causation evidence, defendants, in a reversal of the way in which a normal tort case is resolved, must conduct costly discovery just to *disprove* causation. Federal Rule of Civil Procedure 11 and state analogues were designed to prevent the bringing of allegations that lack evidentiary support. Such rules work only if courts enforce them, which rarely occurs in asbestos litigation.

A recent case in Mississippi provides a good example of the results that can be accomplished by a pro-active judiciary.[109] In this case, Jasper County Circuit Court Judge Robert Evans appointed a Special Master, who ordered plaintiffs' counsel to provide core disclosure information for each of the 2,500 plaintiffs. This core disclosure was to include their names, social security number, work history, work-sites with years of exposure, disease, date of diagnosis, diagnosing physician, and a listing of the products to which each plaintiff allegedly was exposed. As a result of this order, one week later plaintiffs' counsel filed his/her own motion to dismiss approximately 2,200 of the 2,500 plaintiffs. In all likelihood, plaintiffs' counsel was ill prepared to substantiate the claims and was counting on an easy settlement.

C. Ensuring Reliable Medical Evidence of an Asbestos-Related Disease

1. The Court's Duty as Gatekeeper

The reliability of medical evidence in the asbestos litigation may be the single most important consideration in ensuring just and accurate

settlements and verdicts. In other contexts, courts have increasingly served as gatekeepers to assess the significance of medical testimony and evidence. The Supreme Court's decision in *Daubert* almost ten years ago confirmed the responsibility of trial judges to determine if expert testimony is reliable and helpful. It is especially important for courts to exercise this function in asbestos cases, given the wide variance in the amount and scope of medical evidence proffered in support of such claims.

a. "Consistent with" Diagnoses Are Insufficient

Large numbers of asbestos claims are settled on the basis of X-rays reviewed by "B-readers" who claim that the X-ray findings are "consistent with" asbestosis. Two physicians specializing in pulmonology and occupational lung disease recently attested in court pleadings filed before Judge Weiner that a statement that an X-ray is "consistent with" asbestosis is not a complete or reliable medical diagnosis. These experts have recognized that, in addition to X-ray findings, B-readers may make reliable diagnoses of asbestosis only if they physically examine the patient, conduct pulmonary function tests, review the patient's complete occupational and medical history, analyze latency periods, and eliminate more probable causes of chest abnormalities.

Otherwise, abnormalities on a patient's chest X-ray easily may be diagnosed improperly as interstitial fibrosis. Moreover, even if a patient does have interstitial fibrosis, there is not necessarily a reasonable medical certainty that the condition is asbestosis. Many other medical conditions may appear as interstitial fibrosis on an X-ray, a conclusion accepted by the medical community and by at least one federal court that has considered such medical evidence in detail.[110] A "diagnosis" based solely on a chest X-ray is incomplete; such abnormalities are just as consistent with old age, smoking, obesity, lupus, and other medical conditions.

In the nonasbestos arena, courts regularly—indeed uniformly—reject a "consistent with" diagnosis as a basis for showing medically cognizable injury.[111] Yet in the asbestos context, cases with this non-

diagnosis masquerading as a medical finding routinely go forward. There is no basis for such disparity.

Accordingly, medical opinions that an X-ray is "consistent with" asbestosis sounds like a diagnosis but is medically noncommittal. Even though courts possess gatekeeping authority to require parties to produce medically accurate and complete evidence of asbestos disease, they often approve settlements and Trust disbursements based solely on such limited medical statements and opinions.

b. Mass Litigation Screenings Must Be Discouraged

Many asbestos cases supported only with X-ray interpretations are generated through mass litigation screenings in mobile X-ray vans. The purpose of these screenings often is to generate lawsuits, not to provide screened claimants with medical treatment or advice. These mass screenings often are not attended or supervised by a physician, nor do physicians typically prescribe the X-rays for claimants or report the screening results to the claimant. Many screened workers never even speak with a doctor, much less meet one in person or benefit from a physical examination. The attorney's office, not the doctor, typically calls the claimant and informs him or her whether the screening was "positive."

These mass litigation screenings have been derided by the Association of Occupational and Environmental Clinics (AOEC) as "medically inadequate screening tests" that "do not conform to the necessary standards for screening programs conducted for patient care and protection." The AOEC believes that an "appropriate screening program for asbestos-related lung disease includes properly chosen and interpreted chest films, reviewed within one week of screening; a complete exposure history; symptom review; standardized spirometry; and physical examination." Other essential factors include, among other things, "timely physician disclosure of results to the patient, appropriate medical follow-up and patient education." According to the AOEC, omission of these preventive aspects in the clinical assessment of asbestos-related lung disease "falls short of the standard of care and ethical practice in occupational health."

The recruitment of plaintiffs through questionable mass litigation screenings is not new. In a case involving hundreds of tire worker claims against now-bankrupt Raymark generated by screenings in the mid-1980s (discussed *supra*), independent academic researchers concluded that "possibly 16, but more realistically 11, of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform mineral."[112] A Kansas federal judge, reviewing the same evidence, commented that screening procedures in that case had produced "a mockery of the practices of law and medicine."[113]

The increase in new asbestos cases results at least partially from these mass X-ray screenings. Yet there appears to be no medical purpose for these screenings even as thousands of potential claimants are subjected to X-ray radiation. I believe that X-rays are best left to the practice of medicine and that courts must carefully scrutinize any such medical "evidence" allegedly supportive of asbestos claims.

2. Use of Neutral Physician Panels to Review X-rays and Make Proper Medical Diagnoses

In asbestos cases, highly compensated experts often make pivotal, subjective interpretations of chest X-rays that, due to the nature of these mass suits, frequently are not subject to meaningful review by the court or an adversary. Notably, when scrutinized, the results of these mass X-ray readings often are shown to be erroneous. With billions of dollars at stake based on such expert opinions, the need for accuracy is essential to a proper distribution of limited asbestos funds.

An effective method to eliminate such bias and to ensure the accuracy and fairness of medical evidence is for courts to select neutral physician panels to review X-rays and render proper medical diagnoses. Judges have the authority to appoint neutral experts. Federal Rule of Evidence 706, for example, allows a federal court to appoint experts "on its own motion." In the late 1980s, the late federal Judge Carl Rubin, in an extremely rare but logical strategy, retained ten neutral experts to review the medical records of sixty-five asbestos claimants who had filed suit in his court.[114] The experts were subject to deposition on their opinions and testified at sixteen trials over a

three-year period. Judge Rubin adopted this approach after noticing definite trends in asbestos cases filed in his court: the plaintiffs' experts always diagnosed asbestosis, while the defendants' experts rarely if ever found the disease.

In 1991, Judge Rubin reported the results of the court's expert panel. The plaintiffs' experts had diagnosed all the claimants with non-malignant asbestos-related diseases. However, the court-appointed experts disagreed with the plaintiffs' experts in a statistically significant two-thirds of the cases, finding that 42 of the 65 claimants did not have an asbestos-related condition.[115] Judge Rubin concluded that Rule 706 may be essential to governing a trial and guarding against a "Battle of the Experts" whereby the jury makes a final determination based on subjective factors, such as the charm, wit, and appearance of a witness. He resolved to use Rule 706 in future asbestos cases where appropriate, so long as certain common-sense conditions were fulfilled, such as appointment of impartial experts.

Both state and federal courts should consider the use of neutral physician panels to ensure the reliability of medical evidence allegedly supportive of asbestos claims. The risks of exaggerated claims of asbestos disease by plaintiff physicians, or understated claims of disease by defendant physicians, have been sufficiently documented in the Manville and Tireworkers Medical Audits to warrant concern about the objectivity of paid medical experts in the asbestos litigation. If courts were truly interested in improving the accuracy of asbestos litigation outcomes, as they should be, this rather straightforward option would be a widely effective means of achieving that end.

D. Other Court Tools to Restore Judicial Integrity in the Asbestos Litigation

Courts have a variety of other resources on which to draw if their objective is to restore fairness and justice in the compensation of asbestos claimants. The following examples are illustrative.

1. Monitor Contingency Fees

Courts have the authority—I would say duty—to monitor and limit contingency fees to preserve a greater proportion of funds for deserving claimants. Hard-working lawyers, without question, deserve fair compensation for representing their clients. But asbestos cases are quintessential "mature" torts where the formula for building cases is well established. Almost all asbestos cases settle in large blocks with relatively little individual treatment of claims, and with minimal risk of nonrecovery to the lawyers. Given these truths, it is an injustice that lawyers routinely receive 33% to 40% of each recovery, often aggregating to millions of dollars, while sick and needy claimants receive less than they deserve.

Judge Weinstein, who supervises the Manville Trust, has observed that unreasonable and excessive contingency arrangements may exist in asbestos litigation. For example, in the rare case where attorneys' asbestos fees were reduced from 33% to 25%, Judge Weinstein observed the routine nature of legal services in the context of large settlements:

> In any mass tort case, there is an opportunity for a small number of attorneys, each individually representing large numbers of potential claimants, to secure for themselves huge attorneys' fees under individual contingency contracts that bear little or no relation to the actual work to be done or the risks in the case. The problem is particularly acute in the context of a stipulated settlement such as the instant one, where subsequent legal work on behalf of most individual claimants will be relatively routine, mechanical and almost certain to result in recovery.[116]

As bankruptcy after bankruptcy is filed and the finite pool of resources grows smaller, judges must reassess the appropriateness of huge contingency fees that largely go unquestioned.

2. Effective Use of the Bankruptcy Forum

Bankruptcy has become an unfortunate reality of the asbestos litigation, but it also provides a unique opportunity for bankruptcy jurists to resolve asbestos cases equitably. Asbestos-related bankruptcies typically result in the establishment of an asbestos trust that pays pending and future asbestos claims against the bankrupt entity. The court and trustees are obligated to develop reliable in-take criteria by which claims are assessed and paid. Therefore, bankruptcy courts are positioned to adopt those evaluative techniques that have worked in the nonbankruptcy context, such as appointment of independent medical experts to assess alleged medical impairment (e.g., Judge Rubin) and disqualification of unreliable expert "diagnoses" based solely on mass litigation screenings (e.g., Judge Weiner).

Bankruptcy courts also have the authority to appoint neutral trustees to manage the trust, an important component of ensuring a fair and just distribution of the bankruptcy assets. The merits of selecting neutral trustees should be obvious. Yet certain members of the plaintiffs' bar, which often dominate the creditors' committee in bankruptcy, may attempt to influence the trustees' selection. Bankruptcy judges must be vigilant in safeguarding the independence of the trustees on whom the court must rely so heavily.

Certain bankruptcy courts have adopted other useful strategies to evaluate asbestos claims. In the Raymark bankruptcy, for example, unimpaired claimants are not compensated unless they become sick, much like the rule followed by Pennsylvania courts. In the Johns-Manville bankruptcy, the Manville Trust audited claims to verify medical diagnoses by plaintiff experts, concluding that thousands of claimants had either no asbestos-related disease or a less severe condition than alleged. Lawyers for some claimants eventually sued the Trust, asserting that the Trust's governing documents did not permit its medical audit policies. That litigation effectively limited the Manville audit program, but its effectiveness while active is a reminder to bankruptcy judges that audit authority is a valuable tool that should be given to trusts upon their creation. Different bankruptcy trusts could benefit by sharing such information on specific cases (claimants

typically have suits against multiple bankrupt defendants) and by alerting each other to docket management techniques that improve efficiency and fairness.

The bankruptcy court's insistence on reliable evidence of an asbestos-related disease also has a collateral, but immensely important, consequence for both claimants and the bankrupt debtor: ensuring that the debtor complies with its insurance contracts. Insurance coverage often provides a substantial amount of funds eventually paid to asbestos claimants, while also enhancing the debtor's prospects of emerging from bankruptcy. By requiring plaintiffs to submit reliable evidence of injury and causation, the bankruptcy court achieves two objectives: (1) it allows the debtor to fulfill its continuing duty to obtain quality documentary proof necessary to trigger policy coverage, and (2) it preserves the bankrupt estate's insurance assets for claimants who are legitimately sick now and in the future.

In the end, bankruptcy courts will have a significant impact on the direction and eventual resolution of the asbestos litigation. Whether that resolution will come this decade depends largely on the ability of bankruptcy and state judges to succeed where prior courts have failed.

3. Limit Punitive Damages Awards

Courts have the power to assess the appropriateness of punitive damages on the rare occasion cases are tried. The original asbestos manufacturers have declared bankruptcy, leaving more and more peripheral companies as asbestos defendants. The message of deterrence has been conveyed successfully: hide the dangers of a product and risk the solvency of an entire industry. While punitive damages certainly may be appropriate for a select few of these peripheral companies, defendants face the very real threat of sustaining duplicative and redundant punitive damages awards.

Judges possess substantial ability and discretion as a matter of law to prevent a given defendant from being assessed multiple punitive damages awards arising out of the same conduct. Courts must consider whether punitive damages have served their purpose in this litigation

and whether such damages would be better allocated to compensating sick claimants. Limitations by judges on the threat of punitive damages awards also will help lower the incentive to file claims on behalf of nonsick claimants. Moreover, punitive damages awards coupled with burdensome state appellate bonding requirements essentially have prevented higher court review of many asbestos actions. This lack of appellate review is another basis for limiting future exposure to punitive awards.

4. Reinvigorate *Forum Non Conveniens*

It is no coincidence that asbestos lawsuits cluster in patterns that are completely unrelated to where injured plaintiffs reside or where their injuries occurred. Plaintiff-favorable jurisdictions are chosen for lawsuits without a demonstrated connection between the jurisdiction and the filed claim. This trend has so distorted the judicial system that some localities have more asbestos claimants than they do residents. A reinvigoration of the doctrine of *forum non conveniens* would go a long way toward providing more individualized justice for both plaintiffs and defendants.

5. Prevent Joinder, Consolidation, and Discovery Abuses

A final option for restoring judicial integrity in the asbestos litigation relates to the joinder, consolidation, and discovery abuses discussed in Section III, *supra*. The courts have the ultimate obligation to ensure that litigants' due process rights are respected—regardless of docket pressure. While liberal use of joinder and consolidation rules initially was perceived to provide a judicial solution to the asbestos litigation crisis, relaxing those rules has done little to stem the seemingly endless supply of claims by the unimpaired. Judges risk undermining basic and long-standing legal rules by continuing this tendency to group together dissimilar claims that should be managed and tried separately. Joinder and consolidation may provide temporary relief from asbestos cases, but that benefit is not, in my view, worth the damage inflicted on our legal traditions.

State judges, of course, bear the brunt of determining how to give individualized consideration to thousands of cases, a seemingly impossible task. I submit, however, that compromising legal rules, no matter how pragmatic or justified, cannot be our first line of judicial defense to a type of litigation that has defied resolution. Indeed, federal courts should feel obliged to intervene on due process and equal protection grounds if state courts are too inundated to apply state procedural rules in accordance with constitutional requirements. I remain convinced that our collective experience and judicial wisdom can arrive at a better solution, one that protects the integrity of our judicial institution while ensuring fairness to all parties in the asbestos litigation.

V. CONCLUSION

The judiciary has a vital role to play in solving the asbestos litigation crisis. The sheer number of cases, unlike any type of previous litigation, has compelled courts to value expediency in resolving claims at the expense of fairness and procedural safeguards designed to protect litigants' rights. That strategy has failed: claims are reaching record levels, more cases are being filed by individuals who are unimpaired, bankruptcies continue to mount, and limited defendant funds are compensating lawyers and the least injured claimants instead of truly sick victims.

In my view, jurists have the responsibility and authority to improve the way our Judicial System manages asbestos cases. The goal is not without obstacles. However, while this litigation has confounded courts, litigants, and academics for decades, I submit that solutions exist to the subversion of justice in these cases. Indeed, it is our duty to find them.

I agree with Senior United States Circuit Court Judge Joseph F. Weis, Jr., of the Third Circuit Court of Appeals, who in 1993 wrote:

> 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.[117]

Strength of imagination, courage to enforce the law under extreme pressure, and commitment to the judicial oath are qualities of our judiciary that I believe remain intact. Now more than ever, our Judicial System needs state and federal judges to utilize their talents to restore integrity and reason to the asbestos litigation. I have confidence that they are up to the task.

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[1] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

[2] *See* Letter from Christopher Edley, Jr., Professor of Law, Harvard Law School, to Robert Raben, Assistant Attorney General, at 3 (Nov. 19, 1999).

[3] *Id.*

[4] *Id.*

[5] *See* Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (Institute for Civil Justice, Rand Corp., Aug. 2001).

[6] *Id.* at 2.

[7] *Id.* at 12.

[8] Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 2 (Mar. 1991).

[9] *Id.* at 14.

[10] *Id.* at 26.

[11] *Id.* at 27.

[12] Ortiz, 527 U.S. at 865.

[13] *See* Raji Bhagavatula et al., *Asbestos: A Moving Target*, 102, No. 5 A.M. BEST'S REVIEW 85 (Sept. 1, 2001) (estimating $275 billion in cumulative asbestos liability); *see also* Michael Angelina & Jennifer Biggs, *Sizing Up Asbestos Exposure*, 16, No. 20 MEALEY'S LITIGATION REPORT: ASBESTOS 32-38 (Nov. 26, 2001) (estimating $200 billion); *Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, BUSINESS WIRE, June 12, 2001; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1 (noting that $200 billion in estimated asbestos liability exceeds costs associated with Superfund, Hurricane Andrew, and the September 11 terrorist attacks).

[14] *See, e.g.*, Eric Roston, *The Asbestos Pit: An Old Issue Is Back and the Lawsuits Are Killing Shares*, TIME, Mar. 11, 2002.

[15] Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154.

[16] Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1.

[17] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 384, 393 (1993)).

[18] Order, *In re* Joint E. & S. Dist. Asbestos Litig., No. 4000, 82B11656 (BRL), 2001 WL 146436, at *1 (E.D.N.Y. Nov. 7, 2001).

[19] Administrative Order No. 8, *In re* Asbestos Prods. Liab. Litig., MDL 875 (E.D. Pa. Jan. 14, 2002).

[20] *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, App. C (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *see, e.g.*, ANDREW CHURG, NEOPLASTIC ASBESTOS-INDUCED DISEASE, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 339 (2d ed. 1998) ("Benign pleural disease, particularly plaque, is still seen with considerable frequency, but it generally has little or no functional import."); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 455 (3d ed. 1994) ("Whether calcified or not, pleural plaques alone are symptomless.").

[21] Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?* 13 CARDOZO L. REV. 1819, 1853 (1992).

[22] RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS, at 2 (1985); *see also* VICTOR ROGGLI, ET AL., PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 176 (Little, Brown and Co. 1992) ("The great majority of individuals with pleural plaques alone have no symptoms or physiologic changes.").

[23] *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990).

[24] CHURG, *supra* note 20, at 339.

[25] DOLL & PETO, *supra* note 22, at 2.

[26] Parloff, *supra* note 15.

[27] Gerard Altonji et al., *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, A.M. BEST SPECIAL REPORT, at 5 (May 7, 2001).

[28] *See* Hensler, *supra* note 5, at 6, 29.

[29] *See* Michael E. Angelina & Jennifer L. Biggs, *Asbestos Claims: Is This the Beginning or the End?* TILLINGHAST-TOWERS PERRIN REPORT 15 (Presented at the Casualty Actuaries of the Mid-Atlantic Region 2001 Regional Meeting May 30, 2001) (reproducing disease mix chart of filings with the Manville Trust in 2000).

[30] Memorandum by Interested Attorney (S. Kazan), at 3-4, *In re* Joint E. & S. Dist. Asbestos Litig., 90 CV 3973 (JBW) (E.D.N.Y. 2001).

[31] Letter from Steve Kazan to Ron Motley et al., at 1 (Oct. 24, 2001) (attached as exhibit to Memorandum by Interested Attorney, *supra* note 30).

[32] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

[33] *See* Parloff, *supra* note 15; Trial Tr., Simeon Johnson v. AC&S, Civ. No. 2000-181 (Cir. Ct. Holmes, Miss. 2001).

[34] *Id.*

[35] Letter from Manville Trustees to Judges Weinstein and Lifland, at 4 (Dec. 5, 2001).

[36] Hearing Tr. at 40-41, 47-48, *In re* Kentile Floors, No. 92-46466 (Bankr. S.D.N.Y. Apr. 30, 2001).

[37] *See* Parloff, *supra* note 15.

[38] *See* Second Am. Compl., G-I Holdings v. Baron & Budd et al., No. 01, Civ. 0216 (RWS) (S.D.N.Y. Jan. 25, 2002).

[39] *See* Aff. of Patricia Houser ¶¶ 14-17, *In re* Manville Personal Injury Settlement Trust Med. Audit Procedures Litig., 98 Civ. 5693 (Mar. 31, 1999).

[40] *See* A.R. Localio et al., *The Manville Personal Injury Settlement Trust X-Ray Audit: An Assessment of the Identification of the Underlying Disease Process Implications for Medical Review by Certified B-Readers*, Biostatistics Section, Dept. of Health Evaluation Sciences, Penn State Univ. College of Medicine & Center for Clinical Epidemiology and Biostatistics, Pennsylvania State University (Feb. 24, 1998).

[41] *See* Aff. of Patricia Houser, *supra* note 39, ¶ 44.

[42] *See* Memorandum from Patricia Houser to Manville Trustees (May 13, 1998) (attaching table with complete data).

[43] *Id.*

[44] *See* R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32, No. 11 J. OCCUPATIONAL MED. 1088-90 (Nov. 1990).

[45] *Id.* at 1089.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1090.

[49] Lisa Girion, *supra* note 13 (quoting Tillinghast-Towers consulting actuary); *see also* Gerard Altonji et al., *supra* note 27, at 5 ("[I]t is common practice for [plaintiff] attorneys to package at least one 'meso' [cancer] claim together with numerous other claimants and to threaten suit on the 'meso' claim(s) if payment demands for the entire package are not met.").

[50] *See In re* Arriola Energy Corp., 74 B.R. 784, 790-91 (S.D. Tex. 1987).

[51] *See* Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001.

[52] *See* Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, Jackson-Clarion Ledger, June 17, 2001; *Mississippi Jury Returns $150M Verdict Against AC&S, Dresser Industries, 3M Corp.* 16, No. 19 MEALEY'S LITIGATION REPORT: ASBESTOS 4 (Nov. 9, 2001).

[53] *See* Parloff, *supra* note 15.

[54] *See* Harris Interactive, *U.S. Chamber of Commerce State Liability Systems Ranking Study* (Jan. 11, 2001).

[55] *Id.*

[56] *See* MISS. CODE ANN. §§ 11-11-3, 11-11-11 (2001); Miss. R. Civ. P. 82(c).

[57] *See* MISS. CODE ANN. § 11-11-11; Miss. R. Civ. P. 82(c).

[58] *See* Mitchell, *supra* note 52.

[59] *See* American Bankers Ins. Co. v. Alexander, Nos. 98-IA-00046-SCT, 97-IA-01271, 2001 WL 83952, at **1-6 (Miss. Feb. 1, 2001) (affirming decision of, *inter alia*, trial judge in Claiborne County to permit joinder of 1,371 plaintiffs in an insurance fraud case); *see also* Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 27, 2001 (discussing *American Bankers*).

[60] *See* Miss. R. Civ. P. 42(a).

[61] *Id.*, cmt. ("The [trial] court has complete discretion within the bounds of justice and its jurisdiction.").

[62] *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 Honorable Conrad L. Mallett, Jr.).

[63] *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 Prof. Christopher F. Edley, Jr.).

[64] Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

[65] Malcolm v. National Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993).

[66] *See In re* North Am. Refractories Co., 53 S.W.3d 917, 920 (Tex. App. 2001), *op. withdrawn & superseded on different grounds*, No. 09-01-270-CV, 2001 WL 1517920 (Tex. App. 2001).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See, e.g.*, Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink, Relatively Healthy Plaintiffs Swamp Courts, Sending Companies into Chapter 11*, WALL ST. J., Apr. 15, 2002; Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001.

[71] *See, e.g.*, Bill Burke, *A Pittance for Their Pain*, VIRGINIAN-PILOT and LEDGER-STAR, May 10, 2001.

[72] *Id.*

[73] *Hearings on H.R. 1283* (Edley Statement), *supra* note 63.

[74] Letter from Manville Trustees, *supra* note 35, at 2.

[75] *The Fairness in Asbestos Compensation Act of 1999: Hearings on S. 758 Before the Senate Judiciary Comm.*, 106th Cong. (Oct. 5, 1999) (statement of the Honorable Conrad L. Mallett, Jr.).

[76] Administrative Order No. 8, *supra* note 19.

[77] Memorandum by Interested Attorney, *supra* note 30, at 4.

[78] *See Merrill Lynch Asbestos Panel Presentation* (Executive Summary), Dec. 18, 2000; *see also* Hensler et al., *supra* note 5, at 12-13.

[79] First Am. Compl. ¶ 3, Huber v. Taylor, C.W. No. 02-0304 (W.D. Pa. Mar. 1, 2002).

[80] *Id.*

[81] *Id.*

[82] *Id.* ¶¶ 3, 73-110.

[83] *Id.*; *see also* Matt Moore, *For Some Who Were Part of Asbestos Settlement, Questions Linger*, ASSOCIATED PRESS, Feb. 14, 2000 (stating that some plaintiffs in the settlement "are questioning why the monetary awards were based more on geography than sickness").

[84] *See* Angelina & Biggs, *supra* note 29, at 17.

[85] *See For U.S. Law Firms, Asbestos Has Evolved into a Profitable Industry over the Past 30 Years*, BUSINESS, Feb. 10, 2002; *see also* Hensler et al., *supra* note 5, at 11.

[86] *See* F.T. McCarthey, *Still Killing: Asbestos Claims: Asbestos Strike[s] Again*, ECONOMIST, Aug. 19, 2000.

[87] *See* Richard Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001.

[88] *Id.*

[89] *Id.*

[90] *See Ford Motor Co. Facing Billions in Safety-Related Suit Claims*, ATLANTA JOURNAL-CONSTITUTION, Mar. 24, 2001.

[91] *See* Paul Sherer, *New Credit Aids Federal-Mogul in Asbestos Battle*, WALL ST. J., Jan. 4, 2001.

[92] *See* Monte Burke, *An Affair to Remember: Crown Cork owned an asbestos company for 93 days in the 1960's. The purchase price just went way up.*, FORBES, June 11, 2001; *see also Pa. House Declines to Pass Amendment to Bill to Limit Asbestos Liability* 16, No. 11 MEALEY'S LITIGATION REPORT: ASBESTOS 8 (July 6, 2001); *Pennsylvania Governor Signs Bill Limiting Crown Cork & Seal Asbestos Liability* 16, No. 22 MEALEY'S LITIGATION REPORT: ASBESTOS 10 (Dec. 21, 2001).

[93] *Id.*

[94] *Id.*

[95] *See* Darrell Hassler, *Crown Cork & Seal Shuts Six Plants, Cuts 700 Jobs*, BLOOMBERG NEWS, Feb. 8, 2002.

[96] *See* Altonji et al., *supra* note 27, at 3.

[97] *See* Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, BLOOMBERG NEWS, Feb. 4, 2002.

[98] *Id.*

[99] *See* Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996).

[100] *See* Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88 (Tex. 1999).

[101] *See, e.g.*, Bernier v. Raymark Indus., 516 A.2d 534 (Me. 1986); *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563 (D. Haw. 1990); Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987).

[102] Administrative Order No. 8, *supra* note 19.

[103] *Id.*

[104] *See* Lore v. Lone Pine Corp., No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (not designated for publication).

[105] *See, e.g.*, Acuna v. Brown & Root Inc., 200 F.3d 335, 338-40 (5th Cir. 2000) (affirming dismissal of more than 1,600 uranium personal injury claims after plaintiffs failed to comply with trial court's pre-discovery orders requiring them to establish certain elements of their claims through expert affidavits).

[106] Martinez v. City of San Antonio, 40 S.W.3d 587, 591-93 (Tex. App. 2001); *see also* Cottle v. The Superior Court of Ventura County, 3 Cal. App. 4th 1367, 1387 (Cal. Ct. App. 1992).

[107] *See, e.g.*, Mark Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 13-16 (2001).

[108] Berenson, *supra* note 16.

[109] *See* Robert Stephens v. Combustion Engineering, Civ. No. 11-0010 (Cir. Ct. Jasper, Miss., _____ 2002).

[110] *See, e.g.*, Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *8 (D. Kan. May 30, 1990).

[111] *See, e.g., In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 769 (3d Cir. 1994); Turpin v. Merrell Dow Pharm., 959 F.2d 1349, 1359-60 (6th Cir. 1992); Haggerty v. Upjohn Co., 950 F. Supp. 1160, 1165-68 (S.D. Fla. 1996); Emigh v. Consol. Rail Corp., 710 F. Supp. 608, 612 (W.D. Pa. 1989); *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1250 (E.D.N.Y. 1985); Carter v. United States, 593 F. Supp. 505, 514-15 (W.D. Mich. 1984).

[112] Reger et al., *supra* note 44.

[113] Raymark, *supra* note 110.

[114] *See* Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (Oct. 1991).

[115] *Id.* at 39.

[116] *In re* Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 558 (S.D.N.Y. 1995), *aff'd in part and vacated in part*, 100 F.3d 944 (2d Cir. 1996), 100 F.3d 945 (2d Cir. 1996), and 78 F.3d 764 (2d Cir. 1996); *see also* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 74 (Northwestern Univ. Press. 1995) ("Plaintiffs' counsel like [mass settlements] because they generally do not reduce their percentage fee per case so that, because of the large settlement amounts, their lawyers' hourly fees jump spectacularly. An audit of the Baltimore asbestos cases, for example, might show a net fee on the order of thousands of dollars per hour.").

[117] Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom.* Owens-Corning Fiberglass Corp. v. Dunn, 510 U.S. 1031 (1993).

ABOUT THE AUTHOR

Griffin B. Bell is a senior partner in the law firm of King & Spalding.

Judge Bell was born in Americus, Georgia, on October 31, 1918, and attended public schools and Georgia Southwestern College. From 1941 to 1946, he served in the U.S. Army, attaining the rank of major. In 1948, he graduated *cum laude* from Mercer University Law School in Macon with an LL.B. degree. He has received the Order of the Coif from Vanderbilt Law School and honorary degrees from Mercer University and several other colleges and universities.

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Judge Bell served on the Secretary of State's Advisory Committee on South Africa from 1985 to 1987. He also was a Director of the Ethics Resource Center for several years and in 1986 served as its Chairman of the Board. From 1986 to 1989, Judge Bell served as a member of the Board of Trustees of the Foundation for the Commemoration of the United States Constitution. In 1989, he accepted an appointment as Vice Chairman of President George H.W. Bush's Commission on Federal Ethics Law Reform. During the Independent Counsel's investigation of the Iran-Contra Affair, Judge Bell represented President Bush.

In his private practice, Judge Bell has represented clients in all phases of trial and appellate litigation. He has conducted numerous investigations, including internal reviews for E.F. Hutton's Board of Directors concerning fraud charges, and an independent review of the

Exxon *Valdez* oil spill in Alaska commissioned by Exxon Corporation's Board of Directors.

Most recently in 2002, Judge Bell served on Secretary of Defense Donald Rumsfeld's ad hoc Advisory Committee on new rules governing military tribunals. He also completed his service on the Webster Commission, which in March 2002 issued its report on FBI security programs and Russian spy Robert Hanssen.

Judge Bell continues to practice law and is active in issues involving the United States Judicial System.

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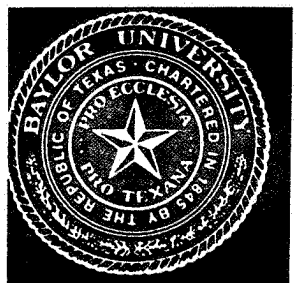

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Some Proposals For Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation

Mark A. Behrens

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SOME PROPOSALS FOR COURTS INTERESTED IN HELPING SICK CLAIMANTS AND SOLVING SERIOUS PROBLEMS IN ASBESTOS LITIGATION

Mark A. Behrens*

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Asbestos litigation has been around for over two decades. Recently, however, the litigation environment has changed significantly. For instance, earlier in the litigation, most of the individuals who filed asbestos claims had substantial exposures and were sick.[1] The people they were suing were large manufacturers of asbestos-containing products, such as Johns-Manville Corp.[2] Now, the vast majority of all new asbestos-related claims—as much as ninety percent, according to some reports—are filed

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[1] *See* JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 30 (Rand Inst. For Civil Justice 1984) (stating that only four percent of asbestos claims closed in 1980-1982 lacked a manifest asbestos-related injury).

[2] *See id.* at vii (stating that asbestos claims closed in 1980-1982 "were concentrated on a few defendants. Sixteen corporations were named as defendants on at least half of all suits. Another 15 or so are involved in one-quarter to one-half of the suits . . . . Plaintiffs on closed claims sued an average of 15 defendants.").

by individuals who have little or no physical impairment.[3] Many of the early defendants are in bankruptcy or out of business.[4] People involved in the litigation know there is an "asbestos-litigation crisis."[5] Many in the public are relearning.[6]

Courts should be concerned about the current trends in asbestos litigation, particularly as they affect sick claimants. Claims by unimpaired individuals, fueled by aggressive client drives by personal injury lawyers,[7] are pouring into the civil justice system at an unprecedented rate. Litigation costs and bulk settlements associated with these claims are

[3]*See* JENNIFER L. BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS, 1 (December 2001), *available at* http://www.actuary.org/mono.htm (estimating that more than ninety percent of current claimants are alleging nonmalignant injuries); *see also* Quenna 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 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people.").

[4]*See* John Rooney, *Evolution, No End Seen for Asbestos Litigation*, CHICAGO DAILY L. BULLETIN 4, Apr. 21, 2001.

[5]Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[6]*See* Alex Berenson, *A surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1, *available at* 2002 WL 18538000; Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 95; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1, *available at* 2001 WL 28937452 ("The wave of new litigation and a surge in the number of people reporting exposure are a blunt reminder that the asbestos problem, a largely forgotten product liability mess of the 1980s, has not gone away."); Amity Shlaes, *The Real-Life Tragedy of the Asbestos Theatre*, FIN. TIMES, May 14, 2002, at 15.

[7]For a thorough discussion of this process, see Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. (2001) (forthcoming) (on file with the Baylor Law Review); *see also In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 748 (E. & S.D.N.Y. 1991) (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., 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."); Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154, *available at* 2002 WL 2190334; Eric Roston, *The Asbestos Pit*, TIME, Mar. 11, 2002, at Y9, *available at* 2002 WL 8385920; Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341 ("To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'").

rapidly depleting scarce resources that should go to those most in need of compensation—"the sick and dying, their widows and survivors."[8]

To date, at least fifty-six companies have been driven into bankruptcy.[9] More are likely to follow.[10] This is creating pressure on so-called "peripheral defendants," companies that are being dragged into the litigation to make up for the "traditional defendants" that are no longer around to pay their full share. These peripheral companies only have attenuated connections to asbestos, but they provide fresh "deep pockets," and that is why they have become targets of litigation.[11]

The cost of all this litigation is staggering. Ratings agency A.M. Best estimates that asbestos litigation has already cost American companies over $21.6 billion,[12] and predicts that the litigation may wind up costing another $43.4 billion during the next twenty years.[13] The consulting firm of Tillinghast-Towers Perrin predicts that the total cost of asbestos litigation in the United States will ultimately reach $200 billion.[14]

[8]*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) (quoting *In re* Patenaude, 210 F.3d 135, 139 (3d Cir. 2000), *cert. denied sub nom.*, Patenaude v. Owens-Illinois, Inc., 531 U.S. 1011 (2000)); *see also* Quenna 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 ("According to a letter Manville trustees sent to [Senior United States District] Judge Weinstein on Dec. 5 [2001], a 'disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.'"); Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2001, at A1, *available at* 2002 WL-WSJ 3392934.

[9]*See* BIGGS ET AL., *supra* note 3, at 17 (listing fifty-two asbestos-related bankruptcies. Two subsidiaries of RHI Refractories Holding Co. (Harbison-Walker Refractories Co. and North American Refractories Co.), Kaiser Aluminum Corp. and Porter-Hayden Co. filed for Chapter 11 reorganization 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*, Vol. 16, No. 15 MEALEY'S ASBESTOS BANKR. REP. 34 (Aug. 2001).

[10]*See Asbestos Liability System Needs Immediate Overhaul*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Apr. 9, 2001, at 18, *available at* 2001 WL 13149753; Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2000, at B4, *available at* 2000 WL-WSJ 26620724.

[11]*See* Susan Warren, *Asbestos Suits Target Makers Of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1, *available at* 2000 WL-WSJ 3025073.

[12]*See* Christopher Oster, *Some Insurers Face Shortfall in Reserves For Costly Claims Related to Asbestos*, WALL ST. J., May 7, 2001, at A4, *available at* 2001 WL-WSJ 2862651.

[13]*See id.*

[14]*Tillinghast-Towers Perrin Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, *available at* http://www.towers.com (last visited May 7, 2002).

Unfortunately, the courts themselves share some of the blame for the ever-growing "elephantine mass of asbestos cases."[15] "Many courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system, without regard to the merits of the claims."[16] These courts were well-intentioned. They wanted to put money in the hands of the sick as fast as possible, which meant lowering some key legal barriers.[17] They also sought to reduce extremely high transaction costs.[18] In addition, they had the practical problem of trying to contain bulging court dockets—a pressure that continues and must seem almost overwhelming in certain areas of the country with extremely heavy asbestos caseloads.

In attempting to make things better, however, these courts actually have made the litigation much worse.[19] As Professor Francis McGovern of Duke Law School has written:

> 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.[20]

[15]Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

[16]Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 8 (2001).

[17]For example, many courts abandoned the traditional "time of injury" rule to start statutes of limitations running, replacing it with a "discovery rule." *See, e.g.*, Bendix Corp. v. Stagg, 486 A.2d 1150, 1153 (Del. 1984). "A discovery rule favors plaintiffs because the statute of limitations only begins to run once the claimant discovers, or in the exercise of reasonable care should have discovered, both the harm that is the subject of the action and the cause of the harm." S. Rep. No. 105-32, at 38 (1997). Some courts also imposed "super strict" liability for failure to warn. *See* Johnson v. Raybestos-Manhatten, Inc., 740 P.2d 548, 550 (Haw. 1987); Carter v. Johns-Manville Sales Corp., 557 F. Supp. 1317, 1319 (E.D. Tex. 1983). Two other cases, *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982), and *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110 (La. 1986), were later overruled by legislation. *See* N.J. REV. STAT. § 2A:58C-3(3) (1987); LA. REV. STAT. ANN. § 2800.56(1) (1991).

[18]It has been estimated that transaction costs represent as much as seventy percent of all monies expended in asbestos litigation. *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 749 (E. & S.D.N.Y. 1991).

[19]*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 (2000).

The law of unintended consequences has become the rule in asbestos litigation.[21]

Courts should take a fresh look at the asbestos litigation and work to solve the problems of today, particularly the serious problems caused by the huge number of claims filed by the unimpaired or very mildly impaired. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

> 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.[22]

This Article provides an overview of the asbestos litigation problem. It describes how the litigation has morphed and grown into a colossus that nobody could have foreseen even just a few years ago. The Article explains that the recent explosion of filings by unimpaired claimants has

[20]Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997); *see also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger the mass tort filings become.").

[21]*See* Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts–View From the Bench*, 15 TOURO L. REV. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases."); Glenn W. Bailey, *Litigation is destroying American companies*, USA TODAY (MAG.), Jan. 1, 1994 at 76, *available at* 1994 WL 13637753 ("Judges' efforts to resolve [asbestos] cases all too often have resulted in a perverse incentive—causing more cases and more backlog.") (Mr. Bailey was the CEO of Keene Corp. which filed for Chapter 11 protection in 1993 as a result of asbestos liability it acquired primarily from its 1968 purchase of a small manufacturer of acoustical ceilings, ventilation systems, and thermal insulation products).

[22]Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom.*, Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993).

been the "wild card" that has caused earlier estimates of the litigation to be so far off the mark. The Article describes how these claims are jeopardizing recoveries for sick claimants and clogging the court system to the detriment of these and other tort claimants. The Article then proposes some solutions that courts should adopt to preserve assets needed to compensate sick claimants, now and in the future. In urging courts to take steps to address the asbestos litigation problem, this Article does not argue that claimants suffering from serious asbestos-related diseases should be denied compensation. To the contrary, absent some change in the way asbestos claims are resolved, claimants who are truly sick may not receive adequate or timely compensation. Changing the current asbestos compensation system would be pro-claimant.[23]

I. AN OVERVIEW OF ASBESTOS LITIGATION TODAY: HOW DID WE GET HERE?

When asbestos product liability lawsuits emerged almost thirty years ago,[24] nobody could have predicted that courts at the beginning of the Twenty-first Century would be dealing with a worsening litigation crisis. In fact, many believed that by now we would be able to see some light at the end of the long litigation tunnel.

"Because of the increased awareness of dangers and new government regulations, use of new asbestos essentially ceased in the United States in the early 1970's [sic]."[25] Moreover, it was known that asbestos-related

[23] *See generally* Trisha L. Howard, *Plaintiff's Lawyers Seek Limit on Asbestos Lawsuits by People with Nonmalignant Illnesses*, ST. LOUIS POST-DISPATCH, Dec. 11, 2001, Metro, *available at* 2001 WL 4499314 (explaining that lawyers representing plaintiffs with malignancies believe steps should be taken to "preserve the integrity of these [defendant] companies and their assets for people who are truly sick."); *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 MEALEY'S LITIG. REP.: ASBESTOS 39 (Mar. 1, 2002) (quoting mass tort personal injury lawyer Victor Schwartz as stating that "flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."); Sherrid, *supra* note 7 (quoting plaintiffs' lawyer Steve Kazan as stating that weak asbestos cases are taking awards that could go to legitimate claimants, such as mesothelioma victims).

[24] *See generally* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973).

[25] *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 737 (E. & S.D.N.Y. 1991). Almost immediately after its creation in 1970, the Occupational Safety and Health Administration ("OSHA") promulgated an initial regulation limiting asbestos exposure. *See* 36 Fed. Reg. 10466, 10506 (table 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* 36 Fed. Reg. 23207 (Dec. 7, 1971) (emergency temporary standard); 37 Fed. Reg. 11318 (June 7, 1972) (final standard). OSHA's asbestos regulations became progressively more restrictive, effectively precluding the use of asbestos in most commercial applications.

disease generally becomes manifest "15 to 40 years" after exposure.[26] Therefore, many predicted that the litigation would be a serious, but declining problem. Unfortunately, this is not the case.[27]

Thirty years have now passed, and as the statistics show, the number of asbestos filings is going up, not down. The number of pending cases nationwide doubled between 1993 and 1999, from 100,000 cases to more than 200,000 cases.[28] Up to 700,000 more cases are expected to be filed by the year 2050.[29] The number of future claimants could be as high as 3.5 million.[30]

In the year 2000 alone, approximately sixty thousand claims were filed against the Manville Personal Injury Settlement Trust, an asbestos compensation fund created after Johns-Manville Corp. declared bankruptcy in 1982. The year 2000 avalanche represented the greatest number of claims filed against the Manville Trust since 1989, the Trust's first full year of operation. Despite the large number of claim filings in 2000, the Trust expected to see fifty percent more claims filed in 2001 than the previous high-water mark set just one year earlier.[31] To deal with the rise

[26] KAKALIK ET AL., *supra* note 1, at 5.

[27] *See Tillinghast-Towers Perrin Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, *available at* http://www.towers.com (last visited May 7, 2002) ("Although most thought that the claims would have trailed off by now, the number of plaintiff filings has increased dramatically, with 50,000 to 60,000 claims filed against some defendants in the last year, compared to averages near 20,000 in the early to mid 1990s.").

[28] *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong. 4 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [herinafter *Prof. Edley Testimony*].

[29] *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, vol. 14, no. 10 MEALEY'S LITIG. REP.: ASBESTOS 22 (June 18, 1999).

[30] *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 5 (Mar. 1991) in vol. 6, no. 4 MEALEY'S LITIG. REP.: ASBESTOS (Mar. 15, 1991) [hereinafter *Judicial Conference Report*] (stating that "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.").

[31] *See* Manville Personal Injury Settlement Trust: State of the Trust, 3rd Quarter, 2001, *available at* http://www.mantrust.org (last visited May 7, 2002) ("During the first nine months of 2001, the Trust received 69,500 new claims, compared to 44,800 received during the comparable nine-month period last year and 59,200 claims filed during all of 2000.").

in claims, the Manville trustees decided in July of 2001 to lower payments to claimants.[32]

The Manville Trust is a good indicator of trends in asbestos litigation. W.R. Grace & Co. reported in 2001 that the pace of asbestos claims being filed against the company had skyrocketed. Eighty-one percent more claims were filed against the company in 2000 than in 1999. 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.[33] The chairman of Federal-Mogul, which manufactures engine bearings, pistons, gaskets and seals for auto makers and the spare-parts market, recently said that his company decided to declare bankruptcy "based on the fact that [its] asbestos liabilities weren't going to diminish. In fact, they were going to grow."[34]

As a result of the asbestos lawsuit explosion, resources needed to compensate truly injured people are steadily being depleted. Recent awards to unimpaired or mildly impaired claimants illustrate this problem. For example, in March of 2001, a Texas jury awarded twenty-two plaintiffs $35 million for "future physical impairment" and "future medical costs although it is likely that these claimants will never become seriously ill."[35] In October of 2001, a Mississippi jury awarded $150 million to six plaintiffs "who are not now sick from asbestos and may never become so."[36] 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.[37] In November of 2001, another Texas jury awarded $3 million to three plaintiffs who were exposed to asbestos at an aluminum plant.[38] "Their attorney said the verdict was reached even though two

[32] *See* Kim, *supra* note 8.

[33] Susan Warren, *W.R. Grace Seeks Bankruptcy Protection In the Face of Asbestos-Related Litigation*, WALL ST. J., Apr. 3, 2001, at B8, *available at* 2001 WL-WSJ 2859018.

[34] Mitchell Pacelle, *Federal-Mogul Files in Bankruptcy Court After Estimate for Asbestos Liability Soars*, WALL ST. J., Oct. 2, 2001, at B11, *available at* 2001 WL-WSJ 2877281.

[35] *Texas Jury Awards $3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001); *Two Asbestos Defendants Hit With $35 Million Verdict*, 23 No. 4 Andrews Asbestos Litig. Rep. 3 (Mar. 1, 2001).

[36] Patti Waldmeir, *The Need for Damage Limitation*, FIN. TIMES (London), Nov. 15, 2001, at 16.

[37] Margaret Cronin Fisk, *Jury awards six asbestos plaintiffs $25 million each*, NAT'L L.J., Nov. 12, 2001, at B1.

[38] *See Texas Jury Awards $3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001).

plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past asbestos exposure."[39]

The large number of major employers that have declared bankruptcy as a result of asbestos litigation reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future. As stated, at least fifty-six companies have been driven into bankruptcy.[40] Each of these bankruptcies puts "mounting and cumulative" financial pressure on the "remaining defendants, whose resources are limited."[41] Indeed, it is clear that the bankruptcy "process is accelerating" due to this "piling on" effect.[42]

For instance, in 2000, Babcock & Wilcox Co., Pittsburgh 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. In the first quarter of 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 U.S. subsidiaries (Harbison-Walker Refractories Co. and North American Refractories Co.) as a result of asbestos liability claims.[43] Mounting asbestos litigation also led Porter-Hayden Co. and Kaiser Aluminum Corp. to file for Chapter 11 reorganization in early 2002.[44] Other companies also are likely to seek the protection of the bankruptcy courts.[45]

These bankruptcies have strong ripple effects throughout the entire business community. When companies like Johns-Manville, W.R. Grace, GAF, Owens Corning, and other "traditional defendants" seek the protection of the bankruptcy courts to deal with mounting numbers of

[39] *Id.*

[40] *See supra* note 9.

[41] Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) [hereinafter *Edley & Weiler*].

[42] *See In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied*, 532 U.S. 1066 (2001).

[43] *See* William Hall, *Asbestos Claims Force RHI to Seek Protection for US Arm*, FIN. TIMES-FT.COM, Jan. 8, 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.

[44] *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 RECORD (Baltimore, Md.) Mar. 19, 2002, *available at* http://www.mddailyrecord.com (last visited May 7, 2002).

[45] *See* Kim, *supra* note 8; Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Vol. 16, No. 6 MEALEY'S LITIG. REP.: ASBESTOS (Apr. 20, 2001).

claims, experience shows that the plaintiffs' personal injury bar simply will cast its litigation net wider and bring in "peripheral defendants."[46] These defendants are diverse, ranging from oil companies, to automobile manufacturers, to utilities, to hospitals and colleges.[47] Many are household names, such as Ford Motor Co., Campbell Soup Co., AT&T Corp., and 3M Co., the maker of Scotch® tape and Post-it® notes.[48] Some may have participated in the chain of distribution of the sale of an asbestos-containing product; others are premises liability defendants.[49] Involvement in asbestos litigation can have devastating consequences for these companies.

For example, on December 7, 2001, Halliburton Co. saw its market value slashed almost in half—*dropping almost $3.8 billion in a single afternoon*—after Wall Street analysts became concerned that the company may be dragged more deeply into asbestos litigation.[50] As one analyst explained, investors became concerned that three recent adverse verdicts against the oilfield services and engineering company raised the "specter of lawsuits spiraling out of control, much like those at other asbestos defendants."[51] Days later, both Moody's Investor Service and Standard & Poor's cut Halliburton's long-term bond rating amid uncertainty surrounding Halliburton's asbestos exposure.[52] Dow Chemical Co. lost one-third of its market value in a little over a month after analysts became

[46] *In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 747-48 (E. & S.D.N.Y. 1991) (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 . . .).

[47] *See* Rooney, *supra* note 4, at 4; Warren, *supra* note 11.

[48] *See* 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.

[49] *See* Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, *available at* 2001 WL-WSJ 2859560 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); Editorial, *The Job-Eating Asbestos Blob*, WALL ST. J., Jan. 23, 2002, at A22, *available at* 2002 WL-WSJ 3383766.

[50] *See* 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.

[51] *Id.*

[52] *See Halliburton Co.: Contract in China is Won; Credit Rating Is Cut By S&P*, WALL ST. J., Dec. 12, 2001, at B4, *available at* 2001 WL-WSJ 29680465; *Halliburton Co.: Downgrade From Moody's Reflects Doubts on Claims*, WALL ST. J., Dec. 17, 2001, at A4, *available at* 2001 WL-WSJ 29680831; *see also* Susan Warren & Alexei Barrionuevo, *Halliburton Shares Fall on New Worries About Asbestos Suits*, WALL ST. J., Jan. 7, 2002, at A20, *available at* 2002 WL-WSJ 3382138.

concerned about asbestos claims against Dow's Union Carbide unit.[53] 3M Co. lost thirteen percent of its market value during the same time period due to lawsuits involving respirators (breathing masks).[54] Georgia-Pacific Corp.'s stock fell thirty-seven percent because of anticipated asbestos claims.[55] Together, these companies saw "$25 billion in market value evaporate in just six weeks."[56]

The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation. In early mid-1980s, approximately 300 defendants had been named in asbestos cases.[57] Now, more than 2000 companies or individuals have been named as asbestos defendants in courts across the country, and the number of defendants is growing.[58] Some of these "peripheral defendants" have themselves begun to declare bankruptcy.[59]

The combination of forces at work in the asbestos litigation has set off a chain reaction, or domino effect: payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted the assets of the defendant companies and forced many of them into bankruptcy; as more companies have been driven into bankruptcy, the process has accelerated because more and more liability is pushed over onto fewer and fewer companies; to make up for the shares of those companies, defendants with increasingly attenuated connections to asbestos are being pulled into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them, just as the companies that came before them in the litigation. This process will

[53] See Alexei Barrionuevo, *Halliburton Vows to Continue Fight on Asbestos Cases*, WALL ST. J., Jan. 15, 2002, at B2, *available at* 2002 WL-WSJ 3382925; Steve Maich, *Asbestos 'Nightmare' Hits U.S. Firms*, NAT'L POST ONLINE, Jan. 18, 2002 (on file with the Baylor Law Review); *see also* Kortney Stringer, *Halliburton to Organize Structure as Two Separate Business Units*, WALL ST. J., Mar. 20, 2002, at A4, *available at* 2002 WL-WSJ 3389270.

[54] *See* Maich, *supra* note 53. The cases allege that 3M respirators, which were labeled for non-toxic use, did not completely protect the plaintiffs from asbestos related illnesses.

[55] *See* Chad Terhune, *Georgia-Pacific Says Asbestos Charge Will Result in Net Loss for Fourth Period*, WALL ST. J., Jan. 25, 2002, at A5, *available at* 2002 WL-WSJ 3383988.

[56] Steve Maich, *supra* note 53; *see also* Christopher Bowe, *Asbestos Casts Shadow Over US Corporations*, FIN. TIMES - FT.COM, Jan. 18, 2002.

[57] KAKALIK ET AL., *supra* note 1, at vii.

[58] *See* Douglas McLeod, *Asbestos Continues to Bite Industry*, BUS. INS., Jan. 8, 2001, at 1, *available at* 2001 WL 5100719.

[59] *See Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike In Claims*, Vol. 15, No. 23 MEALEY'S LITIG. REP.: ASBESTOS 7 (Jan. 5, 2001).

continue to play out on a broad scale for many years unless something is done to solve the problem.

II. WHY THE ORIGINAL ESTIMATES ABOUT THE LITIGATION WERE SO FAR OFF THE MARK: FILINGS BY THE UNIMPAIRED OR MILDLY IMPAIRED ARE EXPLODING

The reason the original estimates of the litigation have been so far off the mark is that nobody could have predicted the enormous number of unimpaired or mildly impaired individuals who would file asbestos claims. Today, the vast majority of new asbestos claims are filed by unimpaired claimants, defined as "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."[60] Individuals who have little or no physical impairment now account for as much as ninety percent of all new asbestos-related filings.[61] The United States Supreme Court has said that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment."[62]

Various factors are driving the avalanche of filings by unimpaired claimants. One reason is that some courts have relaxed the traditional rule that a plaintiff cannot recover in tort without a present, physical injury.[63] They have done so in two ways. First, courts are increasingly willing to recognize as an "injury" internal changes in plaintiffs that in some cases can only be seen on an x-ray and may never impair the claimant's health.

[60]Prof. Edley Testimony, *supra* note 28, at 5.

[61]*See supra* note 3.

[62]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 41, at 393).

[63]*See* Schwartz & Lorber, *supra* note 19, at 253 (citing REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 2 (Feb. 15, 1999)) (John Aldock, Esq., participant in Dec. 8, 1998 Mass Torts Working Group Conference commented that "The 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."). 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. 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. *See* Hon. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39 (1991).

The "injury" that is often attributed to unimpaired plaintiffs 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. Second, some courts have been willing to recognize claims by plaintiffs who have been exposed to asbestos, but are not sick and may never develop a physical illness—examples are fear of future injury and medical monitoring claims.[64]

The erosion of the traditional tort law physical injury rule, however, provides only a partial explanation for the increase in filings by unimpaired claimants. It does not answer the question why unimpaired claimants are choosing to bring their claims before they are actually injured. One explanation for the "file now" trend is that many claimants may feel compelled to file for remedial compensation because of fears that state statutes of limitations will bar their claims if they do not file soon after the first markers of exposure become detectable.[65] 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 be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability."[66] Another reason may be that plaintiffs are aware that many asbestos defendants are going bankrupt, and may seek compensation now out of fear that it will not be available later.[67] Finally, some plaintiffs and

[64]*See* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 59 S.C. L. REV. (forthcoming Summer 2002) (manuscript at 2, on file with the Baylor Law Review); *see also* Victor E. Schwartz et al., *Medical Monitoring–Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1070 (1999); Mark A. Behrens & Phillip R. Anderson, *State Supreme Courts Retreat From Medical Monitoring Causes of Action*, Vol. 20, No. 5 PROD. LIAB. L. & STRATEGY at 1, (L.J. Newsletters, 2001).

[65]Dr. Louis Sullivan, the former Secretary of the U.S. Department of Health and Human Services, testified before Congress that there are "mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 1999 Leg., 106th Cong. 4 (July 1, 1999) (statement of Dr. Louis Sullivan), *available at* 1999 WL 20009757.

[66]*In re* Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991).

[67]At a recent conference one New York state trial court judge on an unofficial basis expressed concern that if changes are made to address the problem of payments to the unimpaired at this time, the resources may not exist to compensate those individuals if and when they develop an asbestos-related illness in the future. But, if changes are not made now to curb payments to the unimpaired, then it is virtually certain that the resources will not exist to

their lawyers may be aware of the huge awards being given to other unimpaired plaintiffs, and may think "why wait for an injury to manifest itself if I can receive compensation now?"[68]

While the various causes for the "file now" trend may be understandable, claims by the unimpaired clog the court system, causing unwelcome delays for asbestos claimants with fatal diseases, such as mesothelioma, and older claimants, which is frequently the case.[69] Such claims also delay justice for other people seeking recovery through the courts. Perhaps most troubling, "the[] presence [of unimpaired claimants] 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."[70] Claims brought by plaintiffs with no serious physical impairments are at the heart of the current asbestos litigation problem.

III. REFORMS THAT WOULD HELP PRESERVE ASSETS FOR SICK CLAIMANTS

A. *Reforms to Stem the Flood of Unimpaired Claims*

The solution to the asbestos problem, if there is to be one, will most likely have to come from the courts, particularly the state courts. The United States Supreme Court made it clear in *Amchem Products, Inc. v. Windsor*[71] and *Ortiz v. Fibreboard Corp.*[72] that the Court will not approve mass settlements of asbestos cases under the Federal Rules of Civil Procedure. The Court properly interpreted Rule 23 of the Federal Rules of Civil Procedure, but its decisions nevertheless mean that the class action device is not available to resolve large numbers of asbestos cases.

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compensate those individuals if they get sick in the future. Continued payments to the unimpaired will bring about the very situation that trial judge understandably wishes to avoid.

[68]*See* Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA TODAY, July 15, 1999, at A17.

[69]*See* KAKALIK ET AL., *supra* note 1, at vi.

[70]Edley & Weiler, *supra* note 41, at 393. Senior United States District Court Judge Charles R. Weiner, who oversees the federal asbestos multidistrict proceedings, has explained that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re* Asbestos Prods. Liab. Litig. (No. VI), No. Civ. A. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996).

[71]521 U.S. 591 (1997).

[72]527 U.S. 815 (1999).

Furthermore, Congress has failed to enact legislation to address the problem, despite calls for action from the Supreme Court,[73] federal appellate courts,[74] and the Judicial Conference of the United States.[75] While federal legislation is certainly needed, asbestos claimants and defendants no longer have the luxury of waiting for such a speculative remedy. The solution must start where the problem started—with the state courts.[76]

To date, however, only a handful of courts have been willing to take steps to stem the flood of unimpaired claims or address the reasons people feel compelled to file them. Below are some success stories by courts that have moved in the right direction.

1. No Injury; No Recovery

The Supreme Court of Pennsylvania has held that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action.[77] Further, the court has held that the discovery of pleural plaques or a nonmalignant, asbestos-related lung pathology "does not trigger the statute of limitations with respect to an action for a later, separately diagnosed disease of lung cancer."[78] Furthermore, "because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not

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[73]*See Amchem*, 521 U.S. at 628–29 ("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."); *Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted); *see also* Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting).

[74]*See Dunn*, 1 F.3d at 1399 (Weis, J., dissenting) ("Unquestionably, a national solution is needed."); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312 (5th Cir. 1998) ("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); *id.* at 338 (Garza, J., concurring) ("I implore Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved . . . [in] the asbestos litigation crisis.").

[75]*See* Judicial Conference Report, *supra* note 30, at 3 (concluding that federal legislation is needed to solve the asbestos litigation problem).

[76]*See* Edley & Weiler, *supra* note 41, 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.").

[77]*See* Simmons v. Pacor, Inc., 674 A.2d 232, 237 (Pa. 1996) (upholding Giffear v. Johns-Manville Corp., 632 A.2d 880 (Pa. Super. Ct. 1993)).

[78]*Id.*

recoverable."[79] The court's decision relieves the pressure on individuals to file unripe claims simply to avoid statute of limitations issues later on. The court's ruling also helps preserve assets for the seriously ill by ensuring that they will not have to compete with the unimpaired to obtain compensation.

2. Inactive Dockets

Other courts have addressed the statute of limitations issue and the problems posed by unimpaired claimants by creating inactive dockets, also known as deferral registries or pleural registries.[80] Under these plans, individuals who cannot meet certain objective medical criteria are placed on an inactive docket with statute of limitations being tolled, and all discovery stayed. Claimants are moved to the active civil docket when they present credible medical evidence of impairment.

Inactive docket plans have several obvious benefits. First, sick claimants are able to have their claims heard faster; they can move "to the front of the line" and not be forced to wait until earlier-filed unimpaired claims are resolved.[81] This can be especially important if the claimant has a fatal disease or is an older person.[82] Second, inactive docket programs help unimpaired individuals by protecting their claims from being time-barred should an asbestos-related disease later develop. This would address a primary engine driving the filing of many claims by unimpaired claimants.[83] Third, because there is no discovery or pressure to settle inactive claims, inactive dockets conserve scarce financial resources that are needed to compensate sick claimants[84]—resources that are now spent

[79] *Id.* at 238.

[80] *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 553 (1992); Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001).

[81] *See* Judicial Conference Report, *supra* note 30, at 10 (stating that average duration of asbestos cases exceeds other types of cases).

[82] *See* KAKALIK ET AL., *supra* note 1, at vi.

[83] *See In re* Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 970 (1988) ("Removing time limitations on the filing of toxic substances cases will prune from the civil dockets a substantial body of cases that are either premature or needless.").

[84] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 822 n.1 (1999) ("[T]ransaction costs exceed the victims' recovery by nearly two to one . . . ."); *id.* at 867 (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 Prods., Inc. v. Windsor, 521 U.S. 591, 632 (1997) (Breyer,

litigating "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."[85] Fourth, inactive dockets reduce the specter of more employers being driven into bankruptcy, and can help slow the spread of the litigation to "peripheral" defendants.[86]

Some inactive docket plans have existed for many years; they have proven to be fair and effective.[87] For example, the Massachusetts inactive asbestos docket was created in September of 1986 through an amendment to an order creating a statewide consolidated asbestos docket.[88] The docket was envisioned as a mechanism by which plaintiffs who had been diagnosed with asbestos-related pleural diseases could toll all applicable statutes of limitations regarding their claims, or the related claims of their families or estates, until their pleural conditions developed into either asbestosis or some type of malignancy. While on the inactive docket, cases are exempt from discovery.[89]

An inactive docket was established in the Circuit Court for Cook County (Chicago), Illinois in March of 1991 under the leadership of Judge Dean M. Trafelet.[90] In creating that system, Judge Trafelet recognized that asbestos litigation posed serious problems for plaintiffs and defendants: unimpaired individuals were filing claims out of fear that the statute of limitations would expire before their disease progressed to a stage that was

J., concurring in part and dissenting in part) ("[O]f each asbestos litigation dollar, 61 cents is consumed in transaction costs . . . Only 39 cents were paid to the asbestos victims.") (citations omitted).

[85] Schuck, *supra* note 80, at 555.

[86] *See* Warren, *supra* note 11; Editorial, *The Asbestos Blob*, WALL ST. J., July 2, 2001, at A14, *available at* 2001 WL-WSJ 2868353.

[87] *See 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).

[88] *See* Commonwealth of Massachusetts, Middlesex Superior Court, "Massachusetts State Court Asbestos Personal Injury Litigation Order," Sept. 1986.

[89] Similarly, pleural cases originally filed in the consolidated docket may be transferred to the inactive docket on plaintiffs' motion, and thereafter become subject to all of the same provisions and requirements as cases originally filed on the inactive docket. *See id.*

[90] *See In re* Asbestos Cases, Order to Establish Registry For Certain Asbestos Matters (Cir. Ct., Cook Cty., Ill. May 26, 1991). The Cook County inactive docket plan has been a success. When Judge Trafelet took over the assignment of handling Cook County's asbestos docket in 1984, there were 8000 cases pending. Today there are about 875 pending active cases, while another approximately 1200 cases are on the pleural registry. *See* Rooney, *supra* note 4.

medically recognized as impaired, while defendants expended substantial sums in appearing in and defending against such claims.[91]

Under the Cook County Plan, each claimant must file an Asbestos Personal Injury Information sheet.[92] All cases alleging an asbestos-related cancer or mesothelioma may proceed directly to the active docket. All claims registered by persons who claim a history of asbestos exposure and demonstrate objective asbestos-related physical findings (such as pleural plaques), but who either do not meet the minimum criteria for impairment as defined in the Order, or who have not manifested a cancer certified as asbestos-related as described in the Order, are placed on the registry. These claimants remain on the registry until removed in accordance with the procedures specified in the Order.[93] While on the registry, claims are exempt from discovery, and "shall not 'age' for any purpose."[94]

The Circuit Court for Baltimore City established an inactive docket in 1992.[95] Under the Order, every claim is initially placed on the inactive docket, though certain claims are eligible for immediate removal.[96] For a claim alleged to be eligible for removal from the inactive docket either immediately upon filing or subsequently due to changed circumstances, claimant's counsel is required to file a Request for Removal, and documentation necessary to show that the claim meets the "minimum criteria for removal," as defined within the Order.[97] If the court orders a claim removed from the inactive docket, the Clerk of the Court is directed

[91] *See In re* Asbestos Cases at 2-3.

[92] All claims must be filed individually; the Order prohibits claims on behalf of groups of classes of claimants. *See id.* at 15. Additionally, the docket is closed to out-of-county plaintiffs. *See* Laura Duncan, *Deferred Asbestos Docket Closed to Out-of-County Plaintiffs*, CHICAGO DAILY L. BULL. 1, July 9, 1992.

[93] Cases may be removed in two ways, one essentially permitting dismissal of an action and the other designed to encompass a change in claimant's medical condition. First, a claimant may be voluntarily removed from the Registry upon filing of a certificate by counsel stating that the claimant is withdrawing his or her claims. *See In re* Asbestos Cases at 10. The tolling of pertinent timeliness provisions thereafter ceases. *See id.* A case may also be removed pursuant to the filing of a Request for Removal, along with accompanying documents and medical certifications establishing impairment. *See id.* Defendants have the opportunity to object to removal, with the court making the ultimate removal determination. *See id.* at 12. Once removal has been approved, the claimant proceeds to file a complaint on the active docket. *See id.*

[94] *Id.* at 14-15.

[95] *See In re* Asbestos Pers. Injury and Wrongful Death Asbestos Cases, Order Establishing An Inactive Docket For Asbestos Pers. Injury Cases, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992).

[96] *Id.* at 8.

[97] *Id.*

to place the court on the active civil docket for Baltimore City, or transfer the matter to the appropriate jurisdiction.

Other courts have taken a similar path, establishing a "gatekeeper" system that utilizes objective medical criteria to filter out claims by the medically unimpaired. For example, the Court of Common Pleas of Cuyahoga County, Ohio, recently established a case management order providing that all upcoming discovery and trial preparation in the Cleveland area asbestos litigation will focus on groups of plaintiffs whose claims seek redress for functional impairment due to asbestos exposure.[98] The court's order reflects the intent to allow the claims of plaintiffs who are functionally impaired to be decided before the claims of the unimpaired, thus helping to preserve assets needed to compensate the truly sick.[99]

At the federal level, 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 ("the federal MDL Panel"), has recently ordered 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.[100]

B. *End Mass Joinder or Mass Trials*

In contrast to the success stories described above, some courts continue to utilize procedural mechanisms that encourage the filing of large numbers of asbestos claims, particularly claims by the unimpaired. Perhaps the most troubling of these practices has been the use of mass joinder or mass trials of claims, including the joinder of claims by the truly sick with the unimpaired. For example, people who have serious illnesses, such as mesothelioma or lung cancer, are lumped in with persons who have nothing wrong with them under any reasonable medical criteria. Apples (e.g., mesothelioma claims) and mixed with bananas (i.e., the unimpaired).

When courts join weak cases with other cases, or when courts force settlements of weak cases by allowing the claims of the truly sick to be leveraged, the plaintiffs who are not sick use the plaintiffs who are seriously ill to "inflate the value of those claims."[101] Mass trial procedures

[98] *In re* Cuyahoga Cty. Asbestos Cases, Gen. Pers. Injury Asbestos Case Mgmt. Order No. 1 (as amended Jan. 4, 2002).

[99] *Id.* at 1.

[100] *See In re* Asbestos Prods. Liab. Litig. (No. VI), (E.D. Pa. Jan. 16, 2002).

[101] Prof. Edley Testimony, *supra* note 28, at 11.

not only threaten the due process rights of defendants, they also result in impaired claimants receiving smaller awards than if their cases were decided individually.[102] As Professor Christopher Edley of Harvard Law School has explained: "[L]oading a large number of [impaired and unimpaired] claims together produces a bet-the-company risk for the defendants, making settlement more likely."[103] In the settlement, then, the high 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.[104]

Mass trial procedures also add to the asbestos litigation "traffic jam" by encouraging the filing of weak claims.[105] One of the most notable mass consolidations was *Cosey v. E.D. Bullard Co.*, a Mississippi state court case.[106] Plaintiffs' 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.[107] In May of 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).[108] The judge pressured the defendants to settle on draconian terms. According to sworn affidavits, the judge told the defendants that if they failed to settle, he would try the remaining 1700 cases immediately before the same jury, with an instruction to find the defendants liable. Counsel for the defendants

[102] *See* Hon. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 507 (1994) (stating that "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 these cases cannot be tried at once. Mixing the cases for trial and settlement may result in a lower recovery for the more seriously injured, but it will generally result in a quicker fee for counsel.") (citations omitted).

[103] Prof. Edley Testimony, *supra* note 28, at 11.

[104] *Id.* at 6-7.

[105] McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, *supra* note 20 at 606; *see also* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1011 (1995) (arguing that aggregation of asbestos cases has resulted in the presence of a large proportion of claims filed by unimpaired claimants).

[106] Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County, June 12, 1998).

[107] *Id.*

[108] *See The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 13 (July 1, 1999) (statement of William N. Eskridge Jr., Professor, Yale Law School) (citing defense motion for recusal of trial judge, accompanying affidavits, and attempted appeal to Mississippi Supreme Court).

allegedly said the plan sounded "like this side of hell."[109] The judge allegedly corrected him, saying: "No counsel, that is hell."[110] Efforts to secure the judge's recusal were rebuffed with threats of discipline against the defense attorneys. The cases were forced to settle.[111]

Another example of mass litigation abuse is occurring right now in West Virginia. In 1999, the West Virginia Supreme Court established a Mass Litigation Panel to use "mass trials" to dispose of the more than 25,000 asbestos cases pending in that state.[112] According to the court's plan, all pending asbestos cases were to be resolved by July of 2002.[113] Three railroad companies and an underwriting company who are defendants in the actions and facing over 5000 pending cases objected, arguing that litigating so many cases in such a short amount of time would effectively prevent them from interviewing the plaintiffs or having the plaintiffs examined by doctors.[114] The companies filed a federal lawsuit against the West Virginia Supreme Court, claiming that the Mass Litigation Panel violates their due process rights. Despite the lawsuit filed by the defendants, however, Judge Martin Gaughan, the judge overseeing the mass litigation of the West Virginia asbestos claims, recently entered a order scheduling mass trials in three groups for "all asbestos-related cases pending between the parties," with the trial set to begin on September 23, 2002.[115]

Notably, of the 5000 cases that have been filed against the three railroads in West Virginia, 4400 have been brought by plaintiffs "who do not work, live or pay taxes in West Virginia."[116] Moreover, fifty-seven percent of the cases pending against the railroads nationwide have been filed in West Virginia.[117] The high percentage of cases filed by out-of-state

[109] *Id.* at 13-14 (citing Affidavit of Daniel P. Myer, ¶¶ 17-11 (attached to defendants' recusal motion)).

[110] *Id.*

[111] *See id.*; *see also* Parloff, *supra* note 7.

[112] *See* W. VA. TRIAL CT. R. 26.01 (2002).

[113] *See* Michelle Saxton *Railroads File Lawsuit Against W. Va. Supreme Court*, ASSOC. PRESS NEWSWIRE, Nov. 29, 2001.

[114] *See id.*

[115] *See In re* W. Va. Asbestos Pers. Injury Litig. "Trial Scheduling Order," Cir. Ct. Kanawha Cty., W. Va. (Feb. 26, 2002).

[116] Dennis O'Brien, *Norfolk Southern Sues W. Va. Over Asbestos Ruling*, VIRGINIAN-PILOT & LEDGER-STAR, Nov. 30, 2001, at D1, *available at* 2001 WL 26282222.

[117] *See id.* The situation in West Virginia has become so unfair that the United States Supreme Court has decided to review the matter. *See* Norfolk & W. Ry. Co. v. Ayers, 122 S. Ct.

plaintiffs suggests that "efficient" handling of asbestos claims does not help courts dispose of cases, it merely attracts more cases.[118]

In other litigation that does not involve asbestos, most judges would not consolidate or join cases involving plaintiffs with completely different types of injuries (or no injury at all). Such mass trial procedures are inappropriate from a legal standpoint and unsound as a matter of public policy. Asbestos cases should be treated the same as any other personal injury case.

C. *Stop Multiple Punitive Damages Abuse*

Punitive damage awards play another important role in speeding corporate defendants down the path to bankruptcy, threatening the availability of funds needed to compensate sick plaintiffs.[119] Such awards provide a "windfall recovery" to plaintiffs;[120] they are not normal civil damages, but are awarded "over and above compensatory damages."[121]

Plaintiffs' lawyers seek punitive damages in virtually every asbestos case they file.[122] It is not uncommon for them to hit the jackpot at trial, particularly in Texas.[123] Here are some examples of punitive damages awards handed out in Texas in 2001:

1434 (2002) (mem.); *see also* Mark A. Behrens, *When the Walking Well Sue*, NAT'L L. J., Apr. 29, 2002, at A12.

[118]*See* Victor E. Schwartz, *supra* note 64

[119]*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., 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.").

[120]City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

[121]*In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000); *see* 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).

[122]*See The Asbestos Litigation Crisis in Federal and State Courts, Hearings Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. 136 (July 1, 1999) (statement of William W. Schwarzer, Senior United States District Judge for the Northern District of California and Director, Federal Judicial Center).

[123]Jury awards of punitive damages do not necessarily reflect final judgments. Many punitive damages awards are later reduced or overturned on appeal. Texas, for example, has enacted statutory limits on punitive damages awards. In Texas, punitive damages are limited to

- A jury awarded $130 million, including $60 million in punitive damages, in a products liability personal injury and wrongful death lawsuit involving five asbestos claimants.[124]
- Another jury awarded $55.5 million to a man with mesothelioma caused by asbestos; the award included $21 million in compensatory damages to the plaintiff, $5.5 million for his wife, and $14 million for the couple's children, as well as $15 million in punitive damages (later reduced to $2.75 million).[125]
- One more jury awarded $11.1 million, including $3 million in punitive damages against two asbestos defendants.[126]
- A jury awarded $5.25 million, including $3 million in punitive damages, for the death of a former steam mechanic who died from asbestos-related mesothelioma.[127]
- Another jury awarded $175,000 in punitive damages for the mesothelioma death of a plaintiff exposed to asbestos at several workplaces.[128]
- One jury found an insulation maker liable for $3 million in compensatory damages and $15 million in punitive damages in the case of a single plaintiff diagnosed with asbestosis.[129]

Punitive damage awards "threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants."[130] This is true even in cases that are settled out of court, because of the leveraging effect punitive damages have at the settlement table.[131] As Senior United States Circuit Judge Weis has explained:

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the greater of $200,000 or two times economic damages plus amount equal to noneconomic damages up to $750,000. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2001).

[124]*Texas Jury Awards $130 Million to Five Plaintiffs In Asbestos Suit*, 23 No. 19 ANDREWS ASBESTOS LITIG. REP. 3 (Sept. 27, 2001).

[125]*Meso Victim and Family Awarded $55 Million By Texas Jury*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 4 (Sept. 13, 2001).

[126]*Texas Jury Hits Two Asbestos Defendants With $11 Million Verdict*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 3 (Sept. 13, 2001).

[127]*Texas Jury Awards Mechanic's Family $5 Million in Meso Death Case*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 5 (Sept. 13, 2001).

[128]*Texas Widow Awarded $725,000 in Meso Death*, 23 No. 16 ANDREWS ASBESTOS LITIG. REP. 3 (Aug. 16, 2001).

[129]*Texas Jury Finds Insulation Maker Liable For $18 Million*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

[130]Judicial Conference Report, *supra* note 30, at 32.

[131]Yale law professor George Priest has observed:

> [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.[132]

Multiple punitive damages also frustrate the settlement of cases and delay recoveries for sick claimants.[133]

Recently, these various factors led the United States Court of Appeals for the Third Circuit to conclude: "It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls . . . ."[134] "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 simply cannot be justified."[135] Wasting

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> [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.

George L. Priest, Punitive Damages Reform: The Case of Alabama, 56 LA. L. REV. 825, 830 (1996); *see also* Steven Hayward, The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings 8 (Pac. Res. Inst. Pub. Pol'y Feb. 1996), *available at* http://www.pacificresearch.org (last visited May 10, 2002) (concluding that "[b]oth 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.").

[132]Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir. 1993) (Virgin Islands) (Weis, J., dissenting).

[133]*See* William W. Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW. 116 (Oct. 1991) ("Barring successive punitive damage 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.").

[134]*In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000).

[135]Hon. R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 DICK. L. REV. 265, 296 (1983).

limited and diminishing assets in this way "is a tragedy of major proportions."[136]

Some courts have begun to address these problems by curbing punitive damages abuse in asbestos cases. For example, the Third Circuit Court of Appeals recently approved a decision by the federal MDL Panel to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial.[137] The circuit court, quoting liberally from a 1991 Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, said that its decision was based on "compelling" public policy:

> 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 [sic] 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.[138]

In blunt terms, the Third Circuit concluded its opinion by strongly urging state courts to adopt similar measures to preserve assets for sick asbestos claimants.[139]

Fortunately, some state courts are acting in this area. They have severed, deferred, or stayed indefinitely punitive damage claims. For example, Judge Marshal A. Levin has stayed all punitive damage awards in Baltimore City asbestos cases until compensatory claims are satisfied.[140] In reaching his decision, Judge Levin observed that it "is manifestly unjust for

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[136]Judicial Conference Report, *supra* note 30, at 29; *see also* H.R. Rep. No. 106-782, at 19 (2000) (bankruptcies by asbestos defendants harm "shareholders, employees, and communities affected, as well as future claimants who now must look elsewhere for compensation.").

[137]*In re* Collins, 233 F.3d at 812.

[138]*Id.* (quoting Judicial Conference Report, *supra* note 30, at 32).

[139]*See id.* ("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.").

[140] Abate v. A.C. & S., Inc., No. 89236704, slip op. at 26 (Md. Cir. Ct. Dec. 9, 1992); Keene Corp. v. Levin, 623 A.2d 662, 663 (Md. App. 1993) (noting that Judge Levin deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages are paid.").

a judicial system to allow relief based chiefly on the lottery of when a human being happens to become ill."[141] 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 punitive damages and compensatory 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.[142]

Similarly, in Northampton County (Bethlehem and Easton), Pennsylvania, Administrative Judge Jack Panella has 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."[143] Judge Panella acknowledged that additional punitive damage awards might have a deterrent effect upon future similar conduct, but, given the "onslaught of bankruptcies of asbestos producers," he believed that asbestos litigation had sufficiently instructed the manufacturers of other products that selling dangerous products "is not a profitable industry."[144] He has therefore severed all punitive damages claims from discovery, pre-trial motions, and trial in his court.[145] Under Judge Panella's ruling, discovery relevant to

[141] *Abate*, No. 89236704, slip op. at 25.

[142] *Id.* at 23–26

[143] *In re* Asbestos Litig., No. C0048AB200100003, slip Order at 6 (Pa. Ct. Com. Pl. Jan. 11, 2001).

[144] *Id.* at 6–7. 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.

[145] *Id.* at 1.

punitive damages claims cannot even begin until a plaintiff obtains a favorable jury verdict on his or her compensatory damages claim.[146]

In nearby Philadelphia, a three judge panel has severed and deferred all pending and future punitive damage claims in the Philadelphia Court of Common Pleas.[147] In its 1986 order, the court explained:

> If punitive damages are allowed in the face [of] so many . . . defendants filing for bankruptcy, it is very possible that some plaintiffs will get the windfall of punitive damages while others find that the money is gone by the time their cases come to trial. . . .
>
> For these reasons, it is appropriate to wait [and] see what happens before punishing defendants that certainly have [been] punished to some extent already.[148]

In New York, at least some judges have severed and indefinitely deferred punitive damage claims in asbestos cases.[149]

As these courts have appreciated, no constitutionally justifiable or sound public policy goal is served by repeated punitive damages awards in asbestos cases.[150] Other courts should follow the leadership of these courts and act now to preserve funds needed to compensate the truly sick.[151]

[146] *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. *Id.* at 4.

[147] *See* Yancey v. Raymark Indus., Inc., No. 1186 (832), Asbestos Order No. 0001, slip op. at 5 (Pa. Com. Pl. Oct. 1986) (on file with the Baylor Law Review); *see also Third Circuit Rehears Dunn Arguments en Banc*, Vol. 8, No. 1 MEALEY'S LITIG. REP.: ASBESTOS 20 (Feb. 5, 1993), (reporting that the "Philadelphia Court of Common Pleas has a basic 'standing order' that all punitives are to be stayed . . . .").

[148] *See Yancey*, No. 1186 (832), Asbestos Order No. 0001, slip op. at 10.

[149] *See $64.65 Million Awarded in Four Asbestos Cases*, Vol. 4, No. 3 MEALEY'S LITIG. REP.: TOXIC TORTS 16 (Dec. 15, 1995) (reporting on the New York case of *Falloon v. Westinghouse Electric* in which the trial court severed and deferred punitive damages indefinitely).

[150] *See* Walter Dellinger III & Victor Schwartz, *Asbestos Litigation Today–A Discussion of Recent Trends*, COLUMNS ASBESTOS RAISING THE BAR IN ASBESTOS LITIG. 5 (Jan. 2002) (statement of Walter E. Dellinger, III. Mr. Dellinger, a partner with O'Melveny & Meyers LLP in Washington, D.C., is the Douglas B. Maggs Professor of Law at Duke University Law School. He served as Solicitor General of the United States under President Clinton.).

[151] *See* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 158 (2001).

IV. CONCLUSION

The current asbestos litigation environment encourages the filing of weak or meritless claims; it often undercompensates individuals who are sick and overcompensates those who are not. In addition, the litigation frequently wrecks havoc on any company that becomes involved, now matter how attenuated its exposure. It is time for the courts to engage in a fresh examination of the litigation and study how recent trends may affect individuals who are or may become sick. Past rulings may have been appropriate and sound at the time they were rendered but need to be reconsidered in light of major changes in the nature and substance of asbestos litigation.

In light of those changes, courts should act now to preserve assets for the truly sick. Courts should address the serious problems resulting from filings by the unimpaired or mildly impaired, and the inappropriate mass joinder of claims. They should also stop the drain of critical resources caused by multiple punitive damages awards. By doing so, courts can: (1) help preserve scarce and depleting assets for those in need and who deserve compensation the most; (2) reduce delays in the court system caused by the growing flood of claims; (3) protect the due process rights of defendants; (4) reduce pressure on the remaining solvent "traditional defendants," and (5) slow the spread of the litigation with respect to "peripheral defendants." Forward-thinking courts that work to accomplish these key objectives can send a much needed signal to other courts that steps need to be taken now to preserve assets for sick claimants and curb asbestos litigation abuse. The faster the reforms advocated in this article are implemented, the more people will be helped by them.

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*1 WHAT COURTS CAN DO IN THE FACE OF THE NEVER-ENDING ASBESTOS CRISIS

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For more than twenty-five years, state and federal courts across the country have struggled to respond to an ever-expanding asbestos litigation crisis. [FN1] Over $20 billion and thirty bankruptcies later, more asbestos claims are filed now than ever before. [FN2] Many predict that the number of claims (and the number of bankruptcies) will only keep increasing and that tens of billions of additional dollars will be spent. [FN3]

*2 Despite the lengthy history of asbestos litigation, our courts have not been able to develop a coordinated, comprehensive and fair method to resolve the asbestos problem. Judges, in an effort to clear their dockets, have often adopted case management techniques that have actually encouraged more and more asbestos claims, particularly by claimants who are, at best, mildly impaired or more recently, not sick at all. [FN4] As a result, 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. At the same time, many of these case management techniques have limited the procedural protections typically available to tort defendants.

Without a fair and rational method of resolving asbestos claims in the tort system, and with federal legislation remaining highly speculative, defendants have increasingly been forced into bankruptcy courts. [FN5] That outcome benefits no one. Plaintiffs suffer because the limited pool of funds available to pay asbestos claims is "steadily being depleted," [FN6] making it more likely that claimants who develop a serious asbestos-related illness will not receive adequate or timely compensation in the future. [FN7] Bankrupt companies may have to lay off employees, close plants and cut back on core business practices--matters which can be significant to the *3 local or national economy. [FN8] And, in consequence, some other good, safe, even beneficial, non-asbestos products may no longer become available, either because of the financial problems of the company or because the company or other companies, perhaps unreasonably, fear liability. Bankruptcies are also bad news for remaining defendants that have only a remote connection to asbestos such as oil companies, hospitals, colleges and many local "mom and pop" small businesses. [FN9] Plaintiffs seek compensation from these peripheral defendants to make up for the loss of funds from larger, more culpable companies that have gone into bankruptcy. [FN10] This has a domino effect that results in additional defendants filing for bankruptcy. [FN11]

*4 The purpose of this article is not to argue that claimants suffering from serious asbestos-related diseases should not be compensated. To the contrary, one of the points of this article is that absent some change in the way asbestos claims are resolved, [FN12] claimants who become truly sick in the future may not receive adequate compensation. Changing the current asbestos compensation system would be pro-claimant.

Also, the purpose of this article is not to ascribe blame. Rather, it is to fix a problem. The judges cannot be blamed for their good intentions. Neither can the plaintiffs' attorneys be blamed for zealously representing their clients--which is what they are doing here. [FN13] This normally produces great social good. However, in the case of asbestos, a seriously flawed system has resulted.

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I. The Current Asbestos Crisis

No one could have predicted that more than twenty-five years after asbestos product liability litigation emerged, courts would still be facing tens of thousands of new claims each year. Certainly no one would have predicted that by the year 2000, over 200,000 asbestos cases would be clogging the courts with new claims increasing at a staggering rate. In fact, new claims against the largest asbestos defendants have averaged approximately 40,000 per year over the past several years. [FN14]

Two examples are noteworthy. In the year 2000 alone, 60,000 claims were filed against the Manville Trust--a Trust established to handle asbestos claims against Johns-Manville Corp., which filed for bankruptcy in 1982. The year 2000 avalanche ***5** represented the greatest number of claims filed against Manville since 1989, the Trust's first full year of operation. [FN15] The Trust also estimates that there will be 50% more claims in 2001 than the previous high-water mark set a year earlier. [FN16] Because of the flood of new claims, the Trust imposed a sixty-day moratorium to determine if it could continue to pay claims as it has in the past. [FN17]

Similarly, in a recent filing in the United States Bankruptcy Court for the District of Delaware, W.R. Grace & Co. stated that in 2000 asbestos claims had increased 81% over the prior year, reaching a total of 49,000 claims. [FN18] Moreover, in January of 2001, claims against W.R. Grace had increased 374% over those in January of 2000, and February of 2001 claims were 207% higher than February of 2000. [FN19]

Defendants have settled well over 300,000 claims, but these efforts to resolve the claims have failed to reduce the caseload. One defendant, Owens Corning, devised a National Settlement Program to settle as many claims as possible. That Settlement Program was cited by opponents of legislative reform as an example of why asbestos legislation was not necessary. [FN20] But even after settling hundreds of thousands of claims, Owens Corning was forced to file for bankruptcy because claimants continued to bring more and more claims seeking larger and larger settlements. [FN21]

***6** While the initial focus of asbestos litigation was the asbestos producers and the manufacturers of asbestos products, over time the pool of defendants has grown. More than 2000 companies or individuals have been named as asbestos defendants in courts across the country, and the number of defendants is growing. [FN22] As the primary asbestos defendants have declared bankruptcy, the list of defendants has been expanded to include companies with little more than a remote connection to asbestos. [FN23] The new defendants are diverse, ranging from oil companies, to automobile manufacturers, to hospitals and colleges. They generally have an attenuated connection to asbestos. [FN24] Some of these peripheral defendants have already sought bankruptcy protection. [FN25]

Perhaps these developments in asbestos litigation--a substantial increase in both the number of claims and the number of peripheral defendants--would be understandable if the number of sick claimants were also increasing. But that is not the case. The bulk of the new cases are being filed by people who are not sick in a meaningful sense. As many as 80% of new cases are brought by plaintiffs who suffer from no physical impairment, [FN26] and it is likely that most of these ***7** plaintiffs will never become ill from their exposure to asbestos. [FN27] If they had little or no costs, particularly to those who are or will become more compellingly ill, suits by such claimants might be considered just. Yet the lawsuits by these relatively unimpaired claimants are allowed to proceed and reduce the limited pool of resources available for those individuals who are much sicker or dying or will become sick with serious asbestos-related diseases in the future.

That funds may not be available for these latter individuals has been apparent since the early 1990s. In 1990, Chief Justice Rehnquist convened a Judicial Conference Committee to examine the growing asbestos litigation problem. [FN28] After extensive study, the Committee reported in 1991 that the "situation has reached critical dimensions and is getting worse." [FN29] Characterizing the state of asbestos litigation as "a disaster of major proportions to both the victims and the producers of asbestos products," the Committee concluded that the courts were "ill-equipped" to address the mass of claims in an effective manner. [FN30] The increasing caseload made long pre- trial delays increasingly "routine," while the continuing exhaustion of defendants' assets has raised a real

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prospect that "future claimants may lose altogether." [FN31]

Recent awards to unimpaired or mildly impaired claimants ***8** illustrate the Committee's concern that truly sick claimants may face a depleted pool of assets in the future. In October of 2001, a Mississippi jury awarded six asbestos plaintiffs $150 million--$25 million each--even though none of the plaintiffs are sick from asbestos and may never become so. [FN32] The plaintiffs claimed that in the future they may suffer asbestos-related diseases because their work, often decades ago, brought them into contact with asbestos- containing products. In March of 2001 a Texas jury awarded twenty-two plaintiffs, who were not seriously ill, $35 million for "future physical impairment" and "future medical costs although it is likely that these claimants will never become seriously ill." [FN33] There are many similar examples. In February of 1998, a Texas jury awarded $115.6 million in damages [FN34] to twenty-one plaintiffs whose illnesses ranged from "mild" to "asymptomatic" asbestosis, and even to "unconfirmed" illnesses. [FN35] Also in 1998, a Mississippi state jury awarded between $2 million and $3.5 million to two plaintiffs whose alleged asbestosis could not be detected by x-ray examinations. [FN36]

How did we get here? Unfortunately, the courts themselves must share some of the responsibility. Many courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system, without regard to the merits of the claims. While these judges undoubtedly had good intentions, they have actually made things worse by encouraging the filing and settlement of questionable claims. [FN37] As one commentator noted ***9** nearly four years ago,

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 demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam. [FN38]

In the federal courts, all asbestos claims have been consolidated for pre- trial purposes before Senior United States District Judge Charles R. Weiner of the Eastern District of Pennsylvania (the federal MDL Panel). Thus, the same procedural rules implemented by the court, such as the severing of all punitive damages claims, [FN39] have been used in connection with tens of thousands of claims. But state courts have adopted different and, often, contradictory rules. For example, some courts place suits brought by unimpaired claimants on an inactive docket so that the seriously ill can be compensated first. Other courts however, such as courts in Mississippi, [FN40] consolidate thousands of claims of relatively unimpaired people with the claims of those who are quite sick or dying. This practice tends to overcompensate the relatively unimpaired at the expense of the very sick. This lack of coordination can best be demonstrated with some concrete examples.

***10** II. The Lack of Coordination Among the Courts

Early rulings in favor of asbestos claimants often resulted from the willingness of courts to stretch accepted legal principles or develop new theories that permitted claims where traditional theories would have denied recovery. While clearly the result of good intentions--compensating people harmed by asbestos--such rulings only tended to encourage unmeritorious lawsuits. Faced with the addition of thousands of asbestos cases to their dockets, courts began to use a wide variety of substantive and procedural methods to try to manage the ever-increasing caseload. Some of these mechanisms sought to take into account the problems posed by asbestos litigation such as limited resources and suits by unimpaired claimants. But most of the procedures adopted by the courts were designed to move cases along as if efficiency and expediency were the only important factors; they ignored the prospect that claimants who actually become seriously ill in the future may not be adequately compensated, ignored important rights of defendants and ignored the impact of increasing numbers of defendant bankruptcies.

The different ways that courts have addressed the asbestos problem, can be seen by (1) the response by courts to the filings by unimpaired claimants, (2) the use by courts of mass joinders or mass trials in certain states, (3) the willingness of courts to permit the award of medical monitoring costs and (4) the failure of courts to account for the impact of punitive damages, including their in terrorem effect at the settlement table.

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A. Addressing the Dilemma of the Unimpaired Claimant

At the heart of the current asbestos problem are claims brought by individuals who are not seriously ill or who may never become sick at all. As noted above, a large number of cases filed against asbestos defendants are filed by plaintiffs with no serious physical impairments. When these weak cases are consolidated with other cases, or when courts force settlements of these weak cases by allowing the claims of the truly sick to be leveraged, the plaintiffs who are not ill use the plaintiffs ***11** who are seriously ill to " inflate the value of those claims." [FN41] Plaintiffs who are not seriously ill and suffer no physical impairment receive recoveries to the detriment of those plaintiffs who are seriously ill and dying.

Only a relatively small portion of the current nationwide burden of asbestos lawsuits involves serious injuries. [FN42] Only a small fraction of the cases present claims of severe asbestosis or asbestos-related malignancies such as lung cancer or mesothelioma. Far greater numbers involve conditions which, if present at all, are associated with little or no actual impairment. [FN43] This has led Judge Weiner, who oversees the federal asbestos multidistrict proceedings, to note that "(o)nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases." [FN44] The influx of large numbers of claims by the relatively unimpaired defeats the purpose of the tort system: "that the sick and dying, their widows and survivors should have their claims addressed first." [FN45] Claimants' attorneys understandably fear, however, ***12** that if they don't file claims for their relatively unimpaired clients, the statute of limitations may have run if and when the clients do become seriously ill. It is a valid concern and drives some of the problem.

To date, only a handful of courts, such as the Supreme Court of Pennsylvania, have been willing to take steps to address this problem. That court has ruled that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action. [FN46] Further, the court held that the discovery of pleural plaques or a non- malignant, asbestos-related lung pathology "does not trigger the statute of limitations with respect to an action for later, separately diagnosed disease of lung cancer." [FN47] The court added "because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable." [FN48]

The Pennsylvania Supreme Court's decision is an important step in the right direction. First, the court's ruling ensures that those who are not seriously ill will not threaten the right to compensation of those who are. [FN49] Second, the court affirmed that individuals need not file claims simply to avoid any statute of limitations issues; absent physical impairment the clock does not run. [FN50]

Cognizant of both the statute of limitations issue and the problems posed by unimpaired claimants, a few other courts have created pleural registries or inactive dockets pursuant to which the claims of those who cannot meet certain objective medical criteria are placed on an inactive docket where statute of limitations and similar defenses are tolled. For example, the Massachusetts inactive asbestos docket was created in September ***13** of 1986 through an amendment to an order creating a statewide consolidated asbestos docket. [FN51] The docket provides a mechanism by which plaintiffs who have been diagnosed with asbestos-related pleural diseases can toll all applicable statutes of limitations regarding their claims or the related claims of their families or estates, until their pleural conditions developed into either asbestosis or some type of malignancy. [FN52] While on the inactive docket, cases are exempt from discovery. [FN53]

Similarly, the Circuit Court for Cook County, Illinois, created a pleural registry system in March of 1991. [FN54] In creating that system, the court recognized that asbestos litigation posed problems for parties: plaintiffs exhibiting no impairment filed claims out of fear that the statute of limitations would expire before their disease progressed to a stage that was medically recognized as impaired, while defendants expended substantial sums in appearing in and defending against such inchoate claims. [FN55]

Under the Cook County plan, claimants must file an Asbestos Personal Injury Information Sheet. [FN56] Cases in which an asbestos-related cancer or mesothelioma is alleged may immediately go on the active docket. [FN57]

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Claimants who have a history of asbestos exposure and demonstrate objective asbestos-***14** related physical findings (such as pleural plaques) but who either do not meet the minimum criteria for impairment, as defined in the Order, or who have not manifested a cancer certified as asbestos-related, as defined in the Order, place their claims on the registry. [FN58] While on the registry, claims are exempt from discovery and "shall not 'age' for any purpose." [FN59]

Other courts have also begun to acknowledge the unimpaired claimant problem. Recently, the Texas Supreme Court addressed a statute of limitations question arising out of an asbestos claim and, in that context, noted the problems raised by compensating unimpaired claimants. In Pustejovsky v. Rapid American Corp., [FN60] the issue before the court was whether a plaintiff could bring separate actions for separate latent asbestos diseases. [FN61] The court found that a claim for malignant asbestos disease would not be barred by the statute of limitations even where a previous claim for asbestos exposure or minimal impairment had been filed. The court concluded that it was better to allow the second action because otherwise, claimants would feel compelled to bring premature and vague claims (such as fear of cancer) to avoid statute of limitations issues. The court specifically identified its concern that giving damages to claimants who are not sick in a meaningful sense would result in the overcompensation of those who do not get a disease and a "systematic under- compensation" for those who do. [FN62]

B. Mass Joinders and Mass Trials

Perhaps the most troubling procedural mechanism used by courts to resolve large numbers of asbestos claims has been the mass joinder or mass trial of thousands of individual claims ***15** which include claims by both those who are demonstrably sick and those who are unimpaired. The use of this procedural conglomeration threatens both the right of the seriously ill plaintiffs to be fully compensated and the right of defendants to fair process.

1. Mississippi

Although Mississippi does not have court procedures that allow for class actions, Mississippi joinder rules do allow for the joinder of hundreds or thousands of claimants from across the country in one case. Under Mississippi rules, it does not matter how many plaintiffs are from out-of-state so long as one of the plaintiffs is a Mississippi resident who is suing one out-of-state defendant. [FN63] This "one and all" rule is procedurally similar to class actions but without the same level of protection. [FN64] Mass joinder of asbestos claims in Mississippi courts, in conjunction with Mississippi rules that provide limited time for discovery, can be used to limit the procedural protections to which defendants are generally entitled. [FN65]

A Mississippi case that highlights the problem is Cosey v. E.D. Bullard Co., [FN66] a consolidated case where a trial involving twelve of the 1738 plaintiffs resulted in a jury verdict of $48.5 million. [FN67] The judge advised the defendants to settle with the ***16** remaining plaintiffs, or he would try them immediately in front of the same jury, with an instruction to find the defendants liable. [FN68] When counsel for the defendants said the plan sounded "like this side of hell," the judge corrected him saying, "No counsel, this is hell." [FN69] As one defendant's general counsel remarked, "It's no secret that there are state courtrooms in Mississippi which have become notorious for awarding outlandish verdicts to asbestos claimants who are not sick and as a result, asbestos cases from all over the country tend to migrate there." [FN70]

Not surprisingly, Mississippi's rules have resulted in forum-shopping. [FN71] Over the past few years the number of plaintiffs filing suit in Jefferson County has exceeded the number of Jefferson County residents. [FN72] In early 2001, two new asbestos suits were filed in Mississippi, one including over 2000 claimants [FN73] and a second involving over 7000 claimants, [FN74] a majority of whom did not reside in Mississippi. Unfortunately, it appears this trend will continue. The Mississippi Supreme Court recently rejected a request to correct the problem in American Bankers Insurance Co. v. Alexander. [FN75] There the court affirmed the joinder of 1371 plaintiffs in a case in Jefferson County, and made no attempt to change Mississippi's joinder rules. [FN76]

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***17** 2. West Virginia

The West Virginia courts have used mass trials for tens of thousands of asbestos claims. Beginning with the first consolidated trial in 1989, over 20,000 asbestos claims have been included in mass trial groups. [FN77] These trials did not address all liability issues. Instead, there were no named plaintiffs presented to the jury, and the issue to be resolved was whether any of the numerous defendants had either manufactured a defective product or maintained a workplace which was not reasonably safe. The mass trials also determined whether some of the defendants had acted in a manner that would warrant an award of punitive damages and asked the jury to develop a "multiplier" for calculating such damages. [FN78] A second phase was contemplated which would only then focus on the defendant's liability and the amount of the compensatory damages. [FN79] Although the ostensible purpose of this procedure was to avoid repetitive litigation, the goal was to "provide the opportunity for the parties to settle massive numbers of cases at one sitting." [FN80]

In 1996, the West Virginia Supreme Court had the opportunity to address the viability of these mass trials in a situation where there were no common issues among the defendants who each allegedly had maintained an unreasonably safe workplace. [FN81] The plaintiffs had allegedly worked in various facilities owned by different defendants all of which were in West Virginia. [FN82] These "premises"-related defendants challenged ***18** the trial court's consolidation of a number of separate civil actions filed on behalf of individuals who claimed physical injuries stemming from asbestos exposure which occurred while the plaintiffs were "constructing, repairing, and/or maintaining various facilities" owned by the defendants. [FN83] The Supreme Court of West Virginia ruled that the consolidation plan was appropriate and provided the trial court with "broad authority" for resolving as many claims as quickly as possible. [FN84]

Until recently, however, it appeared that some change might be forthcoming. The West Virginia Supreme Court elected to consolidate virtually all West Virginia asbestos claims before one judge under West Virginia's mass litigation procedures. As part of the Mass Litigation Panel proceedings, the judge in charge held a series of meetings with counsel for plaintiffs and defendants to formulate a plan for proceeding with the asbestos cases. [FN85] Plaintiffs sought to continue the trial practices that made West Virginia an attractive jurisdiction. Plaintiffs requested "a consolidated, common issues trial for all pending asbestos cases," [FN86] arguing that past consolidations "created important, substantive rights" and therefore, a denial of those procedures in the future "raise(d) issues of a denial of substantive due process and equal protection to the . . . members of the . . . class under both the Constitution of West Virginia and the United States Constitution." [FN87] The motion was denied, and the court instead scheduled "a series of small-group, all-issues trials" [FN88] (although Judge MacQueen argued that an inactive docket may violate the West Virginia ***19** Constitution). [FN89]

Unfortunately, the West Virginia Supreme Court reversed course and, while allowing at least some of the small-group, all-issues trials to proceed, made clear that it expected to see larger consolidated trials. The court appointed a new "supervising judge" to schedule a new series of meetings with counsel for plaintiffs and defendants to consider the types of larger trial groups that should be scheduled. [FN90] The court said that those trial groups might include, among other things, "cases involving the premises liability theory," "cases with issues susceptible to mass trial of all or most parties" and "cases involving common product exposure." [FN91] Thus, mass trials will probably be back in West Virginia in the future.

3. Maryland

Trial courts in Baltimore, Maryland, have also consolidated thousands of asbestos claims. The first mass trial, held in 1992, was broken into phases and, as in West Virginia, focused on general issues of liability and punitive damages. Following the mass trial, the court scheduled a series of smaller trial groups or mini-trials to resolve the remaining issues specific to individual claimant issues. Rather than resolving claims quickly and efficiently, ten years later these mini-trials have yet to be concluded. [FN92] In February of this year, a judge in Baltimore Circuit Court approved a settlement of over 6800 asbestos-injury cases, which had been pending in the system for years. [FN93]

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***20** Mass trials and mass consolidations are perhaps the most obvious examples of case management techniques designed to resolve cases quickly but which actually end up encouraging the filing of more asbestos claims. Such procedures take the focus away from the merits of individual claims (while often ignoring the due process rights of defendants) and allow non-meritorious claims to flourish. More importantly, mass trials and mass consolidations provide a mechanism which increases the value of unimpaired claims at the expense of truly sick plaintiffs, further reducing the limited pools of resources and increasing the likelihood that future deserving claimants will not be fully compensated.

C. Medical Monitoring

Plaintiffs in medical monitoring cases seek post-exposure, pre-symptom recovery for the expense of periodic medical examinations to detect the onset of physical harm (which may or may not occur). Some courts have permitted recovery for medical monitoring, but many have rejected it. [FN94] Medical monitoring, like recovery for expected future impairment or fear thereof, may have its place in tort law, but in the asbestos litigation, this device has become a caricature.

Recognition of medical monitoring absent physical injury could have enormous consequences for asbestos litigation given the massive number of individuals who were exposed to asbestos at some level. If even a small fraction of these individuals were to seek recovery for medical monitoring, the effects on future claimants, the court system and the remaining solvent defendants could be far- reaching. As one court explained:
There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . Allowing today's generation of ***21** exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's (sic) being remediless. [FN95]

These serious practical concerns led the United States Supreme Court in Metro-North Commuter Railroad Co. v. Buckley [FN96] to reject medical monitoring in Federal Employers' Liability Act (FELA) [FN97] cases. [FN98] One of the Court's primary concerns in Buckley was that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." [FN99] As a result, defendants would be exposed to unlimited liability, and a "'flood' of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury. [FN100] The Court concluded:

(W)e are more troubled than is (the dissent) by the potential systemic effects of creating a new, full-blown, tort law cause of action--for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other. [FN101]

Equally instructive on this point is the Texas Supreme Court's more recent decision in Temple-Inland Forest Products Corp. v. Carter. [FN102] In rejecting a "fear of disease" claim ***22** brought by a person who was exposed to asbestos, but had no physical injury, the court explained:

The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos- related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared. Also, claims for exposure could proliferate because in our society, as the Supreme Court observed, "contacts, even extensive contacts, with serious carcinogens are common." [FN103]

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For this reason, the Texas Supreme Court was reluctant to stray from the bedrock rule, taken from the Restatement (Second) of Torts, that a showing of actual injury is an indispensable element of a tort cause of action. [FN104] The court stated: "If recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk," which would "exacerbate not only the multiplicity of suits but the unpredictability of results." [FN105]

Sound public policy dictates that courts maintain the 200-year-old principle that causes of action generally require proof of a present physical injury. [FN106] The traditional physical injury ***23** rule serves a number of important functions with respect to medical monitoring claims. First, it prevents courts from being flooded with thousands of new claims. As one set of commentators has pointed out, with an estimated thirty-eight percent of all cancers attributable to occupational exposure to toxic chemicals and 50,000 hazardous waste sites in the United States, "in the very near future we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances and to get medical experts to testify that the exposure significantly increased our risk of disease." [FN107] It was precisely this concern that persuaded the United States Supreme Court to refuse to allow medical monitoring claims in the Buckley decision. [FN108]

Furthermore, medical monitoring awards are often totally unnecessary. Most workers today already receive access to medical check-ups through a health plan. [FN109] A tort award would simply provide a windfall recovery. As the Supreme Court noted in Buckley, "where state and federal regulations already provide the relief that a (medical monitoring) plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits" because recovery would be allowed "irrespective of the presence of a 'collateral source.'" [FN110]

In addition, medical monitoring awards are subject to serious abuse. If awarded in a lump-sum, there is no guarantee that any recovery will actually be spent on medical monitoring. ***24**[FN111] In fact, evidence suggests that lump-sum awards are more likely to be spent in the short-term than to be saved for future medical monitoring. [FN112] This will almost certainly be true in the vast majority of cases where monitoring is already provided by a " collateral source."

Moreover, the social risk associated with making medical monitoring too readily available to the millions of persons in our society who can claim exposure to toxic substances, including asbestos, will have the effect of compensating those who are unimpaired or slightly impaired at the expense of those who are seriously injured. When courts permit large damage awards for medical monitoring, less money is available to compensate those who have serious injuries or will develop serious injuries in the future.

These serious problems will only be exacerbated if claimants seeking medical monitoring are permitted to pursue recovery through the vehicle of class action litigation. People who suffer actual asbestos-related injuries may be unable to obtain compensation for their injuries if funds are further depleted for monitoring classes of individuals who have no present physical injury, and may never become sick.

Despite these facts, some state courts still permit plaintiffs to recover damages for medical monitoring even in the absence of injury. In 1998, the Supreme Court of Louisiana, in a suit brought on behalf of a class of plaintiffs that had not filed suit for asbestos disease or injury, ruled that for an asymptomatic claimant exposed to asbestos, "the reasonable cost of medical monitoring is a compensable item of damage . . . provided that a plaintiff satisfies (certain) criteria." [FN113] As a result of this ***25** ruling, the Louisiana Legislature amended its law to eliminate medical monitoring as a compensable item. Specifically, the amendment stated, "Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease." [FN114]

But in April of 2001, the Louisiana Supreme Court spoke again on the issue, this time holding that the Legislature's decision to eliminate medical monitoring was unconstitutional to the extent that the law was applied retroactively (i.e., to the extent the plaintiff already had a "vested property right" in a cause of action it could not be divested by a subsequent statute). [FN115] The upshot of the ruling was to permit large numbers of claimants who

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acknowledged they were unimpaired to seek ***26** medical monitoring costs in the courts, depleting funds available to compensate those claimants who are or may become sick. [FN116]

D. Managing Punitive Damages Claims

Continuing to award punitive damages in asbestos cases no longer makes sense. The purpose of punitive damages in product liability cases is to punish manufacturers for the injuries their products caused and to deter others from doing the same. [FN117] It would be difficult to argue that punitive damages awards in asbestos cases over the past twenty years have not adequately punished asbestos manufacturers. Moreover, individuals responsible for decisions relating to asbestos products no longer work at these corporations and in most cases are dead. Punishing corporations for decisions made years before the present management was in power does not serve the purpose of punitive damages.

When the threat of large punitive damage awards is used to increase settlement amounts, punitive damages become a means of extortion rather than the corrective and deterrent they are intended to be. Thus, continued use of punitive damages not only violates a defendant's rights, [FN118] it threatens future ***27** plaintiffs by driving defendant corporations into bankruptcy, thereby depleting the pool available for compensatory damages. [FN119]

The United States Court of Appeals for the Third Circuit recently recognized many of these same concerns. In In re Collins, [FN120] the Third Circuit had the opportunity to consider the Judicial Panel on Multidistrict Litigation's decision not to remand punitive damages claims for trial together with the remainder of personal injury claims arising from asbestos exposure. [FN121] The court was convinced that there was a "compelling" public policy rationale for severing the claimants' punitive damage claims:
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. 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. [FN122]

***28** Yet many courts have not been willing to take similar steps to curb the impact of punitive damages claims. For instance, the Supreme Court of Montana had to decide whether W.R. Grace & Co. could present evidence of the scope of asbestos litigation it faced as well as hypothetical average amounts for each pending claim during a mini-trial on punitive damages. [FN123] The purpose of that evidence was to show that an award of punitive damages could threaten the ability of sick claimants to obtain compensation. [FN124] The trial court permitted W.R. Grace to introduce an economic expert who performed a series of calculations in order to approximate the potential damages facing the company in comparison to the company's net worth. [FN125]

However, the Montana Supreme Court ruled that the trial court abused its discretion in admitting this evidence - finding that such evidence is irrelevant to the issue of punitive damages, as well as "highly speculative." [FN126] On remand, W.R. Grace would have been unable to introduce such expert testimony and thus, the jury would have been unaware of the impact of a large punitive damages award on seriously ill claimants. W.R. Grace has since sought bankruptcy protection following a flood of new asbestos claims.

III. A Global View Is Needed

In mass tort litigation, such as the asbestos litigation, when a judge in one state acts, he or she not only affects the plaintiffs and defendants in that state, but also current and future plaintiffs and defendants in all other states. Imagine the frustration of one judge, coping with the impact of depleted funds and mounting bankruptcies by setting for trial only the ***29** cases of those who are sick or have died from an asbestos disease, watching a judge in

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another state allow unimpaired claimants to achieve compensation as part of a mass consolidated trial. With no end in sight to the asbestos litigation crisis, courts must reexamine the procedural mechanisms and substantive rules they have adopted to determine whether they are actually making the problem worse.

Unfortunately, courts are often hesitant to take a global view of the problem at the expense of the citizens of their state. For example, a state judge may be unwilling to prevent plaintiffs in his or her state from receiving punitive damages if a similarly situated plaintiff in another state will not be precluded from receiving them. [FN127] This state-centric view of the litigation is not just a theory. For example, in West Virginia, the plaintiff's submission to the West Virginia Mass Litigation Panel actually argued that a mass consolidated trial of all asbestos claims was necessary because of the supposed "risk of bankruptcy filings on the part of the remaining asbestos manufacturing defendants" as well as "the drain of defendant dollars to other litigation in other states where litigation plans are in effect." [FN128] More specifically, the plaintiffs argued that "if the dollars are not being demanded in West Virginia, they will be spent elsewhere until they are all gone." [FN129]

***30** The lack of a coordinated approach results in compensation based on forum rather than merit. A recent settlement illustrates this problem. In November of 1999, eighteen of the nation's leading asbestos makers agreed to settle two of the largest asbestos personal injury cases for $160 million. [FN130] However, the money was not allocated to plaintiffs based on the severity of injury, but apparently on where they lived. [FN131] For example, $263,000 went to each of 246 plaintiffs who lived in four counties in Mississippi and who suffered injuries. [FN132] Seven Texas plaintiffs only received $43,500 each. [FN133] But 2645 residents of Ohio, Indiana and Pennsylvania who had similar injuries only received $14,000 each. [FN134]

In the absence of federal legislation, judges must look outside their own "asbestos fiefdoms" [FN135] and make decisions that will help resolve the problem at a national level. They must cooperate and work toward a global approach to these cases. "Through (such) cooperation, judges can promote efficiency and ***31** horizontal equity in the adjudication." [FN136] Cooperation on a global level will serve two immediate goals--"eliminating redundancy and promoting consistency." [FN137] Additionally, cooperation today would assure the long-term goal of compensating claimants who become truly sick in the future.

A. Take Steps to Control Claims by the Unimpaired

Courts must be willing to distinguish between the claims of those who are truly sick and those who are not. The adoption of inactive dockets by courts in Illinois, Massachusetts and Maryland is a good example of a method of controlling claims by the unimpaired. The unwillingness of the Pennsylvania Supreme Court to recognize a cause of action by claimants who are asymptomatic is another. Until courts take steps to control claims by the unimpaired, court dockets will continue to be clogged by such claims, and the limited resources available to those who are truly sick will continue to be depleted.

B. Strictly Enforce Joinder and Venue Rules to Prevent Forum Shopping

Courts need to be more assertive in requiring that claimants have had some substantive contact with the state in which they have filed suit. Thousands of cases are filed in states like Mississippi even though the claimants have no connection to the state because Mississippi's joinder rules are so liberal. Similarly, the streamlining of judicial procedures encourages out-of-state residents to file suit in Ohio. One solution would be for courts to require that plaintiffs either have been exposed to asbestos in the state or live or work in the state in which they file suit. Doing so would decrease forum shopping while also unclogging state courts faced with lawsuits by thousands of individuals who literally have no relationship to that state. In- state plaintiffs who pay taxes to keep the state courthouses open would benefit by having their claims heard faster.

***32** C. Bring More Cases Before Fewer Judges

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Many states have procedures which allow for the consolidation of cases from across that state to be transferred to a single judge. These types of procedures have been used by states in other mass tort contexts such as Fen/Phen and silicone breast implants. [FN138] A more consistent approach to the handling of the asbestos litigation can be achieved if the number of judges responsible for managing asbestos cases is reduced. [FN139]

D. Provide Institutional Support

More formal mechanisms should be adopted to provide opportunities for judges from across the country to share their views and experiences concerning the asbestos litigation. Organizations such as the National Judicial College and ad hoc state court committees have provided forums for improved communication in the past, but additional steps should be taken. An organization that maintained claimant statistics, compiled case management orders and opinions and provided a forum for increased communication would provide judges with an important resource to draw upon as they try to balance their need to move cases along with the need to protect both the availability of funds to compensate the truly sick and the rights of defendants. [FN140] Making this information available to litigants may also streamline the parties' ability to work out ***33** case management and discovery matters with less court involvement.

E. Use the Tools that Already Exist

While some common-sense innovations, such as inactive dockets, are available to the courts, many judges do not have to look past their own court rules to improve the asbestos problem. One of the reasons that more and more asbestos claims are being filed is that courts have been unwilling to treat asbestos claims like they would other tort claims. Judges need to require plaintiffs to meet their burden of proof and be willing to dismiss cases on summary judgment if that burden is not met. Furthermore, judges need to enforce the procedural rights of defendants and, in particular, the rights of defendants to full discovery. The time required to enforce the rule of law now will actually save time in the future because the incentive to file frivolous or marginal claims will have been eliminated.

IV. The Courts Are the Only Practical Solution

In Ortiz v. Fibreboard Corp., [FN141] United States Supreme Court Justice David Souter stated that "the elephantine mass of asbestos cases . . . defies customary judicial administration." [FN142] As one Third Circuit Judge commented:
Unquestionably, a national solution is needed. Despite the deteriorating situation, Congress has declined to act and class actions are inadequate remedy. . . .
. . . 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. [FN143]

***34** Even more recently, in discussing the need for a legislative solution, one Maryland District Court Judge recognized:

the need for developing less complex and more responsive and responsible ways of sorting out the blame and cost for industrial-age ills such as asbestosis than a system of litigation meant to sort out competing claims to straying cattle. Yet, the system lumbers on because no one has the incentive or initiative to change it, perhaps because everyone is so invested in the status quo. [FN144]

The need for a national solution has never been stronger than it is today, where over thirty companies have been forced into bankruptcy as a result of asbestos-related litigation, where the number of cases on court dockets continues to grow at epidemic proportions and where claimants who get sick in the future run the risk of undercompensation or no compensation at all. However, without federal legislation, which remains speculative,

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only the courts can take steps to improve the asbestos litigation environment. Mechanisms designed to move cases along have failed. Courts must be willing to try new techniques, such as inactive dockets, and at the same time enforce those rules--tort standards and forum limitations--that already exist. Whichever path they choose, the courts must do something now before the problem gets even worse.

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[FN1]. One of the first major asbestos-liability cases was Borel v. Fibreboard Corp., 493 F.2d 1076 (5th Cir. 1973) , where the court of appeals affirmed a verdict against an asbestos defendant on a strict liability theory.

[FN2]. See Harold Brubaker, Three Major Firms Have Filed for Bankruptcy Protection from Asbestos Claims, Phila. Inquirer, Jan. 13, 2001 (describing the history of Crown Cork & Seal which, for three months in the early 1960s, owned a company that made one product that allegedly contained asbestos and still spent $90 million on asbestos claims in 2000 alone); John Rooney, Evolution, Not End, Seen for Asbestos Litigation, Chi. Daily L. Bull., Apr. 21, 2001; A Trail of Toxic Torts: Fresh Asbestos Trouble for Insurers, The Economist, Jan. 27, 2001, available at 2001 WL 7317425.

[FN3]. See The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (1999) (hereinafter Hearings) (statement of Christopher Edley, Jr., Professor, Harvard Law School); Christopher Bowe, The Americas: Asbestos Sparks New Jitters in US Litigation, Fin. Times, Jan. 31, 2001; Queena Sook Kim, Asbestos Claims Continue to Mount, Wall St. J., Feb. 7, 2001, at B1, available at 2001 WL-WSJ 2853509; Richard B. Schmitt, How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial, Wall St. J., March 5, 2001, at A-1, available at 2001 WL-WSJ 2856111. A.M. Best Co. recently estimated that asbestos claims could ultimately cost the insurance industry $65 billion. Lorraine Gorski, Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers, BestWire, May 8, 2001. Additional billions of dollars would be incurred by defendants themselves. A recent study by Tillinghast-Towers Perrin estimates that the ultimate cost will reach $200 billion, of which 39% will be borne by defendants and 61% by U.S. or foreign insurers. Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion, Bus. Wire, June 12, 2001 (hereinafter Tillinghast-Towers).

[FN4]. The Asbestos Blob, Wall St. J., July 2, 2001, at A-14, available at 2001 WL-WSJ 2868353.

[FN5]. Since the beginning of 2000, seven major asbestos defendants, including U.S. Gypsum in June 2001, have filed for bankruptcy. See Daniel Gross, Recovery Lessons from an Industrial Phoenix, N.Y. Times, Apr. 29, 2001, at Bus. 4; Sabrina Jones, It's Been 38 Years Since W.R. . . ., Wash. Post, Mar. 19, 2001, at E-1 (discussing the claims against W.R. Grace which filed for bankruptcy shortly after the article was published), available at 2001 WL 2552120.

[FN6]. In re Collins, 233 F.3d 809, 812 (3d Cir. 2000).

[FN7]. See Queena Sook Kim, Firms Hit by Asbestos Litigation Take Bankruptcy Route, Wall St. J., Dec. 21, 2000, at B4, available at 2000 WL-WSJ 26620724; Mark D. Plevin et al., Don't Bankrupt Asbestos, Legal Times,

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Mar. 19, 2001, at 68.

[FN8]. Financial problems are of course faced by companies that have not filed for bankruptcy protection. "Every company that is a defendant in asbestos litigation" sees these lawsuits "sop up cash flow, diverting money that could be used to develop new products, hire new employees, and build new plants." Brubaker, supra note 2. The stock values of these companies plummet because "Wall Street loathes the uncertainty of a liability that seems to have no end." Id.; see also The People v. America Inc.: American Companies in Court, The Economist, Mar. 24, 2001 (discussing the financial scrutiny being faced by companies with even the most remote connection to asbestos claims), available at 2001 WL 7318244.

[FN9]. Deepa Babington, Lawyers Seek New Asbestos Targets After W.R. Grace, Reuters, Apr. 2, 2001; Cy Goldberg & Darren Check, Bullseye Gets Bigger on Peripheral Defendants: The Effect of Bankruptcies on Asbestos Litigation, Legal Intelligencer, Apr. 25, 2001; Adrian Michaels, Problem of Cash Reserves to Meet Rising Claims, Fin. Times, Apr. 27, 2001, at 3.

[FN10]. U.S. Gypsum filed for bankruptcy in June 2001 citing political changes in the U.S. Senate which it believed made asbestos legislation less likely. USG Says It May Seek Bankruptcy Protection, Wall St. J., June 5, 2001, at A-12, available at 2001 WL-WSJ 2865545. U.S. Gypsum had been lobbying Congress for a legislative solution but pointed to slower progress than expected combined with increasing settlement demands that are "completely out of proportion to our . . . liability." Id. Crown, Cork and Seal spent $100 million on asbestos litigation in 1999 and $160 million in 2000 and had estimated that its 2001 costs would be $275 million. Mealey's Litig. Rep.: Asbestos, May 18, 2001, at 13.

[FN11]. Bankruptcies have caused some plaintiffs' lawyers to file new claims at a "dizzying pace." Bill Geroux, Asbestos Lawsuits Multiply: Bankruptcies Chief Reason, Rich. Times-Dispatch, Apr. 28, 2001, at B-2, available at 2001 WL 5321831. As one publication that tracks asbestos litigation noted, "The cumulative effect of bankruptcy reorganization by many large asbestos defendants has left many of the remaining companies reeling as new claims remain on the rise with no end in sight." Mealey's Litig. Rep.: Asbestos, May 18, 2001, at 13. That article reported the claim data for the following non- bankrupt defendants: (1) Owens-Illinois - 20,000 new claims in 2000 (compared to 12,000 new claims in 1999), (2) Federal Mogul - 39,000 new claims in 2000, (3) Pfizer - 33,165 pending claims against itself and 58,346 pending claims against its Quigley subsidiary in 2000 (compared to 26,890 pending claims against Pfizer in 1999 and 57,328 pending claims against Quigley in 1999). Id.

[FN12]. For a discussion concerning recent efforts to pass asbestos legislation, see James Reed, Federal Asbestos Legislation: The Search for a Strategy, Harris Martin Columns: Asbestos, Apr. 2001.

[FN13]. They also get paid but so do the lawyers and businessmen on the other side. A system that pays people to look out for the interests of others is not a bad system.

[FN14]. See Hearings, supra note 3.

[FN15]. See Letter from David Austern, President, Claims Resolution Management Corporation, to Attorneys Who File Manville Trust Claims (Mar. 26, 2001) (on file with author).

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[FN16]. Id.

[FN17]. Id.

[FN18]. W.R. Grace & Co.'s Informational Brief at 38, In re W.R. Grace & Co. (Bankr. D. Del. Apr. 2, 2001) (No. 01-01139).

[FN19]. Id. at 38-39. As a historical marker, prior to 1980, there were approximately 950 cases pending in the federal courts. See Terrence Dungworth, Product Liability and the Business Sector: Litigation Trends in Federal Courts 36 (1988). By 1985, that number increased four-fold to over 37,000 cases. Id.; see also Deborah R. Hensler, Asbestos Litigation in the United States: A Brief Overview 3 (1992).

[FN20]. See H.R. Rep. No. 106-782, at 67 (2000) (describing the Justice Department's views on behalf of the Clinton Administration).

[FN21]. Owens Corning Files Voluntary Chapter 11 Petition to Resolve Asbestos Liability, PR Newswire, Oct. 5, 2000; Joseph B. White & Jim VandeHei, Owens Corning Files for Chapter 11, Citing Escalating Asbestos-Liability Claims, Wall St. J., Oct. 6, 2000, at A3, available at 2000 WL-WSJ 22612276.

[FN22]. See Innocent Hurt in Asbestos Suits, Chi. Sun-Times, July 3, 2001, at 21, available at 2001 WL 7240088; Douglas McLeod, Asbestos Continues to Bite Industry, Bus. Ins., Jan. 8, 2001, at 1, available at 2001 WL 5100719 .

[FN23]. See supra notes 9-11 and accompanying text.

[FN24]. Susan Warren, Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps, Wall St. J., Apr. 12, 2000, at B1, available at 2000 WL-WSJ 3025073; see also Brubaker, supra note 2 (discussing order requiring Sears to pay $1.5 million to a seventy-eight-year-old man who purchased building materials containing asbestos from Sears fifty years ago).

[FN25]. See, e.g., Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike in Claims, Mealey's Litig. Rep.: Asbestos, Jan. 5, 2001, at 1.

[FN26]. See Queena Sook Kim, G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases, Wall St. J., Jan. 8, 2001, at B12 (citing report from G-I Holdings, formerly GAF Corp., that "as many as 80% of its asbestos settlements are paid to unimpaired people"), available at 2001 WL-WSJ 2850312; see also Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1853 (1992) (stating that in 1992, claims by the unimpaired "account(ed) for sixty to seventy percent of new asbestos claims filed."). Allegations typically assert that plaintiffs may have future harm or have only pleural plaques. "(Pleural) plaques are areas of (the pleura membrane covering the lung and chest wall) in which cell tissue is replaced 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.'" Hearings, supra note 3 (statement of William N. Eskridge, Jr., Professor, Yale Law School).

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[FN27]. See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 746- 47, 750-51, 812 (E.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992), on reh'g, 993 F.2d 7 (2d Cir. 1993) (discussing the mass, assembly-line medical screening programs employed by some attorneys for claimants); see also Tillinghast-Towers, supra note 3 (indicating a significant majority of new claims are for non-malignant diseases).

[FN28]. Judicial Conference 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, Mealey's Litig. Rep.: Asbestos, Mar. 15, 1991, at 3.

[FN29]. Id. at 2.

[FN30]. Id.

[FN31]. Id. at 3; see In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. at 746-47, 750-51, 812 (describing the backlog of asbestos personal injury cases).

[FN32]. See Margaret Cronin Fisk, Jury Awards Six Asbestos Plaintiffs $25M Each, Nat'l L.J., Nov. 12, 2001, at B1; Patti Waldmeir, The Need for Damage Limitation, Fin. Times (FT.com), Nov. 15, 2001, available at 2001 WL 28473877

[FN33]. Two Asbestos Defendants Hit with $35 Million Verdict, 23 No. 4, Andrews Asbestos Litig. Rep., Mar. 1, 2001, at 3.

[FN34]. This $115.6 million included $15.6 million in compensatory damages and $100 million in punitive damages. McLeod, supra note 22.

[FN35]. Id.

[FN36]. Hearings, supra note 3. 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).

[FN37]. For example, the court administrator in Cuyahoga County, Ohio, noted that "We are victims of our own success." Cuyahoga Asbestos Cases Abound, Dayton Daily News, May 14, 2001, at 2-B, available at 2001 WL 21258316. That court's cases have grown from 4000 to 27,000 in just four years and the court "has become so experienced at handling asbestos cases that even people who never lived or worked in Ohio file their lawsuits in the court." Id.

[FN38]. Francis E. McGovern, The Defensive Use of Federal Class Actions in Mass Torts, 39 Ariz. L. Rev. 595, 606 (1997).

[FN39]. In re Collins, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied sub nom., Collins v. Mac-Millan Bloedel,

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Inc., 121 S. Ct. 2216 (2001).

[FN40]. See, e.g., John Porretto, Rural County Known for Huge Verdicts, Biloxi Sun Herald, July 2, 2001 (discussing the negative impact on jobs, the cost of healthcare and availability of insurance); see also supra note 36.

[FN41]. Hearings, supra note 3; see also Patricia Waldmeir, A Legal System Insulated from Logic: A New Surge of Asbestos Lawsuits is Bankrupting U.S. Business and Exposing the Failings of the Law, Fin. Times, June 7, 2001, at 12.

[FN42]. As Judge Weinstein has pointed out, large numbers of claims by plaintiffs without serious injury are often generated as a result of mass, "assembly-line" medical screening programs:
(Some attorneys) have filed all of their cases without regard to the extent of injury. In conjunction with unions they 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.
In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 748 (E.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992) , on reh'g, 993 F.2d 7 (2d Cir. 1993).

[FN43]. See In re Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("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.").

[FN44]. In re Asbestos Prods. Liab. Litig. (No. VI), 1996 WL 539589, at * 1 (E.D. Pa. Sept. 12, 1996).

[FN45]. In re Patenaude, 210 F.3d 135, 139 (3d Cir. 1999), cert. denied, 531 U.S. 1011 (2000). See generally 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); Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

[FN46]. See Simmons v. Pacor, Inc., 674 A.2d 232, 237 (Pa. 1996) (upholding Giffear v. Johns-Manville Corp., 632 A.2d 880 (Pa. 1993)).

[FN47]. Simmons, 674 A.2d at 237.

[FN48]. Id. at 238.

[FN49]. See 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).

[FN50]. Id.

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[FN51]. See Commonwealth of Mass., Middlesex Super. Ct., Massachusetts State Court Asbestos Personal Injury Litig. Order, Sept. 1986.

[FN52]. Id.

[FN53]. Id. Similarly, pleural cases originally filed in the consolidated docket may be transferred to the inactive docket on plaintiff's motion, and thereafter become subject to all of the same provisions and requirements as cases originally filed on the inactive docket. Id.

[FN54]. See Order to Establish Registry for Certain Asbestos Matters, In re Asbestos Cases (Cir. Ct., Cook County, Ill. Mar. 26, 1991) (hereinafter Registry Order). The pleural registry in Cook County was created by Judge Dean Trafalet who handled the asbestos cases for a fourteen-year period that ended in 1998. When Judge Trafalet took over the asbestos cases there were 8000 cases pending, but today there are about 875 pending cases with another 1200 cases on the pleural registry. See Rooney, supra note 2.

[FN55]. Registry Order, supra note 54.

[FN56]. Id. All claims must be filed individually, as the Order prohibits claims on behalf of groups or classes of claimants. Id.

[FN57]. Id.

[FN58]. Id.

[FN59]. Id.

[FN60]. 35 S.W.3d 643 (Tex. 2000).

[FN61]. The court noted that it had previously held that a claimant who had been exposed to asbestos but had not developed a serious asbestos-related disease could not bring a claim for fear of developing such disease. Pustejovsky, 35 S.W.3d at 648-50.

[FN62]. Id. at 650.

[FN63]. See Mark Ballard, Mississippi Becomes a Mecca for Tort Suits, Nat'l L.J., Apr. 27, 2001 (describing Mississippi as "mecca for plaintiff's lawyers"); Stephen Labatron, Top Asbestos Makers Agree to Settle 2 Large Lawsuits, N.Y. Times, Jan. 23, 2000, at 22.

[FN64]. See, e.g., Miss. Unif. R. of Cir. & County Ct. Prac. § 4.04A (requiring that discovery be completed within ninety days of filing of answer).

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[FN65]. According to one former Chief Justice of the Mississippi Supreme Court, the joinder rules were never intended to authorize the type of "quasi- class litigation" that takes place. Jerry Mitchell, Out-of-State Cases, In-State Headaches, Clarion-Ledger (Jackson, Miss.), June 17, 2001, at 1-A. If this multi-claimant litigation had been intended, a class action rule would have been proposed, according to another former Mississippi Supreme Court Chief Justice, who added that "(w)e did not favor class-action suits for reasons that it was burdensome, and our courts weren't equipped to handle them." Id. Other procedural mechanisms in Mississippi attract asbestos claimants. Labatron, supra note 63. For example, in Mississippi defendants have no right to perform medical exams. See id.

[FN66]. Civ. No. 95-0069 (Cir. Ct., Jefferson County, Miss. 1995).

[FN67]. Motion for Disqualification and Recusal of Judge at 5, Cosey, Civ. No. 95-0069 (hereinafter Motion to Recuse). Punitive damages were to be decided in a separate phase of the trial. Id.

[FN68]. Id. at 5-6; see also Hearings, supra note 3 (noting that the plaintiffs in Cosey, whose disease could not be detected by x-ray, were awarded between $2 million and $3.5 million each).

[FN69]. Motion to Recuse, supra note 67, at 6.

[FN70]. Labatron, supra note 63 (quoting Richard A. Weinberg, General Counsel for GAF Corp.).

[FN71]. See The Cloud Grows Darker over Our Judiciary System, The Times (Lamar County, Miss.), June 28, 2001 (describing efforts to sign up plaintiffs to bring suit in certain Mississippi counties).

[FN72]. Jerry Mitchell, Jefferson County Ground Zero for Cases, Clarion- Ledger (Jackson, Miss.), June 17, 2001, at 1-A. Since 1999, the number of plaintiffs that have filed suit in Jefferson County, Mississippi (more than 10,000), has outnumbered the total number of people in the county (9740). Id.

[FN73]. Third Amended Complaint 1, Ex. A at 1-31, Bankston v. Westinghouse Elec. Corp., No. 2000-17-CVI (Cir. Ct., Jones County, Miss. Mar. 20, 2001).

[FN74]. Amended Complaint 1, Ex. A at 1-146, Williams v. A.P. Green Indus., Inc., No. 2001-6-CV3 (Cir. Ct., Jones County, Miss. May 29, 2001).

[FN75]. No. 98-IA-0046-SCT, 2001 WL 83952 (Miss. Feb. 1, 2001).

[FN76]. Am. Bankers Ins. Co., 2001 WL 83952, at *1. Nevertheless, one current Supreme Court Justice has expressed support for a rule addressing who can access Mississippi courtrooms. See Toni Terrett, Supreme Court Justice Books Tort Reform, Clarion-Ledger (Jackson, Miss.), June 18, 2001.

[FN77]. See Preliminary Reply of the Respondent, A. Andrew MacQueen, with Objections and Motions at 5,

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Mobile Oil Corp. v. MacQueen, No. 29768 (W. Va. May 25, 2001) (hereinafter Preliminary Reply of Judge MacQueen).

[FN78]. Id.

[FN79]. Id.

[FN80]. Id.

[FN81]. West Virginia ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996).

[FN82]. MacQueen, 479 S.E.2d at 302.

[FN83]. Id.

[FN84]. Id. at 305.

[FN85]. Petition for Writ of Mandamus, Writ Granted as Moulded at 5, West Virginia ex rel. Ronald Allman v. MacQueen, No. 29767 (W. Va. July 6, 2001) (hereinafter W. Va. Mandamus Ruling).

[FN86]. Plaintiffs Represented by the Law Offices of Stuart Calwell, PLLC; Peyton, Parenti & Whittington; the Law Office of John E. Sutter; Hartley & O'Brien Law Offices; James F. Humphrey & Associates, L.C.; and Harvit & Schwartz, L.C.'s Memorandum in Support of Plaintiff's Earlier Motion for Mass Trial at 1, In re Asbestos Personal Injury Litigation, No. 00-Misc-222 (Cir. Ct. of Kanawha County, W. Va. Mar. 16, 2001) (hereinafter Plaintiffs' Motion for Mass Trial).

[FN87]. Id. at 2.

[FN88]. W. Va. Mandamus Ruling, supra note 85, at 5.

[FN89]. Preliminary Reply of Judge MacQueen, supra note 77, at 1-2.

[FN90]. W. Va. Mandamus Ruling, supra note 85, at 17.

[FN91]. Id. at 18. The West Virginia Supreme Court noted that it believed that any constitutional issues were premature because the specific types of trials to be held had not been decided yet. Id.

[FN92]. Memorandum and Opinion, In re Baltimore City Asbestos Personal Injury and Wrongful Death Cases, No.

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92344501 (Baltimore Cir. Ct. May 9, 2001). In order to avoid similar problems, the Baltimore court subsequently adopted an inactive docket similar to those used in Massachusetts and Cook County, Illinois. Id. at 2. Challenges to the viability of that inactive docket have been denied. Id.

[FN93]. Caitlin Francke, Asbestos Lawsuits to Be Settled, Baltimore Sun, Feb. 14, 2001, at 1-B, available at 2001 WL 6150935.

[FN94]. See generally Victor E. Schwartz et al., Medical Monitoring - Should Tort Law Say Yes?, 34 Wake Forest L. Rev. 1057, 1059-71 (1999) (discussing the case law on medical monitoring).

[FN95]. Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372. (S.D. W. Va. 1990), aff'd, 958 F.2d 36 (4th Cir. 1991).

[FN96]. 521 U.S. 424 (1997).

[FN97]. 45 U.S.C. §§ 51-60 (1994). FELA is a federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employer railroads. FELA is something like a tort equivalent of workers' compensation for the railroad field.

[FN98]. Buckley, 521 U.S. at 442-43.

[FN99]. Id. at 442.

[FN100]. Id.

[FN101]. Id. at 443-44. Similar concerns recently led the Nevada and Alabama Supreme Courts to reject medical monitoring in Badillo v. American Brands, Inc., 16 P.3d 435 (Nev. 2001), and Hinton ex rel. Hinton v. Monsanto Co., 2001 WL 1073699 (Ala. Sept. 14, 2001).

[FN102]. 993 S.W.2d 88 (Tex. 1999).

[FN103]. Temple-Inland, 993 S.W.2d at 93 (emphasis added).

[FN104]. See Restatement (Second) of Torts § 436A (1965) (stating that defendant should not be held liable for emotional disturbance absent physical injury); see also Purjet v. Hess Oil V.I. Corp., 1986 WL 1200, *4 (D.V.I. Jan. 8, 1986) (applying Virgin Islands law) ("We are bound, however, to follow the Restatement's rule that actual injury is an indispensable element of a tort cause of action," including medical monitoring claims.)

[FN105]. Temple-Inland, 993 S.W.2d at 93.

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[FN106]. See, e.g., W. Page Keeton et al., Prosser And Keeton on The Law of Torts 361 (5th ed. 1984) (stating that the majority of courts do not allow recovery for mental distress unless there is a physical injury).

[FN107]. Susan L. Martin & Jonathan D. Martin, Tort Actions for Medical Monitoring: Warranted or Wasteful?, 20 Colum. J. Envtl. L. 121, 130 (1995); see also Andrew R. Klein, Rethinking Medical Monitoring, 64 Brook. L. Rev. 1, 13 (1998) ("According to the United States Environmental Protection Agency ("EPA"), billions of pounds of hazardous chemicals are emitted into the air each year, and nearly twenty percent of the U.S. population (approximately 40 million people) live within four miles of a hazardous waste site that the EPA has placed on its National Priority List.") (footnotes omitted).

[FN108]. See Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442 (1997).

[FN109]. Approximately eighty percent of all standard medical testing is paid for by third-party insurance. 2 Enterprise Responsibility for Personal Injury--Reporters' Study 379 (1991).

[FN110]. Buckley, 521 U.S. at 443.

[FN111]. As one commentator has noted, "(t)he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible." Arvin Maskin et al., Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?, 27 Wm. Mitchell L. Rev. 521, 540-41 (2000).

[FN112]. George W.C. McCarter, Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation, 45 Rutgers L. Rev. 227, 257 n.158 (1993) (footnote in title omitted).

[FN113]. Bourgeois v. A.P. Green Indus., Inc., 97-3188, pp. 8-9 (La. 7/8/98), 716 So. 2d 355, 360. The court identified seven criteria that needed to be established:
(1) Significant exposure to a proven hazardous substance.
. . . .
(2) As a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
. . . .
(3) Plaintiff's risk of contracting such a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease.
. . . .
(4) A monitoring procedure exists that makes the early detection of the disease possible.
. . . .
(5) The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles.
. . . .
(6) The prescribed monitoring regime is different from that normally recommended in the absence of exposure.
. . . .
(7) There is some demonstrated clinical value in the early detection and diagnosis of the disease.
Bourgeois, pp. 9-11, 716 So. 2d at 360-61. To this list, the court added that the "costs must be both reasonable and limited in duration to the maximum latency period (if known) of the diseases for which there is an increased risk."

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Id. at p. 11, 716 So. 2d at 361.

[FN114]. La. Civ. Code Ann. art. 2315 (West 1997 & Supp. 2001) (emphasis added).

[FN115]. Bourgeois v. A.P. Green Indus., Inc., 2000-1528, pp. 11-12 (La. 4/3/01), 783 So. 2d 1251, 1260-61.

[FN116]. The court held that because the plaintiffs, before passage of the statute, had filed an amended petition alleging the seven criteria, they could pursue their medical monitoring claims. Bourgeois II, p. 12, 783 So. 2d at 1260-61; see Crooks v. Metro. Life Ins. Co., 2001-0466, pp. 3-4 (La. 5/25/01), 785 So. 2d 810, 812 (stating that the court should determine whether the seven criteria from Bourgeois I occurred before Act 989 went into effect).

[FN117]. See, e.g., Restatement of Torts § 908 cmt. a (1939) (noting that the functions of punitive damages are punishment and deterrence); Victor E. Schwartz et al., Prosser, Wade, and Schwartz's Cases and Materials On Torts 549 (10th ed. 2000) (describing the origin and purpose of punitive damages).

[FN118]. See 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."); 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."); 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."); 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 labeled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment.").

[FN119]. 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.").

[FN120]. 233 F.3d 809 (3d Cir. 2000), cert. denied sub nom., Collins v. Mac-Millan Bloedel, Inc., 121 S. Ct. 2216 (2001).

[FN121]. Collins, 233 F.3d at 810.

[FN122]. Id. at 812. Other courts have also severed punitive damages claims. For example, in Northampton County, Pennsylvania, Judge Panella severed all punitive damages claims from discovery, pre-trial motions and trial, ruling that any discovery with respect to punitive damages would not occur until after a plaintiff was successful on his compensatory damages claims. In re Asbestos Litig., No. C0048GV2001000003, slip. op. at 2 (Ct. of Common Pleas of Northampton County, Pa. Jan. 11, 2001).

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[FN123]. Finstad v. W.R. Grace & Co., 2000 MT 228, ¶ 7, 8 P.3d 778, 781.

[FN124]. Finstad, ¶ 46, 8 P.3d at 787.

[FN125]. Id. ¶ 40, 8 P.3d at 785.

[FN126]. Id. ¶¶ 48-49, 8 P.3d at 787.

[FN127]. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967) (noting that "a state otherwise willing to impose such self-denying limits might be disinclined to do so until assured that others would follow suit").

[FN128]. Plaintiffs' Motion for Mass Trial, supra note 86, at 7.

[FN129]. Id. at 7 n.3. In two separate opinions, the West Virginia Supreme Court of Appeals has reflected on this potential transfer of wealth in general. In Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991), the court stated:
State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the national economy and national welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.
Garnes, 413 S.E.2d at 905. Earlier in Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991), the court opined:
Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade- offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self- defense.
Blankenship, 406 S.E.2d. at 786.

[FN130]. See Labatron, supra note 63 (noting that these Mississippi cases involved almost 4000 plaintiffs from five states).

[FN131]. See id.

[FN132]. See id.

[FN133]. See id.

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[FN134]. See id.

[FN135]. Francis E. McGovern, Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation, 148 U. Pa. L. Rev. 1867, 1880 (2000). Professor McGovern stated that the "ubiquity and massness of the tort should lead to cooperation among judges." Id. at 1867. He proposed a cooperative strategy that judges can use to deal with the many problems associated with mass torts. Specifically, Professor McGovern offered four proposals: "(1) revise the MDL rule or approach to make the strategy explicit; (2) revise Rule 23 to allow for more comprehensive settlements; (3) provide institutional support for state judges and for cooperative efforts; and (4) revise the Manual for Complex Litigation to educate judges concerning cooperative institutional strategy." Id. at 1892.

[FN136]. Id. at 1867.

[FN137]. Id. at 1872.

[FN138]. Id. at 1886-87.

[FN139]. One solution of course would be to revise the multi-district litigation (MDL) rules to allow both state and federal claims to be transferred to a single judge. As Professor McGovern explains, "(i)f the MDL statute were amended to allow the transferee judge to oversee pretrial discovery for both federal and state cases, it would be possible to reduce much of the redundant discovery." Id. at 1892. Additionally, if the MDL judge had greater powers, such as the ability to defer aggregation or settlement until the marketplace has spoken, or to eliminate incentives to file claims prematurely (e.g., toll the statute of limitations), "then the premature massness that preempts a liability determination could be lessened." Id.

[FN140]. Professor McGovern conceptualizes a National Center for State Courts, funded by the State Justice Institute, which would establish an "institutional mechanism . . . to share information and provide limited support" so that there would be "a permanent method of insuring a more effective state marketplace of litigation." Id. at 1894.

[FN141].
527 U.S. 815 (1999).

[FN142]. Ortiz, 527 U.S. at 821; see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628-29 (1997) ("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.") (footnote omitted).

[FN143]. Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting) (footnote omitted), modified on other grounds, 13 F.3d 58 (3d Cir. 1993).

[FN144]. Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C., 133 F. Supp. 2d 747, 751 (D. Md. 2001).

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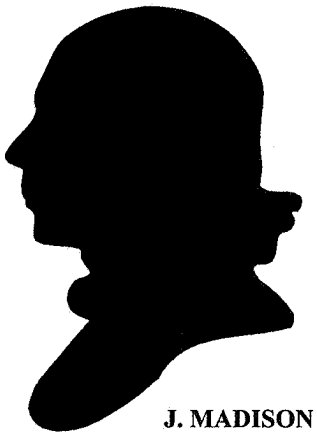
ASBESTOS LITIGATION AND THE ROLE OF COURTS



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ADDRESS:

TOWARD GREATER JUDICIAL LEADERSHIP ON ASBESTOS LITIGATION

By Steven Hantler, Assistant General Counsel, DaimlerChrysler.

This speech was delivered to the Alabama Lawyers Chapter of The Federalist Society, and as part of The Federalist Society's National Lawyers Convention in 2002.

It is always a privilege and an honor to appear before the Federalist Society. Justice Clarence Thomas once said that the debates of this Society spark "a dialogue between lawyers and judges, and even at times amongst judges themselves."[1] It is therefore fitting that the remarks that follow are directed to our Nation's state and federal judges.

There is a need—as never before—for judges to reflect, talk and lead in cleaning up the problem of asbestos litigation, the biggest single tort crisis in American history. I spotlight the role of the courts because the Congress has refused to act. Several years ago, the United States Supreme Court lamented that "[t]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."[2] Usually, when the Supreme Court speaks, Washington, D.C. listens. Three times, however, the nation's highest court has urgently pleaded for Congress to stem the flood of asbestos cases-each time, to no avail.[3]

Under our current, flawed system, healthy people are allowed to snatch compensation that rightfully belongs to the sick. America's stockholders and employees are threatened by bankrupting verdicts. America's leading corporations are treated as pinatas by irresponsible juries in a handful of notorious venues. And America's courts are buried under an avalanche of asbestos litigation.

While Congress refuses to act, however, some judges are assuming leadership and a growing number of their colleagues are heeding the call. For the sake of a still fragile national economic recovery, for the sake of injured plaintiffs and innocent defendants, the time has come for judges to take the lead.

The time has come for judges to take control of asbestos lawsuits, and impose standards of peer-reviewed science to medical claims. Judges

need to inform juries when other defendants settle out of a case—often the best evidence of which party was the most responsible; juries need to hear all of the facts in order to avoid gross over-compensation.

Judicial leadership in asbestos litigation has become a matter of urgent national importance. To explain why, allow me to briefly review how we got here and the magnitude of this crisis. I will then outline some of the roles that courts can play in working toward a just and equitable solution.

I. The Three Catastrophes of Asbestos Litigation

Anyone old enough to remember the 1970s recalls the appearance of strange, white-suited workers with respirators removing asbestos from one building after another. Asbestos seemed especially insidious because it was all around us—in our walls and ceilings, in our schools and factories. It was a secret thing, an unseen menace, yet it was everywhere.

We now know that in many instances it was safer to leave inert asbestos alone than to disturb it. However, time has only confirmed the link between asbestos and lung disease. This link was firmly established when inordinate numbers of shipyard workers who had installed asbestos-insulated pipes into U.S. warships during the Second World War contracted lung disease. Other workers in industries with high exposures to asbestos also showed signs of lung disease. Some suffered from severe asbestosis, a stiffening of lung tissue that can overwork the heart. Some suffered from a far worse condition, mesothelioma—a deadly malignancy.

The injury was real. The responsibility was undeniable. It is for cases like these that America's civil justice system exists. Trusts were set up and formulas devised to get compensation to injured people as expeditiously as possible.

What should have been a straightforward matter of justice and compensation, however, was complicated by inventive legal strategies driven more by the profit motive than any quest for justice. With the aging of potential plaintiffs, and the abandonment of widespread use of asbestos decades ago, one would expect cases to follow a bell-shaped curve, with the crest of the wave at least within sight. In fact, National Cancer Institute data shows the number of annual mesothelioma deaths declined in the 1990s.[4] A medical text described asbestosis as a "disappearing disease."[5]

The incidence of asbestos-related disease may be beginning to crest in life, but in law it is building to tsunami-like proportions. It is already at the heart of the longest-running mass tort litigation in U.S. history. Instead of decreasing, new cases continue to increase. Analysts believe

that some trusts could see 2.5 million claims in the near future.[6] This piling on has resulted in not one but three catastrophes.

A. The First Catastrophe: Stealing from the Sick

The sustained boom in asbestos litigation is happening, in large part, because trial lawyers began to actively recruit plaintiffs who, by any reasonable standard, are not sick, injured or even necessarily exposed to asbestos. Motions filed in federal court attest to the fact that across America, hordes of people have been lured into mobile vans to undergo free lung examinations performed by companies sponsored by trial lawyers. Before each exam, the prospective plaintiff is required to sign a representation contract, enrolling as a potential plaintiff.[7]

These plaintiffs are being signed up even though they do not have an asbestos-related disease. When independent academic researchers studied X-rays from the mid-1980s of tire workers (whose case had subsequently bankrupted a defendant), they found that "possibly 16, but more realistically 11 of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform material." Audits of claimants' X-rays in other cases have found similar disparities between diagnoses-from the highly dubious to the outright bogus.[8] "In many cases," writes Lester Brickman of the Benjamin N. Cardozo School of Law, "reading the X-ray is like taking a Rorschach test; whatever is there is totally in the eye of the beholder."[9]

Courts were clogged with cases involving plaintiffs with pleural plaques-a scarring of the lungs with many possible causes, and a syndrome that most doctors regard as harmless. More recently came cases filed by thousands of people who suffer from incipient or marginal asbestosis-a benign condition that bears at least a superficial resemblance to more than 130 lung inflammations, including those caused by smoking or airborne particles.[10] In the early 1980s, traditional plaintiffs-people with obvious asbestos exposure and disease-accounted for about three-quarters of expenditures. By 1997, Supreme Court Justice Stephen Breyer noted that "[u]p to half of asbestos claims are now being filed by people who have little or no physical impairment."[11] This disturbing trend has continued-more and more cases are being filed by plaintiffs who have not suffered an injury. In fact, the RAND Institute for Civil Justice estimates that nonmalignant cases now account for 90 percent of filings.[12]

So what should have been a large, but finite, group of plaintiffs-persons who had actually suffered a legally cognizable injury from their exposure to asbestos-has taken on freakish proportions. RAND reports that more than 500,000 claimants have filed asbestos-related litigation, typically against several dozen defendants. At least five companies have

been hit with at least 300,000 claims each, with some reporting more than 500,000 claims. Three bankruptcy trusts have received 360,000 claims or more.[13]

The ever-expanding pool of asbestos plaintiffs is attributable to the fact that asbestos litigation is a very profitable industry for trial lawyers. As Stephen Kazan, a leading plaintiffs' attorney, has candidly explained: "The asbestos companies are really cash cows that we should care for and cultivate so we can milk them for years as we need to. But I have colleagues who would rather kill them, cut them up and put them on the grill now. We'd all have a great time, but there are people who would be hungry in five years."[14]

The tragedy is that as plaintiffs' lawyers enroll the healthy and those with minor complaints into their lawsuits in order to line their own pockets, less and less money has been available for those who are actually sick and dying. The Manville Trust—set up to compensate the injured—can now only pay out about 5 cents on the dollar to sick people.[15] Moreover, for someone suffering from mesothelioma, justice delayed is truly justice denied. But, because of the jamming of dockets with meritless cases, asbestos lawsuits, according to Justice Stephen Breyer, "are subject to a delay that is twice that of other civil suits."[16]

The U.S. Supreme Court was so alarmed by this state of affairs that—11 years ago—it empanelled the Judicial Ad Hoc Committee on Asbestos Litigation to rationalize the system. This panel of jurists found that "unless Congress acts to formulate a national solution . . . all resources for payment will be exhausted . . . That will leave many thousands of severely damaged Americans with no resource at all."[17] Unfortunately, for the genuinely sick, that day is here.

B. The Second Catastrophe: Targeting the U.S. Economy

The biggest threat to our economic health may not be the ebbing recession or Enron-like accounting scandals. As incredible as it may seem at first glance, asbestos litigation is emerging as a prime threat to corporate investment and renewed job creation. Consider the following disasters:

- The California Northridge earthquake, which devastated much of the Los Angeles area, cost insurers $17 billion.
- Hurricane Andrew, which ravaged the Southeast, cost insurers $21 billion.
- The September 11th terrorist attacks cost insurers $43 billion.
- Asbestos litigation will cost insurers alone $130 billion. Total costs for insurers and defendant corporations could reach as high as $200 billion.[18]

Where will those billions come from?

As professor Christopher Edley, Jr. of Harvard Law School has noted, "[t]here is no 'asbestos industry' anymore. . . . And many, perhaps most, of today's defendants cannot accurately be described as 'asbestos companies.'"[19] Nonetheless, more than 1,000 American corporations, across half of the Department of Commerce's industrial categories, today find themselves in the crosshairs of asbestos litigation firms.[20] U.S. insurers have spent approximately $21.6 billion on asbestos claims to date. At least five companies reported spending more than $1 billion in asbestos litigation costs prior to filing for bankruptcy.[21]

Following the bankruptcy of Johns-Manville, once ranked 181st on the Fortune 500 list, companies have fallen like tenpins.[22] Since January 2000, at least 16 asbestos defendants have entered Chapter 11, including boilermaker Babcock & Wilcox; glassmaker Pittsburgh Corning; insulation maker Owens Corning; floor manufacturer Armstrong World Industries; roofing-materials firm G-I Holdings; chemical giant W.R. Grace; construction-materials manufacturer USG Corp.; auto-parts conglomerate Federal-Mogul Corp; and most recently, Kaiser Aluminum Corp. of Houston, employer of 6,000 people.

Owens Corning's general counsel, Maura Ablyn Smith, explained why the company that invented glass fiber had to file for bankruptcy. "We looked at our position and said, 'We can't be paying $27 million to $30 million for 10 to 12 individual plaintiffs—even if they were sick.'

That would be an incredible amount of money to have to pay out per person for a company that was [already] trying to meet its obligations to hundreds of thousands of people."[23]

In the asbestos feeding frenzy, small companies are treated like hors d'oeuvres. One Lancaster, Pennsylvania insulation contractor, which had never performed contracts at any of the sites where the plaintiffs worked, and sold few asbestos-containing products anywhere, was dragged into a courthouse in Mississippi. The jury slammed this little company with an $83 million judgment that was ten times its valuation.[24] Many such companies close their doors, unable to even afford the appeal bond some states require. Companies that merge to become more competitive (like Halliburton, which acquired Dresser Industries in 1998) often find that they have connected themselves to huge and unforeseen liabilities.

As company valuations are hit hard, loyal employees are the real losers. When Federal-Mogul filed for bankruptcy, its employees—who held 16 percent of the company's stock—saw their assets fall by 99 percent. About 14 percent of Owens Corning's shares—which lost 97 percent of their value in the two years before its filing—were owned by employees. Hardest hit are those building savings through Employee Stock Ownership Plans and 401(k) plans.[25]

RAND reports that "[b]oth plaintiff and defense attorneys also told us that as one defendant has followed another into Chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants."[26] Or as the CEO of now-bankrupt Federal-Mogul grimly joked, "The last man standing gets to pay the entire liability."[27]

As a result, companies that seem unlikely or at least tangential targets—from Chiquita Brands, to General Electric, to Sears Roebuck—have been hit with asbestos suits seeking huge damages. Ford Motor, General Motors and DaimlerChrysler have seen claims alleging injury by auto mechanics from asbestos in brakes and clutches rise significantly over the last two years,[28] although about a dozen, well-controlled epidemiological studies have come to the remarkably consistent finding that there is no relationship between exposure to trace amounts of asbestos during brake-repair work and disease.[29] In fact, auto mechanics are somewhat less likely to develop mesotheliomas than people in other occupations, including teachers, librarians and secretaries.[30]

C. The Third Catastrophe: Degrading the Law

The Supreme Court's ad hoc committee determined that: "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."[31] And that was more than a decade ago. As this "elephantine mass" of asbestos litigation overwhelms dockets, judges are pressured to let standards of due process slip in the name of administrative fairness. The worst abuses arise from absurd extremes of venue shopping, referred to as "magic jurisdictions" by Mississippi state attorney general Mike Moore.[32] One such venue, the courthouse in rural Jefferson County, between 1995 and 2000, has processed twice as many plaintiffs as its county has residents.[33] Dick Scruggs has posed the question, "Why don't defendants try more cases if they are sure the science is on their side and if they are sure the plaintiffs are not sick?" The answer in many cases is these "magic jurisdictions." I'd like to quote from an esteemed member of the Mississippi bar about these magic jurisdictions: "There, where the judiciary is elected with verdict money, the trial lawyers have established relationships with the judges. They've got large populations of voters who are in on the deal. And it's almost impossible to get a fair trial if you're a defendant in some of these places. It's pretty tough to handle a $100- or $500 million judgment. It ties up your credit, your company. Stock gets hard-hit and they're forced into a settlement. Any lawyer fresh out of law school can walk in there and win the case, so

it doesn't matter what the evidence or the law is."[34]

In the name of efficiency, courts often allow small and questionable venues like these to handle some of the biggest collections of cases—thereby setting national standards. In the name of efficiency, courts tolerate the acceptance of standards of proof that are minimal to non-existent. In the name of efficiency, courts are allowing cases for healthy claimants to move forward absent any proof of any injury or even connection to a defendant's products.[35] In the name of efficiency, the courts allow plaintiffs' attorneys to seek batch settlements by lumping a few very sick people with many without symptoms—a cynical use of the dying as "trump cards" to up the ante for meritless cases.

Then there is the question of causation. In the name of efficiency, all lung abnormalities are presumed to be caused by the defendant's products, even if the plaintiff is a smoker. Moreover, in many cases, plaintiffs cannot remember which asbestos product—if any—they might have been exposed to decades ago. To skirt this problem, many courts have simply relaxed the standards of proof to a degree to which practically any asbestos defendant can be linked to any plaintiff's injury. Trial lawyers facilitate this end-run around traditional tort principles by essentially advising their clients to lie. One memo handed out to asbestos plaintiffs, later revealed in court, advises claimants: "Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case. You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered . . . ."[36]

When it comes to obvious manufacturing of plaintiffs, too many judges are looking the other way. Claims based on shoddy medical exams, the fruit of free mass screenings, are accepted at face value. Federal Judge Charles R. Weiner concluded: "The court finds that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."[37] Judges, concerned that some defendants may go bankrupt before a plaintiff develops a disease, have even allowed large verdicts to go to plaintiffs who seek compensation for their *fear* of cancer. In some states, nonmalignant cases outnumber cancer cases by margins as wide as 47 to 1.[38]

The courts—again, in the interest of administrative efficiency—are also ignoring their mandate under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Under *Daubert,* now part of Rule 702, a plaintiff must show that the defendant's product was more likely than not the cause

of the disease. The Supreme Court also directed the lower courts to act as "gatekeepers" to ensure that scientific evidence is not only relevant, but also reliable.[39] In fact, Supreme Court rulings and Federal Rules of Evidence make it clear that such judicial "gatekeeping" is not only desirable, it is required. Expert opinion evidence must be rejected when "there is simply too great an analytical gap between the data and the opinion proffered."[40] If any batch of cases has ever met this condition, asbestos is it.

II. Time For Judges To Take Control

One judge, Reynaldo Garza, said: "I implore the Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved. Congress alone has the power to devise a system . . . in response to the asbestos litigation crisis."[41] In many ways, Judge Garza is right. So was the U.S. Supreme Court. Only Congress can enact national reforms that cut to the heart of the asbestos litigation problem.

Congress should establish objective medical criteria for asbestos-related impairments. Congress should set standards to eliminate abusive forum shopping, so that the whole U.S. judicial system does not tilt toward a handful of small jurisdictions well-known for their propensity to lavish huge awards on questionable claims. Congress should limit lawyers' fees in asbestos litigation cases to the same pay-outs delivered in workers' compensation cases. And Congress should enact a uniform national statute of limitations that reasonably accommodates latent disease claims, so that healthy plaintiffs who have a legitimate fear of later developing asbestos-related illnesses won't be stampeded by fear into crowding the dockets.

All of these are good and necessary reforms. But despite pleas from the Supreme Court and elsewhere, Congress has been unable, or unwilling, to act. As a result, the time has come for the courts to exercise greater responsibility in managing the flood of asbestos litigation.

- Judges should refuse to allow plaintiffs' attorneys to park cases packed with specious claims for the express purpose of gaining economic leverage over defendants.
- Judges should use the tools available in their jurisdictions to batch similar cases so that *Daubert* standards can be applied to them. In a mass-tort context, that is the only way to obtain, as one legal expert put it, "a single, uniform, fair, and efficient resolution of all claims growing out of a set of [related] events."[42]
- Judges should broom out their dockets. Where no disease exists, no case should either. Judges should either transfer these cases

to an inactive file (so they can be reactivated if healthy plaintiffs should develop an asbestos-related disease after the tolling of the statute of limitations), or dismiss them without prejudice.

- Judges need to inform juries when other defendants settle out of a case—often the best evidence of which party was most responsible; juries need to hear the all of the facts in order to avoid over-compensation.
- Judges should place limits on punitive awards. Defendants deserve to be protected from excessive awards. We also need to ensure the first plaintiff to the courthouse—or the one who happens to file in a "magic jurisdiction"—doesn't walk away with tens of millions of dollars, at the expense of future plaintiffs.

Above all, judges should do the job the Supreme Court assigned to them. For the sake of the injured, for the sake of the economy, and for the sake of the law itself, it is time for judges to become the nation's gatekeepers. The courts must stem the tide of abusive asbestos litigation before it overwhelms us all.

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[1] www.fed-soc.org/whatpeoplearesaying.htm (last visited June 26, 2002).
[2] *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 821 (1999).
[3] *See generally* www.asbestossolution.org.
[4] SEER Data, National Cancer Institute *available at* http://seer.cancer.gov.
[5] *See* W. Raymond Parkes, Occupational Lung Disorders 464-78 (3d ed. 1994).
[6] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 12 (RAND Inst. for Civil Justice Aug., 2001).
[7] Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise,* L.A. Times, Dec. 17, 2001, at A1.
[8] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p. 154. For an excellent discussion, *see* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation,* 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 281-94 (2001).
[9] Brickman, 26 WM. & MARY ENVTL. L. & POL'Y REV. at 283.
[10] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, *at* p. 154.
[11] *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (citing Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis,* 30 HARV. J. LEGIS. 383, 384, 393 (1993)).
[12] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 29 (RAND Inst. for Civil Justice Aug., 2001).
[13] *Id.* at 3.
[14] Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise,* L.A. Times, Dec. 17, 2001, at A1.
[15] David Austern, *Mem. to Attorneys Who File Manville Trust Claims,* Claims Resolution Mgmt. Corp., Jun. 21, 2001; *see also,* Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 13 (RAND Inst. for Civil Justice Aug., 2001).
[16] *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part).

[17] Report of the U.S. Judicial Ad Hoc Committee on Asbestos Litigation (1991).
[18] Michael Freedman, *The Tort Mess is Worse Than You Think: Out-of-Control Lawsuits Are Shutting Down Medical Practices, Killing Businesses and Costing the Economy $200 Billion a Year,* Forbes, May 13, 2002, at p. 90.
[19] Christopher Edley, Testimony before the Judiciary Committee of the House of Representatives, (1999), quoted in Douglas McLeod, *Asbestos continues to bite industry,* Business Insurance, Jan. 8, 2001.
[20] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 11 (RAND Inst. for Civil Justice Aug., 2001).
[21] *Ibid.* at 8-9.
[22] See Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p. 154.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 25 (RAND Inst. for Civil Justice Aug., 2001).
[27] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p. 154.
[28] *Ibid.*
[29] To name three: Kay Teschke et al., *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88, CANADIAN J. PUB. HEALTH 163 (1997); Robert Spirtas et al., *Malignant Mesothelioma: Attributable Risk of Asbestos Exposure,* 51 J. OCC & ENVTL. MED. 804 (1994); Aaron Blair et al., *Mortality Patterns of U.S. Veterans by Occupation,* 75 J. NCI 1039 (1985).
[30] Otto Wong, *Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence,* 34 REG. TOXIC. & PHARM. 170, 174 (2001); *see also* Kay Teschke, et al. *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos,* 88 CANADIAN J. PUB HEALTH 163 (1997).
[31] Report of the U.S. Judicial Ad Hoc Committee on Asbestos Litigation (1991).
[32] John Porretto, *Moore says serious discussions needed on tort reform,* AP Business Wire, June 9, 2002.
[33] Robert Pear, *Mississippi Gaining As Lawsuit Mecca,* N.Y. Times, Aug. 20, 2001, at A1.
[34] See Richard Scruggs original quotation in Additional Materials section.
[35] For a discussion of the "special asbestos law" created by courts for this purpose, see Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?,* 13 CARDOZO L. REV., 1819, 1840-52 (1992).
[36] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p.154. For a detailed discussion of how medical evidence is used, see Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation,* 26 WM. & MARY ENVTL. L. & POL'Y REV. at 273-81.
[37] Admin. Order No. 8, *In re: Asbestos Prods. Liab. Litig. (No. VI),* MDL No. 875 (E.D. Pa.), entered Jan. 16, 2002.
[38] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p.154
[39] *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993)
[40] *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997)
[41] *Cimino v. Raymark Indus.,* 151 F.3d 297, 339 (5th Cir. 1998) (Garza, J., concurring)
[42] Edward H. Cooper, *The (Cloudy) Future of Class Actions,* 40 ARIZ. L. REV. 923, 947 (1998).

ADDITIONAL MATERIALS:

The following is excerpted from a program held Tuesday, June 18, 2002 at the National Press Club in Washington, D.C.

MR. FRED BARON: I represent people. They are ordinary, everyday people who go to work and do what they are told, and unbeknownst to them, were for years exposed on a daily basis to an extremely hazardous material, asbestos. Each of the people I represent has been diagnosed with some form of an asbestos-related disease. I represent people who come to my office complaining: "Wait a minute, I just went to work. Nobody told me asbestos was there on the job; if they had told me about it, I would have done something to protect myself. Unlike tobacco, I am not addicted to asbestos. I would have avoided it because I do not want to have the problems that I am now having." That is what I routinely hear.

My job as a lawyer for victims is to find a way to deal with their individual problems. So, when I look at the issue of asbestos litigation, I view it as a sad human tragedy because even a cursory review of the history of asbestos-related diseases, clearly shows that by at least the turn of the last century, in the United Kingdom, and certainly, by the '20s, and if you want to stretch it, the '30s and '40s, in the U.S., there was no question but that exposure to asbestos could cause fatal diseases.

Asbestos, though, is different than most other hazards that kill you because it takes a very long time to happen. When you are exposed to asbestos—and particularly nowadays, when exposures are not particularly heavy, it can take 30 or 40 years for the disease manifest. There are two types of diseases: malignant and non-malignant. In most of the asbestos malignancies, life expectancy is less than a year. Non-malignant disease, some believe that non-malignant asbestos diseases are worse because they always progress, they are irreversible, and they can be terminal if you do not die of something else first.

So, again, my job as a plaintiff's lawyer is to help each individual family that is faced with the reality of asbestos related injuries. Of course, the issues, such as fair allocation of assets and other similar issues are indeed very significant problems that I have to be concerned about. But like so many of you in the Federalist Society, I believe in the efficacy of state law. I particularly believe in the importance of state common law, interpreted by in the state courts. I believe that people who work hard, pay their taxes and are good citizens have an absolute right to use the state courts to adjudicate whatever claims they have, legitimate or otherwise.

I would like to try to debunk some of the myths that seem to surround asbestos litigation.

Myth 1: Plaintiffs' lawyers notoriously go out with x-ray vans, find people who work in factories, and develop large numbers of clients. Quite honestly, I am offended when somebody criticizes me for providing free medical services to a person who is working in a factory and who has been exposed to asbestos. If you are an executive at a company, you are probably going to get a free physical every year, and it is probably going to be the best doctor in the city. But if you are working in some industrial facility, maybe a petroleum plant in Brazoria County, Texas, you are not likely to have ready access to free medical examinations by specialists.

Hundreds and hundreds of people who have developed cancer have first learned that they had cancer, hopefully early enough to save their life, as a result of x-ray screenings that were provided either by their union or by plaintiff's counsel. I am offended when people tell me that, "it's terrible that you are giving free medical treatment to working people who end up filing suits." I do not buy that argument. When a victim is diagnosed with a disease and somebody is legally responsible under state law, there should be no barrier to that individual filing a suit to reclaim their rights.

Myth 2: Unimpaired asbestos claimants are flooding the courts. Let me stop for a minute before I discuss this issue. I have a genetic defect: I went to law school. That defect causes all kinds of problems, as so many of us know, but it particularly binds those of us who have it to the doctrine that we were taught in our torts course in our first year: "If someone does something negligently and causes injury to another person, that person is entitled to seek recompense in court." I can't remember anything in the law anywhere that says "if someone does something negligently and causes impairment to somebody, only then can that person can seek recompense."

It is like somebody is trying to re-write the law only as it applies to asbestos injuries. Many of us know that people who are involved in automobile accidents often develop a sore neck. Maybe that is a minor injury but we all agree that the injured party is absolutely entitled to recover whatever medical expenses and other damages from that injury. There is no requirement that the injured party lose work. There is no requirement of total disability. So why is it now that some of our great scholars are telling us that asbestos injury cases, unlike auto injury cases, should not be filed unless the plaintiff is impaired? There is absolutely no such requirement under any state law. Yes, I do represent people who are at the beginning stages of non-malignant asbestos-related diseases who are not yet impaired. These people should have the same rights as anyone who is involved in an automobile accident to file a claim for recompense. Juries evaluate those cases all the time.

Myth 3: New non-traditional companies are being wrongfully added to the litigation. Who are these "new defendants?" Obviously the old

defendants were the manufacturers of asbestos, who manufactured this horrible material and put it onto the stream of commerce. It is a fact that more people ultimately died from asbestos-related disease as a result of working in the shipyards in World War II, than died in the United States Navy during the War.

In the early stages of asbestos litigation, it was easy for us to just sue only the manufacturers because they were clearly liable. They never warned anybody; they never told anybody of the deadly hazards that they had internally identified. But, unfortunately most of these companies have sought protection under Chapter 11 of the bankruptcy code. I would emphasize that Chapter 11 reorganization has been the route that most of these manufacturers have taken—Johns Manville today, as you probably know, is owned by Berkshire Hathaway and employs more people than it did when it went into bankruptcy in 1982. In these reorganizations, companies put up some money and their stock into a trust for victims and re-enter the open market—so nobody is losing jobs in asbestos-related bankruptcies. So as counsel for victims it is our job to look for other defendants who are legally responsible under the laws of the state that are applicable.

I do not see any great problem with us doing that. That is what we are paid to do. When somebody comes in my office and says, "I have got an asbestos-related disease and I want to sue somebody for my losses because I want to be sure my family is taken care of," it is my job to identify defendants who are legally liable under the laws of the applicable jurisdiction. If they are not legally liable, the odds are that they will get out of the case.

Myth 4: Anybody exposed person can file a case even if they are not ill: If my client cannot prove that he has an asbestos-related disease, we are going to lose the case. It is totally false to believe that claimants are people that just come in off the street and say, "I was exposed to asbestos," and then file a lawsuit. In all 50 states, it is required that the plaintiff produce qualified medical testimony that he has an asbestos-related disease before a case can get past summary judgment.

In summary, I am a believer that the state laws work and that it should remain intact and not be operated under a different set of values for asbestos victims who have worked hard all of their lives and are now merely trying to redeem their rights, as they are entitled to under our Constitution.

Myth 5: The courts are hopelessly clogged with asbestos cases. Although commentators speculate about clogged courts, the best source of empirical data on this issue is a journal that is published every year that tracks each of the state and federal court trials in asbestos cases every year. Let me give you some quick statistics. During the year 2001, there were

61 asbestos trials in all 50 states in all the state and federal courts. The year before, there were 55 trials. The year before that, there were 52. Last year, about 35,000 claims settled. The year before that, it was about the same number. Does this system work? Are the courts clogged? Any system that produces 35,000 settlements without the necessity for a trial, and only 60 trials per year in all of the state and federal courts in the United States, is, in my judgment, working very well.

So, what is the pressing problem with this litigation? The problem is simply that there are too many victims of asbestos disease and too great a need to find adequate resources for the victims. The asbestos defendants and the insurance companies who insure them do not like that fact and the unfortunate truth that they cannot see light at the end of the tunnel. I sympathize with that; if I was representing a large company that had a significant asbestos liability, I would be concerned, too.

But, by and large, the position papers that have been sent out by industry advocates have been dramatically misleading—and when I say "sent out" I mean it literally—in Texas. I started getting calls from judges telling me that they were getting inundated with literature, mailed, *ex parte,* from lawyers for the asbestos defendants, telling them how they should do their jobs as judges, which, needless to say, they found offensive. I was amazed that somebody would have the chutzpa to send out such *ex parte* communications to judges telling them how to do their jobs. But, it is still happening. I believe the spin meisters on K Street in Washington, D.C. have made more money from asbestos litigation than probably any other faction of this whole industry. Every year, K Street hucksters promise that they can deliver restrictive legislation. Their clients want a fix. And every year they are promised a strong public relations campaign to make it look like all the plaintiffs are not sick, that the courts are clogged, and there is a major crisis in asbestos litigation.

If you are a client of these PR and lobby firms, I have got to tell you, before you fall for that song and dance and before you write your checks, take a look at history. Asbestos legislation was first proposed in 1979 by Millicent Fenwick, a House member from Manville, New Jersey. She tried her best to create what was then called the White Lung Act, not unlike the recently passed Black Lung Bill for coal miners. By the way, the coalminers' bill estimated to cost $300 million a year at the time of its passage. By the early '80s, its actual cost was over a billion dollars per year. By now, it is a couple of billion dollars a year. Congress would not legislate asbestos then and certainly in this atmosphere, with tight budgets and deficit spending, it will not do it now. After 20 plus years of repeated efforts to get restrictive legislation, and 20 plus years of failure, I think it is very unlikely that anything will happen on Capitol Hill regarding an asbestos litigation "fix."

So, what has been the fallback position of the industry advocates? Try to pollute the jury pool through national public relations campaigns complaining about how the system is being manipulated by uninjured victims and greedy lawyers. Trust me, if the system were indeed being manipulated, the state courts would have straightened it out by now. Occasionally there are some aberrant verdicts and there are indeed some cases where people get a large sum of money when they really do not have a significant injury. But, in my judgment, those represent only two, three, four, perhaps five individual cases every year of the tens of thousands that are resolved each year. Any system that delivers 99.99 percent appropriateness is a pretty damned good system. In reality those big verdicts for people who do not seem to be particularly injured that you hear about all the time almost always get reversed. Anecdotal cases should not be the basis to formulate public policy.

In conclusion, the thought that I would leave you with is that before you start drawing conclusions about how asbestos litigation actually works (or doesn't) to compensate victims-and particularly the myths that I have identified-take a closer look at the facts, and take a closer look at what really happens. When you look under the covers, you are going to see something very different than has been presented by those who have a private rather than public agenda.

PROFESSOR THEODORE EISENBERG: I am an empiricist. Most of my scholarship counts things, and I find asbestos a little frustrating in that some of the best studies on asbestos done by, for example, the Rand Institute for Civil Justice, say how difficult it is to know what is going on in the asbestos world. There seems to be agreement that there is something going on that is very significant.

Our legal system is simply deficient in the way it gathers data, because I do not think anyone really knows the number of asbestos cases, or the number of future asbestos cases, or the number of settlements. And, asbestos is one of the most studied areas. I think the implications for other mass torts, or the mass torts of the future, are a little discouraging because it may be that we are ten years into a crisis before we even know what is going on. As some of you may know, the Administrative Office of U.S. Courts created a category for asbestos in the late '70s or early '80s, but we do not know what was happening before then, and only for asbestos do we know now. We do not even know the number of cases in other mass tort areas.

What we have in asbestos is an illustration that in some sense is truly frightening. And that is, what if we actually sought to achieve justice for everyone who was harmed? What if everyone exposed to asbestos, or if not impaired in the sense of being able perform life functions, impaired in

that under state law they are entitled to recover something—the vast majority of asbestos victims—filed a claim? We see a system that to some people is just broken down. At least to most neutral observers, it is in need of serious study, if not reform.

What if we really had a system where victims—not just of asbestos but of everything—systematically abandoned their low rates of litigation and really did file and try to seek justice? I think the asbestos crisis gives us a little bit of a hint that we just cannot afford that system. We cannot afford mass justice for every tort that occurs in society, and asbestos may be this frightening window on what happens when we become serious about providing mass justice. I am not sure if it should be frightening, but we should be prepared to recognize that full compensation for all harms is not easily attained, nor perhaps do we really want to attain it as a society.

What solutions have been proposed for asbestos? There, it seems to me, I have one comment and one set of skepticisms. It is sort of interesting to me that the legislative solutions are written off—"It's not going to happen," or, I guess from others, we get "Perhaps it shouldn't happen; the judges can handle it." It seems to me that the judges handling the litigation provide an interesting angle on how we feel about, for want of a better term, judicial activism—if people do come in with what is a traditional claim under state law and we have creative solutions that may well be the right solutions. If the judge says, "You have a valid claim under state law, but you're not as sick as this other guy, so I am going to move this claim ahead of yours and you are not going to get paid anything." That may be the right answer from the point of view of justice and economic efficiency. But it is hard to see how judges have the authority to do that.

If the traditional tort law of a state is that if you have got a claim within the meaning of Texas law, you come to court and you get paid, I do not think there is anything in Texas law that says the sickest get paid first. I do not think there is anything in Texas law that says the judge gets to decide which of the suits that get filed get treated better, more quickly, or more efficiently than others. The more creative judges, like Judge Weinstein, have been highly criticized for their creativity.

If we were writing on a slate in which we think that judicial creativity is the answer to the asbestos crisis, we ought to at least pause to think that somewhere down the line, someone is going to say that those judges are activists. That is because they have ignored the law of the state or imposed their own vision of justice, when the people speaking through their legislature or through the common law really have a different set of rules. Judges who do that are probably going to pay a price in reputation with at least some groups.

This leads one to ask the question, why is legislation not on the table here? Perhaps people are just more realistic and it just cannot happen.

Why not? Well, one reason, it seems to me, is a fairly common pattern, and that is the legislature and perhaps also the executive really like having the courts—and if not just the courts, juries especially—as the fall guys.

It is really very convenient to say "It's terribly complicated; we will leave it to the courts, and business, you should really be upset with those judges and those juries because they are the ones that caused that problem. If we could just have good judges and juries, everything would be okay." And the legislature and the executive remain stunningly silent on what is recognized as a widespread social problem. I think the political economy of asbestos plays out the way a lot of things do.

The other branches like the courts as fall guys. The courts cannot stand up for themselves; they are very weak at defending themselves; they have a lot less lobbying power. And juries are the weakest of all. They are not repeat players and they do not have offices. Very few people stand in the shoes of jurors and try to represent them in the national scene.

Then, I take a step back. What would legislation look like if we could get it? Suppose we could push a button and say, "You will legislate." It seems to me that asbestos raises an enormous set of problems. Just to highlight one, that is the problem of long-range planning.

Let us say serious asbestos litigation was born in the 1970s and blossomed in the 1980s. You can say, "Well, I have a crystal ball and I can see that in 2002, we may be less than halfway through cycling the asbestos claims through; let's sit down in 1982 and plan for 20 years in the future." If you really have a major social problem that requires 20 years of foresight, I think that is pretty close to hopeless because I do not know anyone who can plan well 20 years ahead.

We can barely do it—and I am not sure we do it so well—for social security, where things seem to be almost purely numerical. Social security does not have all the issues that asbestos litigation has. So, if you think of your own life, what did things look like five years ago compared to today? Did you have any idea 20 years ago where you would be today? Do you want to sit down and project what should be solved for society 20 years from now? To the extent that we have long-range planning needs for major social problems, that is the nature of asbestos, I guess.

The following is excerpted from a panel held at The Federalist Society's National Lawyers Convention on November 14, 2002.

MR. RICHARD SCRUGGS: Along about the late 1980s, early 1990s, one of the defendants—paradoxically, Owings-Corning—started an outreach program. Owings-Corning was a traditional defendant. The company manufactured thermal insulation products containing asbestos, and

decided that it was paying too much of the asbestos load. So, they took it on themselves to discover all of the other companies that sold products that contained asbestos and put the finger on them. As a result of the so-called outreach program by Owings-Corning, the asbestos litigation proliferated to companies that had theretofore been ignored and not been sued, but nevertheless probably had some liability and should have been responsive to some of the claims of people who were injured by asbestos-containing products.

That is especially true as some of the more traditional asbestos defendants, like Johns Manville, went into bankruptcy. Owings-Corning exhausted its assets and insurance paying claims. It was a very widespread problem, and companies that sold asbestos-containing products need to step up.

You have to remember what we all learned—those of you who are lawyers—in law school about the whole theory of products liability law. That is to spread the loss over society. The innocent workers, the shipyard workers, thousands of whom I represented, were exposed to asbestos, not knowing the product was dangerous and was going to cause them cancer and various other lung illnesses years later. They were innocent in the deal. As between a worker who is innocent and someone who sells a product, makes money on it, and has an obligation to know the dangers or the propensities of that product, I think that company ought to pay for the illness as opposed to the worker. I think that is why the asbestos litigation has evolved to this point.

I think it is a fair criticism that asbestos litigation has somewhat evolved into the endless search for the solvent bystander. There are many companies that probably should not be liable because their responsibility to the various people who had just very insubstantial exposure was probably insubstantial in itself.

But what has happened now is that asbestos litigation has not become just a legal issue, and that is one of the reasons a lot of you are here. It is a political issue. There is an element of politics in the litigation because trial lawyers bringing asbestos cases are generally perceived to be supporters of Democratic candidates.

It may be something that happens, but it is bad public policy to start special legislation for one industry, or for any industry. The American civil justice system is a wonderful mechanism; it is not perfect. It is sort of like Democracy. Like Winston Churchill said, "It is the worst system except for all the rest."

As a societal regulatory mechanism, the courts have served us well. They have served as a safety net for abuses of government or inaction by government. Now that we have got closely divided government—we have got a Senate that is almost even, we have a House that is almost even,

a president who won narrowly—and as a result of that, we have impasse in the legislative branch. Normally, when you have that and you have powerful societal issues, there is a default to the courts, to the civil justice system, to remedy those perceived defaults.

The argument that, "Well, no action by the legislature is action"—that the status quo is acceptable—is really a false argument. Nobody likes the status quo. That is when the courts end up having to be the safety net to change things. We would not have many of the civil liberties that we have today if it were not for the courts correcting things that the legislative or executive branches of government failed to act on.

One of the things that I find a bit amusing is the complaint that the litigation has proliferated to defendants that have no liability and is being brought by victims who have no illness. If that is true, then the cases should be able to be successfully defended.

The companies that are being sued are enormously wealthy, by and large. They have huge insurance policies. They hire the best and brightest lawyers to defend their cases. If the cases are so frivolous, why don't they try them?

I have great confidence in the American jury system. I can promise you that the typical American jury in a tort case is far better informed about the issues at the end of a trial than the American electorate is after a campaign before they vote. There is no question about. The adversarial system works.

So, the idea that the jury's discretion should be limited is no more persuasive to me than the notion that the electorate at large should be limited. There are many on juries that are uneducated, perhaps, but there is a huge difference between education and intelligence. I have a great deal of confidence in the basic intelligence and common sense of the American jury.

Good lawyers can defend bad cases. They should be able to defend bad cases. One of the problems that virtually no one addresses now is that the big law firm defense model, the business model rather, of the large defense firms is process-oriented. The longer they can protract the case and drag it out, the more money they make. Their business model is based not on success, but on process. I think that it is essentially a willful refusal by very bright, educated defense lawyers to find solutions. There is no reason in the world why lawyers of that caliber, with that intellect, cannot come up with clever ways or ingenious ways to resolve mass tort litigation.

We just did that, for example, in the Sulzer orthopedic hip implant litigation. Sulzer, a Swiss company, sold artificial hips and knees that were defective, and had to be recalled, after some 30,000 had been implanted in Americans. A storm of lawsuits followed. People were

advertising for cases all over the country. Thousands of cases were being filed in various courts, very similar to the asbestos phenomenon. The litigation was a little smaller because there were not that many people had the company's hip implants, but there were still far more than enough claims to bankrupt the company. In a year and a half, we resolved that litigation successfully.

So, I do not think legislation is the answer to the asbestos problem. I think it is ingenuity. Big companies need to examine who they are hiring and what the economic incentives of their lawyers are when they start to defend these mass tort. Asbestos cases are no different from any other mass torts.

There are non-legislative solutions to this problem, but the economic incentives are against creating such a solution. I think the idea of prioritizing claims is, in theory, a good idea. I think a mesothelioma case ought to get first call on the money over a pleural plaque case—for those of you who are familiar with asbestos litigation. I am not sure how claim prioritization would work. Anybody can claim he has got a mesothelioma case when it is really an adenocarcinoma case, and you have to litigate the case to establish that. I do not think this approach would work in practice, although in theory, I think it is a good idea to pay the sickest and most severely injured people first.

I also do not think that addressing the litigation based on a defendant's percentage of fault will work either. First of all, if there is some percentage of fault by a solvent defendant where the majority of fault is with an insolvent defendant, I think the solvent defendant who made money selling the product has an obligation under the law to step up. As between that defendant and the innocent worker who was truly injured by the product, the defendant ought to step up. That is the whole theory of product liability law, to spread the loss across society as a whole so that the poor welder in the shipyard, or his family, does not end up having to shoulder that burden without any help.

The idea that the playing field needs to be leveled in asbestos litigation is a bit ludicrous when you consider the mismatch in legal and financial resources that the defendant companies and their insurers have.

The following is excerpted from "Asbestos for Lunch," a Prudential Financial Research Financial Services Group Conference, held on June 11, 2002.

MR. RICHARD SCRUGGS: [...Another fundamental cause for asbestos litigation's explosion into the hundreds of thousands] which is probably the biggest threat to you right now, is what I call the "magic jurisdiction," or jurisdictions where the judiciary is elected with verdict

money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're populous. They've got large populations of voters who are in on the deal, they're getting their place in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. Now a lot of times those get set aside on appeal, like in Texas, for example. A lot of you folks have succeeded in electing a very conservative Supreme Court, that reverses a lot of these things, but in order to get there you got to find it. It's pretty tough to handle a hundred or five hundred million-dollar judgment; it ties up your credit, your company; stock gets a hard hit; and so they're forced into a settlement.

There are probably a dozen magic jurisdictions around the country where this is really a dangerous thing. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is. The jury is going to come back with a large number and the judge is going to let it go to the jury, often on punitive damages. The proliferation of these magic jurisdictions, where plaintiffs join together in large groups even if they're not from those counties, is one of the reasons that the asbestos phenomenon has proliferated—the litigation has proliferated like it did.

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Monday, January 6, 2003

The Great Asbestos Swindle

By Lester Brickman

"Issue one" for the new Congress should be the rescue of the U.S. economy from a lethal threat invisible to most Americans.

While the public expresses justifiable outrage over corporate corruption, another fraudulent enterprise is flying beneath radar screens -- one that has already cost investors and employees with 401(k) plans more than the Enron debacle, drained the economy, and killed thousands of jobs. Asbestos lawsuits -- now expected to cost the U.S. economy more than $200 billion -- will one day undoubtedly take a place in the pantheon of great American swindles, next to the Yazoo land frauds, Credit Mobilier and Teapot Dome.

Ninety thousand new asbestos claims were filed last year -- triple the number filed two years ago. The explosion came two decades ago when plaintiffs' lawyers were forced to retarget their litigation as first the leading defendant, and then other defendants, went bankrupt. Like the proverbial frog in a pot brought to a slow boil, courts grew increasingly comfortable with the uncritical acceptance of radical changes in claimants' testimony about product exposure.

Courts did their share to directly further asbestos litigation by developing a "special asbestos law" -- allowing seriously injured plaintiffs to prevail, without having to prove causation under standard tort-law principles. Making matters worse, the law is now not only applied to cases of dubious injury, but to cases with no injury.

For plaintiff lawyers, this development was like the discovery of gold at Sutter Creek. But these hordes of prospecting lawyers soon ran into a wall -- the actual numbers of sick people. At the rate of 4,000 malignancy claims a year, it would take too long to accommodate the pecuniary interests of tort lawyers. The universe of claimants had to be expanded.

Presto: tens of thousands of claimants who were neither sick nor impaired but who won the asbestos lottery when mass x-ray screenings showed collagen deposits -- benign lung abnormalities related to many environmental causes -- were signed up. The claimants were then given scripts with blatant falsehoods to memorize and repeat in sworn testimony. For practical purposes, the supply of such plaintiffs claiming workplace exposure to asbestos but no injury is essentially infinite. Asbestos litigation will go on until the last dollar is extracted from an ever-widening group of defendants.

Asbestos litigation today has come to consist, mainly, of unimpaired people reaping compensation at the expense of the genuinely injured, on the basis of prepared scripts with perjurious contents, backed by bogus medical evidence. Even though most asbestos cases today are risk free, especially when settled in huge batches, lawyers' effective rates run from $5,000 to $25,000 an hour.

Rampant fraud in asbestos litigation calls for a prosecutorial response. But so far, no prosecutor has been willing to take on the high-rolling lawyers. In the meantime, Congress should legislatively limit fraudulent claiming. Those with no illness or impairment should not be able to destroy entire companies, wiping out shareholder value, employees' 401(k) plans and thousands of jobs.

Mr. Brickman is a professor at the Benjamin N. Cardozo School of Law in New York.

(See related letter: "Letters to the Editor: Victim's Son Denounces Asbestos Litigation Fraud" -- WSJ January 15, 2003.)

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Saturday, August 10, 2002

MONEY

Limit on asbestos lawsuits urged ; Lawyer: Many claimants not ill

John M. Biers Energy writer

Former Attorney General Griffin Bell this week urged Louisiana and Mississippi judges to impose strict new standards to limit the burgeoning docket of asbestos exposure lawsuits.

Bell argues that the recent rise in asbestos litigation is overwhelming the nation's courts and preventing truly injured workers from getting relief.

Exposure to asbestos, a mineral used in manufacturing and insulation, has been linked to various respiratory ills, including lung cancer. Bell estimates more than 200,000 people are seeking redress through the courts for asbestos claims nationwide. The attorney general under President Carter, Bell now practices law with the Atlanta firm King & Spalding and researched the issue for a Midwestern insurance company.

Asbestos litigation is a familiar topic in local legal circles. McDermott International Inc., the New Orleans energy conglomerate, has tumbled in the stock market because of asbestos lawsuits against its Babcock & Wilcox subsidiary. Babcock is working in U.S. Bankruptcy Court to resolve thousands of cases. More than 50 companies have filed for bankruptcy as a result of asbestos claims, Bell said.

Halliburton Inc.'s massive asbestos litigation has gained national notoriety, partly because the energy services company was once headed by Vice President Dick Cheney.

Bell argues that many plaintiffs file asbestos cases without medical evidence of injury. These workers are sometimes drawn to gatherings hosted by trial lawyers where they are screened with X-rays. In many instances, the X-ray is not reviewed by a medical doctor, Bell said. This practice means many uninjured workers get money from mass settlements. The huge case backlog also delays resolution for workers who are genuinely ill, Bell said.

"For every sick claimant who sues, there are many more claimants

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seeking money who are not sick," Bell said. "Asbestos litigation now stands as the only part of our tort system in which people who can show no physical injury are routinely allowed to sue."

Bell, speaking at the Windsor Court at an annual meeting of judges from the two states hosted by the Louisiana Judicial Conference, said a Pennsylvania decision should be applied nationwide. The judge allowed cases involving seriously ill patients to go forward, but placed on an inactive docket cases of workers who might later get sick, Bell said.

Carlton Carl, a spokesman for the Association of Trial Lawyers of America, said he was not familiar with the Pennsylvania ruling, but said Bell's proposal is unfair.

"That's like saying unless you are made a paraplegic in an auto accident, you shouldn't be able to sue," Carl said. "The fact of the matter is that people don't get compensated unless they can show exposure and injury."

Although asbestos litigation reform has been debated in Congress, Bell said he is turning to the courts because a legislative fix is unlikely.

. . . . . .

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Caption: Griffin BellSays huge number of suits hurts legitimate claimants

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The New York Times

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WEDNESDAY, APRIL 10, 2002

A Surge in Asbestos Suits, Many by Healthy Plaintiffs

By ALEX BERENSON

Decades after American companies largely stopped using asbestos, a wave of asbestos-related lawsuits is again flooding the nation's courts.

The suits, once filed mainly against shipbuilders, makers of asbestos and companies in a few other industries, now touch thousands of companies. In the last two years, they have forced at least 18 companies, with more than 100,000 employees, into bankruptcy protection.

Exposure to asbestos has plunged since the 1970's, and the number of new cases of asbestos-related disease has been falling, doctors say. Very few new plaintiffs have serious injuries, even their lawyers acknowledge. But at least 90,000 new claims were filed last year. If the trend continues, as many as 2.5 million people could file asbestos-related suits before the litigation begins to fade around 2030.

Many companies now facing asbestos lawsuits did not make asbestos or use it heavily in their products. They have been sued because more obvious defendants have already filed for bankruptcy protection and are protected from large verdicts.

Wall Street has grown uneasy that even profitable giants like Dow Chemical, which had $27 billion in sales last year, could struggle with claims for years. The National Association of Manufacturers calls asbestos a top priority, along with taxes, trade and energy.

Among the companies that have lost multimillion-dollar judgments since last fall are Dow, Halliburton and 3M. Viacom reported 106,000 claims at the end of the year related to its one-time ownership of Westinghouse, and the big automakers are so worried that they have hired the lawyer who successfully represented Dow Corning in its breast-implant litigation.

"We've got a lot of people who have claims," said Stephen Carroll, a senior economist at the Rand Institute for Civil Justice who has studied asbestos litigation. "It's going to take a lot of money to settle those claims, and we are beginning to run out of people who are rather clearly and distinctly culpable to charge."

New claims have steadily increased since 1997, when the Supreme Court struck down a class-action settlement between asbestos defendants and lawyers for plaintiffs. The settlement would have prevented most people exposed to asbestos from filing lawsuits unless they became sick. The court said the settlement was unfair to future claimants, who would be forced to abide by its terms even though they had not agreed to it.

Plaintiffs' lawyers, who typically receive 25 percent to 40 percent of a settlement, routinely set up mass screenings for union members and other workers who might have been exposed to asbestos. The screenings often turn up moderate lung damage consistent with asbestosis, or asbestos-related lung disease. Lung damage, however, is common in people over 50, especially among smokers.

John Dement, an associate professor for environmental and occupational medicine at Duke University and the former deputy director for lung disease research at the National Institute for Occupational Safety and Health, said there were far fewer cases of serious asbestosis today than 5 to 10 years ago.

"What we're seeing right now is the downswing," Dr. Dement said.

Lawyers for the companies being sued, along with independent experts and some lawyers who represent only seriously ill plaintiffs, say most suits are baseless and an abuse of the courts.

"Sick people with legitimate claims represent a tiny fraction of the claims being brought," said Lester Brickman, a law professor at Yeshiva University who has studied the issue. (Mr. Brickman said he had not consulted for either side in the litigation for more than a decade, although he was briefly hired by the Keene Corporation, an asbestos defendant, in 1989.)

Steven Kazan, a lawyer who represents only plaintiffs with mesothelioma, a cancer caused by asbestos exposure, and lung cancer, dismissed the suits by healthy plaintiffs. "The overwhelming majority of these cases," Mr. Kazan said, "are brought by people who have no impairment whatsoever."

Lawyers who represent unimpaired plaintiffs say their clients have been hurt by asbestos and deserve compensation, even if they are not ill.

Plaintiffs should have a chance to make their cases in court, said Perry Weitz, a partner at Weitz & Luxenberg, which represents 25,000 plaintiffs, including some who have asbestos-related cancers.

"Juries throughout the United States have said that these people deserve compensation," Mr. Weitz said. "You really have to have faith in the jury system."

In the next few weeks, legislation that would delay lawsuits from healthy plaintiffs is expected to be introduced in Congress, with the support of the Asbestos Alliance, a group that includes manufacturers and some plaintiffs' lawyers. Previous efforts to tighten the rules for asbestos suits have foundered, and organized labor, whose support may be crucial for any legislation, has not indicated whether it will back this bill.

Determining how many asbestos suits have been filed or how much companies have spent to resolve them is difficult. Cases are filed in state and federal courts, and many companies do not disclose their spending on settlements.

But American companies and insurers have spent well over $30 billion to defend and settle asbestos lawsuits. United States insurers alone had spent $22 billion by the end of 2000 to resolve claims, according to A. M. Best, an insurance industry analyst. With the number of claims growing, and jury verdicts for cancerous and noncancerous claims soaring, those figures will skyrocket, according to Tillinghast-Towers Perrin, an actuarial firm that has studied the issue. Tillinghast projects that the total costs of asbestos suits will be about $200 billion; some other estimates top $250 billion.

Companies and their lawyers say that the plaintiffs' lawyers bundle a few cases of asbestos-related cancer with hundreds or thousands of claims of asbestosis. Then they file the claims in courts in Mississippi, east Texas and other jurisdictions where juries have a history of being friendly to plaintiffs. Almost any company that made a product containing asbestos can be included in a claim, as long as the plaintiff can show that it may have been used at a place where the plaintiff worked. As a result, many claims name 50 or more defendants.

Companies are almost forced into settlements, said Stan Ferguson, general counsel of the USG Corporation, which makes wallboard and other building materials. USG filed for bankruptcy protection in June of last year after being named as defendant in about 50,000 lawsuits in each of the two previous years.

"Let's say you want to defend every case — $5,000 a case, $10,000 a case — that's $250 million or $500 million in legal fees a year," Mr. Ferguson said. Instead, USG settled its share of cases, paying $1,000 or more for each uninjured defendant.

"There's a tremendous temptation to try to outrun the problem," he said. But if companies become known as willing to settle, they face more and more claims, driving up their costs.

On the other hand, trying to fight cases is nearly impossible, Mr. Ferguson said. People who do not have cancer, or even serious asbestosis, have won multimillion-dollar verdicts in the last year in Mississippi and Texas. In those cases, the plaintiffs have claimed that they have an increased fear of cancer as a result of exposure, as well as an inability to exercise or other minor symptoms.

USG lost a $36 million verdict in Texas last year in a case where the plaintiffs were not sick. "When you face something like that," Mr. Ferguson said, "and you've got another 100,000 in the pipeline, you think this is crazy, and we can't keep doing this."

Asbestos Claims Soar

Nearly everyone who files asbestos claims names the Manville personal injury settlement trust, which handles all claims for Johns-Manville, a maker of asbestos. The number of claims has soared in the last two years. Many claims are from workers who do not have cancer and are not seriously ill, and who worked in industries that expected few claims.

BY HEALTH CONDITION

BY INDUSTRY

TRADITIONAL INDUSTRIES	2001 CLAIMS (ESTIMATED)	CHANGE FROM 1999
Auto maintenance	6,208	+1,634%
Railroad maintenance	8,700	462
Asbestos mining or manufacturing	736	196
Chemicals	8,786	177
Construction	12,367	139
Shipyards	5,246	64
"NEW" INDUSTRIES		
Textiles	9,011	+721%
Pulp and paper	2,825	296
Food and beverage	619	284
Glass	544	275
Metal manufacturing	16,590	187
All others	8,000	190

Source: Claims Resolution Management Corporation

The New York Times

The companies that file for bankruptcy protection are automatically excused from lawsuits against them. (By filing for bankruptcy, the companies essentially agree to pledge most or all of their equity — their assets, less their debts — to a trust that will be used to pay off asbestos claims. Though the companies continue to operate, they often have trouble getting loans or expanding and some have had to cut their work force to save cash. Their current shareholders are left with little or nothing. In return, the companies receive permanent protection from asbestos lawsuits.)

As more companies file for bankruptcy protection, the burden of lawsuits on those that remain grows heavier, since they must pay a bigger percentage of any judgments.

"Asbestos litigation has turned into a search for the solvent bystander," said David Bernick, who represents W. R. Grace, which filed for bankruptcy protection in April of last year. Mr. Bernick, who was the architect of Dow Corning's strategy in defending itself from breast implant lawsuits, is also representing Ford, General Motors and DaimlerChrysler.

The eventual impact of the suits on corporate giants like General Electric is uncertain. Many big companies, including G.E., do not disclose how many suits they face or how much they have spent to settle them. For those that do, including Viacom, the cost of settling lawsuits appears manageable. Viacom, which had $23 billion in sales last year, said it had spent $21 million after taxes to settle suits.

But other companies have been stung. Halliburton, which faced 274,000 claims at the end of 2001, suffered a plunge in its stock in December after a series of multimillion-dollar verdicts. In a regulatory filing this year, Halliburton said it had raised its estimate of its asbestos liability by $650 million last year and expected to raise it further in 2002. The stock has since regained some of its losses.

As concern over the verdicts against Halliburton spread, Wall Street punished the stocks of big companies with potential asbestos liabilities. Dow, Viacom and 3M all briefly plunged in January, though they have recovered.

Wall Street may be underestimating the problem, said Graham Copley, a research analyst with Sanford C. Bernstein & Company. Mr. Copley estimated in January that asbestos liabilities for Dow Chemical probably ranged from $1 billion to $5.5 billion. For Dow, which has a stock market value of $29 billion, the burden is significant but manageable, Mr. Copley said.

But he warned that investors in Dow should be aware that asbestos liabilities seem only to get worse.

"If you look at the history of asbestos, there's never been a good investment story from a company that's been tainted with asbestos," Mr. Copley said. "There's a very large potential class of claimants. If anything, I would say Wall Street may be underreacting."

A Common Product's Troubled History

Asbestos is a general term for several types of minerals that occur naturally in clumps of strong flexible fibers, like microscopic brush bristles. Inexpensive, abundant and an excellent barrier against heat, asbestos was widely used for insulation and fire proofing until the 1970's.

In large chunks, asbestos is harmless. Even when swallowed — the fibers are found in drinking water in many areas — asbestos poses little or no harm. But when the tiny fibers break off and float in the air, they can become dangerous.

Inhaled, the fibers wedge in the lungs and can cause disease years or decades later. In towns like Manville, N.J., the one-time home of Johns Manville, a manufacturer of asbestos products, large numbers of people who worked with asbestos daily contracted diseases like asbestosis, a scarring of the lungs; mesothelioma, a rare cancer of the linings of the lung and chest; and lung cancer.

The hazard of breathing small amounts of asbestos is still debated. In old buildings, asbestos insulation is often left undisturbed, because removing it would release many more fibers into the air than doing nothing.

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CAROLINA REVIEW

LITIGATION GONE MAD:
RECOVERY FOR INCREASED RISK,
S, AND MEDICAL MONITORING

A. Henderson, Jr.
ron D. Twerski

UMMER 2002 NUMBER 4

ASBESTOS LITIGATION GONE MAD: EXPOSURE-BASED RECOVERY FOR INCREASED RISK, MENTAL DISTRESS, AND MEDICAL MONITORING

JAMES A. HENDERSON, JR.*
AARON D. TWERSKI**

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I. INTRODUCTION

The asbestos litigation in its many forms has been, by all accounts, a blight on the American judicial system.[1] Few observers believe that our tort system was

1. *See* JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 2 (1991) (stating that the asbestos situation is a "disaster of major proportions to both the victims and producers of asbestos products"). The report further notes that:

> [D]ockets 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 again; 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.

Id. at 2-3; *see also* Oritz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (noting that the tort system is beset by an "elephantine mass of asbestos cases" that "defies customary judicial administration"); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL.'Y 541, 541 (1992) ("Most commentators agree that tort litigation today is a highly unsatisfactory system for resolving claims arising out of workers' exposure to asbestos."); Steven L. Schultz, Comment, In re *Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged–A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 590 (1992) ("The traditional tort system, in connection with asbestos litigation, has been marked by high transaction costs, excessive delays in providing compensation to injured plaintiffs, unequal recoveries among identically injured victims, litigious parties and a judicial system clogged by an avalanche of cases.").

designed to deal with a national tragedy engendered by a product that has caused and will cause serious harm to thousands of Americans over a period of at least seven decades. What is most disturbing is that some aspects of the legal problems associated with asbestos have been exacerbated needlessly. Giving in to enormous pressure, some courts have recognized theories of recovery that are both substantively unfair and certain to favor claimants whose suffering is minor over claimants who will suffer serious harm in the future.[2] Most courts have rid themselves of such myopia,[3] but bad law tends to hang on.[4] It is high time that the courts cleansed themselves entirely of illegitimate doctrine.

Asbestos litigation's final descent into madness has come in the form of judicial recognition of anticipatory claims on behalf of persons who have not yet suffered injury. Departing from long-standing tradition in tort law, courts have sought to provide immediate compensation to plaintiffs who are asymptomatic and in good health for consequences that they may suffer in the future as a result of either exposure to asbestos[5] or the development of asymptomatic biological changes in their lungs.[6] Plaintiffs have devised three stratagems for receiving "pay me now" compensation. First, they argue that those exposed to asbestos should be entitled to immediate recovery based on the fact that, upon exposure, plaintiffs are at increased risk of contracting asbestosis, mesothelioma, or lung cancer.[7] These claims seek recovery for the value of physical harms based on the possibility that plaintiffs may

2. For a detailed description of the various manifestations resulting from exposure to asbestos see Schuck, *supra* note 1, at 544-549. The range of consequences arising from exposure to asbestos vary significantly and include: (1) Asbestos Fibres in Lung. Any exposure to asbestos may result in asbestos fibers lodging in the lung. The mere lodging of such fibers in the lung is asymptomatic and need not result in pulmonary harm. (2) Pleural plaque or pleural thickening. Subsequent to asbestos exposure, calcified tissue may form on the pleura, the membranes surrounding the lung. Most often those experiencing pleural plaque and thickening are asymptomatic. They can lead active, normal lives free of any pain and suffering. (3) Asbestosis. When inhaled, asbestos fibers may begin a scarring process that destroys air sacs in the lung where oxygen is transferred into the blood. This disease is non-malignant, but nevertheless, may result in decreased pulmonary function. Asbestosis sufferers may encounter shortness of breath, a dry cough, weight loss, and chest pain. (4) Mesothelioma. The most serious of the diseases that may follow asbestos exposure is a malignant tumor in the membranes lining the lungs, abdomen, and chest. Mesothelioma is an incurable form of cancer resulting in the victim's death within seven to fifteen months after its onset. Mesothelioma is almost always caused by asbestos. (5) Lung Cancer. General lung cancer can be caused by asbestos but may be unrelated to asbestos. There may also be a symbiotic relationship between asbestos and smoking in causing lung cancer. *Id.*

3. *See infra* text accompanying notes 27-99.

4. *See, e.g.*, Bonnette v. Conoco, Inc., 801 So. 2d 501, 514 (La. Ct. App. 2001), *cert. granted*, 804 So. 2d 649 (La. 2002).

5. *Id.* at 511.

6. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79, 83-85 (3d Cir. 1986) (applying New Jersey law and allowing recovery for fear of cancer based on plaintiff having developed pleural thickening); Mauro v. Raymark Indus., Inc., 561 A.2d 257, 263 (N.J. 1989) (same).

7. For cases in which plaintiffs sought immediate compensation for increased risk of developing cancer in the future, see, for example, Burns v. Jaquays Mining Corp., 752 P.2d 28, 30 (Ariz. Ct. App. 1987); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 523-26 (Fla. Dist. Ct. App. 1985); Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 189 (Ky. 1994).

develop these diseases in the future. Second, plaintiffs claim that quite apart from any physical consequences that they may actually suffer in the future, they are entitled to damages for the present fear that they experience concerning their future well-being.[8] These claims are premised on the tort of negligent infliction of emotional distress and seek to draw on that theory for recovery.[9] Third, claimants contend that those exposed to asbestos are *ipso facto* entitled to medical surveillance to determine whether they are experiencing changes in their health that might be related to the development of some asbestos-related disease over the course of time.[10]

All of these theories are superficially plausible, if not downright appealing. However, any attempt to embrace them within the mainstream of traditional tort law is manifestly unwise. In truth, they constitute radical departures from longstanding norms of tort law, advanced in recent years to bludgeon a disfavored group of defendants. But the wrongdoing of a defendant, or defendants, does not justify creating legal doctrine that is substantively unfair, especially when doing so strikes mercilessly at another group of plaintiffs who, when the funds to pay damages run dry, will be denied recovery for real, rather than anticipated, ills.

This Article chronicles the development of these "front-loaded" theories of tort recovery and how the courts have dealt with them. We argue that these theories are wrong not only for asbestos claims, but also for all forms of toxic tort litigation. We are aware that some of the positions we take in this Article will be unpopular. However, we draw strength from the fact that we are writing in a Symposium dedicated to the memory of our late friend and colleague, Gary Schwartz. To the best of our knowledge, Gary never addressed the subject under discussion. But those who knew him and followed his work must know that Gary was prepared to take on an unpopular cause when he believed that he was defending the integrity of tort law. His brilliant article attacking the hysteria surrounding the Ford Pinto

8. For cases in which plaintiffs exposed to asbestos or who developed asymptomatic pleural thickening have made claims for mental distress based on their fear of developing cancer in the future, see, for example, Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 427 (1997); *In re* Asbestos Litig. Leary Trial, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 at *3-5 (Del. Super. Ct. June 14, 1994); Simmons v. Pacor, Inc., 674 A.2d 232, 233 (Pa. 1996); Temple-Inland Forest Prod. Corp. v. Carter, 993 S.W.2d 88, 89 (Tex. 1999).

9. The asbestos cases that deal with the right to recover for mental distress rarely explain whether the underlying theory of recovery is strict liability or negligence. For the most part asbestos cases are premised on the failure to warn about the danger associated with the use of asbestos. *See, e.g.*, Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973); Anderson v. Owens-Corning Fibreglas Corp., 810 P.2d 549, 551 (Cal. 1991). In failure to warn cases, strict liability and negligence tend to merge into a single theory. *See, e.g.*, Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994). In any event, whether the theory be negligence or strict liability, the policy questions as to whether and when there should be a duty to protect the right of mental tranquility is the same. *See* JAMES A. HENDERSON & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 223-226 (4th ed. 2000).

10. For cases in which asbestos claimants have sought medical monitoring, see, for example, *Burns*, 752 P.2d at 30; *Simmons*, 674 A.2d at 239.

litigation comes to mind as one example.[11] And his unrelenting opposition to the unprincipled consumer expectations test as the standard for defining defective design in products liability is another.[12] We hope that our work here continues in that tradition.

II. PREINJURY CLAIMS IN A NUTSHELL

A. *Asbestos Exposure and the Single-Action Rule*

In most tort cases, the law provides a plaintiff one indivisible cause of action for all damages arising from a defendant's breach of duty.[13] This hoary rule against splitting a cause of action is designed to prevent vexatious and repetitive litigation of a single underlying claim when plaintiff's injuries eventually result in damages that are more serious than originally contemplated.[14] Classic damages rules allow a plaintiff who has suffered physical injury to recover damages for future injuries only if it can be established with reasonable medical probability that such injuries will actually develop.[15] It is well understood that, in any individual case, the likelihood that a plaintiff may be either undercompensated or overcompensated is real.[16] Many plaintiffs who subsequently suffer additional injury are not able at the time of trial to prove with reasonable medical probability (more probably than not)

11. *See* Gary T. Schwartz, *The Myth of The Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1035-47 (1991).

12. Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435, 476 (1979); Letter from Gary T. Schwartz on behalf of the Product Liability Advisory Council, to Professor Richard Speidel Professor of Law, Northwestern University School of Law (June 4, 1996) (criticizing the consumer expectation test as a standard for defective design in products liability and arguing that it should not be the test for liability in Article 2 of the Uniform Commercial Code) (letter on file).

13. *See, e.g.*, Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136-37 (5th Cir. 1985); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 11.13, at 557 (2d ed. 1977).

14. *See* McKibben v. Zamora, 358 So. 2d 866, 868 (Fla. Dist. Ct. App. 1978) (explaining that the rule "promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single tort incident, and is consistent with the absolute necessity of bringing litigation to an end"); Galveston, H. & S. A. Ry. Co. v. Dowe, 7 S.W. 368, 371 (Tex. 1888) ("The reason for the rule lies in the necessity for preventing vexatious and oppressive litigation, and its purpose is accomplished by forbidding the division of a single cause of action so as to maintain several suits when a single suit will suffice."); *see also* Murphy v. Campbell, 964 S.W.2d 265, 273 (Tex. 1997) ("The fact that the plaintiff's actual damages may not be fully known until much later does not affect the determination of the accrual date . . . .").

15. 22 AM. JUR. 2D *Damages* § 677 (1988) ("Plaintiffs who have submitted proof of prospective damages to a reasonable degree of certainty are entitled to submit the question to the jury . . . ."); C.S. Wheatley, Jr., Annotation, *Future Pain and Suffering as Element of Damages for Physical Injury*, 81 A.L.R. 423, 424 (1932) ("It is well settled that in an action for a personal injury, future pain and suffering on the part of the injured person in consequence of the injury constitute a proper element of the damages . . . provided there is the requisite certainty or probability that such pain and suffering will result.").

16. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. c (1982) (stating that a judgment may be insufficient because the plaintiff's "damages turned out in fact to be unexpectedly large and in excess of the judgment").

that such future injuries will develop. Conversely, medical predictions of future injury may never eventuate. However, the specter of repetitive litigation and the lack of finality to litigation present unacceptable costs to the legal system. Thus, the single-action rule is deeply embedded in the jurisprudence of this country.

With the onset of the asbestos litigation in the 1960s, the need to re-examine the single-action rule became manifest. The problem was basic. The statute of limitations for most tort actions begins to run when the plaintiff discovers his injury.[17] If pleural plaque or asbestosis constitutes physical injury sufficient to trigger the running of the statute of limitations for all future asbestos-related harms, plaintiffs are placed in a no-win situation. Asbestosis, lung cancer, and mesothelioma all have long latency periods.[18] If a plaintiff who has developed pleural plaque waits to file suit until he develops either asbestosis or mesothelioma, or if a plaintiff who has contracted asbestosis waits to file suit until he develops mesothelioma, his cause of action will be long-ago barred by the typical tort statute of limitations.[19] On the other hand, if a plaintiff files suit immediately upon the discovery of some asbestos-related change in his body, such as pleural thickening or asbestosis, and in this initial action seeks to recover for the possibility that he will develop an asbestos-related malignancy, he will be unable to recover for such future losses. As noted earlier, recovery in an initial action for future injury is allowed only if the plaintiff can prove through competent expert testimony a substantial (more probable than not) medical probability of developing such a malignant disease in the future.[20] Neither those diagnosed with pleural plaque or pleural thickening, nor even those who develop asbestosis, can establish that it is more probable than not that they will ultimately manifest some form of asbestos-related malignancy.[21]

17. *See* DAN B. DOBBS, THE LAW OF TORTS § 218 (2000) (explaining the discovery rule); *see also* Louisville Trust Co. v. Johns-Manville Prods. Co., 580 S.W.2d 497, 500 (Ky. 1979) ("[W]hen an injury does not manifest itself immediately the cause of action should accrue not when the injury was initially inflicted, but when the plaintiff knew or should have known that he had been injured by the conduct of the tortfeasor."). Clearly when x-rays show pleural plaque or thickening, or a physician makes a diagnosis of asbestosis, the statute would begin to run and bar a later claim for mesothelioma or lung cancer unless these diseases are recognized as separate injuries that constitute different causes of action.

18. *See* Hamilton v. Asbestos Corp., 998 P.2d 403, 405-08 (Cal. 2000) (noting that the average latency period of asbestosis is twenty years, the average latency period of mesothelioma is thirty to forty years, and that plaintiff had been diagnosed with peritoneal mesothelioma more then thirty years after his last exposure to asbestos).

19. *See* Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 648 (Tex. 2000) ("[T]he single action rule is a catch 22 for victims of multiple latent diseases [because] '[a] plaintiff who sues for asbestosis is precluded from any recovery for a later-developing lethal mesothelioma. But the discovery rule would preclude a plaintiff with asbestosis from waiting to see if an asbestosis-related cancer later develops . . . .'").

20. *See id.* at 649 (citing Ins. Co. of N. Am. v. Myers, 411 S.W.2d 710, 713-14 (Tex. 1966)).

21. *See id.* (stating that since only fifteen percent of asbestosis victims actually develop mesothelioma, no asbestosis plaintiff can satisfy the "reasonable medical probability" requirement). The likelihood that those who have developed pleural thickening will develop mesothelioma or some other form of cancer is even more remote. *See infra* text accompanying note 107.

Given the harshness of the single-action rule, something had to give. Ultimately, the overwhelming majority of courts abandoned the single-action rule and now allow separate causes of action later, when a plaintiff actually develops asbestosis, lung cancer, or mesothelioma.[22] However, to assist exposed plaintiffs in the interim, before the legal enlightenment finally arrived, some courts developed stopgap causes of action to allow asbestos plaintiffs to escape the single-action rule dilemma. Thus, some courts took the position that recovery for increased risk could be predicated on proof of less than reasonable medical probability that the plaintiff would actually develop cancer.[23] At the same time, a number of courts recognized

22. *See* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120-21 (D.C. Cir. 1982) (holding that diagnosis of asbestosis did not trigger the statute of limitations for other injuries caused by the same exposure to asbestos); *Hamilton*, 998 P.2d at 413-14 (holding that under California statute, the single action rule no longer applied to asbestos plaintiffs); Wagner v. Apex Marine Ship Mgmt. Corp., 100 Cal. Rptr. 2d 533, 539 (Ct. App. 2000) (holding that a plaintiff's discovery of one asbestos-related disease does not trigger the running of the statute of limitations on all separate and distinct asbestos-related diseases caused by the same exposure to asbestos); Miller v. Armstrong World Indus., Inc., 817 P.2d 111, 112 (Colo. 1991) (en banc) (holding that the statute of limitations on a claim for damages from malignant asbestosis did not begin to run upon plaintiff's earlier knowledge of existence of benign pleural thickening and pleural calcification); Sheppard v. A.C. & S. Co., 498 A.2d 1126, 1134 (Del. Super. Ct. 1985) (adopting Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982)) *aff'd. sub nom* Keene Corp. v. Sheppard, 503 A.2d 192 (Del. 1986); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 519-23 (Fla. Dist. Ct. App. 1985) ("[P]laintiff may bring a second action for damages if and when he actually contracts cancer."); VaSalle v. Celotex Corp., 515 N.E.2d 684, 687 (Ill. App. Ct. 1987) (holding that asbestosis was a legal injury separate and distinct from lung cancer and action for damages resulting from lung cancer thus accrued when insulator discovered he had lung cancer, not when he learned he was suffering from asbestosis); Parks v. A.P. Green Indus., Inc., 754 N.E.2d 1052, 1058 (Ind. Ct. App. 2001) (holding that plaintiff's suit for asbestosis did not trigger the statute of limitations for lung cancer since they are separate diseases); Wilber v. Owens-Corning Fiberglass Corp., 476 N.W.2d 74, 78 (Iowa 1991) ("The manifestation of asbestosis does not trigger the running of the statute of limitations on all separate, distinct, and later-manifested diseases which may have stemmed from the same asbestos exposure."); Carroll v. Owens-Corning Fiberglas Corp., 37 S.W.3d 699, 703 (Ky. 2000) (holding that although Kentucky has never been a "two disease" state, an action for cancer will accrue on the date of the diagnosis of cancer and not the date of diagnosis of asbestosis since they are separate and distinct diseases); Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020, 1028 (Md. 1983) (holding that plaintiff's claim for lung cancer was not time barred despite a prior diagnosis of asbestosis); Larson v. Johns-Manville Sales Corp., 399 N.W.2d 1, 9 (Mich. 1986) (holding that actions for cancer and mesothelioma were not time barred by a previous asbestosis diagnosis); Fusaro v. Porter-Hayden Co., 548 N.Y.S.2d 856, 860 (N.Y. Sup. Ct. 1989) (holding that a claim for mesothelioma was not time barred by an earlier asbestosis diagnosis); Marinari v. Asbestos Corp., 612 A.2d 1021, 1028 (Pa. Super. Ct. 1992) (articulating the "two-disease rule" later adopted by the Pennsylvania Supreme Court in Simmons v. Pacor, Inc., 674 A.2d 232, 237 (Pa. 1996)); Potts v. Celotex Corp., 796 S.W.2d 678, 685 (Tenn. 1990) (holding that an earlier diagnosis of asbestosis did not bar plaintiff's suit for mesothelioma); *Pustejovsky*, 35 S.W.3d at 653 (holding that the single-action rule did not apply to asbestos litigation); Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 642 (Wis. 1999) ("The diagnosis of a malignant asbestos-related condition creates a new cause of action and the statute of limitations governing the malignant asbestos-related condition begins when the claimant discovers, or with reasonable diligence should discover, the malignant asbestos-related condition.").

23. Bonnette v. Conoco, Inc., 801 So. 2d 501, 511 (La. Ct. App. 2001), *cert. granted*, 804 So. 2d 649 (La. 2002); *see also* Brafford v. Susquehanna Corp., 586 F. Supp. 14, 17-18 (D. Colo. 1984) (denying defendant's motion for partial summary judgment on plaintiff's claim for increased risk of

a cause of action on behalf of asymptomatic plaintiffs for mental distress arising from the fear that they would develop cancer in the future.[24] Unlike the increased-risk claim in which damages are based directly on the risk of developing cancer in the future, the mental distress claim avoids dealing with the reasonable medical probability standard, since the cause of action is based on a plaintiff's currently existing fear of future injury.

B. *The Post Single-Action Era: Bringing Actions Sequentially*

As noted earlier, most American jurisdictions have done away with the single-action rule in asbestos litigation.[25] Plaintiffs who are diagnosed with asymptomatic pleural plaque, pleural thickening, or asbestosis need not rush to the courthouse to file actions for fear that they will be barred by the statute of limitations from doing so later if they develop asbestosis or asbestos-related malignancies. In most states, the successful prosecution of one action will not bar plaintiffs from bringing a later action if they develop a more serious asbestos-related disease.[26] Thus, a plaintiff who has contracted asbestosis can sue immediately to recover damages for the ills associated with that disease. If ten or fifteen years later he contracts mesothelioma, he may bring a new action for damages caused by that virulent form of cancer. The question for the courts, now that plaintiffs enjoy the benefit of waiting until they have a fully developed disease to bring suit, is whether the law should mandate that plaintiffs exposed to asbestos *must* wait until the onset of these diseases to seek recovery, or whether plaintiffs can pursue pre-injury claims for increased risk, mental distress, or medical monitoring based on the possibility that they may develop cancer in the future.

III. WHEN PLAINTIFFS' PREINJURY CLAIMS ARE NOT EVEN SUPERFICIALLY PLAUSIBLE: RECOVERY FOR INCREASED RISK

Courts that have abolished the single-action rule have flatly rejected claims based on increased risk.[27] They have done so with regard to both plaintiffs who

contracting cancer).

24. *See, e.g.*, Herber v. Johnson-Manville Corp., 785 F.2d 79, 85 (3d Cir. 1986); Dartez v. Fibreboard Corp., 765 F.2d 456, 467-68 (5th Cir. 1985).

25. *See* cases cited *supra* note 22. It remains a mystery to the authors why some asbestos defendants continue to defend asbestosis and mesothelioma claims on the ground that plaintiff is precluded from raising these claims when they develop based on the single-action rule. *See, e.g.*, *Carroll*, 37 S.W.3d at 700. The single-action rule forced plaintiffs to seek front-loaded damages for increased risk of cancer or for mental distress based on the fear of developing cancer. *See Pustejovsky*, 35 S.W.3d at 649. Only with the recognition that the single-action rule does not apply to asbestos claims have the courts been able to delay claims for the more serious asbestos-related diseases until they actually come to fruition.

26. *See, e.g.*, *Eagle-Picher*, 481 S.W.2d at 519-523.

27. *See id.* at 520; *see also In re* Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 & n.8 (D. Haw. 1990); Mauro v. Raymark Indus., Inc., 561 A.2d 257, 264-265 (N.J. 1989) (providing exhaustive listing of cases addressing increased risk claims); *Simmons*, 674 A.2d at 237.

have asymptomatic pleural plaque or thickening and plaintiffs who have actually contracted asbestosis. Having preserved the right for plaintiffs to bring actions if and when they actually develop asbestosis or some form of asbestos-related malignancy, these courts see no reason to allow speculation about future injuries. It might be interesting to consider whether a court would bar recovery for increased risk if faced with a plaintiff manifesting pleural thickening or asbestosis who could offer credible testimony that he faces a substantial medical probability of developing a malignancy. Few such cases are likely to arise because plaintiffs exposed to asbestos who develop pleural plaque or asbestosis rarely present such a strong probability of contracting a malignancy.[28] However, even if such testimony were available, it is our view that courts would not, and should not, allow recovery. The reported decisions reflect no judicial tolerance for guessing at future results. Claims for increased risk have no place in the post single-action era.

IV. WHERE PLAINTIFFS' PREINJURY CLAIMS ARE SUPERFICIALLY PLAUSIBLE, BUT TRADITION DENIES RECOVERY: RECOVERY FOR MENTAL DISTRESS

By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who have been exposed to asbestos but who, with rare exceptions, are completely asymptomatic.[29] Because they cannot claim damages for present injury (they have none) or for future injury (increased risk claims are barred), these plaintiffs present claims for mental distress predicated on their present

28. *See infra* notes 84-90 and accompanying text. In two cases, plaintiffs with asbestosis offered evidence that there was a greater than fifty percent probability that they would develop cancer. *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 413 (5th Cir. 1986); Gideon v. Johns-Manville Sales Corp. 761 F.2d 1129, 1138 (5th Cir. 1985).

29. *See* JENNIFER L. BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS 3 (Dec. 2001), available at http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf (estimating that more than ninety percent of current claimants are alleging nonmalignant injuries); Queena 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"); *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the Comm. on the Judiciary House of Representatives*, 102d Cong. 1st & 2d Sess. 81, 100 (Oct. 24, 1991) (testimony of Professor Lester Brickman). Professor Brickman testified:

> [P]leural plaque claims account for approximately 80% of new asbestos claim filings and represent a substantial percentage of previously filed claims. 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 active assistance of local union officials. Often, mobile x-ray vans brought to plant sites are used for the screenings.

Id.; *see also* Schuck, *supra* note 1, at 564 ("Another probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs' lawyers who engage in aggressive claim-solicitation campaigns on a mass basis designed to multiply the number of filed cases, thereby increasing the pressure on defendants to settle cases wholesale.").

fear that they may develop a malignancy in the future.[30] At first glance, asbestos plaintiffs who claim mental distress make a plausible argument for recovery. Those who have been exposed to asbestos, and certainly those whose lungs evidence some physiological changes such as pleural plaque or thickening, do have a small increased risk of developing cancer in the future.[31] This reality, coupled with the widespread concern surrounding the asbestos problem, gives facial credence to plaintiffs' claims that they experience genuine fear that they may develop cancer in the future. Whether they will develop such a disease in the future or not, the mere possibility causes current mental distress. Thus, plaintiffs assert that this distress, caused by the negligence of the defendant, warrants current compensation.

A. *Traditional Limitations on the Tort of Mental Distress*

Before examining the validity of these claims brought by asbestos plaintiffs and the special problems attendant to emotional distress claims arising from exposure to toxic substances, it is important to consider more generally the limitations that courts have traditionally placed on the tort of negligent infliction of emotional distress. In contrast to the tort of intentional infliction of emotional distress that swept the country after the adoption by the American Law Institute of the *Restatement (Second) of Torts* § 46,[32] the tort of negligent infliction of emotional distress has had a checkered history. To this very day, American courts have expressed the view that the "negligent infliction" tort must be substantially limited. Judges have expressed concern that allowing recovery for mental upset based on inadvertent conduct is an invitation to open-ended and uncontrollable litigation.[33]

We note at the outset that compensating for mental distress in most tort cases based in negligence is noncontroversial. When a defendant negligently harms a plaintiff, and the plaintiff suffers pain and mental anguish as a result of his physical injuries, recovery for such parasitic mental distress damages has always been a staple of American tort law.[34] However, a subject of controversy is whether a plaintiff should recover for mental distress that follows upon the heels of defendant's conduct that places the plaintiff in physical danger but does not actually cause harm. For many years courts required, at the very least, that defendant's negligent conduct result in physical impact upon the plaintiff.[35] Once a physical

30. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79, 83-85 (3d Cir. 1986); *In re* Moorenovich, 634 F. Supp. 634, 637 (D. Me. 1986); Burns v. Jaquays Mining Corp., 752 P.2d 28, 30 (Ariz. Ct. App. 1987); *Simmons*, 674 A.2d at 235; Temple Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 89 (Tex. 1999).

31. *See infra* notes 102-08 and accompanying text.

32. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46 has been widely adopted. *See, e.g.*, Harris v. Jones, 380 A.2d 611, 613 n.1 (Md. Ct. App. 1977) (listing states that adopted § 46).

33. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 54, at 360 (5th ed. 1984); DOBBS, *supra* note 17, § 308.

34. DOBBS, *supra* note 17, § 302.

35. *See, e.g.*, Brisboise v. Kans. City Pub. Serv. Co., 303 S.W.2d 619, 627 (Mo. 1957) (en banc) ("[W]here the defendant is not charged with knowledge that the person involved is other than normal, [his conduct] should not be made the basis of an action for abnormal damages having their foundation

impact was established, it was not necessary that the impact have caused physical harm. If the plaintiff suffered only emotional distress once impact was shown, recovery was allowed.[36] Most courts have now rejected the impact requirement and allow recovery for mental distress when the defendant's negligence has demonstrably threatened the plaintiff with imminent physical harm.[37] Many jurisdictions still require that the mental distress result in some form of physical injury to the plaintiff to guarantee the genuineness of the claim.[38] Others dispense with this requirement and allow for mental distress damages even if unaccompanied by physical injury.[39] Finally, the courts have struggled with the problem of when to allow recovery when the defendant causes a plaintiff-bystander to suffer mental distress from witnessing injury to a third party.[40] Courts disagree regarding the conditions imposed as a predicate for bystander recovery.[41] In any event, while the question of how the courts have dealt with negligent infliction of mental distress arising from the direct threat of imminent physical injury to the plaintiff is of great importance to the discussion of the right to recovery for mental distress in toxic tort cases, the right of bystanders to recover for peril to others has no direct relevance. In the toxic tort context, no one has yet claimed that family members have a right to recover for witnessing the physical anguish of asbestos victims who are suffering from cancer. No American court would countenance such a claim.[42]

in mental distress or fright alone."); Bosley v. Andrews, 142 A.2d 263, 264 (Pa. 1958) ("The rule is long and well established in Pennsylvania that there can be no recovery of damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress, unless they are accompanied by physical injury or physical impact.").

36. Morton v. Stack, 170 N.E. 869, 869 (Ohio 1930) (finding inhalation of smoke during fire constitutes impact); Zelinsky v. Chimics, 175 A.2d 351, 354 (Pa. Super. Ct. 1961) (holding that plaintiff need only establish "any degree of a physical impact, however slight").

37. *See, e.g.*, Daley v. LaCroix, 179 N.W.2d 390, 395 (Mich. 1970) ("[W]here a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff . . . may recover in damages . . . notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock."); Battalla v. State, 176 N.E.2d 729, 730-32 (N.Y. 1961) (holding that emotional distress resulting from fear of falling out of an unsecured chair lift was recoverable even without the occurrence of physical impact).

38. *Daley*, 179 N.W.2d at 395; *see also* Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 4-5 (Ill. 1983); Payton v. Abbott Labs, 437 N.E.2d 171, 175 (Mass. 1982); Reilly v. United States, 547 A.2d 894, 896 (R.I. 1988). For an extensive review of the authorities holding that emotional distress must bring about some type of physical manifestation or physical consequence before recovery is allowed see *Jones v. CSX Transp.*, Nos. 01-14786, 01-14787, 2002 U.S. App. LEXIS 6692, at *17-*25 (11th Cir. Apr. 11, 2002).

39. *See, e.g.*, Molien v. Kaiser Found. Hosp., 616 P.2d 813, 821 (Cal. 1980) (en banc); Bass v. Nooney Co., 646 S.W.2d 765, 772 (Mo. 1983) (en banc).

40. *See* DOBBS, *supra* note 17, § 309.

41. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 815-29 (Cal. 1989) (en banc) (allowing recovery to plaintiff who was not in the zone of danger); Bovsun v. Sanperi, 461 N.E.2d 843, 848 (N.Y. 1984) (limiting recovery in bystander cases to plaintiffs who are in the zone of danger).

42. Perhaps the most far-reaching case allowing recovery for witnessing the suffering of a relative is Ochoa v. Sup. Ct., 703 P.2d 1 (Cal. 1985). *See infra* note 47 and accompanying text. In that case, however, the court allowed recovery because the parents witnessed the negligent medical treatment of their child. *Ochoa*, 703 P.2d at 2-4. The court stated:

> [A] distinction between distress caused by personal observation of the

In reviewing the development of the cause of action for negligent infliction of emotional distress, it is important to reflect on the kinds of fact patterns in which courts have allowed recovery. The cases are legion. In *Daley v. La Croix*, as a result of negligent driving, defendant's car left the highway, traveled 63 feet in the air and 209 feet beyond the edge of the road.[43] The car hit a high voltage utility pole, resulting in a great electrical explosion in the plaintiffs' home.[44] Plaintiffs suffered severe emotional distress with accompanying physical manifestations of injury.[45] The Michigan court abandoned the requirement that physical impact was a necessary predicate to a mental distress claim and allowed a claim based on the mental shock to the plaintiffs that resulted in physical harm.[46] Similarly, in *Battalla v. State*, a young girl was placed in a ski lift chair by a state employee who failed to properly lock the safety belt intended to protect the occupant.[47] As a result of the defendant's negligence, the plaintiff became hysterical upon the descent from the mountain and suffered severe emotional distress with resultant physical manifestations.[48] Once again the court departed from the physical impact rule and allowed plaintiff to recover for her emotional distress, which manifested itself in physical injuries, caused by being in danger.[49]

To be sure, not all emotional distress cases are based on events that overtly threaten direct physical harm. In two rather well known California cases, the court allowed recovery for serious emotional distress arising from events that were simply traumatic in nature. In *Ochao v. Superior Court*, plaintiffs were parents of a child who was being held in custody at juvenile hall.[50] While there, the child became very ill with bilateral pneumonia.[51] The parents witnessed the child in agony and pleaded for the right to bring in their own physician to treat the child.[52] All their requests to

> injury and by hearing of the tragedy from another is justified because compensation should be limited to abnormal life experiences which cause emotional distress. While receiving news that a loved one has been injured or has died may cause emotional distress, it is the type of experience for which in a general way one is prepared, an experience which is common. By contrast few persons are forced to witness the death or injury of a loved one or to suddenly come upon the scene without warning in situations where tortious conduct is involved. In the present case, for example, while it is common to visit a loved one in a hospital and to be distressed by the loved one's pain and suffering, it is highly uncommon to witness the apparent neglect of the patient's immediate medical needs by medical personnel.

Id. at 5 n.6.

43. Daley v. La Croix, 179 N.W.2d 390, 391-92 (Mich. 1970).
44. *Id.* at 392.
45. *Id.*
46. *Id.* at 395-96.
47. Battalla v. State, 176 N.E.2d 729, 729 (N.Y. 1961).
48. *Id.*
49. *Id.* at 730-32 (allowing recovery when plaintiff alleged neurological disturbances and residual physical manifestations).
50. Ochao v. Sup. Ct., 703 P.2d 1, 3 (Cal. 1985) (en banc).
51. *Id.*
52. *Id.* at 3-4.

have the child properly treated went on deaf ears.[53] The youngster ultimately died as a result of his illness.[54] He was never transferred from the juvenile hall infirmary to a hospital facility, nor were x-rays or blood tests taken. The child's mother heard her child's agonized screaming and saw his convulsing and vomiting.[55] On these special facts the court recognized a cause of action for negligent infliction of emotional distress.[56]

In an earlier case, *Molien v. Kaiser Foundation Hospitals*, plaintiff was the husband of a wife who had been negligently diagnosed as suffering from syphilis.[57] As a result of the negligently erroneous diagnosis, plaintiff's wife became upset because she believed that the plaintiff had been engaged in extramarital sexual activities.[58] The tension caused by the negligent diagnosis was alleged to have caused the break-up of the marriage and the initiation of divorce proceedings.[59] The California Supreme Court held that recovery could be allowed for emotional distress even though such distress was not accompanied by physical injury.[60]

A fair review of the cases allowing recovery for negligent infliction of emotional distress reveals that this cause of action is quite limited in scope. It was never designed to allow for compensation for general malaise that follows upon the heels of negligent conduct. Rather, it allows recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature. With this historical perspective in mind, we now turn to the asbestos-related mental distress cases. The overwhelming majority of courts that have confronted the question of whether to allow recovery for mental distress when the plaintiff claims only exposure to asbestos or the onset of pleural plaque have denied such claims.[61] We shall first survey the reasons courts have relied on to deny recovery and then turn to the underlying policies that support the denial of these claims.

53. *Id.*
54. *Id.* at 4.
55. *Id.* at 3-4.
56. *Ochao*, 703 P.2d at 6-9.
57. Molien v. Kaiser Found. Hosp., 616 P.2d 813, 814 (Cal. 1980).
58. *Id.* at 814-15.
59. *Id.*
60. *Id.* at 820-21.
61. *See, e.g.*, Ball v. Joy Tech., Inc., 958 F.2d 36, 38-39 (4th Cir. 1991) (applying Virginia and West Virginia law); Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 274 (3d Cir. 1985) (applying Pennsylvania law); *In re* Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1568-70 (D. Haw. 1990) (applying Hawaii law); Amendola v. Kans. City So. Ry. Co., 699 F. Supp. 1401, 1410 (W.D. Mo. 1988) (applying FELA); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31-32 (Ariz. Ct. App. 1987); Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984); *In re* Asbestos Litig. Leary Trial Group, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 at *5 (Del. Super. Ct. June 14, 1994); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 526-28 (Fla. Dist. Ct. App. 1985); Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 194 (Ky. 1994); Payton v. Abbott Labs, 437 N.E.2d 171, 174 (Mass. 1982); Simmons v. Philadelphia Asbestos Corp., 674 A.2d 232, 237 (Pa. 1996); *see also* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 816 (Cal. 1993) (en banc) (no recovery for fear of cancer in a negligence action unless plaintiff is "more likely than not" to develop cancer).

B. *What Courts Have Done in Response to Preinjury Toxic Exposure Claims for Mental Distress*

1. *Utilizing Existing Doctrine to Deny Recovery*

A significant number of courts that limit recovery for negligent infliction of mental distress to cases where the plaintiff has suffered either a physical impact or physical injury have denied recovery for mental distress arising from asymptomatic pleural thickening on the ground that exposures to toxics that do not bring with them symptoms of disease do not constitute sufficient "impact" or "physical injury" to bring them within the rules allowing recovery.[62] The most celebrated case taking this position is *Metro-North Commuter R.R. Co. v. Buckley*,[63] a recent United States Supreme Court decision. In an action brought under the Federal Employers' Liability Act[64] (FELA), a plaintiff who had been employed as a pipe-fitter by the Metro-North Railroad sought recovery for negligent infliction of mental distress arising from his exposure to asbestos dust over a period of three years.[65] In an earlier case, the Court had held that FELA allows recovery for negligent infliction of mental distress only by "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct."[66] Plaintiff contended that his long-term exposure to the asbestos dust that infiltrated his lungs was a sufficient "physical impact" to bring him within the scope of the traditional rule allowing recovery for mental distress.[67] The Supreme Court disagreed. Relying on a large body of common law decisions that refuse asymptomatic plaintiffs recovery for negligent infliction of mental distress,[68] the Court held that even long-term exposure to asbestos, absent symptoms of disease from that exposure, does not qualify as a physical impact and denied plaintiff recovery.[69]

62. *See, e.g.*, *Burns*, 752 P.2d at 31-32; Temple-Inland Prods. Corp. v. Carter, 993 S.W.2d 88, 93 (Tex. 1999).
63. 521 U.S. 424 (1997).
64. 45 U.S.C. §§ 51-60 (1994).
65. *Metro-North*, 521 U.S. at 427.
66. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 547-48 (1994).
67. *Metro-North*, 521 U.S. 428-30.
68. *Id.* at 431.
69. *Id.* at 432-38. Although the Court specifically addressed the issue of a plaintiff who was exposed to asbestos and had manifested no physical changes in his lungs, it is clear that a FELA action for mental distress cannot be predicated on asymptomatic pleural plaque or thickening. At several points, the Court noted that it would not allow an action for mental distress to plaintiffs who are "disease and symptom free." *Id.* at 432. More importantly, the policy reasons cited by the court for denying mental distress recovery for those exposed to asbestos apply equally to plaintiffs who have developed some "trivial" physical change in their bodies. *Id.* at 433.

2. *Creating New Doctrine to Deny Recovery*

Several courts have gone beyond existing rules to deny plaintiffs' claims of mental distress. In an early case, *Eagle-Picher Industries v. Cox*, plaintiff, who had developed asbestosis, sought damages for an increased risk of developing cancer and for his present fear that he would develop cancer in the future.[70] In its rejection of the single-action rule, the court found that asbestosis and mesothelioma are separate diseases.[71] Having decided that the asbestos litigation required a departure from the traditional single-action rule, the court turned to the plaintiff's claim that he should be entitled to mental distress damages arising from his current fear of developing cancer in the future. The court first set forth the Florida rules governing negligent infliction of mental distress.[72] In Florida, the right to recover depends on whether the plaintiff suffers "a physical impact from an external force."[73] When there has been such an impact, the plaintiff may recover for mental distress arising from that impact without any manifestation of physical injury.[74] In the absence of physical impact, plaintiff cannot recover unless the mental distress causes physical injury.[75] Although several courts had held that the ingestion of harmful chemicals or drugs does not constitute an impact[76] the Florida court found that the embedding of asbestos fibers in the plaintiff's lungs qualified as an external physical impact even though the effects were not immediately deleterious.[77]

One would have thought that, once the court decided that the lodging of asbestos fibers in the lungs constitutes an external impact, the court would have simply endorsed the right for all plaintiffs who could prove inhalation of asbestos fibers into their lungs to recover for emotional distress without proof of physical injury. But such was not the case. Instead, the court undertook a separate inquiry as to whether and when it should allow recovery for fear of cancer.[78] It found that fear of cancer claims are genuine since the plaintiff lives with the sword of Damocles over his head.[79] But it then observed that "[i]f Damocles supplies the reason for permitting recovery, Pandora supplies the reason for at least limiting recovery."[80] The court then stated that it would recognize recovery for mental distress in fear of cancer cases only when the plaintiff had suffered physical injury as a result of exposure to asbestos.[81] In the case before the court, the plaintiff had

70. Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985).
71. *Id.* at 522.
72. *Id.* at 526.
73. *Id.*
74. *Id.* (citing Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974)).
75. *Id.* (citing Champion v. Gray, 478 So. 2d 17, 19 (Fla. 1985)).
76. *Eagle-Picher*, 481 So. 2d at 526 (citing Plummer v. Abbot Labs, 568 F. Supp. 920, 927 (D.R.I. 1983); Pazo v. Upjohn Co., 310 So. 2d 30 (Fla. Dist. Ct. App. 1975)).
77. *Id.*
78. *Id.* at 527.
79. *Id.*
80. *Id.*
81. *Id.* at 528-29.

developed asbestosis and thus suffered real physical harm.[82] Asbestosis, though non-malignant, is characterized by such symptoms as shortness of breath, dry cough, weight loss, and chest pain.[83] The court justified allowing recovery for mental distress because it believed that those who contract asbestosis have a well-founded reason to fear that they will contract cancer.[84] The court noted that fifteen percent of those who develop asbestosis will develop cancer.[85] Furthermore, the asbestosis sufferer faced with "a chronic, painful and concrete reminder that he has been *injuriously* exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear,"[86] thus has a bona fide claim for mental distress.

Under the reasoning of *Eagle-Picher*, an asymptomatic plaintiff with only pleural thickening is in no position factually to anger that he has a significantly increased risk of developing cancer or that he is suffering current pain that serves as a constant reminder that a more serious disease may come upon him. His likelihood of developing cancer is minuscule,[87] and he does not face the daily reminder of such fear in the form of any physical discomfort whatsoever.[88] The *Eagle-Picher* court said that requiring a physical injury as a predicate to recovery for mental distress was "both necessary and fair."[89] Permitting an action for fear of cancer where there has been no physical injury from the asbestos "would likely devastate the court system as well as the defendant manufacturers."[90]

In a case of singular importance, *Potter v. Firestone Tire & Rubber Co.*, the California Supreme Court confronted the problem of liability for negligent infliction of emotional distress based on the fear of developing cancer from exposure to a toxic substance.[91] The claimants in *Potter* were property owners living adjacent to a landfill into which the defendant Firestone had dumped a host of chemicals known to be human carcinogens.[92] These chemicals found their way into wells that provided the plaintiffs with drinking water.[93] Plaintiffs alleged physical symptoms which they attributed to the toxic chemicals in the water and also claimed damages for present mental distress arising from fear that they would develop cancer in the future.[94] The trial court found that "it was 'not possible to demonstrate with sufficient certainty a causal connection between these symptoms and well water contamination.'"[95] Nonetheless, the trial court awarded the plaintiffs $800,000 for

82. *Eagle-Picher*, 481 So. 2d at 519.
83. *See supra* note 2.
84. *Eagle-Picher*, 481 So. 2d at 528.
85. *Id.* at 522.
86. *Id.* at 529.
87. *See infra* notes 102-08 and accompanying text.
88. *See supra* note 2.
89. *Eagle-Picher*, 481 So. 2d at 528.
90. *Id.*
91. Potter v. Firestone Tire & Rubber Co. 863 P.2d 795, 802 (Cal. 1993).
92. *Id.* at 801-02
93. *Id.* at 802.
94. *Id.* at 803.
95. *Id.*

their lifelong fear of cancer and the resultant mental distress.[96]

California is one of a handful of states allowing recovery for negligent infliction of mental distress even absent physical injury or harm arising from the mental distress.[97] Nonetheless, the California Supreme Court reversed the award for mental distress damages, holding that in the absence of present physical injury, plaintiffs exposed to toxic substances could recover for mental distress based on the fear of developing cancer in the future only if "future physical injury or illness is more likely than not to occur as a direct result of the defendant's conduct."[98] The California Supreme Court declined to express an opinion as to whether cellular changes in a plaintiff's body would constitute physical injury that would trigger parasitic damages for mental distress.[99] However, what is significant is that the court recognized that emotional distress toxic tort cases require special treatment and cannot be subsumed under the general rules for negligent infliction of emotional distress.

C. *Why the Overwhelming Majority of Courts Have Rejected Mental Distress Recovery for Preinjury Asymptomatic Asbestos Plaintiffs*

Utilizing a variety of limited-duty rules, the courts have denied asymptomatic asbestos plaintiffs recovery for negligent infliction of mental distress. Whether by declaring that asbestos infiltration into the body does not constitute a physical impact, by finding that pleural plaque or thickening is not a sufficient physical injury, or by creating separate rules for fear-of-cancer cases when the fear is caused by exposure to a toxic substance, courts have found ways to deny recovery. The formal contours of the mental distress limited-duty rules provide no insurmountable obstacles to recovery. Courts could just as easily have concluded that exposure to asbestos constitutes a physical impact to the body[100] or that pleural thickening qualifies as a physical injury.[101] Most courts have not so concluded because they view the imposition of such liability as unwise. No single reason predominates. Courts and commentators have identified a host of policy concerns for denying these mental distress claims.

1. *These Mental Distress Claims Are Significantly Different From Traditional Emotional Distress Claims*

Plaintiffs seeking recovery for mental distress generally allege that asymptomatic plaintiffs who have developed some pleural thickening are five times

96. *Id.*
97. The *Potter* decision contains an extensive discussion of California law that allows recovery for mental distress without requiring proof of physical injury. *Potter*, 863 P.2d at 808-10.
98. *Id.* at 807.
99. *Id.*
100. *See, e.g.*, Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 526-27 (Fla. Dist. Ct. App. 1985).
101. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (3d Cir. 1986).

more likely to contract cancer[102] and 300 times more likely to develop mesothelioma than had they not been exposed to asbestos.[103] Defendants argue that mere citation of the statistics that indicate the greater likelihood of contracting cancer or mesothelioma without assessing the baseline risk of cancer in the general population is highly misleading.[104] Where the baseline risk is very low, even a very high multiple can result in a very small likelihood that an asymptomatic plaintiff will ever develop lung cancer or mesothelioma. For example, the baseline risk of lung cancer in the general population is approximately 10 out of 100,000.[105] The increased risk for a plaintiff with pleural thickening is five times the general risk or 50 out of 100,000.[106] Thus, the annual risk of a plaintiff developing cancer is 1/20 of 1%.[107] The baseline risk of developing non-asbestos related mesothelioma is infinitesimal. The annual risk to an asymptomatic plaintiff who was exposed to asbestos is 1/32 of 1%.[108]

No technologically advanced society can realistically consider compensating for mental distress when the likelihood of contracting cancer or mesothelioma is so remote.[109] Pollutants of all sorts fill the air. Regularly we learn through the media that these pollutants are potential carcinogens and that they increase the risk of

102. *See* Simmons v. Pacor, Inc., 674 A.2d 232, 233 (Pa. 1996).
103. *See id.* at 233-34.
104. *See id.* at 234 n.1.
105. *See id.*
106. *See id.*
107. *See id.*
108. *See Simmons*, 674 A.2d at 234 n.1; *see also In re* Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1570 n.10 (D. Haw. 1970) (citing study that evidence of lung cancer among shipyard workers would be approximately sixty seven per million men per year); Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 90 (Tex. 1999) (noting that plaintiffs' risk of cancer increased one percent.) Notably, *Temple-Inland* left open the question of whether one who suffered from an asbestos related-disease might recover for the fear of developing another more serious asbestos-related disease. *Temple-Inland*, 993 S.W.2d at 94. However, in *Pustejovsky*, decided one year later, the court intimated that it would not allow recovery for mental distress in this setting. Pustejovsky v. Rapid Am. Corp., 35 S.W.3d 643, 650 (Tex. 2000).

It should be noted that scientific opinion is divided. Although exposure to asbestos increases the risk of cancer, some studies conclude that "there is no evidence of an increased risk in subjects with pleural plaques compared with subjects without plaques but an equivalent asbestos exposure." E. Chailleux & M. Letourneux, *Impact médical du dépistage des lésions pleurales bénignes liées à l'inhalation de poussiéres d'aminante*, 16 MALADIES RESPIRATOIRES 1286, 1286 (1999). *See also* C. Peacock et al., *Asbestos-Related Benign Pleural Disease*, 55 CLINICAL RADIALOGY 422, 425 (2000) (stating that there is no evidence that pleural plaques undergo malignant degeneration into mesothelioma).

109. *See, e.g.*, *Temple-Inland*, 993 S.W.2d at 91 (refusing to recognize an action for mental distress arising from exposure to asbestos). The court quoted *City of Tyler v. Likes*:

> Without intent or malice on the defendant's part, serious bodily injury to the plaintiff, or a special relationship between the two parties, we permit recovery for mental anguish in only a few types of cases involving injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result.

Id. at 92 (quoting City of Tyler v. Likes, 962 S.W.2d 489, 496 (Tex. 1997)).

developing cancer.[110] Having been exposed to them, they are part of our physical makeup and may lie dormant for decades. The notion that tort law should provide recovery for tiny increments in risk has no traditional basis in the law of torts.

In an earlier discussion, we set forth the rules that generally govern the tort of negligent infliction of mental distress.[111] All of the traditional cases allowing recovery for emotional distress are characterized by a discrete event that brought about a serious and clearly identifiable immediate emotional response that radically altered the emotional well-being of the plaintiff. One simply cannot project from the traditional emotional distress cases a right of recovery for asymptomatic plaintiffs who have an annualized 1/20 of 1% chance of developing cancer. The law has not and should not seek to protect the right to be free from general malaise arising from some small increase in the background risk of contracting cancer. Even courts that advocate recovery for pure mental distress absent physical harm do so only in cases that are light years removed from the claims of mental distress alleged by asymptomatic plaintiffs in the asbestos cases.

2. *Remote-Risk Cases Present Serious Problems in Separating Meritorious From Non-meritorious Claims*

Putting aside the question of whether asbestos mental distress claims are inherently valid, courts have expressed deep concern about their ability to distinguish meritorious claims from those that are trivial. As the United States Supreme Court noted in *Metro-North*, asbestos is only one of a smorgasbord of

110. *See* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 811-12 (Cal. 1993) (en banc). The court noted:

> As a starting point in our analysis, we recognize the indisputable fact that all of us are exposed to carcinogens every day. As one commentator has observed, "[i]t is difficult to go a week without news of toxic exposure. Virtually everyone in society is conscious of the fact that the air they breathe, water, food and drugs they ingest, land on which they live, or products to which they are exposed are potential health hazards. Although few are exposed to all, few also can escape exposure to any."

Id. (quoting Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 576 (1984) (footnotes omitted)). See also *Metro-North Commuter R.R. Co. v. Buckley*, where the Court made a similar observation:

> [C]ontacts, even extensive contacts, with serious carcinogens are common. *See, e.g.*, Nicholson, Perkel & Selikoff, Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980-2030, 3 Am. J. Indust. Med. 259 (1982) (estimating that 21 million Americans have been exposed to work-related asbestos); U.S. Dept. of Health and Human Services, 1 Seventh Annual Report on Carcinogens 71 (1994) (3 million workers exposed to benzene, a majority of Americans exposed outside the workplace); Pirkle, et al., Exposure of the U.S. Population to Environmental Tobacco Smoke, 275 JAMA 1233, 1237 (1996) (reporting that 43% of American children lived in a home with at least one smoker, and 37% of adult nonsmokers lived in a home with at least one smoker or reported environmental tobacco smoke at work).

Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 434-35 (1997).

111. *See supra* Part III.A.

toxic pollutants that are potential carcinogens to which we are daily exposed.[112] Are courts capable of deciding the emotional distress created by the "increased risk of dying" for each carcinogen? Justice Breyer puts it well:

> An external circumstance—exposure—makes some emotional distress more likely. But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say from 23% to 28%) is reasonable and genuine, rather than overstated · particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? The evaluation problem seems a serious one.[113]

3. *Allowing Recovery for Mental Distress Gives Precedence to Those Less Seriously Injured*

Almost every judge and scholar who has addressed the issue of recovery for mental distress arising from exposure to asbestos has noted the irony that the huge volume of mental distress claims can devour the assets of defendants at the expense of more seriously injured plaintiffs.[114] All plaintiffs exposed to asbestos have potential *immediate* mental distress claims. Asbestosis and mesothelioma have very long latency periods. When plaintiffs actually develop these serious diseases for which they are clearly entitled to compensation, they may find that there are no assets left to compensate them for their injuries.[115] To place claims of doubtful

112. *See Metro-North*, 521 U.S. at 434.

113. *Id.* at 435.

114. *See, e.g.*, *Metro-North*, 521 U.S. at 435-36; *Potter*, 863 P.2d at 814; Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 93 (Tex. 1999); *see also* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001). The landmark article describing this problem is Peter H. Schuck's *The Worst Should Go First*. *See* Schuck, *supra* note 1.

115. *See* Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 155, 155. Parloff states:

> Because of the dwindling number of plausible, solvent asbestos defendants, tension has built between the firms that represent only very sick plaintiffs, like Steve Kazan's, and larger firms that represent all plaintiffs, including the unimpaireds. "I happen to believe," says Kazan, "that the interests of the unimpaired clients in fact are better served by giving them nothing or very little now, but making sure that if they were to get sick later on there will be money for them."
>
> In February 2000, when the most recent waive of bankruptcies began, Kazan and others with practices like his decided that their clients' interests could no longer be adequately protected by plaintiffs creditors' committees composed predominantly of lawyers like Baron [who represents both injured and unimpaired plaintiffs]. They formed a committee of their own to make sure that their point of view would be heard.

Id. at 170.

validity ahead of serious injury claims because the former are by definition first in time is simply unjust. No one has a good word to say about this practice. In several jurisdictions where plaintiffs legitimately fear that failure to bring immediate action may mean that they will later be barred by the statute of limitations if they develop asbestosis or an asbestos related malignancy, courts have established inactive docket plans.[116] Under these plans, plaintiffs who have asymptomatic pleural thickening are listed in a pleural registry, and their claims are deferred until they suffer true physical impairment.[117] The statute of limitations is tolled and discovery is stayed until objective evidence of physical impairment is forthcoming.[118] The net effect of such plans is to disallow recovery for mental distress based on the fear of developing more serious asbestos-related diseases in the future.[119]

4. *Mental Distress Claims Against Second Generation Asbestos Defendants are Manifestly Unfair*

When considering the validity of mental distress claims for asymptomatic plaintiffs, one must take into account the impact of such causes of action against the second generation of "peripheral" asbestos defendants. These defendants are not manufacturers of asbestos, but are, for the most part, companies that purchased asbestos for use as a component in a larger general product. Automobile and truck manufacturers who used asbestos in brake linings and boiler manufacturers who used asbestos as an insulator are recent examples of this new generation of peripheral defendants[120] who have been targeted once the prime defendants—the asbestos companies—have been driven into bankruptcy and are no longer a source of funds to compensate asbestos plaintiffs.

To understand the injustice of allowing an action for mental distress on behalf of asymptomatic plaintiffs against the second generation of asbestos defendants, it is necessary to provide some context for this cause of action. Actions brought against asbestos manufacturers on behalf of plaintiffs who have contracted asbestosis or mesothelioma have the greatest claim to validity. Manufacturers who, because of their expertise, either knew or should have known of the dangers associated with exposure to asbestos may face legitimate negligence claims for failure to warn of the risks of harm. When such negligence results in physical injury, the plaintiff has a claim for traditional tort damages. As we have seen, if the plaintiff cannot demonstrate illness or disease and claims only mental distress, the courts generally deny recovery for the reasons set forth above.[121] On the other hand,

116. *See* Behrens & Parham, *supra* note 114, at 13-16.

117. *See id.* at 8-9.

118. *See id.* at 8.

119. *See id.* at 18.

120. *See* Parloff, *supra* note 115, at 162.

121. See *supra* notes 102-19 and accompanying text.

cases brought against the non-manufacturer second generation "peripheral" defendants are of questionable validity. These defendants had neither the expertise nor the access to research and data that characterize the claims against defendant manufacturers.[122] Even if claims against these defendants are facially valid, they represent fault different not only in degree, but in kind, from that alleged against asbestos manufacturers. Whether such tenuous fault should support recovery for injuries such as asbestosis or mesothelioma can be debated. But what clearly should be beyond the pale is allowing a claim based on tenuous fault to support a cause of action for suspect mental distress damages.

Courts that are considering whether to allow recovery for mental distress for asymptomatic plaintiffs against manufacturers should be aware that such an action, once recognized, will be utilized against second, third, and fourth generation defendants whose fault, if any, is marginal. Ideally, tort law, through the medium of proximate cause, is supposed to deny recovery when harm is wildly disproportional to fault.[123] As a practical matter, case by case proximate cause determinations cannot be managed in the context of the huge volume of asbestos cases. Claims based on marginal fault that result in damages based on fear created by tiny increments of increased risk will come to dominate the asbestos litigation scene. The madness must come to an end.

V. WHERE PLAINTIFFS' CLAIMS ARE SUPERFICIALLY PLAUSIBLE AND TRADITION IS NONEXISTENT: RECOVERY FOR MEDICAL MONITORING

A. *Why Medical Monitoring Claims Are Superficially Plausible, if Not Downright Appealing*

As earlier discussions make clear, claims for increased risk are manifestly implausible because no good reason exists for allowing unimpaired plaintiffs to pursue recovery prematurely, based on inherently speculative claims about future possibilities, when they will most assuredly be allowed to come into court later if and when they actually suffer injury.[124] Quite simply, speculative claims for future injuries should be deferred to such a time when certainty replaces speculation. And while claims for mental anguish caused by increased risk are comparatively more plausible—the mental anguish represents a current, not a future, injury—strong traditions in Anglo-American law cut against allowing such claims for intangible losses in the absence of physical impact or injury.[125] In contrast, claims for medical monitoring appear to combine currency and tangibility. A plaintiff exposed to asbestos or other toxic substances may argue that she requires surveillance quite

122. *See* Informational Brief of Babcock & Wilcox Co. at 3-12, *In re* The Babcock & Wilcox Co. (Bankr. E.D. La. filed Feb. 22, 2000) (No. 00-10992).

123. *See generally* DOBBS, *supra* note 17, §§ 180-86.

124. *See supra* notes 27-28 and accompanying text.

125. *See supra* notes 62-113 and accompanying text.

independently of whether she eventually suffers injury.[126] Furthermore, medical monitoring is designed to commence immediately, in the physical world, and its economic costs are demonstrably real and calculable. Indeed, the costs of medical surveillance resemble, at least superficially, the costs of medical treatment for tortiously-caused physical injury, which courts have properly recognized since our tort system began.[127] As shall be made clear, this apparent similarity masks important differences between medical treatment for actual injuries and medical monitoring for the possibility of future injuries.[128] But, it helps to explain why exposure-based medical monitoring claims are superficially attractive.

Another reason for the intuitive appeal of medical monitoring claims is that asbestos and other toxic substances have come to epitomize the evils of ruthless industrial technology in the public eye,[129] and the plaintiffs are quintessentially innocent victims of wrongdoing.[130] In this setting of heightened sensitivities, if not passions, the plaintiffs may come to be seen in the collective judicial mind as analogous to beleaguered victims of natural disasters, seeking funding for public health programs aimed at preventing future outbreaks of disease.[131] On the other hand, plaintiffs seeking to recover for alleged emotional upset following exposure to asbestos may appear to be overreaching, looking for a monetary windfall after the event.[132] But who can doubt the motives of plaintiffs who seek merely the opportunity to undergo unpleasant, often invasive medical examinations to attempt to detect the early onset of disease? Claims for mental anguish are inherently suspect; claims for medical monitoring, by contrast, seem justified. It follows that even if a substantial portion of what defendants are required to spend on monitoring does not actually redress a significant social problem, these liabilities are believed to be warranted because they respond to wrongdoing in a symbolically satisfying manner.

126. *See, e.g.*, Betts v. Manville Pers. Injury Settlement Trust, 588 N.E.2d 1193, 1218 (Ill. App. Ct. 1992) ("Here, the incurring of medical expenses for future monitoring of plaintiffs' conditions is reasonably certain to occur, although the contracting of cancer is not.").

127. *See* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 615-629 (5th ed. 1999).

128. *See infra* note 183 and accompanying text.

129. Even in the context of the recent World Trade Center tragedy, the media raised the spectre of asbestos contamination. *See, e.g.*, Tracy Watson, *Uncertainty Surrounds Asbestos*, U.S.A. TODAY, Feb. 7, 2002, at 6A; David France & Erika Check, *Asbestos Alert*, NEWSWEEK, *at* http://www.newsweek.com (Sept. 14, 2001).

130. *See, e.g.*, Eric Planin & Michael A. Fletcher, *Many Schools Built Near Toxic Sites, Study Finds*, WASH. POST, Jan. 21, 2002, at A2 (reporting that hundreds of thousands of children throughout the country attend schools built near toxic sites and are thereby endangered); *cf. infra* note 178 and accompanying text.

131. *See* Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 431 (W.Va. 1999) ("[T]here is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease . . . ." (quoting Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993))).

132. *See, e.g.*, Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 434, 435 (1997) ("[H]ow can one determine from the external circumstance of exposure whether . . . a claimed strong emotional reaction . . . is reasonable and genuine, rather than overstated . . . ?").

To these admittedly impressionistic observations may be added another explanation for the superficial appeal of medical monitoring claims—one rooted in the judicial decisions allowing recovery. Awarding preinjury plaintiffs exposed to asbestos and other toxic substances the costs of medical monitoring may serve as something of a consolation prize, helping to soften the negative impact of judicial rejection of the same plaintiffs' claims increased risk and mental anguish.[133] The pattern repeats itself in the reported decisions. Plaintiffs alleging exposure to asbestos or other toxic substances, without any resulting physical injury, come before courts asserting claims for relief on the three bases being examined in this Article. The judges fairly routinely reject their claims for increased risk and mental anguish, for the reasons outlined earlier, impliedly admonishing the plaintiffs for having imagined that relief might be forthcoming in the absence of physical injury.[134] However, these same judges, when they address the claims for medical monitoring, reverse direction and take pains to explain why this third basis of liability does not raise the same concerns as did the first and second.[135] On a fair reading of these decisions, one gets the impression that the medical monitoring claims provide judges with an opportunity to give the plaintiffs something, without seeming to break totally with the traditional requirement that negligence plaintiffs demonstrate tangible physical harm. In this respect, allowing recovery for medical monitoring may seem to judges like the least they can do for plaintiffs placed at increased risk by modern technology.

B. *The Case Law to Date Is Mixed, Leaning Toward Acceptance but With Recent Signs of Stiffening Resistance*

Published judicial opinions began to focus on medical monitoring in the early to mid-1980s, with judicial attention increasing steadily since then. The earliest cases involved classic examples of traumatic impacts and physical injuries in which the plaintiffs sought to recover for the future costs of continued medical surveillance.[136] The medical monitoring aspects of these cases were consistent with traditional remedies for negligence-based tort recovery, and they cannot be said to

133. *See generally* Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 521 (2000) ("With its lower standards of proof, a medical monitoring award often represents plaintiffs' strongest chance of success.").

134. *See, e.g.*, Burns v. Jaquays Mining Corp., 752 P.2d 29, 32 (Ariz. Ct. App.1987) ("The psychosomatic injuries diagnosed by Dr. Gray . . . are not the type of bodily harm which would sustain a cause of action for emotional distress.").

135. *Id.* at 33 ("[D]espite the absence of physical manifestations of any asbestos-related diseases . . . the plaintiffs should be entitled [to recover the costs of medical monitoring].").

136. *See, e.g.*, Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 316 (5th Cir. 1986) (involving plaintiff who was soaked in cacogenic chemicals); Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 818 (D.C. Cir. 1984) (involving a flying accident which killed and injured hundreds of orphans).

have broken new ground.[137] The seminal decision allowing recovery for medical monitoring in the absence of traumatic impact or manifested physical injury is *Ayers v. Township of Jackson*, decided in 1987.[138] In that case, the New Jersey Supreme Court held that a group of plaintiffs who had been exposed to a toxin in their residential drinking water could recover medical surveillance costs from their municipality, which was found responsible for their predicament.[139] The *Ayers* court held that the plaintiffs, none of whom had developed symptoms of exposure-related disease, could recover medical monitoring expenses if such monitoring were found to be reasonably necessary in light of five articulated criteria.[140] In so holding, the court relied on earlier decisions involving traumatic impacts and physical injuries, and purported merely to be countenancing the extension of a traditional remedy for a traditional tort.[141] Over the next several years other courts, relying on *Ayers*, allowed recovery for medical monitoring in cases involving persons who, having been exposed to toxics substances, had not yet manifested physical injuries.[142] For example, in In re *Paoli R. R. Yard PCB Litigation*, decided in 1990, the Third Circuit Court of Appeals, applying Pennsylvania law, recognized medical monitoring claims.[143] The *Paoli* opinion sets forth four prerequisites to recovery that have played a role in guiding subsequent developments.[144] To date, courts in about twenty jurisdictions, including the highest courts in at least seven states, purport to recognize these claims.[145] Several academic commentators have approved of these developments.[146] Some of these commentators, including the author of a recent law

137. *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 6 (1998) (noting that *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, the seminal case involving traumatic impacts of an airplane crash, broke no new ground in allowing medical surveillance claims).

138. Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987).

139. *See id.* at 312-13.

140. *See id.* at 312.

141. *See id.* at 311 ("Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles.").

142. *See, e.g.*, Burns v. Jaquays Mining Corp., 752 P.2d 28, 33 (Ariz. Ct. App. 1987); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 978-82 (Utah 1993). *See generally* Klein, *supra* note 137, at 9-10.

143. *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3rd Cir. 1990) (applying Pennsylvania law).

144. *See id.* Other courts have adopted these criteria. *See, e.g.*, *In re* Marine Asbestos Cases, 265 F.3d 861, 866 (9th Cir. 2001).

145. *See* THOMAS M. GOUTMAN, MEDICAL MONITORING: HOW BAD SCIENCE MAKES BAD LAW 39-55 (2001) (listing states that recognize medical monitoring claims).

146. *See, e.g.*, Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 716 (1992); Linda A. Elfenbein, Note, *Future Medical Surveillance: An Award for Toxic Tort Victims*, 38 RUTGERS L. REV. 795, 811 (1986); Leslie S. Gara, Note, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 303-04 (1988); Allan T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 851 (1988); Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 COLO. LAW. 1533, 1534-35 (1994). *But see* George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 283

review article that may prove to be influential,[147] explicitly base their analysis on the fact that allowing recovery in these cases does not represent a new cause of action but merely the recognition of an evolving remedy for a traditional tort.[148]

What makes medical monitoring interesting from a precedential standpoint is the fact that at least four courts—including the United States Supreme Court—have rejected medical monitoring claims in the last several years. In *Metro-North Commuter R.R. Co. v. Buckley*, the United States Supreme Court considered these developments and rejected medical monitoring claims under FELA as unwise and uncalled for.[149] The soundness of this conclusion will be considered in a subsequent discussion in this Article.[150] Suffice it to say that Justice Breyer's majority opinion penetrates the superficial appeal described earlier and finds the claims to lack sufficient substantive merit to warrant their recognition in FELA cases.[151] Moreover, within the last year, supreme courts in two states—Nevada[152] and Alabama[153]—have rejected medical monitoring claims in the absence of physical injury. The most recent decision rejecting medical monitoring claims is *Duncan v. Northwest Airlines, Inc.*, in which the federal district court, applying Washington law, held that no cause of action exists to recover the costs of medical monitoring.[154] Referring to such claims as "a novel, nontraditional tort and remedy,"[155] the district court noted that "[m]ost of the states that have considered the issue have chosen to recognize a remedy rather than create a separate, new cause of action."[156] The court concluded that, under Washington law, the plaintiff could pursue medical monitoring as part of her claim to recover for existing injury, but could not pursue that claim independent of such injury.[157]

Importantly, these decisions rejecting preinjury medical monitoring recovery support the conclusion that the case law is mixed regarding whether medical monitoring claims should be allowed where personal injury is not present. A majority of the relevant decisions to date recognize such claims, although a number of these jurisdictions insist that no new cause of action—rather, only a question of

(1993).

147. *See* Klein, *supra* note 137, at 10-11.

148. *See supra* note 146.

149. Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 443-44 (1997).

150. *See infra* Part V.C.

151. *Metro-North*, 521 U.S. at 438-44.

152. *See* Badillo v. Am. Brands, Inc., 16 P.3d 435, 441 (Nev. 2001).

153. *See* Hinton v. Monsanto Co., No. 1000599, 2001 WL 1073699 at *4 (Ala. Sept. 14, 2001).

154. Duncan v. Northwest Airlines, Inc., 203 F.R.D. 601, 608-09 (W.D. Wash. 2001) ("In light of Washington's hesitation to recognize new torts, its reluctance to allow damages for enhanced risk without an accompanying present injury, and the ambiguity in case law from other states, this Court holds that there is no cause of action for medical monitoring as an independent tort under Washington law.").

155. *Id.* at 607.

156. *Id.*

157. *Id.* at 609.

remedy—is involved.[158] But at least four courts, including the United States Supreme Court and the highest courts of two states, have rejected this position.[159] On any fair assessment of the relevant precedent, American courts have not reached consensus regarding the legitimacy of these medical monitoring claims. The question remains unanswered, to be considered on the merits.

C. *On the Merits: Recovery in Tort for Preinjury Medical Monitoring Claims Should Be Rejected*

1. *Clearing Away the Underbrush: The Issue Is Substantive, Not Merely Remedial*

As the foregoing discussion of legal precedent makes clear, many courts and commentators who support medical monitoring claims insist that the issue is whether to allow a somewhat novel remedy (some even dispute the novelty of the remedy) in the context of a traditional, mainstream tort.[160] These courts and commentators assert that nothing really new is happening substantively if a court imposes medical monitoring liability on a defendant when the plaintiff has not yet manifested physical injury. Regardless of whether recovery should be allowed in these cases, characterizing the issue as essentially remedial is wrong. The view that medical monitoring involves nothing new rests, explicitly or implicitly, on the questionable premise that the plaintiffs in these cases have been "injured"—that their exposures to asbestos and other toxins have placed them at greater risk of future injury, and that this fact of increased risk, or the fact of the exposure itself, constitutes an "injury" similar to a broken leg suffered in an automobile accident.[161] Simply stated, this premise is false. From the beginnings of our negligence

158. *See* Badillo v. Am. Brands, Inc., 16 P.3d 435, 440 (Nev. 2001) ("Courts have recognized medical monitoring more often as a remedy than as a cause of action.").

159. *See supra* notes 149-57; *see also* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1074 (1999).

160. *See supra* notes 141, 148, 158 and accompanying text.

161. *See* Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 430 (W.Va. 1999). The court held: "We now reject the contention that a claim for future medical expenses must rest upon the existence of present physical harm. The 'injury' that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is 'the invasion of any legally protected interest.' *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 7(1) (1965)). The court then quoted the United States Court of Appeals for the District of Columbia Circuit, one of the first courts to grapple with this subject:

> It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.

Id. (quoting Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 826 (D.C. Cir. 1984). For a helpful explanation of how flexible the concept of "injury" can be in this context, see Matthew D. Hamrick, Comment, *Theories of Injury and Recovery for Post-Exposure, Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look*, 29 CUMB. L. REV. 461, 468-85 (1999).

jurisprudence, "injury" has been synonymous with "harm" and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm.[162] This definition is not drily logical; it serves as a linchpin in determining the duties of care owed by defendants and both the validity and timeliness of plaintiffs' claims for fault-based recovery.[163]

As explained earlier, a great majority of American courts have rejected exposure-based claims to recover for increased risk of future injury in the absence of current injury.[164] It follows that judicial and academic commentary categorizing medical monitoring claims as merely a question of appropriate remedy or measurement of recovery serves as an analytical smoke screen to hide the fact that a substantive departure from tradition is being implemented. It may turn out that recognizing these claims makes sense in light of the relevant policy considerations. But the "only remedies are involved" rhetoric represents analytical underbrush that must be cleared away before the substantive policy issues can be addressed on the merits. The substantive question to be answered is this: Should courts allow plaintiffs to recover based on the possibility of future injuries by imposing on defendants the current costs of medically monitoring those persons placed at increased risk? Framing the question in this manner makes clarifies what many advocates of recovery for medical monitoring seek to obfuscate: that to recognize these claims is to allow current recovery in the absence of current injury. A reasonable court might choose to allow these claims; but such a decision would be neither "only remedial" nor "business as usual."

2. *The Arguments in Support of Recovery for Medical Monitoring Tend to Beg the Questions of Whether Plaintiffs Have Suffered Injury and Whether the Claims Could Be Fairly Adjudicated*

A recent Supreme Court of West Virginia decision, *Bower v. Westinghouse Electric Corp.*,[165] relying on an earlier California Supreme Court decision,[166] outlines four public policy considerations that favor recognizing a right to recover medical monitoring costs: (1) allowing recovery serves "an important public health interest in fostering access to medical testing," especially in light of the value of early diagnosis and treatment for insidious diseases such as cancer;[167] (2) recognizing these claims promotes deterrence by discouraging the irresponsible

162. Section 282 of the *Restatement (Second) of Torts* defines negligence as conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm." RESTATEMENT (SECOND) OF TORTS § 282 (1965). Section 7 defines "harm" as denoting "the existence of loss or detriment in fact of any kind to a person." *Id.* at § 7(1).

163. *See generally* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1272 (2001) (noting that historically, "the evil against which tort law was directed was the doing of harm, rather than the infringement of rights or the violation of duties").

164. See *supra* note 27 and accompanying text.

165. Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

166. Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 816 (Cal. 1993) (en banc).

167. *See Bower*, 522 S.E.2d at 431.

distribution of toxic substances;[168] (3) early monitoring may prevent or mitigate future illnesses and thus reduce the eventual liability costs to the defendants;[169] and (4) allowing recovery serves "societal notions of fairness and elemental justice" by assuring that plaintiffs "wrongfully exposed to dangerous toxins," but unable to prove that cancer or other disease is likely, may recover when medical surveillance is shown to be reasonable and necessary.[170] The West Virginia Supreme Court concluded that recovery for medical monitoring is appropriate "where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct."[171]

A detailed critique of this reasoning is unnecessary to our purpose.[172] The important point here is that the court's policy analysis assumes that courts are equipped to resolve the issues of proximate causation and measurement to which the court alluded in its above excerpted conclusion and that the relevant social costs of medical surveillance are significant. The *Bower* court's second policy argument regarding deterrence, for example, is valid only if one assumes that the social costs of any given exposure to asbestos or other toxic substance can, in the absence of physical injury, be determined fairly and accurately. However, given the unavoidable difficulties of measurement and assessment, together with the great number of claims involved, the possibility of significant overdeterrence is very real in this context.[173] Additionally, the court's fourth argument—that allowing medical monitoring claims will provide compensation to plaintiffs who cannot prove that they have been or are likely to be injured—clearly begs the question of why justice is necessarily served by allowing, through the back door, recoveries that courts will not allow in through the front.[174] In the end, the policy issues that really count are the ones that the West Virginia Supreme Court's policy analysis[175] begs: Are courts institutionally capable of determining the true social costs, in the form of increased needs for medical surveillance, of public exposures to toxic substances? Are those social costs substantial enough to warrant inviting massive litigation, involving potentially millions of exposed plaintiffs, as a kind of judicially-sponsored public health program? These important issues are taken up in the discussion that follows.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. For example, the first and third reasons are redundant. The point of substance in both is that monitoring helps prevent disease, which simultaneously benefits the patients, society, and the defendants who must pay when disease occurs.

173. *See* Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442 (1997) (noting that recoverable costs are difficult to identify and tens of millions of individuals may have suffered exposure that justifies monitoring); *see also* Klein, *supra* note 137, at 27 ("Forcing defendants to internalize unmatured risk in the nature of medical monitoring expenses . . . raises serious concerns of overdeterrence.").

174. *See* Klein, *supra* note 137, at 15 ("[E]nhanced risk itself is not compensable, but if you demonstrate an increased risk of disease, you can recover medical monitoring costs . . . .").

175. *See supra* notes 165-74 and accompanying text.

3. *Powerful Arguments Support Rejection of Recovery for Preinjury Medical Monitoring*

No one has yet advocated for the proposition that tort-based funding of medical surveillance serves a significant social need. Available evidence strongly suggests that many, if not most, persons exposed to toxic substances do not want to be monitored. Obviously, rational persons would like to be paid money "in the name" of receiving surveillance; but they apparently have a lot better ways to spend the money than on monitoring, once they receive it.[176] Thus, it is hardly surprising that many proponents of tort liability insist that recoveries go not to the claimants directly in money payments, but to fund court-administered programs from which claimants may benefit only by actually undergoing medical monitoring.[177] Moreover, even if it were somehow possible to determine which monitoring costs are attributable to which toxic sources, most monitoring systems established to accomplish marginal improvements would duplicate systems set up for similar purposes.[178] A large majority of Americans (admittedly not all) are covered by one form or another of general health insurance which presumably is in place to carry the lion's part (admittedly not all) of the financial burden of medical monitoring.[179] Even if marginal social benefits were generated by recognizing tort claims for medical monitoring, they are almost certainly smaller than proponents of tort recovery anticipate in their arguments. Furthermore, such monitoring -- especially excessive monitoring -- is not only wasteful of scarce resources, but often places those being monitored at risk of surveillance-related harm.[180]

But if the social benefits derived from court-sanctioned medical monitoring are questionable to the point of being dubious, the serious negative impacts of such liability on the business firms involved cannot be doubted. Given that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world,[181] and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless.[182] When courts require plaintiffs to prove that they have been, or are likely to become,

176. *See* Klein, *supra* note 137, at 24 ("[F]ew (if any) medical monitoring proponents suggest that courts award lump-sum damages to plaintiffs, presumably because they fear that plaintiffs will spend the money on goods and services other than medical surveillance."); *see also* Maskin et al., *supra* note 133, at 541-42 & nn.101-13 (2000) (describing relevant data on plaintiffs' use of medical monitoring awards).

177. *See* Maskin et al., *supra* note 133, at 543 (advocating limiting recovery to a medical fund); *see also* Blumenberg, *supra* note 146, at 665-66 (explaining the periodic payment approach to dispersing medical monitoring funds).

178. *See Metro-North*, 521 U.S. at 442.

179. Robert Pear, *Number of Uninsured Drops for 2nd Year*, N.Y. TIMES, September 28, 2001, at A20 (reporting that 177 million people have employer-sponsored health insurance).

180. *See generally* GOUTMAN, *supra* note 145, at 13-16; McCarter, *supra* note 146, at 276-80.

181. *See* Klein, *supra* note 137, at 13-14 & nn.60-61; McCarter, *supra* note 146, at 245-46 & n.102.

182. *See Metro-North*, 521 U.S. at 433 (referring to "unlimited and unpredictable liability"); *see generally* Maskin et al., *supra* note 133, at 528-29 & nn. 34-46.

physically injured as a result of exposures to asbestos or other toxic substances, defendants' potential liabilities are contained within natural boundaries. In contrast, in the medical monitoring context there are no such natural boundaries. Especially when medical surveillance is seen as conferring significant public health benefits, proponents may be hard-pressed to see the need for boundaries. After all, what could be wrong with having unpopular defendants pay for making America a healthier place?

The accuracy of these observations regarding potentially crushing liabilities is revealed by the concern that advocates of medical monitoring liability have expressed regarding the need to set meaningful requirements that plaintiffs must meet before imposing such liability. The most often recognized requirements clearly reflect these concerns. Thus, the West Virginia Supreme Court in *Bower* adopted six such prerequisites to medical monitoring liability.[183] These include *significant* exposure to "a *proven* hazardous substance,"[184] creating an increased risk of "a *serious* latent disease,"[185] requiring monitoring that is "*different* from what would be prescribed in the absence of the exposure."[186] Observe that the court self-consciously relied on a series of quantitative modifiers, italicized above, in an effort to reserve liability for truly deserving cases. Anyone familiar with modern American trial practice will understand that, however well-meaning, this reliance on superlatives will not prevent most well-prepared cases from reaching triers of fact.[187] There is no escaping the conclusion that defendants in these medical monitoring cases face potentially crushing liabilities.[188]

Another inescapable implication of the inherent vagueness and open-endedness of medical monitoring litigation is that the courts will face, in the long run, an overwhelming flood of litigation in this area.[189] If the past decade of asbestos litigation has taught us anything, it is that the appetites of the plaintiff's bar know no limits in the ongoing search for secondary and even tertiary generations of defendants against whom to bring massive collective actions on new and expanding legal theories.[190] The West Virginia Supreme Court may believe that it "did justice"

183. *See* Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 432-33 (W.Va. 1999).

184. *Id.* (emphasis added) (Elements one and two).

185. *Id.* (emphasis added) (Element four).

186. *Id.* (emphasis added) (Element five).

187. All that plaintiffs must do to satisfy the first requirement, for example, is to have their medical expert testify that the exposure is "significant" and that the substance -- e.g., asbestos -- is a "proven" hazard. The disease -- cancer, in most instances -- is indisputably "serious." *Bower*'s six prerequisites may make academics feel good, but they should make any competent trial lawyer smile.

188. *See supra* note 182 and accompanying text.

189. *See* Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 433 (1997) (noting that medical monitoring claims could threaten a "flood" of less important cases).

190. *See generally* Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1. The article describes how plaintiffs' lawyers are bringing actions, including preinjury exposure claims, against everyone who had any connection -- even tangential -- with asbestos. For example, MetLife Insurance Company recently settled asbestos claims based on its having sold group life insurance policies to the employees of asbestos companies, thereby playing a role as "part of the foundation to put asbestos everywhere." *Id.*

in *Bower* by adopting an ostensibly sensible rule of liability with which lower courts will be able to render medical monitoring decisions that are fair, rational, and manageable. But surely *Bower* has unwittingly brought upon the West Virginia judiciary the potential for a plague of future litigation of questionable substantive benefit with which it is institutionally incapable of dealing. Manifestly the Supreme Court of West Virginia has set upon a course that will prove just as unworkable and unmanageable as would recognition of the emotional upset claims.[191] The possible reasons why the *Bower* court succumbed to temptation regarding medical monitoring are explained below.[192] But the institutional costs to the courts in that state will, almost certainly, be very great.

Finally, it must be understood that judicial recognition of claims for preinjury medical surveillance threatens the conceptual integrity of the American common law of torts. When one reflects objectively on what is happening in jurisdictions like West Virginia, at the conceptual level these medical monitoring claims combine elements of failure to rescue and pure economic loss. In effect, the plaintiffs in these cases want to force the defendants to pay the purely economic costs of rescuing them from a medical predicament. In both of these areas of the common law of torts courts have traditionally proceeded with great caution, perceiving correctly that, however superficially appealing plaintiffs' claims may appear in the short run, the open-endedness of robust liability regimes would prove highly problematic in the long run.[193] In these medical monitoring cases the plaintiffs' predicaments are allegedly caused by the defendants' wrongful acts in distributing or discharging asbestos or other toxic substances.[194] But the fact remains that from a legal process perspective the tasks of sorting out how much of that predicament can fairly be attributed to defendants' behavior, and what, exactly, to require by way of rescue efforts, are no less onerous here than in other duty-to-rescue contexts.[195] Moreover, the conclusion is inescapable that the plaintiffs are seeking to recover pure economic loss in the absence of either personal injury or property damage.[196] Recognizing these claims represents an important conceptual extension that is obfuscated in the judicial decisions and academic commentary characterizing the

The article quotes a leading plaintiffs' lawyer as saying in a lunchtime interview, "'The asbestos companies are going bankrupt faster than you and I can eat the food.' . . . 'We need to find someone else to pay the victims.'" *Id.*

191. *See supra* notes 61-123 and accompanying text.

192. See *infra* Part D.

193. *See generally* HENDERSON, JR. ET AL., *supra* note 127, at 267-97, 392-409.

194. Thus, technically the plaintiffs' medical monitoring claims come within an exception to the no-duty-to-rescue rule for cases in which the defendant's conduct has created the need for rescue. *See, e.g.*, Tubbs v. Argus, 225 N.E.2d 841, 842-43 (Ind. Ct. App. 1967) (explaining the no-duty-to-rescue rule and its exceptions).

195. *See generally* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 901-02 (1982) (arguing that since tort law guides behavior, the restraints it imposes explain much of its substantive content).

196. *See* Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 439 (1997) (referring to medical monitoring costs as "a separate negligently caused economic 'injury'").

recoveries as being merely remedial in nature.[197]

D. *Suggestions Regarding Why Courts in Twenty Jurisdictions Have Recognized Medical Monitoring Claims*

To the extent that the preceding analysis may persuade objective readers that the West Virginia Supreme Court and approximately twenty other jurisdictions[198] have erred in recognizing these causes of action, it is interesting to speculate why this is happening. Part of the answer lies in the earlier discussion of the superficial attractiveness of these claims.[199] But one might have expected that courts would have penetrated beyond the surface of first impressions. American courts have resisted similar temptations in other areas—the rejection of exposure-based claims for mental anguish is a good example.[200] Acknowledging the speculative nature of these musings, the authors suggest that a combination of exogenous factors (factors outside traditional legal precedents and recognized policy objectives) may have combined to help persuade a surprising number of courts to allow recovery for preinjury medical monitoring. We begin with the popular culture surrounding and presumably influencing judicial behavior. Our modern world, quite literally, is full of risks of invidious disease from exposure to a host of toxic substances.[201] Culturally, our tendency is to seize upon a relatively few, often relatively minor risks from among the many that exist and focus our collective energies on "solving" those problems.[202] One such risk is the increased risk of cancer from certain selected contaminants in our living and working environments. Make no mistake—the risk of contracting cancer in America today is certainly not "minor."[203] But much of that risk is not related to contaminants in the environment;[204] and of that part of the cancer risk that is so related, a substantial portion can fairly be described as "background" levels of contaminants that have nothing directly to do with the discharge or distribution of potentially harmful substances by toxic tort

197. *See supra notes* 141, 148, 158 and accompanying text.

198. *See supra* notes 138-45, 165-71, and accompanying text.

199. *See supra* Part V.A.

200. *See supra* notes 62-113 and accompanying text.

201. *See supra* note 181 and accompanying text.

202. *See generally* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999). The authors define "availability cascades" as self-reinforcing processes of collective belief formation by which expressed perceptions trigger massive chain reactions that give those perceptions increasing plausibility. *Id.* Once started, these cascades of perceptions can escalate rapidly to dominate the attention of the media. *Id.* at 685-87. These cascades can be helpful but they can also prompt regulators, including courts, to implement socially harmful responses. *Id.* at 685..

203. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF UNITED STATES: 1996 94 (1996) (noting that 23.5% of Americans who died in 1994 died of cancer).

204. *See* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 855-56 (1984)(citing epidemiological studies indicating that disease is caused both by specific substances as well as "background risk"). Professor Rosenberg notes that researches have even associated mesothelioma, which had been "linked exclusively to asbestos exposure, with exposure to other sources." *Id.* at 856 n.31.

defendants.[205] One approach to achieving solutions to the toxic tort problem is to promote ambitious, post-hoc ameliorative programs of some type, including aggressive medical surveillance, to "heal the wounds."[206] The authors suspect, but obviously cannot prove, that courts have been encouraged by these cultural biases to allow medical monitoring recoveries.[207]

Moreover, the fact that so many of these toxic exposure cases have environmental implications —carcinogens such as asbestos, for example, are seen to pollute the natural environment— invokes the sizeable and presumably influential apparatus of the environmental movement.[208] The authors suspect that some of the judges who approve of court-mandated medical surveillance may be attracted by the prospect of enlisting the deterrent potential of tort law in wider efforts aimed at cleaning up the environment. More generally, academic tort law commentators—especially authors of student notes— have traditionally tended to applaud judicial innovations aimed at increasing the liabilities of corporate defendants perceived to be harming helpless plaintiffs.[209] We submit that at least some of the judges who have recognized the rights of plaintiffs to insist on medical surveillance regimes of dubious personal and social value may have been encouraged by cheerleaders—environmentalists and legal academics— registering their enthusiastic approval from the sidelines.

And finally, it should be noted that these medical monitoring claims are an important component in the evolving phenomena commonly referred to as "mass torts" and "toxic tort litigation." Members of the plaintiffs' bar have an obvious and enormous financial stake in these proceedings; they are almost certainly the major beneficiaries of the successes enjoyed thus far. Significantly these medical monitoring claims may turn out to be uniquely suited to class action treatment. In general, courts have been hostile toward nationwide class certification in cases involving classic tort claims for monetary damages flowing from physical injuries.[210] In contrast, court-ordered programs designed to provide claimants with

205. *See generally* McCarter, *supra* note 146, at 245-46 & nn.102-104.

206. A proponent of recovery in these cases concludes her analysis by observing that "[re]cognition [of medical monitoring claims] by all courts would go a long way toward healing the wounds inflicted when individuals are unwittingly exposed to toxic substances." *See* Blumenberg, *supra* note 146, at 716.

207. *See* Kuran & Sunstein, *supra* note 202, at 758 (observing that courts may be influenced by the cultural pressures of collective concerns over risks and that courts "have a role to play in preventing excessive reactions to availability cascades").

208. It is no coincidence that at least half of the proponents of recovery for medical monitoring have approached the subject from an environmental perspective. *See, e.g.*, Blumenberg, *supra* note 146, at 661-62, 675-78.

209. *See supra* note 146. The authors cannot verify this observation empirically, and certainly intend no criticism of the authors. We opine from our experience that judicial innovation is, understandably, more intriguing to legal academics than are defenses of the status quo. We confess to being old-fashionedly skeptical of innovation. *See, e.g.*, James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467, 514-24 (1976).

210. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997) (overturning certification of class consisting of individuals exposed to asbestos who had reached settlement with defendant). *See generally* Maskin et al., *supra* note 133, at 546 ("[I]t is clear that 23(b)(3) [class

nonmonetary relief, preferred by the academic proponents of medical monitoring,[211] may be viewed as injunctive and equitable relief under Rule 23(b)(2) of the Federal Rules of Civil Procedure and similar state rules.[212] And while courts have denied class certification in medical monitoring cases under Rule 23(b)(3),[213] advocates favoring expansion of class action practice continue to insist that even medical monitoring claims seeking monetary recoveries are inherently susceptible to class treatment, essentially on the ground that factual variations among claimants and variations in applicable law are not so troubling here as in other areas of tort.[214] The authors do not think it merely coincidental that the major thrust of the expansionary, prorecovery movement afoot in twenty American jurisdictions and widely applauded by legal commentators may also lend itself to being handled through the class action mechanism. Even if the cases recognizing claims for exposure-based medical surveillance to date have not necessarily involved class certification,[215] judicial acceptance of the substantive aspects of these cases will very likely be aided and abetted in the future by the availability of procedural mechanisms with which to consider—and settle—massive numbers of claims in a single judicial proceeding.

VI. CONCLUSION

Asbestos litigation has been plagued by the willingness of some courts to front-load damages and allow recovery for "injuries" that in all likelihood will never eventuate. In the early days of asbestos litigation when the single-action rule still

actions are] an avenue which has been closed to many future mass-tort plaintiffs.").

211. Even skeptics agree that court-ordered programs are the only sensible approach. *See, e.g.*, McCarter, *supra* note 146, at 283 ("Some form of equitable relief, such as the trust fund endorsed in *Ayers* for governmental defendants, is the sole valid objective of future medical monitoring claims.").

212. *See, e.g.*, Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475, 476-77 (W.D.N.Y. 1995). *But see* Cook v. Rockwell Int'l Corp., 181 F.R.D. 473, 480 (D. Colo. 1998) (stating that medical monitoring case was essentially a suit for damages); Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D. Ohio 1991) (noting that plaintiffs' medical monitoring claims are "poorly-disguised money damage claims").

213. *See, e.g.*, Lockheed Martin Corp. v. Sup. Ct., 94 Cal. Rptr. 2d 652, 656 (Ct. App. 2000).

214. *See* Elizabeth J. Cabraser & Fabrice N. Vincent, *Class Certification of Medical Monitoring Claims in Mass Tort Product Liability Litigation*, SE01 ALI-ABA, 10-19 (1999) (pointing out that several courts have certified state-wide class actions).

The authors do not subscribe to the view that factual variations in medical monitoring cases are insubstantial. It will be recalled that the United States Supreme Court in *Amchem* refused class treatment for asbestos claims because it found the variation among claimants to be so substantial that commonality was lacking. *Amchem*, 521 U.S. at 629. In cases where medical monitoring is sought, the factual variations may be even more substantial. Since the claims are not based on any manifestation of an asbestos-related disease, but only on exposure to asbestos, the court must confront factual variations among claimants regarding whether any given plaintiff was exposed to asbestos and the level of any such exposure. Furthermore, questions as to the type of medical monitoring sought and whether such monitoring would confer a benefit on any plaintiff in allowing early detection of a curable disease will vary depending on the plaintiff. These highly individualized factual variations seriously question the appropriateness of class treatment.

215. *See supra* notes 138-45.

held sway, the reason for front-loading damages was understandable. If plaintiffs were not able to recover for all ensuing harms when they first discovered some physical indication that they might contract an asbestos-related disease in the future, they might be barred if they actually developed such a disease in the future. The long latency period for asbestos diseases made it almost certain that statutes of limitations would bar them from bringing their fully matured causes of action. Now that the overwhelming majority of courts have held that the single action-rule does not apply to latent toxic tort cases, plaintiffs can wait to see whether they actually develop a serious asbestos-related injury in the future.

Not willing to wait on the morrow, plaintiffs have sought to convince courts that they should be compensated for present suffering. They have argued that even though they are asymptomatic, they are entitled to recover for mental distress arising from their present fear that they will develop future injury and that they are entitled to medical monitoring awards so that they can determine whether they will need to be treated for some disease that may develop in the future. The huge majority of claims made under both of the above theories have been made on behalf of plaintiffs who have been exposed to asbestos or have developed some minor changes in their lungs evidenced by pleural plaque or pleural thickening. The likelihood that these plaintiffs will develop a malignancy in the future is very remote. Recovery for mental distress for fear of such remote harms has no support in the case law recognizing the tort of negligent infliction of mental distress.

The medical monitoring claims are equally attenuated. To respond to such claims it is necessary to provide medical surveillance for all plaintiffs who have only a slight increase in risk of developing malignancies in the future. The specter of a massive, never-ending que of claimants is very real. Moreover, as the massive number of uninjured claimants presenting anticipatory claims devours the defendants' resources, those defendants are forced into bankruptcy leaving nothing for those whose ills, whey they eventually manifest themselves, are not the least bit speculative. This problem has already pitted lawyers who represent the seriously injured against their cohorts who represent the unimpaired. The asbestos saga has been a tragic chapter in American social history. It need not have become a tragic chapter in American jurisprudence. But it has and it will remain so unless courts put an end to the madness.

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OPINION

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■ **ASBESTOS LITIGATION**

When the walking well sue

By Mark A. Behrens SPECIAL TO THE NATIONAL LAW JOURNAL

IN A WELCOME MOVE, the U.S. Supreme Court in *Norfolk & Western Railway Co. v. Freeman Ayers* will review a West Virginia state court jury's award of $5.8 million to six retired railroad workers who alleged that they are entitled to emotional distress damages under the Federal Employers' Liability Act for exposure to asbestos at the railroad and elsewhere. The case presents the court with an important opportunity to address what the court has called an "asbestos-litigation crisis."

The court should reverse the judgment below and send a strong message that unique asbestos-only distortions of the law shall not be tolerated. By doing so, the court also can send a clear signal that it is time to stop the hemorrhaging in asbestos cases so as to preserve assets needed to compensate the truly sick.

The efficient administration of justice for the truly sick should be given priority in our system of justice. Unfortunately, some courts, like those in West Virginia, have forgotten this basic principle. In an effort to control bulging dockets, these courts have substituted efficiency for fairness as their overriding goal. Instead of making the litigation situation better, however, they have actually made it far worse.

The number of pending asbestos cases nationwide doubled from 1993 to 1999, from 100,000 cases to more than 200,000. Up to 700,000 more filings are expected by 2050. The number of future claimants could reach 2 million. More than 56 major companies have been driven into bankruptcy—12 within the past two years. More companies will fall.

Present trends in asbestos litigation have set off a chain reaction. Payments to individuals with little or no serious physical illness have encouraged more lawsuits. Some reports suggest that as many as 90% of new asbestos-related claims are filed by the unimpaired or mildly impaired. The Supreme Court has noted that "up to one half of asbestos claims are now filed by people who have little or no physical impairment."

Dozens of bankruptcies

These filings have forced dozens of so-called traditional asbestos defendants into bankruptcy, including Owens Corning, Armstrong World Industries Inc. and W.R. Grace & Co. This year, Kaiser Aluminum Corp. and Porter-Hayden Co. filed for Chapter 11 reorganization. RHI Refractories Holding Co., a steel industry leader, was forced to seek bankruptcy protection for two U.S. subsidiaries.

These bankruptcies have ripple effects throughout the entire business community. When traditional defendants are forced into bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider and sue more defendants. Now more than 2,000 companies or individuals have been named as asbestos defendants. Many are household names, such as Ford Motor Co., Campbell Soup Co. and 3M. These companies, including the railroad defendant in *Ayers*, have only attenuated connections to asbestos, but they provide fresh deep pockets; this has caused them to become targets of litigation.

Some of the new attenuated class of defendants, the so-called "peripheral defendants," have themselves begun to collapse under the great weight of claims against them. The downward spiral will continue to play out on a broad scale for many more years unless something is done.

The epitome of asbestos cases

Ayers is a paradigm of the nationwide asbestos-litigation crisis. The case essentially involves a bare claim for emotional distress by plaintiffs who are, at best, mildly impaired, against an attenuated peripheral defendant. It also arises from a state that has developed a notorious reputation for stripping defendants of their basic rights—such as the ability to bring dismissal motions at the outset of a case—in order to promote what some consider a more efficient handling of asbestos cases.

The issue before the court is whether Federal Employers' Liability Act plaintiffs must follow the accepted common law requirement that emotional injuries are compensable only if manifested in an objective form. As the court explained in *Consolidated Rail Corp. v. Gottshall*, such proof traditionally has been required to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability."

The court is also being asked to decide whether liability act defendants can be held 100% responsible even if they may have been minimally at fault for a harm. At trial, the jury was instructed to make the railroad pay for harms caused by plaintiffs' exposure to asbestos on the job and while working elsewhere.

The court's ruling in *Ayers* will largely govern the liability under the law for asbestos-related claims against the major eastern railroads. It is also likely to set the tone for asbestos-related rulings by state courts. State court judges everywhere watch the Supreme Court for guidance.

The court should act to preserve assets and judicial resources for the truly sick and send a strong message about fairness in asbestos cases. Asbestos claimants and defendants no longer have the luxury of waiting for congressional or legislative action. As Judge Joseph F. Weis Jr. of the 3d Circuit wrote in an asbestos case: "It is judicial paralysis, not activism, that is the problem in this area." NLJ

Mark A. Behrens is a partner in the law firm of Shook, Hardy & Bacon in Washington, D.C.

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The real-life tragedy of the asbestos theatre

The increasing number of new claims is hurting innocent companies and making a mockery of the common law system

AMITY SHLAES

By now most observers are accustomed to America's tort theatre. We know all the players: the swaggering trial lawyers, the sheepish corporations that are forced to empty their deep pockets, the Robin Hood juries that hand out cash as a form of redistributive justice.

But for sheer unpredictability and scale, nothing can thrill like asbestos. In what other tort drama do the actors reach out and collar unsuspecting members of the audience (Halliburton, the energy services company, being the flamboyant example)?

Even though asbestos, the mineral, has disappeared from new buildings and products – the government banned its use decades ago – cases are proliferating. Last year about 90,000 new claims were filed against companies, three times the rate just a couple of years ago. Defendant companies that have had little or nothing to do with asbestos routinely go bankrupt after being hit with a penalty. And much of the cash is going to lawyers and people who are unimpaired.

The history of asbestos jurisprudence is worth recalling, if only for what it tells us about the common law. This system, with its incremental establishment of precedent through case law, is part of the Anglo-American tradition of freedom. Yet here it has been revamped into a monster with a tyranny all its own.

Just decades ago, asbestos seemed a manageable problem. On the one hand there were the visibly injured – those who suffered from mesothelioma, a fatal cancer, and asbestosis, an emphysema-like condition – whose illness was caused by asbestos. These were mostly workers who had substantial exposure over years – wartime dock workers and pipefitters. On the defendant side, only a few companies were vulnerable: the 300 or so US companies that mined asbestos or sold asbestos products. As with other law regarding toxic substances, state statutes of limitations applied: cases had to be filed within two or three years from the time of injury.

But asbestos disease has a latency period that can run into decades and so some of the injured were unable to sue. Most states thus altered their statutes, so that the clock began running only when people became aware of their disease.

This sounded logical but in turn begat a second problem: plaintiffs began to flood the legal system. What is more, the body of plaintiffs was no longer confined to those with evident physical impairment from asbestos. Now many of the litigants – and soon the majority – were unimpaired or only mildly impaired. Courts and juries began to grant large injury awards merely on the basis of smaller exposure, thus enriching many who will never experience asbestos disease.

Meanwhile, plaintiff lawyers, with acquiescence from judges, began doing what they could to expand the theory of what constituted injury. The US Supreme Court has just agreed to review another such case: *Norfolk & Western Railway Co v Freeman Ayers*, in which a West Virginia jury awarded six retired railway workers $5.8m because of "emotional distress" over fear of cancer after exposure to asbestos.

What a contrast to the UK, where the House of Lords is deliberating whether Edwin Matthews, a plaintiff, may recover anything if it is not clear which company was responsible.

Desperate to stanch the flooding of their dockets, judges in the US took yet another unusual step: they began to allow a form of mass consolidation that is not permitted in most classic tort categories in the US. "Bananas go with bananas" was the old rule of class action, says Victor Schwartz, co-author of the classic tort text, *Prosser, Wade and Schwartz*. Now judges were grouping apples (unimpaired possible casualties) with oranges (workers with diagnosed mesothelioma) in the same suit.

In order to stave off even larger settlements for the dying plaintiffs, judges and juries allowed awards to the entire group. By making litigation efficient, they encouraged more of it.

On the companies' side, the law likewise shifted. The traditional defendants that mined asbestos and sold asbestos product were almost all gone. So the plaintiffs' Bar began to take advantage of "the joint and several liability" doctrine that is especially strong in certain corners of the US. In those venues, a company need only to be proven responsible for a small share of an injury in order to be fully liable for its costs. Soon nearly any company with a connection to asbestos found itself ensnared.

It would be easy to blame this tragedy on the tort shark lawyers, who, often unscrupulously and perhaps sometimes illegally, profit from the suits. Lester Brickman, a professor at Yeshiva University's Cardozo School of Law, has pushed for the aggressive prosecution of some of these fellows (the charge would be suborning perjury). The judges are responsible, too: in a public "Letter to the Nation's Trial Judges", Mr Schwartz beseeched judges to drop their "pass them through" mentality.

A share of the blame likewise lies with Congress, which can bring the curtain down on mass asbestos actions but has declined to do so. This is notwithstanding earnest bleating and begging by the Supreme Court.

The third problem, though, is cultural: that attitude that sees big awards as compensation for all life's other wrongs. It is not the juries alone that I blame here but also the press and politicians who support the attitude that personal injury trials are a lottery. In a recent article, author Nicholas Lemann wrote that the personal injury suit may well have become, for America, "the metaphor that does the political work for liberalism".

A common law system, after all, is not theatre but a national privilege; it allows courts and citizens the right to make law, instead of faraway authorities. To retain that privilege, though, we have to recall that good common law is based on good common sense.

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Monday, April 15, 2002

EDITORIAL

ASBESTOS SUITS MOCK JUSTICE

If you've reached the point where you can't feel anything but disgust and despair about the American legal system, don't bother to read any further. But if you still possess a sense of outrage, read on.

In courtrooms and behind the scenes around the United States, a quiet scandal is spreading. Lawyers with the scruples of jackals are forcing companies into bankruptcy, jeopardizing the livelihoods of hundreds of thousands of workers and the nest eggs of untold numbers of investors.

The jackals' excuse for their legal extortion is asbestos, which U.S. companies stopped using decades ago. The number of new cases of asbestos-related disease has been falling since the 1970s, and even their attorneys acknowledge that very few new plaintiffs have serious injuries. Yet 90,000 new claims were filed last year, many against companies that never made asbestos or used it heavily in their products.

They are being sued only because other defendants have already filed for bankruptcy protection, stung by or fearful of multimillion-dollar jury verdicts like those awarded in Mississippi and Texas, where plaintiffs with wafer-thin claims have won damages for such trivial "injuries" as having an increased fear of cancer as a result of exposure to asbestos. One company went bankrupt after being named in about 50,000 lawsuits in each of the past two years. U.S. companies and insurers have spent well over $30 billion to defend against or settle asbestos suits. Experts estimate the cost will reach $250 billion.

The ripple effect is enormous. As more companies file for bankruptcy, the pool of remaining defendants shrinks, exposing them to a greater share of liability. That forces more companies to go bankrupt. Shareholders are left with little or nothing, and employees are left without jobs. Already more than 100,000 workers have been affected, and that's in just the 18 companies that have gone bankrupt. Lawsuits currently active affect thousands of companies.

Heard enough? Then demand change. Legislation is expected to be introduced soon in Congress to delay suits from healthy plaintiffs. Support it. But that alone won't do the trick. What's needed is fundamental change in the way the legal system handles suits of this kind.

Reform should come preferably from within. Judges should dismiss frivolous lawsuits before they can do this kind of damage. Lawyers should act more responsibly. Those who don't should be sanctioned. Those who still don't should be disbarred.

The legal system should serve the cause of justice, not make a mockery of it.

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■ VERDICT OF THE WEEK

NOVEMBER 12, 2001
VOLUME 24, NO. 12

Jury awards six asbestos plaintiffs $25 million each

P. B1

By Margaret Cronin Fisk
STAFF REPORTER

SIMEON JOHNSON, Charles White, Bobby Lawrence, James Curry, Phillip Pate and Ernest Jordan all worked for years as laborers in boiler rooms and around pipes in shipyards and schools in Mississippi. During this time, which spanned the 1950s to the 1970s, each was exposed to asbestos and subsequently diagnosed with asbestos-related lung disease, according to plaintiffs' attorney Isaac K. Byrd Jr. Although none has developed asbestosis or mesothelioma, "our pulmonologists testified they were all at risk for developing lung cancer and mesothelioma," he said.

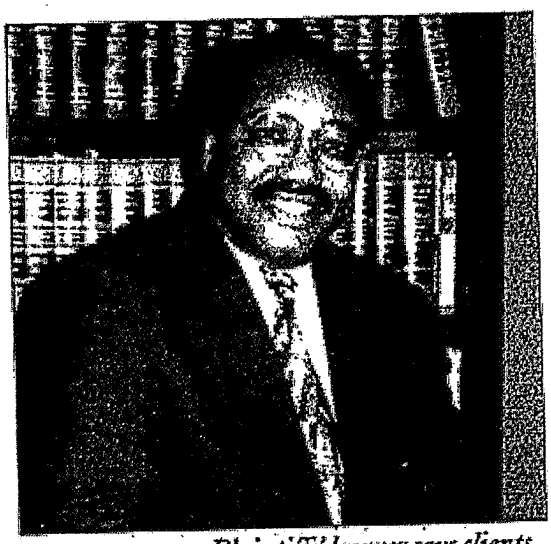
These plaintiffs, along with four others whose cases settled prior to trial, sued a bevy of asbestos makers and distributors, charging that their negligence caused the men's illnesses. All but three of the defendants settled before trial, leaving AC&S Manufacturing Inc., Dresser Industries and Minnesota Mining & Manufacturing Inc.

At a glance

CASE TYPE: Asbestos
CASE: Johnson v. AC&S Manufacturing Inc., No. 2000-101
COURT: Holmes Co., Miss., Circuit Court
VERDICT: $150 million

The plaintiffs claimed that AC&S manufactured and distributed asbestos despite actual knowledge, going back decades, of the dangers to workers, and that Dresser's Harbison Walker division did likewise. The claim against 3M was for selling a dust mask that was not effective with respect to asbestos.

The defendants denied any liability and contested the claims of asbestos-related illnesses. Dresser's owner, Halliburton Co., stated in a press release that "the only doctor to find a supposed asbestos-related condition was hired by plaintiffs' lawyers to screen potential clients."



ISAAC K. BYRD: *Plaintiffs' lawyer says clients were at risk of getting cancer, mesothelioma.*

On Oct. 27, a Lexington, Miss., jury found all three companies liable and awarded $150 million—$25 million to each plaintiff. The jury, however, assigned partial responsibility to other manufacturers. As a result, Dresser is liable for $21.25 million, 3M for $22.5 million and AC&S for $83.75 million. The defendants have indicated that they plan to appeal.

PLAINTIFFS' ATTORNEYS: Isaac K. Byrd Jr., Suzanne G. Keys and Precious T. Martin, Byrd & Associates, Jackson, Miss.; Timothy W. Porter and Patrick J. Malouf, Porter & Malouf, Jackson

DEFENSE ATTORNEYS: Leslie Joyner Bobo, Butler, Snow, O'Mara, Stevens & Cannada, Jackson; David

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Civil Justice Forum

No. 40 August 2002

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Asbestos Litigation: Malignancy in the Courts?

Lester Brickman

Professor Lester Brickman teaches at the Yeshiva University Benjamin N. Cardozo School of Law. His areas of expertise are lawyers' ethics with a focus on lawyers' fees; tort reform, including administrative alternatives to mass tort litigation; and contingency fee reform. He is widely quoted in the press, and his writings have been influential in changing policy with regard to non-refundable retainers and in setting the tone for national debate over tort reform. He has consulted for the US Office of Education, Ford Foundation, National Science Foundation, Council on Legal Education for Professional Responsibility, American Bar Association, and others.

Roger Parloff is a journalist who has been on the staff of The American Lawyer, Inside, *and* Brill's Content. *His work has also appeared in* The New York Times Magazine, Harper's, New York, *the* Wall Street Journal, The New York Times Sunday Book Review, *and* People, *among others. He recently authored a thorough article on the asbestos issue that appeared in the March 4th issue of* Fortune.

INTRODUCTION BY ROGER PARLOFF

While I was preparing for this introduction, I had a disconcerting experience. I learned that essentially every point that I tried to make in my Fortune *article had already been made more convincingly, more comprehensively, and more powerfully ten years earlier in an article in the* Cardozo Law Review *by Professor Lester Brickman. So, although Professor Brickman is an expert in the law and jurisprudence, I am relieved that he does not seem to be personally litigious.*

Please welcome Lester Brickman.

REMARKS OF PROFESSOR LESTER BRICKMAN

As many of you know from reading Roger Parloff's article,[1] about 90,000 new asbestos claims were filed last year. That's approximately triple the number of just two years ago.[2] If asbestos litigation filing rates were an accurate indication of asbestos-related injury, we could conclude that such injuries had reached epidemic proportions. In fact, they haven't. Far from it.

Most injurious exposure to asbestos-containing materials occurred during World War II when the United States undertook the most massive shipbuilding effort in history—an effort that was critical to our success in the war.[3]

The next wave of exposure came during the 1950s and the 1960s, when workers were exposed to asbestos-containing products during their installation at numerous construction sites. However, by 1970, or shortly thereafter, when knowledge of the hazards of the use of asbestos-containing

products became widespread, manufacture of such products pretty much ceased. Significant exposure—from the point of view of injury producing potential—diminished substantially thereafter.

For the principal asbestos-related diseases of asbestosis and mesothelioma[4] to occur, there has to be substantial exposure over a period of time, followed by a ten to forty year latency period, before actual disease manifestation occurs. Given the current ages of the occupational groups that were subjected to high-exposure levels, and their dates of exposure, one would expect that the numbers of new asbestos claims would be declining to a comparative trickle today.

Almost overnight, claimants and witnesses changed their testimony regarding Manville's share of the relevant market decades earlier.

What then accounts for the disconnect between the dates and rates of exposure and the huge increases in recent years in the numbers of claim filings? The answer is simply astounding. But, to understand it, I have to take you first on a whistle-stop tour through Asbestos Litigation Land.

The tour begins in the early 1970s when evidence was discovered that demonstrated that the Johns-Manville Corporation, Raybestos-Manhattan Corporation, and others had conspired decades earlier to suppress information on the hazards of inhaling asbestos in the course of mining and manufacturing asbestos-containing materials.[5] This damning evidence led the judiciary to facilitate asbestos disease claiming, beginning in 1973.[6]

By 1982, when asbestos litigation against Johns-Manville, which mined virtually all of the asbestos used in the United States and was, by far, the leading manufacturer of asbestos-containing materials, had mushroomed to 16,000 claims, Manville, surprising everyone at the time, declared bankruptcy. After Manville entered bankruptcy, every dollar of injury that a jury would attribute to Manville would be heavily discounted. This posed a severe problem for plaintiff attorneys, virtually all of whom, to that point, had concentrated on suing Manville. There then occurred one of the great sea changes in American legal history. Almost overnight, claimants and witnesses changed their testimony regarding Manville's share of the relevant market decades earlier. It plunged from as high as 80% to 25% or less and, by 1990, to 10%,[7] and even less today when the Manville Trust is paying only five cents on the dollar.

It is reasonably clear that this altered testimony was procured by plaintiff lawyers as part of their re-tooling of asbestos litigation. Judges, who probably knew what was occurring, were perhaps tolerant because seriously injured workers deserved compensation. They may have reasoned, at least in these cases, that the end justified the means.

Even today, the process inures. As each asbestos defendant goes bankrupt, there is an immediate and even uncanny change in claimant and witness testimony as to the percentage of that company's products at particular work sites.

Another issue created by the Manville bankruptcy (the biggest player and payer in the industry) was a looming capital shortage. This was partially solved in 1981 when Judge Bazelon held that, for purposes of insurance coverage, every carrier that had ever insured an asbestos-producing company over previous decades during which asbestos-containing products were being made, and every carrier that had insured a company at any point since, up to the time of the litigation, had to kick in policy limits for each and every year in which such policies were in force.[8] This holding was the equivalent of commandeering the government printing press into printing between 50 and 100 billion dollars in currency and putting the bill to the insurance companies. The creation of this enormous pool of insurance capital was seen by the former asbestos manufacturers as their salvation. In fact, it was their doom.

But for that decision, there would be no asbestos litigation today to speak of. It would have ended long ago when all the available corporate assets had been consumed. Instead, the decision was to have the same effect as the discovery of gold at Sutter's Creek. But, before the rush could be on, a few more steps were necessary.

Most of the post-Manville defendants had ended up in the asbestos products business by purchasing much smaller companies. Had these smaller companies remained independent, then asbestos litigation would have ended long ago, when their assets and insurance proceeds had been consumed. The fortuity of their being bought up by larger companies enabled the courts to apply the doctrine of "successor liability" to multiply the effects of the decision to rewrite insurance coverage.[9] As applied, successor companies not only inherited the liabilities of the acquired companies to the extent of the assets of those acquired companies, but to the extent of the assets of the acquiring companies as well, including their newly-minted insurance coverage. Thus the successor companies were held liable, not only for the 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 acquisitions and, indeed, of which they could not have been aware.

Having created a pot of gold, the next step in the development of asbestos litigation was to provide a path to the pot that would circumvent a major obstacle—tort law. Tort law, reduced to its paradigm, provides that if A injures B, B can sue A for the extent of his injuries. But, to prevail, B has to prove that A proximately caused the injury. Most asbestos litigation involves claims of exposure to asbestos products 15, 20, 30 or more years earlier at multiple work sites where many different asbestos-containing products were being used. Thus, problems of proof abound in this litigation. Nonetheless, the proximate cause obstacle was swept aside by creative lawyering, resulting in the development of what I termed 10 years ago "special asbestos law."[10] Instead of having to directly prove both exposure to specific products and causation, all that was required was testimony from somebody that Company A's products were used at the work site, plus medical testimony that exposure could cause injury, plus a claim of significant injury,[11] and the case could go to the jury, and the jury could do what juries do. But in adjusting the rules of evidence to meet the exigencies of asbestos cases, that is, in creating a result-driven evidentiary regime for cases where the fullest compensation for serious injury seemed merited, the appellate courts failed to confine the circumstantial hearsay evidence rule that they had created to cases of serious injury. Almost immediately, special asbestos law was applied to cases of dubious injury and ultimately to cases, as we will see, with no injury.

Almost immediately, special asbestos law was applied to cases of dubious injury and ultimately to cases . . . with no injury.

For some judges, "special asbestos law" needed to be augmented by numerous evidentiary rulings during the course of trials that would further weight the process in favor of the plaintiff. Thousands of such rulings were made which never saw the light of day outside of the courtroom. Let me give you one example. A plaintiff, claiming asbestosis testified, as is typical, that he was short of breath and could no longer work or engage in many of life's activities.[12] During the course of this trial, the judge became ill, and it was necessary to declare a mistrial and conduct a new trial with a different judge and a different jury. During the subsequent trial, a juror who had been seated at the first trial voluntarily came forth and offered to testify that he happened to observe that same plaintiff outside the courtroom and that he exhibited none of the symptoms that he had displayed in the courtroom (of shortness of breath, and so on). Despite the clear relevance and critical importance of this freely volunteered testimony, the judge disallowed it on procedural grounds.

Although there was overwhelming evidence that the plaintiff had suffered no injury, and that he continued to carry on his normal activities, *the jury awarded him a million dollars in compensatory damages and $25 million in punitive damages,* remitted by the judge to $500,000 and $2 million respectively, and somewhat further remitted in an appellate proceeding.

Here was asbestos litigation writ large. A claimant who almost certainly had no asbestos-related disease, no injury, no symptomatology, invoked "special asbestos law" and with additional and critical help from the judge, had been awarded huge sums by a jury.

The circle was now squared. There was a pot of gold, special asbestos law, and the removal of the last impediment posed by tort law, the requirement of evidence of real injury.

There were still obstacles to overcome in the development of modern asbestos litigation. Huge assets had been sequestered, special law created, but, at the rate of 4,000 malignancy claims a year, it would take much too long to accommodate the pecuniary interests of tort lawyers. The universe of claimants had to be expanded.

Perhaps 50% of persons heavily exposed to asbestos over a period of years, develop "pleural plaques," which are deposits of collagen fibers detectable only by x-rays, visible 20 or more years after initial exposures as thickenings of the lining of the lungs.[13] The vast majority of individuals with plaques have no lung impairment and no symptomatology whatsoever. For most, is a totally benign condition. Furthermore, there is no scientific evidence to indicate that having pleural plaques results in any greater likelihood of contracting an asbestos-related disease than others similarly exposed that have not developed pleural plaques. Indeed, a leading pulmonologist that I consulted indicated that someone with pleural plaques has a much lower likelihood of thereafter contracting asbestosis than a similarly exposed individual who does not have pleural plaques.

Despite the fact that there is no scientifically credible evidence that being diagnosed with pleural plaques is an indication, above and beyond the fact of exposure, of any greater likelihood of contracting an asbestos-related disease than if no pleural plaques existed,[14] the condition has been labeled a "disease" in some states (though in other states, such a categorization is rejected.) In other states, pleural plaque claims are denominated as "fear of cancer" claims though, again, there is no credible evidence relating pleural plaques to malignancy. Not surprisingly, claims migrate to those states where compensation is available. However denominated, pleural plaque claims were brought by the thousands and soon billions of dollars in compensation were being paid out to these claimants.

The circle was now squared. There was a pot of gold, special asbestos law, and the removal of the last impediment posed by tort law, the requirement of evidence of real injury.

Tens of thousands of asbestos claims began to inundate the courts, clogging their dockets. To deal with the traffic crisis that they had created, courts decided to build the equivalent of superhighways to accommodate caseload congestion. By use of consolidations, class actions and other aggregative techniques, courts began to dispose of cases by the tens, and then hundreds, and then thousands, in single swoops. This had three effects. First, the defendants confronted "bet the company" scenarios. The possibility existed that a jury in a jurisdiction specially selected by plaintiff's attorneys because of its propensity for awarding huge amounts to plaintiffs, could award millions in compensatory damages per claimant, and more importantly, tens or hundreds of millions in punitive damages collectively. And so, acting rationally, defendant's counsel settled the aggregated claims even though many of them, and later most of them, had little or no merit.

Second, plaintiff lawyers had great incentives to include more and more unimpaired claims since defendants were compelled to settle the aggregated cases.

Third, plaintiff lawyers mobilized. They had learned that the greater the number of claims that they brought, the greater the pressure they put on courts to aggregate them,[15] and the greater the pressure on defendants to settle the aggregated claims irrespective of their merits. In response, they used mobile x-ray vans to do mass screenings and engaged in other techniques to collect clients by the droves.

The strategies adopted by the courts to deal with the consequences of their own decisions were thus perverse.[16] They had the exact opposite of the intended effect. The more the courts aggregated asbestos claims in order to clear their dockets, the more claimants the plaintiff lawyers searched out to refill the pipelines and create new pressures to aggregate more groups of claims.

In addition to understanding how pleural plaque claims have been used to perpetuate a fraud on the civil justice system, comprehending the answer to the question I posed at the outset also requires understanding of the role of asbestosis claims. When any of scores of different dust particles penetrate the lung's forward line of defenses, they can produce inflammation that can lead to a scarring of lung tissue.[17] When it does, the condition is termed interstitial or parenchymal "fibrosis."[18] If the fibrosis is the result of exposure to silica (sand), the condition is termed "silicosis;" if it is the result of exposure to asbestos, it is called "asbestosis." There is no difference in these conditions—only the name is different. Asbestosis in its mildest form causes no breathing impairment and, like pleural plaques, is detectable only by chest x-ray. In more severe cases, it is progressive and debilitating and can lead to death.

Frequently, in asbestos litigation, diagnoses of asbestosis are disputed. Some medical experts hired by plaintiff lawyers virtually always find asbestosis and some hired by defendants rarely find asbestosis. Where does the truth lie? A Federal district court judge substituted court-appointed medical experts for the parties' experts, to examine 65 plaintiffs, each of whom would have been diagnosed by plaintiffs' experts as having asbestosis. The neutral experts found that only 15% had asbestosis and 20% were unimpaired but had pleural plaques. The remaining 65% had no identifiable condition.[19] If this example is characteristic of asbestosis claiming, and there is good reason to believe that it is, then 70% or more of claims currently denominated as asbestosis are simply bogus.

The strategies adopted by the courts to deal with the consequences of their own decisions were thus perverse.[16]

The role of asbestosis claims in asbestos litigation underwent dramatic changes in the mid-1990s. By then it had become clear that all of the so-called traditional defendants would soon go bankrupt. In a desperate attempt to survive, the CCR, an association of 20 of the leading asbestos defendants that had banded together to jointly defend asbestos litigation suits, sought out and entered into a $1.2 billion settlement agreement with the nation's leading plaintiff asbestos law firms (save one). The agreement, known in the trade as *Georgine,* provided that, in exchange for setting up an administrative claiming process for adjudication of all future claims, there would be huge payouts for the lawyers' current inventory of 14,000 claims, including their pleural plaque claims, that would net the lawyers approximately $300 million in fees. This settlement was closely associated with an immediately prior settlement of asbestos claims which netted the plaintiffs lawyers upwards of $300 million in fees.

The critical feature of *Georgine*, indeed the core reason why the defendants sought out the lawyers and agreed to both settlements, was that there was

to be a zero valuation for future pleural plaque claims. While the settlement agreement was later struck down by the United States Supreme Court,[20] it had an almost immediate and immense effect on asbestos claiming.

Plaintiff lawyers began reclassifying their unimpaired pleural plaque claims as asbestosis to defeat the *Georgine* exclusion of pleural claims.[21] For the Manville Trust, set up as part of the Manville bankruptcy, non-malignancy claims, consisting mostly of unimpaired claims, *have quintupled in the last four years.* In response to this cataclysmic increase in claiming, which forced the Manville Trust to decrease its payment rate from 10 cents on the dollar to 5 cents on the dollar (and a further reduction is clearly in line), the Trust began medical audits of the asbestosis claims being submitted by requiring x-rays, which they then sent out to experts for reading. The audit program demonstrated that several of the law firms were consistently using bogus medical evidence.[22] When plaintiff lawyers complained about being required to have to submit x-rays along with their claims, the presiding judge, one of the most sought after federal district court judges in the country by plaintiff lawyers filing certain mass tort actions,[23] instructed the Trust to stop the auditing program and to pay claims as submitted and not subject them to any kind of an auditing procedure. [24]

Effective hourly rates for plaintiff asbestos lawyers range from $1,000 an hour to $25,000 an hour.

The mass screenings of would-be clients was also facilitated by the establishment of entrepreneurial enterprises to administer pulmonary function tests.[25] Given the enormous financial incentives built into the medical evidence production process, it is not surprising that many of these enterprises systemically and deliberately deviate from testing standards in order to produce positive results.[26]

Even when medical evidence is produced by specialized professionals (radiologists who are called "B" Readers to recognize a higher level of skill), financial incentives have often overwhelmed professional standards. It is a fact that different asbestos law firms have different disease mixes that characterize their portfolio of claims. There is considerable evidence that some B-Readers conform their outcomes to the preferences of the lawyers that retain them. So, a B-Reader reading 100 x-rays for Law Firm A might find 95% to show evidence of asbestosis, whereas the same reader, reading the same 100 x-rays for Law Firm B and conforming to their disease mix, might only find a 50% rate of asbestosis.[27]

The engine that drives asbestos litigation is, of course, the contingency fee.[28] *Effective hourly rates for plaintiff asbestos lawyers range from $1,000 an hour to $25,000 an hour.* In some aggregations, the effective hourly rates of return are much higher. Only contingency fees in tobacco exceed these hourly rates.

In theory, lawyers' contingency fees ought to vary according to the degree of risk. At the very least, charging 40% contingency fees in cases utterly devoid of risk (as, for example, where by prior settlement, the lawyer automatically bills defendants for payment of new claims), would appear to clearly violate rules of ethics limiting lawyers' fees to reasonable amounts. In fact, they do not. *This is so because the rules of ethics simply do not apply to fees generated by asbestos lawyers (and, I might add, also do not apply to fees generated for many of these same lawyers wearing their tobacco litigation hats).*

Another example of the exemption of asbestos lawyers from rules of ethics, if not from criminal laws, are the methods used by some lawyers to process the claims of the unimpaired. Once the claimants are recruited by mass screenings and the requisite medical evidence is produced by the B-Readers and other mass medical testing enterprises, the mass processing continues at the law firms where paralegals prepare the clients for deposition.[29] If these clients cannot remember

what products they came in contact with 20 and 30 years ago at multiple and various work sites, as many do not, the paralegal will show them pictures of product labels, instruct them as to which products they are to testify they came in contact with, and then give them written information about those products with instructions to memorize that information, because they are going to take a test—it's called a "deposition"—and if you pass the test, you get money.[30]

In addition, they are told which products they are to testify that they did *not* come in contact with. These, of course, are the products of companies in bankruptcy that are paying too few cents on the dollar.[31] They are also instructed to say that they never saw warning labels on the bags containing the products and are reassured that they are not to worry about being challenged with regard to any feature of their testimony, because the lawyers for the defendants have no way of knowing which products they actually used and, therefore, cannot contest *anything* that they say.[32] Finally, they are instructed what to say with regard to their adverse health condition. Pages and pages of sample symptoms are provided.[33]

In my opinion, previously expressed in the form of an affidavit, this is subornation of perjury. It is also a principal, if not *the* principal, method of processing unimpaired asbestos claims today.

These exemptions, both from the rules of ethics and criminal law, are simply the tip of the iceberg in terms of delineating the influence that these lawyers have come to exert in American society. The final stop, then, in my whistle stop tour is to focus on the leading asbestos litigation lawyers. There is no better indication of their sheer, raw power than the account in the press and elsewhere of how some of these lawyers expressed their opposition to a bill introduced into Congress in late 1998 and re-introduced in early 1999, co-sponsored by more than a 102 Senators and Congressmen that would have set up an administrative process to defer resolution of the claims of "non-sick" persons until and unless they actually developed an asbestos-related disease.[34] As all of us know, the First Amendment to the Constitution of the United States provides that "Congress shall make no law. . . abridging the right of the people peaceably to assemble, and to petition the government for redress of grievances. . ." Note carefully that the First Amendment's prohibitions do not apply to asbestos lawyers, only to Congress (and the States.) When the proposed legislation to remove unimpaired claimants from the litigation process appeared to be generating a head of steam, the leading asbestos lawyers, representing 80% of pending cases, summoned the defendant companies supporting the bill to a series of meetings at which they informed the companies that unless they withdrew their support for the bill and instead, announced their opposition, they would be put out of business in short order. The threat was more than credible. All of the defendant companies, save one, capitulated.

In addition, they are told which products they are to testify that they did not *come in contact with. These, of course, are the products of companies in bankruptcy that are paying too few cents on the dollar.*[31]

I have searched historical records in an attempt to identify groups in U.S. history who have amassed wealth and power comparable to that of the contingency fee lawyers involved in the asbestos and tobacco litigations. The closest approximation I have been able to come up with are the Robber Barons of the late Nineteenth Century. The powers and excesses of the Robber Barons were ultimately curbed by legislative and judicial action. Today's version exercises far more power than the Goulds and Fisks, or even the Morgans and Rockefellers, ever did. The reality is that our modern-day robber barons, armed with their riches and shielding their naked power from public view with a little help from Hollywood, have come to exercise dominant control over both legislative and judicial processes.

Now that I have completed my whistle stop tour of Asbestos Litigation Land, I can answer the question that I posed at the outset: Why is asbestos litigation increasing at a time when medical science says it should be decreasing?

It is because asbestos litigation today has come to consist, mainly, of non-sick people, suing in jurisdictions where asbestos litigation is one of the main industries supporting the local economy,[35] claiming compensation for non-existent injuries, often testifying according to prepared scripts with perjurious contents,[36] and often supported by specious medical evidence.[37]

On the basis of the empirical data and analysis set forth in the articles I have published as well as other published and unpublished materials, it is my opinion that asbestos litigation today is, for the most part, a massively fraudulent enterprise that can rightfully take its place among the pantheon of such great American swindles as the Yazoo land frauds, Credit Mobilier, and Teapot Dome. The issues posed by asbestos litigation, as practiced today, in my judgment, should be seen less as matters of civil justice reform than as matters of law enforcement. Some years ago, a Federal judge, in addressing the S&L scandals and focusing on the role of professionals in the many fraudulent schemes that were uncovered, asked rhetorically, "Where were the lawyers?" Today, I answer, I think we know where the lawyers are. But where are the prosecutors?

AUTHOR'S NOTE

Empirical data, statements and conclusions set forth in this presentation are largely based upon three articles that I have written on asbestos litigation: *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 Cardozo L. Rev. 1819 (1992) (hereinafter *"Asbestos Litigation Crisis"); The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 Cardozo L. Rev. 1891 (1992) (hereinafter *"Asbestos Claims Management Proposal");* and *Lawyers' Ethics and Fiduciary Obligation In The Brave New World of Aggregative Litigation,* 26 William & Mary Environmental Law & Policy Review 243, 271-298 (2001) (hereinafter *"Aggregative Litigation"*). As noted in *Asbestos Litigation Crisis*, some of the data that I relied on for my initial article "was obtained during the course of consulting work on contingency fees and punitive damages that I did for an asbestos defendant; however most of the unpublished empirical data which I refer[ed] to was obtained as part of my research for the Article.... [B]ecause of this and other opportunities I... had to 'extensively review empirical data, case files and other materials' on asbestos litigation, the Administrative Conference of the United States [an executive branch agency of the U.S. government] asked me to 'draft a proposed administrative solution to the asbestos litigation crisis which the panelists at [a] colloquy [that I organized for the Conference] were invited to criticize." *Id.* at 1819, quoting from Introduction of Lester Brickman by the Chairmen of the Administrative Conference at the colloquy titled: *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States (Oct. 31, 1991).

In editing this presentation for publication, I have added citations to supporting materials where I thought that would be helpful to the reader. Those seeking a more detailed understanding of asbestos litigation, however, may wish to read the articles I have listed above.

END NOTES

1. Roger Parloff, "Asbestos lawyers are pitting plaintiffs who aren't sick against companies that never made the stuff—and extracting billions for themselves," Fortune, March 4, 2002 at 155.

2. Certain industries have reported huge increases in filing rates. In the past two years, for example, there were increases of 721% in the textile industry, 296% in the pulp and paper industry, and 284% in the food and beverage industry. *Id.*

3. Convincing evidence exists that both the Navy Department and the White House knew that many of the shipyard workers, who were practically bathed in the asbestos installation that they were installing inside the ships, would contract deadly diseases but *c'est la guerre*. In war time, there are casualties and the U.S. Government apparently considered shipyard workers to be on the front lines. *Asbestos Litigation Crisis* at 1884-86.

4. For a description of mesothelioma, *see Asbestos Litigation Crisis* at 1842-44. It is commonly thought that mesothelioma, a particularly virulent malignancy of the pleural, pericardial and peritoneal cavities, is caused exclusively by exposure to asbestos. *See, e.g.,* O'Brien v. National Gypsum, 944 F. 2d. 69 (2d Cir. 1991). In fact, approximately 20% of malignant mesotheliomas are not caused by asbestos exposure. Michele Carbone, Robert A. Kratke & Joseph R. Testa, The Pathogenesis of Mesothelioma, 29 Seminars in Oncology 2 (Feb. 2002); Mark Britton, The Epidemiology of Mesothelima, 29 Seminars in Oncology 18 (Feb. 2002).

5. *See* Paul Brodeur, OUTRAGEOUS MISCONDUCT (1985).

6. *See* Borel v. Fiberboard Corp., 443 F. 2d. 1076 (5th Cir. 1973).

7. *See Asbestos Claims Management Proposal* at 1894 n. 13; *Aggregative Litigation* at 277 n. 105.

8. Keene Corp. v. Ins. Co. of North America (INA), 667 F. 2d 1034 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 951 (1982). *See Asbestos Litigation Crisis* at 1832 n. 51.

9. *Asbestos Litigation Crisis* at 1881-84.

10. *Id.* at 1840-52.

11. *Aggregative Litigation* at 294-95.

12. *See* Dunn v. Owens-Corning Fiberglas, 774 F. Supp. 929 (D.V.I. 1991); *see also Asbestos Litigation Crisis* at 1844-47.

13. *Asbestos Litigation Crisis* at 1852; *see also* Paul Sterk, "Imaging of Pleural Plaque, Thickening and Tumors," downloaded from UpToDate at www.uptodate.com, last visited April 30, 2002.

14. In a study of power plant workers, *See* Dr. Joseph M. Miller, Benign Exposure to Asbestos Among Power Plant Workers (1990) (unpublished), 172 workers were identified who had had significant exposure to asbestos, 19 of whom retired, 9 had died, 30 declined to enter the study and 114 were still alive, employed at the plant and were agreeable to participating in the study. Eighty percent had exceeded 30 years of latency and the mean latency of all participants was 32 years. The 114 workers were monitored annually from 1982 to 1990. Approximately 43 percent were found to have pleural plaques. Not one had asbestosis. Ninety five percent had no impaired lung function. Six of the seven individuals with slight to moderate reduction in lung function were heavy smokers, whose impairments were not characteristic of asbestosis, and the seventh was an ex-smoker. There was no significant difference in the mean values on lung performance tests between those with pleural plaques and those not found with pleural plaques. Of the 172 workers identified in 1982, 25 deaths had been recorded by

1990. None died of mesothelioma or asbestosis. Two who were heavy cigarette smokers died of lung cancer.

Included in the study was a review of other studies of power plant workers. These other studies showed an increased prevalence of pleural plaques but no significant difference in clinical symptoms or in lung function when compared to a control group. The study concluded: Despite the "... high prevalence of pleural plaques..., the absence of clinical asbestosis, the lack of excess lung cancer and no finding of mesothelioma provide reasonable evidence of low risk to those workers during a full occupational lifespan.... [T]he finding of no significant difference in mean [lung function] among those with and without plaques appear to absolve plaques as a cause of the minimal impairment of respiratory function noted in a few smokers." *Id.* at 7-9. "Only when asbestosis was also detected in association with plaques did the risk of cancer increase, thus signifying heavier asbestos exposure as the cause of increased risk, rather than the mere presence of pleural plaques." *Id.* at 10.

15. *Aggregative Litigation* at 257.

16. *Asbestos Litigation* Crisis at 1826-27.

17. *See* Ken Donaldson & C. Lang Tran, Inflammation Caused by Particles and Fibers, 14 Inhalation Toxicology 5 (2002).

18. *Asbestos Litigation Crisis* at 1846 n. 112.

19. *Id.* at 1847 n. 120.

20. Amchem Products Inc. v. Windsor, 521 U.S. 591 (1997), *aff'd* 83 F. 3d 610 (3rd Cir. 1996).

21. *Aggregative Litigation* at 284 n.112.

22. *Id.* at 286-92.

23. *Id.* at 264.

24. *Id.* at 290-91.

25. *Id.* at 273 n. 95, 282 n. 110.

26. *Id.* at 282 nn. 110-111.

27. *Id.* at 293 n. 141.

28. *Asbestos Litigation Crisis* at 1834.

29. Aggregative Litigation at 273-81.

30. *Id.*

31. *Id.* at 276-77.

32. *Id.*

33. *Id.* at 278-81.

34. *Id.* at 246 n. 13.

35. *Asbestos Litigation Crisis* at 1827; for a discussion of the role of forum shopping in mass tort litigation , *see Aggregative Litigation* at 258-65.

36. *Aggregative Litigation* at 275-81. For a description of the type of testimony that might emanate from the use of such scripts, *see Asbestos Litigation Crisis* at 1848 n. 125.

37. *Aggregative Litigation* at 281-293.

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MEALEY'S LITIGATION REPORT

Asbestos

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'Medical Monitoring And Asbestos Litigation' —

A Discussion With Richard Scruggs And Victor Schwartz

LOEC Panel Discussion

Chapman University
Orange, California

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SECTION: Volume 17, Issue #3

HEADLINE: 'Medical Monitoring And Asbestos Litigation' - A Discussion With Richard Scruggs And Victor Schwartz

BODY:
The following panel discussion took place at the Law and Organizational Economics Center's Fourth Annual Judges and Lawyers Symposium held at Chapman University in Orange, California, on October 26, 2001. The title of the symposium was Health Care: Economics, Law, and Public Policy. The LOEC is the nation's preeminent provider of rigorous, high-quality education to state judges.

Texas Supreme Court Justice Craig Enoch:

We have two talented speakers today who are going to address two very interesting topics: medical monitoring and asbestos litigation. Our first speaker is Richard Scruggs from Pascagoula, Mississippi. Mr. Scruggs represents workers suffering from occupational injuries such as asbestosis, noise-induced hearing loss, and hand and arm vibration syndrome. His firm serves as special consultant to the Attorneys General of Mississippi and Louisiana, represents plaintiffs in asbestos litigation, and acts as co-counsel in special litigation consolidated personal injury cases. Since May of 1994, Mr. Scruggs' firm has been the lead private counsel to the Attorney General of Mississippi in the state's litigation against the tobacco industry. His firm filed the first complaint of its kind seeking reimbursement of Medicare funds and other health care costs provided by state government. He has also worked with Puerto Rico and states such as Oklahoma, Idaho, Louisiana, Michigan, Kansas, Montana, Ohio, Oregon, Rhode Island, Vermont, and New York. In 1997, his firm was influential in negotiating a Memorandum of Understanding between a number of state attorneys general and the tobacco industry. That Memorandum of Understanding was the model for the Master Settlement Agreement between the state attorneys general and the tobacco industry in 1998.

Our next speaker is Victor Schwartz, a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P., a 575-person law firm based in Kansas City, Missouri. Mr. Schwartz is a former law Professor and Dean of the University of Cincinnati College of Law. Later, as chairman of the Federal Interagency Task Force on Product Liability, he received the Department of Commerce Secretary's Award for professional excellence in government service. Mr. Schwartz assisted in the drafting of both the Model Uniform Product Liability Act and the Risk Retention Act. For over two decades, he has been the senior author of Prosser, Wade and Schwartz's Torts (10th ed. 2000), the most widely used torts casebook in the United States. He is also the author of Comparative Negligence, co-author of Guide to Multistate Litigation, and author of numerous articles. Mr. Schwartz is frequently quoted in The Wall Street Journal, The Washington Post, and The New York Times, and has appeared on "Oprah" and "60 Minutes."

We are very pleased to have both speakers with us today. The first topic they will address is medical monitoring.

Richard Scruggs:

Medical monitoring is a controversial topic that has its foundation in class actions resulting from mass torts. The class action vehicle itself has been controversial as a tool for resolving mass tort cases. Class actions can be efficient in that they allow claimants to aggregate all of their claims and resolve them in a single case. Often a company that is involved in very high stakes mass tort litigation is invited to settle rather than bet the company on one big trial involving tens of thousands, if not millions, of victims.

On the other hand, critics have charged that class actions are subject to abuse, such as coupon settlements where a few class action lawyers cut a sweetheart deal with the defendant's lawyers and, essentially, sell out the rights of the many victims for a pittance. The lawyers make a great deal of money, but the victims get practically nothing, and their rights are barred. Despite those abuses, however, I think the class action vehicle has great potential as an alternative to forcing a company to choose between declaring bankruptcy or trying every case until the company exhausts its insurance coverage in jurisdictions where runaway verdicts are common.

Medical monitoring arose in response to some of the challenges that plaintiffs face in meeting all of the requirements for class certification. Often, class actions are challenged in mass torts because they do not meet the typicality requirement of Rule 23(a) of the Federal Rules of Civil Procedure [or similar state rules]. Additionally, class actions may be challenged based upon the predominance requirement of Rule 23(b)(3) because, in many cases, issues of individual exposure or injury can be argued to predominate over issues common to the class.

In medical monitoring cases, those problems are minimized because everyone in the potential class has been exposed to some sort of dangerous or defective product and is entitled the same sort of remedy (i.e., medical monitoring). The real reason that medical monitoring, in my judgment, is preferable to a traditional class action is because it will better satisfy the requirements for maintaining a class, particularly on appellate scrutiny. Medical monitoring also provides a possibility of settling the case, whereas the jurisprudence is uncertain as to whether settlement classes that do not meet the strict requirements of Rules 23 of the Federal Rules of Civil Procedure are permitted.

The United States Supreme Court's decisions in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), as well as some cases by other courts, have created confusion as to when class action settlements will be permitted and when they will not. Medical monitoring seems to be sort of a fiction that both industry and trial lawyers use to satisfy those requirements so that they can craft a settlement that will meet the strict requirements of Rule 23.

In sum, I think that medical monitoring is a valid device. I think that, depending on the type of case, whether it should be used or not can be debated. Generally speaking, however, I think that medical monitoring serves a worthwhile purpose.

Victor Schwartz:

Medical monitoring is a concept that sounds appealing, but when you take a closer look at the issue, there are several reasons to be concerned.

The most troubling issue with medical monitoring is that it allows plaintiffs to recover damages without requiring them to show that they have suffered an injury. If you look at my

casebook or any standard tort treatise, you would see that it has been a bedrock principle of tort law for over 200 years that a plaintiff may not recover unless he or she has been injured. In medical monitoring cases, however, the plaintiff is not hurt-there is nothing wrong with him or her; there is no injury.

Of course, tort law has changed over time, and continues to change, but most significant changes to tort law happen gradually, over a long period of time. For example, when some of us went to school the rule in many states was contributory negligence, which meant that if a plaintiff was even a little bit at fault, he or she could not recover at all for an injury. Gradually that was changed into a comparative negligence rule. I agree that comparative negligence is a better rule, but that change took decades. Changing a rule that says somebody who is not harmed can recover damages is a fundamental change to tort law.

The Supreme Court of the United States looked at medical monitoring in Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997). Metro-North involved a medical monitoring claim brought by a pipefitter against his employer under the Federal Employers' Liability Act ("FELA") for occupational exposure to asbestos. FELA provides a cause of action for railroad workers against railroads engaged in interstate commerce. Cases involving FELA have generally been construed in favor of plaintiffs since FELA was enacted in 1908.

Metro-North was a case in which the facts were very sympathetic to the plaintiff. Buckley had been exposed to significant levels of asbestos, but he could not demonstrate any present physical injury - nothing was wrong. The Supreme Court decided not to allow medical monitoring under FELA. If you look at the opinion it is interesting what the Court said and observed. The Court expressed concern about many of the same issues that I will discuss today, such as the huge, almost limitless classes of people that could potentially have a claim for medical monitoring, and the difficulty of identifying which medical monitoring costs are necessary and beneficial.

I disagree with Mr. Scruggs in that I do not think that medical monitoring avoids the individualized issues raised in a class action. I think that there are several questions in medical monitoring cases that will vary from plaintiff to plaintiff. These issues include, what type of treatment is needed by each plaintiff? How much exposure is necessary before you allow a man or a woman to make a claim for medical monitoring? Are these questions really best suited for a court? Very recently the Supreme Court of Alabama (see Hinton v. Monsanto Co., 2001 WL 1073699 (Ala. Sept. 14, 2001)) and the Supreme Court of Nevada (see Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001)) both answered that question in the negative. Those two courts reasoned that the legislature may be in a better position to decide whether medical monitoring should be awarded and, if so, when.

Another issue raised by medical monitoring is, how can the courts ensure that the person who receives an award is actually going to use it to obtain medical monitoring? My friend Justice Maynard of the West Virginia Supreme Court of Appeals filed a dissenting opinion in a recent case in which a majority of that court decided to allow medical monitoring (see Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W.Va. 1999)). As Justice Maynard noted in his dissent, there is absolutely no way to assure that somebody who receives an award under a medical monitoring claim will actually use it to get a checkup. In contrast, a legislature can establish mechanisms to ensure that medical monitoring awards are used for checkups. Moreover, legislatures can determine what should be done in cases where a plaintiff may already receive medical monitoring under his or her existing health care plan. Under the collateral source rule, courts are generally not permitted to consider funds that a plaintiff may receive from outside sources. In the case of medical monitoring, however, it may be worth letting the legislature decide whether to allow a double recovery.

Another problem with medical monitoring is that it may produce a flood of claims. Let me give you one hypothetical to illustrate the difference between the number of claims that may

be filed in a mass tort action alleging actual injury and the avalanche of claims that could result if medical monitoring were allowed. Suppose that exposure to a particular drug or chemical may produce cancer in a small percentage of the people exposed. There may be several hundred claimants. But, if medical monitoring were allowed, millions of people might have claims. As you can see, there is a very significant difference. The money spent on monitoring may use up assets needed to compensate those with an actual injury. This might occur even if the people exposed had proper monitoring available to them through their health plans.

While I can understand why medical monitoring sounds appealing, the need for medical monitoring is a highly individualized decision. It is extremely difficult for any court to construct a brand new cause of action of this type, which is why many of the courts that have considered this issue have decided not to allow medical monitoring. I will conclude by noting that in New Jersey, the Supreme Court had previously decided to allow medical monitoring with no physical manifestation. (See Ayers v. Township of Jackson, 525 A.29 287 (N.J. 1987)). The Supreme Court of New Jersey has retreated a bit from that decision, and held that for medical monitoring to be allowed in New Jersey, the plaintiff must have an injury before monitoring is appropriate. (See Theer v. Phillip Carey Co., 628 A.2d 724 (N.J. 1993)).

Justice Enoch:

In Texas, before a plaintiff can bring a tort claim, there has to be a legal injury. It is not sufficient to have "negligence in the air;" there has to be an injury. It seems to me that the difficulty in toxic tort cases is that once the substance comes into contact with someone, it may or may not cause an illness in that person, and the courts are having difficulty in deciding at what point the legal injury occurred. For example, in the case of asbestos, many more individuals are exposed to asbestos than will actually develop mesothelioma or lung cancer. Perhaps medical monitoring has been developed by courts to deal with the problem that results when someone has been exposed to a toxic substance but there is no way to tell whether the person will develop an injury. Is this part of the reasoning for medical monitoring? Or is medical monitoring simply a way in which to encourage settlement when there is a exposed class of individuals that may not meet the requirements of Rule 23?

Richard Scruggs:

Judge Enoch, I think that you have stated the issues in medical monitoring very well. The question is, does the injury become actionable upon exposure of the body to a toxic substance, or must the plaintiff wait for a physical manifestation of the injury? I would argue the claim should be allowed upon exposure to the substance. A person who was exposed to excessive doses of radiation from a leak in a reactor, and, as a result, has a much higher risk of cancer or leukemia should be entitled to be checked if early detection can save or prolong his life. That is what medical monitoring is all about. Often, with toxic tort injuries, such as asbestos-related diseases, the physical ramifications of the exposure to the substance do not manifest themselves for 20 years or longer. In many cases, mesothelioma does not manifest itself until 30 or 40 years after the exposure has occurred. I think that the question of when the exposure and the risk of the manifestation of the disease ought to entitle a victim to medical monitoring should be a jury issue. I do not think that should be legislated any more than any other cause of action should be legislated. I think it should be a jury issue as to when the risk is sufficient to warrant medical monitoring. The industries that plaintiffs are generally seeking to hold responsible for these sorts of torts or potential torts are usually very well-heeled industries. They have very talented lawyers working for them, arguing that the risk is minimal. I do not think that it is unfair to require an industry that sells a product, which vastly increases the risk of injury to the people exposed to it, to pay for the monitoring that will be required for early detection.

Victor Schwartz:

A very good plaintiffs' firm in New York has stated that 25 million people have been exposed to asbestos, and I believe that number is accurate. Trying to differentiate between which plaintiffs are going to be allowed to bring claims, and which are not, is an issue that has troubled seven justices of the Supreme Court of the United States. To put this issue in front of a jury puts the jurors in an uncharted sea. If there has been some magnification of risk that is very significant, a rule could be established by the legislature or an administrative body that medical monitoring is required. There are several issues, however, that have to be considered in putting together a medical monitoring program. First, will the medical monitoring do any good? The West Virginia Supreme Court of Appeals decided to allow a claim even if the medical monitoring would not help because the potential disease being monitored is untreatable. Second, how should courts distribute the damages to the plaintiffs? Should the plaintiffs receive lump sum damages, or does there need to be a mechanism in place to ensure that the funds are used for medical monitoring? Third, should claimants who are already receiving medical monitoring through their employer or their insurance be entitled to a double recovery? Can we have a clear trigger to differentiate those who really deserve medical monitoring from those who do not? These are some of the issues that courts need to consider when they are deciding whether to allow medical monitoring.

Audience Member:

Is medical monitoring a new cause of action that is just developing?

Richard Scruggs:

Medical monitoring is not that new; it has been around for a long time. Medical monitoring first arose in the context of asbestos, where people would sue for exposure only, stating that they were at risk because they were exposed to asbestos. Most courts of appeals said that the statute of limitations would begin to run when there was a manifestation of the disease, although in some states, such as Alabama, the statute is triggered by exposure. In some cases, 20 years later, when that person gets cancer, the statute of limitations has run out because he did not sue at the time of exposure. Most courts, however, have taken the position that the statute does not start to run, and the injury is not compensible, until there is a physical manifestation resulting from the exposure.

Audience member:

What would happen if a plaintiff was successful on medical monitoring claim and, then, within the statute of limitations period, the plaintiff develops an injury such as cancer? Would the plaintiff have a new claim? Is the physical injury claim barred by the prior medical monitoring recovery?

Richard Scruggs:

There are separate causes of action, arguably, but I think that most courts would say that the defendant would be entitled to a credit for any amount of money that has been paid to the victim in medical monitoring. I think that if the plaintiff actually develops a disease, he is entitled to compensation for that injury, but the defendant should receive some sort of credit for the amount that it has already paid.

Victor Schwartz:

As I discussed in a recent article, courts in the various states that have looked at medical monitoring have dealt with the issue in several different ways. (See Victor E. Schwartz et al., Medical Monitoring - Should Tort Law Say Yes?, 34 Wake Forest L. Rev. 1057 (1999)).

Justice Enoch:

Let's move on to asbestos.

Richard Scruggs:

I think Victor may be surprised at some of what I will say regarding asbestos. I think that, as one California Supreme Court Justice has said, asbestos litigation has become the endless search for a solvent bystander. Most 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. Now, the companies that are peripherally related to the bankrupt defendants are being seized and held up in what I call the "magic jurisdictions," areas where what happens in court is irrelevant because the jury will return a verdict in the favor of the plaintiff. I think that what has happened in asbestos litigation is that most of the companies that are responsible for producing asbestos-containing products with knowledge of their hazards back in the 1930s and 1940s, companies like Johns-Manville and Owens Corning, have all gone bankrupt.

Some lawyers are attempting to impute the primary defendants' knowledge to the peripheral industries. I think that is the wrong approach. I do not think that trial lawyers are serving either the legal profession or their clients well by seeking to impose liabilities on companies that really should not be liable. These attorneys are actually passing up companies that they ought to be going after, such as some of the foreign companies that dealt with some of the most for deadly forms of asbestos. Those are the people they ought to go after. They were the ones that made substantial profits on asbestos sales, knew the product was dangerous and, nevertheless, sold it. Trial lawyers should pursue those companies, rather than going after companies who may have had some asbestos in their products but do not appear to have had the same level of knowledge as the primary asbestos defendants. I do not think we are serving ourselves well by going after the companies that had marginal liability, and trying to characterize those companies, which clearly are not asbestos companies, as asbestos companies, so that they will suffer the public stigma of being known as an "asbestos company."

Victor Schwartz:

I agree with Mr. Scruggs about this. There are two major changes in asbestos litigation today, and Mr. Scruggs may disagree with me on the second one. The first is that the defendants are no longer the 54 companies who are in bankruptcy, the so-called primary defendants. The defendants today are the companies that did not make asbestos, the peripheral defendants. In some areas, there is a presumption that these peripheral defendants had the same amount of knowledge as those who made asbestos-containing products. The processes and procedures that were set up for defendants who have repeatedly been proven at fault are being applied in some jurisdictions to peripheral defendants. This is not right.

The second major trend is the increase in the number of cases being brought by unimpaired claimants. There is nothing wrong with these individuals, they have no manifestation of injury; they are healthy. How do the courts deal with claims by unimpaired individuals? Massachusetts, which is not known for conservative jurisprudence, has developed a solution that I think is a good one. In Massachusetts, there is a registry for individuals who have been exposed to asbestos. When individuals put their names on the registry, the statute of limitations is prevented from running on their claims. If the individuals do get sick, they can have their claims removed from the registry and placed on the active civil docket.

One of the problems that I have noticed is that many of the mechanisms that were created to deal with the massive number of asbestos cases are not working in the way that the judges

who created these mechanisms had intended. For example, many judges, faced with 5,000 or 7,000 asbestos cases were looking for expedient ways to handle the cases, and efficiency became the hallmark of everything they did. In order to deal with the huge number of cases, some judges discouraged discovery or were more lenient with the rules for scientific evidence and x-rays than in other cases. Some attorneys saw that judges were not looking very carefully at the x-rays, were not deposing plaintiffs, and were assuming that the defendants had guilty knowledge, and saw an opportunity. What has happened as a result is that instead of getting rid of cases the goal of promoting efficiency has brought about thousands and thousand of new cases. (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 (2000)).

Conservative estimates by Rand Corporation indicate that unimpaired claimants account for at least half of the new asbestos cases being filed. Courts are going to be flooded with these claims, and the only way to stem the tide will be to apply basic rules of law. I am not talking about tort reform; I am talking about basic rules that are applied to other cases when there is a peripheral defendant involved. First, the best way to protect an unimpaired claimant is to make sure that his or his claim is not extinguished by the statute of limitations. As I said earlier, some estimates indicate that 25 million people have been exposed to asbestos. It is going to be difficult for courts to handle that volume of claims. There are a few people who are seriously injured who need help, and the courts need to be able to address the claims of those people. Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.

Audience Member:

Perhaps the solution to the problem is to have the state legislatures address the situation, to amend the statute of limitations so that it does not begin to run on exposure, but only runs when there is an actual injury. What do you think of that solution?

Richard Scruggs:

I think that would be a great solution in a perfect world. I think the problem is going to require national legislation, however, because if only a few states do it then the plaintiffs will migrate to states in which the statutes do not run. Asbestos litigation has become a cottage industry. I consider myself to be a first or second generation asbestos lawyer. We are now in the eighth and twelfth generation of asbestos lawyers. Some attorneys are building their practices on these mass production inventory asbestos settlements. If one state passes some sort of asbestos litigation reform law, the attorneys will simply go to another state that has more liberal joinder rules and bring the case over there. There must be national legislation in order to solve this problem. The problem with ATLA (the Association of Trial Lawyers of America) and other organizations like that who are watch dogs for consumer rights and lawyer rights, is that these groups are afraid of any sort of legislation in Congress, because even if the initial proposal looks good, they are afraid of what the end result will be. Victor, with his able skills in the American Tort Reform Association, will try to move the goalposts way down field. Nobody can trust the legislative process. I think that national legislation is needed to address the asbestos litigation problem and it would be great if that could be done.

Victor Schwartz:

I agree with Mr. Scruggs that national legislation is needed and I would pledge, certainly on the behalf of anybody that I represent, not to load up such legislation with tort reform. I think the asbestos registry approach would be very helpful to preserve the claims of people if they get sick. I would not try to load legislation dealing with this very major problem with any tort reform. I would try to reach agreement with people like Mr. Scruggs on something

that they considered fair. This is a national problem.

In Congress right now there is an atmosphere of bipartisanship that I have not seen in a very long time. There is an opportunity for people who normally may not be in agreement to try to reach agreement on things that affect us all at this point.

Judge Enoch:

Some people view asbestos litigation as being a "mature mass tort." It has been around for decades and certain rules have been fashioned to address it. Is there an immature mass tort on the horizon? Are there new types of claims that trial court judges will be facing in the very near future?

Victor Schwartz:

Over the next 10 years it is estimated that at least 500,000 new asbestos claims will be filed by the unimpaired if they are allowed to recover. In settlements involving unimpaired claimants, attorneys are combining settlement of impaired claimants with unimpaired claimants. If a plaintiffs' lawyer has 5,000 cases, he may have 10 cases of people with mesothelioma or cancer - people with real and serious injuries who deserve compensation - and 4,990 unimpaired claimants. In settlement negotiations, however, the attorney may agree to take less on the lung cancer and mesothelioma cases if the defendants will settle claims of the unimpaired at the same time. If this type of resolution of unimpaired claimants' claims with seriously injured individuals is allowed to continue, asbestos will be a self-perpetuating litigation. Asbestos will be "the next asbestos."

There are other things on the horizon. Mr. Scruggs would probably have better vision than I do on this topic, but I think that one area may be in pharmaceuticals. I think that there will be a new style of cases brought against pharmaceutical companies that do not involve personal injury. Chemicals may be another hot area. The EPA has been gathering certain data on some chemicals that have never really had that kind of testing. I also see that on the horizon in the next, I would say, 5 to 10 years. I am not commenting on whether the claims will be successful or not, but these are areas in which I think people are likely to try to bring claims.

Richard Scruggs:

I agree with Victor on the pharmaceutical issue. There are a lot of attorneys that have made an awful lot of money in asbestos litigation over the years. I think the ease with which asbestos companies have been successfully sued has diverted a lot of the trial bar away from exploring new mass torts like cases against the pharmaceutical industry. I do think, though, that there is one mass tort on the horizon which is very similar to asbestos, and that is litigation against the manufacturers of welding supplies for manganese poisoning that causes early Parkinson's Disease.

Most of the trial lawyers today have large asbestos inventories; about 20 to 30 percent of their clients were welders or in welding-affiliated trades. Some very incriminating documents from the 1930s and 1940s have surfaced from the major manufacturers of welding supplies, showing their knowledge. Some of these documents are every bit as damaging as those that have surfaced in the asbestos and tobacco litigations. This is definitely the closest thing to asbestos cases that I think we will see.

Justice Enoch:

We have a little bit of time for a few more questions.

Audience Member:

Could you explain to us how medical monitoring works in terms of insurance coverage issues?

Richard Scruggs:

Generally speaking, the carrier for companies that receive a judgment for medical monitoring will have to pay for medical monitoring. It will be a health care cost which will come off the insurance policies. As a practical matter, I do not think it will raise insurance costs. I think it will simply be more of the same until insurance is exhausted. One of the reasons that a lot of asbestos companies or companies that sold asbestos-containing products are settling is not necessarily because they want to settle, but because their insurers have said that they want to get rid of the claims. Once that happens, whether those claims are paid in injury cases or in medical monitoring cases does not really matter. The claims will be resolved faster with medical monitoring than they will with case-by-case injury claims, but once the insurance is exhausted then the victim will move on to someone else. I really do not think that medical monitoring is going to increase health care costs.

Victor Schwartz:

I think the worst way to handle medical monitoring is through the liability system. I think it should be handled under the health care system, where there is a health care provider to make a judgment as to whether or not an individual needs medical monitoring. If he or she does, the medical provider can see that he or she receives the proper monitoring, as compared to a lump sum damages award that may never be used for medical monitoring.

Justice Enoch:

We have time for one more question.

Audience member:

We have been talking about asbestos defendants and some incriminating evidence that surfaced in a document from the 1930s. How does the concept of a long latency period affect the evidence available to the plaintiffs?

Richard Scruggs:

Well, unfortunately for the plaintiffs, much of the evidence has been lost either intentionally or through some document retention policy where every 10 years a company will cull its files and get rid of documents.

We were fortunate in the asbestos and tobacco litigations that documents were not destroyed. We may be fortunate in the welding liability litigation as well. Some of the documents I have seen are pretty incriminating. I think the plaintiffs are going to have to prove that there is some evidence of spoliation of documents in order to get a presumption that the evidence would have been incriminating. That is why I think that regardless of how well-funded the plaintiffs are, or are perceived to be, and how aggressive they have been, the companies are still generally holding most of the cards, and they have gotten away with murder. There is a saying that when a worker kills his boss it is murder, but when the boss kills the worker, it is workers' compensation.

Victor Schwartz:

I think that judges will be very harsh in situations where there has been spoliation of evidence. That behavior should be discouraged. Part of my practice is counseling people on how to stay out of court, and I think that document preservation is important.

In closing, I just want to clarify one point. I agree with Mr. Scruggs that the pharmaceutical companies are going to be exposed to new and very serious litigation. On that point we agree. For the record, however, when Mr. Scruggs talked about how the companies deserve it - I did not agree with him there.

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National

Asbestos litigation overwhelms courts

Stephen Hudak and John F. Hagan; Plain Dealer Reporters
Distribution zones: All

LONNIE TIMMONS III THE PLAIN DEALER Rita Krammes believes she is dying because she was a helpful spouse. Although she taught full time, Krammes, 52, saw to it that her handyman husband's work shirts were clean and pressed. Not until she was diagnosed with mesothelioma did she learn the dust she shook from his clothes was asbestos. Her case is on Cuyahoga County's fast-track cancer docket. CHUCK CROW THE PLAIN DEALER Asbestos Judges Leo Spellacy, left, and Harry Hanna rarely seat a jury, despite a docket of 34,000 cases and a full trial schedule. Most cases settle. "Usually, the only question is who's going to pay," Hanna said. Above, the judges meet with lawyers during a pretrial conference last month. LONNIE TIMMONS III THE PLAIN DEALER George Quick's first brush with asbestos was during a tour in Vietnam. He changed the asbestos-lined brake pads on hundreds of Army Jeeps and trucks. His last brush may have been as custodian of Hudson schools. He said he occasionally found it in ceiling tiles and pipe wrap. The schools removed it. Quick needs an oxygen tank to breathe. JOSHUA GUNTER THE PLAIN DEALER Documents and exhibits for asbestos cases crowd storage rooms in the basement of the Cuyahoga County Courthouse. JOSHUA GUNTER THE PLAIN DEALER Michael V. Kelley

Michael Kelley has a mansion in Hunting Valley, a million-dollar beach condo, a private jet, a Jaguar and no apologies.

The Cleveland lawyer, who grew rich representing workers with lungs scarred from asbestos, doesn't see a problem with the longest-running and most-expensive legal saga in U.S. history.

But others do.

"Asbestos litigation has become a national nightmare as well as a national disgrace," said Steven Kazan, a lawyer representing victims of mesothelioma, a painful cancer caused by asbestos. "This has nothing to do with health anymore and everything to do with lawyers taking advantage of economic opportunity."

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Not enough of the money is getting into the hands of people who have suffered, said Mickey Kilbane, a Cleveland asbestos worker critical of corporate bankruptcies and fat lawyer fees.

"How much is enough for these guys?" he asked.

About $54 billion has been spent by companies and insurers to settle and fight claims, according to the RAND Institute for Civil Justice, which has studied asbestos cases for over 20 years.

It estimates the final bill will exceed $200 billion. RAND's latest report, released in September, also found:

Nearly 60 cents of every dollar spent on asbestos litigation goes to pay fees and expenses of lawyers for both sides. Plaintiffs' lawyers typically charge a contingency fee of 40 percent.

Even though the industry abandoned asbestos more than 30 years ago and asbestos-related deaths are dropping, new claims are actually increasing.

More than 200,000 claims for asbestos injuries jam dockets in U.S. courts, including more than 34,000 in Cuyahoga County, one of the nation's five busiest for asbestos cases.

According to some estimates, as many as 90 percent of those who are filing claims are not sick but acted now for fear the once-deep money trough will be empty if they wait until they are.

Kazan said every claim paid to someone who isn't sick cheats someone who is.

Last month, Cuyahoga County Judges Harry Hanna and Leo Spellacy created a fast-track "meso docket," which puts the cases of asbestos-cancer victims at the front of the line.

A typical asbestos lawsuit filed in Cleveland today names 100 or more defendants, a shotgun approach used by lawyers uncertain whose product to blame and who can most afford to pay.

It's a search for the deepest pockets, said Matthew O'Connell, a

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founding partner in the Cleveland firm of Sutter, O'Connell, Mannion & Farchione, who are specialists in asbestos defense.

Half the Fortune 500 have been accused, including companies like drug giant Pfizer and CBS' parent Viacom, which never used asbestos but acquired companies that once did.

Most consider themselves "peripheral" defendants, caught in plaintiff dragnets after more culpable companies like Johns-Manville and Ohio-based Owens Corning filed for bankruptcy.

"In this day and age, the burden of asbestos litigation has nothing to do with culpability," O'Connell said. "You've got people who are not sick suing people who never made the stuff."

It happens partly because of a controversial legal doctrine known as "joint liability," which holds a company that is only partly to blame 100 percent responsible if co-defendants can't pay.

Some plaintiffs are recruited by lawyers with Web sites and brash ads, including one suggesting: "A PICTURE OF YOUR LUNGS COULD BE WORTH MILLION$"

"It's not principle motivating them," O'Connell said. "There's money out there."

Kelley, whose firm has filed more than 1,400 asbestos claims in Cuyahoga County this year - three times as many as the next-busiest firm - said plaintiff's lawyers are an easy target.

"They bitch about people like me," he said. "But who's protected workers over the years? The government? The EPA and [Occupational Safety & Health Administration] didn't. Industry certainly didn't. Who? Trial lawyers, like me."

Deborah Hensler, co-author of the RAND study, said most of the newest asbestos claims are based on chest X-rays showing a shadow on the pleural membrane surrounding the lungs.

The shadow - usually caused by a thickened or scarred membrane - could indicate asbestos exposure but also may suggest 100 other diseases that aren't the fibers' fault.

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These pleural plaques usually do not impair breathing or develop into more serious diseases. But under Ohio law, they can be considered injuries for which a worker may sue.

Big national firms like Kelley's, which boasts 25,000 clients, sponsor X-ray screenings at union halls, providing doctors and a portable unit to examine large groups of workers.

"People on the other side hate screenings, of course, because it creates cases that wouldn't otherwise be filed," Kelley said.

But some on his side hate them, too.

"These are not patients; they are plaintiffs recruited for profit," Kazan said.

David Egilman, an expert medical witness who testifies primarily for asbestos plaintiffs, also criticized mass screenings this year in the American Journal of Industrial Medicine.

"I was amazed to discover that, in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one," he said.

"Some workers end up being unnecessarily and incorrectly advised that they have a potentially or invariably fatal disease. A number, no doubt, suffer anxiety and stress as a result. Others may change their life plans for no valid reason."

Nonetheless, Texas lawyer Fred Baron, a pioneer in asbestos litigation who has a Cleveland-area office, defended free screenings as a service to workers uncertain of their exposure.

"If a big trailer pulls up in front of [your office] and offers women free mammograms, would you be screaming and yelling that's outrageous? Of course not," he said. "Having a physician examine somebody and take an X-ray to determine whether they have lung cancer or asbestosis, to me, is not a bad thing."

But Judge Charles Weiner of Philadelphia, presiding over all asbestos claims in federal court, will no longer hear a case that

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was spawned from a mass screening unless shown additional evidence of disease.

Former federal Judge Thomas Lambros took a similar approach here in Cleveland in 1988, dismissing the cases of 1,500 sailors who couldn't back up their claims. Most never refiled.

While asbestos lawyers have portrayed themselves as tenacious fighters for working people battling corporate conspirators, others view them as unscrupulous money-grubbers.

In January, asbestos defendant G.I. Holdings sued several prominent law firms, accusing them of filing thousands of bogus claims to overwhelm courts and reap fees. The company claimed lawyers threatened them with a "nuclear response" if it continued to push for legislation that would change asbestos litigation and cap punitive damages.

In Texas and Ohio, Baron's firm was accused of improperly coaching witnesses after a 20-page memo called "Preparing for Your Deposition" was discovered by defense lawyers. The memo instructed clients how to answer crucial questions: "It is important to mention that you NEVER saw any labels on asbestos products that said WARNING or DANGER."

But lawyers aren't solely to blame for the new flood of claims. RAND's Hensler said defendant companies and judges shoulder some blame.

Many companies unwittingly encourage new filings by agreeing to settlements that pay even the weakest claims, believing it is less risky than losing a trial and paying punitive damages.

Some just opt for bankruptcy.

Rather than go belly-up, a company facing heavy asbestos claims can reorganize in Chapter 11 and set up a trust to pay damages. It can emerge later without asbestos liability and flourish.

"The bankruptcies are the tip of the iceberg," said Stephen Carroll, co-author of the RAND study. "Under the surface there are a lot of corporations being hit hard by asbestos liabilities and they put their money into compensation payments instead of investment."

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Meanwhile, existing trusts like Johns-Manville's, besieged by claims, pay just 5 cents on the dollar.

As money is used to pay those who are not sick, dying claimants or their widows and children get a fraction of their due. Lynne Marion of Bay Village, for instance, will see no more than $150,000 of a $4.4 million award for the death of her 51-year-old husband, Dennis, a mechanic.

The company, which ran brake and alignment centers, can't pay more.

"The legal part was long and depressing," Marion said. "We had to relive everything. And when you have to go to court, that's another slap in the face. Then they give you a judgment against people that don't have anything."

Meanwhile, judges, concerned about dockets suddenly clogged with thousands of similar asbestos cases, have relaxed pretrial rules, lowered legal barriers and consolidated complaints to speed them along.

"Eternity would not have been long enough to try all these cases," explained retired Judge James McMonagle, who formerly presided over the asbestos docket in Cuyahoga County.

The idea was to resolve cases quicker and pay the sickest victims faster.

But "if you build a superhighway, there will be a traffic jam," said Francis McGovern, a national expert on mass litigation whose career began in Cuyahoga County resolving asbestos claims.

The system has to change, said Sen. Mike DeWine, an Ohio Republican and a member of the Senate Judiciary Committee, which held hearings in September to consider a legislative solution.

"As things stand now, victims face a growing risk of never being compensated for asbestos-related illness, and many businesses face a growing risk of liquidation," DeWine said.

Twice, the U.S. Supreme Court has called on Congress to deal with

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the "elephantine mass of asbestos cases," saying a judicial remedy to the never-ending crisis is improbable if not impossible.

Yet the partisan fight seems unlikely to be resolved anytime soon. Democrats support trial lawyers who don't want changes; Republicans back corporate interests who do.

Supreme Court justices will hear arguments tomorrow in an asbestos case from West Virginia that the insurance industry and other critics see as symbolic of the legal crisis.

The courts will review a jury verdict awarding $5.8 million to six retired railroad workers who said they feared their exposure to asbestos may cause them to develop cancer.

None of the retirees has cancer.

For more information: Visit www.epa.gov/asbestos/

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Note: Chart by The Plain Dealer - Source: Cuyahoga Common Pleas Court -- A burgeoning docket (see microfilm)

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MEALEY'S LITIGATION REPORT

Asbestos

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Why We Have To Defend Against Screened Cases Now Is The Time For A Change

By
David M. Setter
Kathryn E. Young
and
Andrew L. Kalish

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MEALEY'S LITIGATION REPORT: Asbestos

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Commentary

Why We Have To Defend Against Screened Cases Now Is The Time For A Change

By
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and
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I. Introduction: Now Is The Time For A Change

The filing of unimpaired nonmalignant asbestos cases such as asbestosis and pleural disease continues to rise. Already unimpaired nonmalignant claims greatly outnumber malignant asbestos claims. While the defense of malignant claims demands more money and energy, the unimpaired nonmalignant claims are far more costly in the long run (*i.e.*, small settlement averages per claim multiplied by large numbers of claims equate to huge payouts over time). Companies are going bankrupt, workers are losing jobs and plaintiffs with malignancies or impaired nonmalignancies are being denied full compensation because of the mass filings of unimpaired nonmalignant claims.

The reason for the rise in unimpaired nonmalignant claims is simple: Mass screening testing entities manufacture unimpaired nonmalignant claims. These screening entities travel around the country in mobile trailers and examine prospective claimants in parking lots, union halls and motel rooms. Their primary goal is to generate legal claims for their clients, certain plaintiffs' law firms.

Entering inventory settlements and refusing to conduct discovery against mass screening entities for fear of retaliation by plaintiffs' law firms simply has not worked. While many defendants (including many of those in bankruptcy) have agreed to forego defending unimpaired screened cases in return for low dollar averages in bulk inventory settlements, these practices have only provided the impetus for even more screenings and the filing of even more claims. Trying to buy a company's way out of asbestos litigation has not only proved unsuccessful, it has been the first step towards bankruptcy for many companies.

Defendants must realize they cannot settle their way out of "the asbestos litigation crisis" by keeping a low profile. Rather, they must rise up against the mass manufactured nonmalignant claims. This strategy involves employing the same litigation strategies that most defense counsel

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use in a simple products liability case. It requires conducting discovery into how the claim came to be or the "manufacture" of the claim and deposing responsible physicians, technicians and testing entities.

The end goal of assertive discovery is to stop or slow down the manufacture of unimpaired non-malignant claims by mass screening entities. The filing of *Daubert/Frye* motions to dismiss or strike, arguing that screening companies use illegal or questionable techniques to manufacture claims, will help slow down or stop these claims. Numerous public policy arguments exist that warrant a Court dismissing screened claims. This article reviews how and why those claims are manufactured in order to advance those arguments.

Efforts in some Washington cases prove that assertive discovery can be effective. A motion was filed in Washington addressing Dr. Jay Segarra's involvement with the mass testing entity Respiratory Testing Services. Through discovery of the technicians, Respiratory Testing Services, and Dr. Segarra, the defendants showed the court the following:

> It is indisputable that the five physicians illegally diagnosed the above plaintiffs with an asbestos-related condition based on the x-ray films taken by [Respiratory Testing Services'] uncertified x-ray technicians with RTS' unapproved x-ray machine and developed by those technicians in RTS' unapproved darkroom. For doing so, they received considerably more money from RTS than they would have received for a negative diagnosis. Given these breaches, none of the five physicians' diagnosis can constitute the requisite 'competent' expert evidence from which this court or any jury can determine with reasonable certainty that plaintiffs' suffer from an asbestos-related condition.

Defendant Metalclad's Motion for Summary Judgment Regarding Failure to Establish Proof of Injury for Certain XXIII Cases, at 11, *In Re Certain: Asbestos Cases* (ACR XXIII Cases), Superior Court of King County, Washington (October 3, 2003). The Washington Court agreed:

> Dr. Segarra has the requisite skill, training and experience to render expert diagnoses concerning lung disease. However, when he participated in union screenings of certain plaintiffs, he performed examinations, rendered diagnoses, and recommended treatment without being licensed in Washington, a criminal offense. He also relied for his diagnoses on radiology reports from unregistered and uncertified technicians or radiologists using unregistered and uncertified equipment. The court concludes it would contravene public policy to accept such evidence.

Order by the Honorable Sharon S. Armstrong, ACR XXIII (Superior Court of King County, Washington, October 15, 2002). Similar motions should and could be worked up and filed in many screened cases.

Further, this discovery could encourage legislative scrutiny as another vehicle for exposing the manufactured nature of the unimpaired nonmalignant claims. *See The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. NO. 108-118, at 81-183, 108th Cong. 1 (2003) (statement by Senator Jon Kyl R-AZ). A Congressional inquiry could be an important fact-finding process to determine the validity of the proposed $150 billion legislative solution. In other words, Congress could take some significant air out of that proposed $150 billion legislation by investigating or demanding an investigation about how unimpaired nonmalignant cases end up being manufactured as well as the overall validity of some of those claims.

The time for a change is now. The status quo is not working. It is now time for the defendants to begin defending screened cases by conducting assertive discovery, uncovering the truths about mass screenings, and by filing the appropriate *Daubert/Frye* motions.

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This article sets forth what many estimate to be the future of asbestos litigation if mass screenings continue unchecked, discusses mass screening entities, their manufacture of unimpaired nonmalignant claims and, most importantly, the necessity to defend against those claims. Unfortunately, there is far too much factual information to discuss every screening entity in detail, but this article should provide some insights into what one commentator called "[t]he great asbestos swindle." Lester Brickman, *The Great Asbestos Swindle*, WALL ST. J., January 6, 2003, at A18.[1]

II. The Floodgates Are Wide Open

Unimpaired nonmalignant asbestos claims far outnumber malignant asbestos claims. Though the ratios vary by jurisdiction, in some states nonmalignant claims outnumber cancer claims by margins as wide as 47 to 1. Roger Parloff, *Asbestos - The $200 Billion Miscarriage of Justice*, FORTUNE.COM, March 4, 2002, at 7.

The Rand Institute estimated that nonmalignant claims account for 89% of all claims and that there have been more than 600,000 asbestos-related claims filed in the United States through the end of 2000. *See* Stephen J. Carroll, et al., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT, at 40 and 65 (2002). Of these, as much as 90% could be unimpaired claims. *Id.* at 20 ("Several more recent studies have found fractions of unimpaired claimants ranging from two-thirds to up to 90% of all current claimants...").

While more than half a million unimpaired nonmalignant claims have most likely been filed, the Rand Institute estimates that less than half of all potential asbestos claims have come forward. Deborah Hensler, et al., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE, at 50 (2001). Some analysts predict that future asbestos filings could reach 2.5 million. *See Mass Tort Expert Addresses Asbestos with UBS Warburg Investors*, HARRISMARTIN COLUMNS, at 67 (May 2002) (citing data reviewed by Georgene Vairo).

III. The Rise In Unimpaired Nonmalignant Claims Defies Real World Incidences

Do the numbers seen in the tort system correspond to the real world? Some analysts predict that over two million people are expected to bring claims for asbestos-related diseases. *Id.* If this is true, then why has there not been an outcry by the media and the medical community about this incidence of nonmalignant asbestos disease? There has been no outcry because the nonmalignant "epidemic" is only a legal fiction created by lawyers and their mass screening entities.[2] "[W]hile asbestosis may be disappearing from America's hospitals, it is precipitously on the rise in America's courthouses . . . ." Parloff, *supra*, at 2.

The National Institute for Occupational Safety and Health ("NIOSH") publishes limited data on deaths due to asbestosis and the number of nonfatal workplace asbestosis claims. From 1990 through 1999, it reported 10,914 asbestosis deaths in the United States. *See* National Institute for Occupational Safety and Health, *Work-Related Lung Disease Surveillance Report 2002*, December 2002, at 7. NIOSH also has tracked nonfatal workplace illnesses and, in evaluating United States Bureau of Labor Statistics from 1997, found that diseases of the lungs (including asbestosis and silicosis) accounted for only 2,900 cases, which was less than 1% of all nonfatal occupational illness cases. *See* National Institute for Occupational Safety and Health, *Worker Health Chartbook 2000 - Nonfatal Illness*, at 17. In fact, the Office of Rare Diseases, part of the National Institute of Health, categorizes asbestosis as a "rare" disease. *See List of Rare Diseases*, Office of Rare Diseases, <http://ord.aspensys.com/asp/diseases/diseases.asp? this=A>, last visited August 8, 2003.

According to the medical community, "the number of new cases of asbestos-related disease has been falling...." Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, April 10, 2002, at A1. Dr. John Dement, an Associate Professor for Environmental and Occupational Medicine at Duke University and former Deputy Director at NIOSH, pointed out that there are far fewer serious cases of asbestosis today than five to ten years ago. *Id.* In fact, almost ten

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years ago, "the medical text Occupational Lung Disorders describe[d] asbestosis as a 'disappearing disease.'" Parloff, *supra.*

In addition, reports from two hotbeds of asbestos litigation, Texas and Mississippi, are striking. In Mississippi, there were only 261 asbestosis deaths reported to health officials between 1991 and 1999. *See* National Institute for Occupational Safety and Health, *Work-Related Lung Disease Surveillance Report 2002*, December 2002, at 7. Further, the Texas Department of Health, which records the incidence of asbestosis in Texas, recorded only 37 cases of asbestosis in 1998. *See* Letter from Laurie Wagner, Texas Bureau of Epidemiology, dated May 21, 2003, on file at Socha, Perczak, Setter & Anderson, P.C.

While in all likelihood nonmalignant asbestos-related deaths and claims are underreported, one is hard-pressed to explain the huge discrepancy other than by the manufacture of claims by mass screening entities.

IV. Mass Screening Entities' Manufacture Of Unimpaired Nonmalignant Claims Harms Everyone

The number of manufactured unimpaired nonmalignant claims destroys everything in its wake. Not only are existing defendants looking at potentially over a million more claims, but new companies are added daily as defendants to make up for bankruptcies. Also, as companies go bankrupt, the public loses jobs and savings. Even plaintiffs themselves are harmed. Plaintiffs with malignant and/or impaired claims are seeing their recoveries shrink as unimpaired claims drain money out of an ever-shrinking pool of resources.

A. The Companies

Companies throughout the country are suffering from the mass screening entities' manufactured claims. The aggregate outlay for asbestos claims already totals $54 billion. Joseph E. Stiglitz, et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 57 (2003). However, projections estimate that only one-fifth to one-quarter of the eventual costs have already been paid. *Id.* at 58. If asbestos litigation continues at the present pace, its financial toll could reach $200 billion. *See* Eric Roston, *The Asbestos Pit*, TIME, March 3, 2002.

Most of these costs are for nonmalignant claims. The Rand Institute estimates that 65% of all asbestos compensation is paid to nonmalignant diseases. *See* Carroll, *supra*, at 65. This percentage will only increase as the number of unimpaired nonmalignant claims continues to rise.

Over sixty companies have already filed bankruptcy due to asbestos liabilities. *See* Stiglitz, *supra*, at 58. The rise of unimpaired nonmalignant claims is directly to blame. In the last five years, thirty-five companies have declared bankruptcy, more than in the previous twenty years. *Id.* So long as mass screening entities are allowed to manufacture nonmalignant claims, the outcome is obvious. The Honorable Jack B. Weinstein forewarned all companies involved:

> [I]f the acceleration and expansion of asbestos lawsuits continues unaddressed, it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy. This is increasingly the case as more obvious defendants become bankrupt and aggressive plaintiff lawyers move on to fresh victims.

Notes for Remarks on Asbestos: Symposium, Asbestos What Went Wrong, at 12, Bar Association of the City of New York, New York (October 21, 2002) (statement of the Honorable Jack B. Weinstein, Senior U.S. District Judge, Eastern District of New York).

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When defendant companies go bankrupt, remaining defendants and new defendants pick up the bill as plaintiffs' attorneys search for more deep pockets. As plaintiffs' attorney Steven Kazan noted:

> In the early days of the litigation, you had Manville. Manville goes away. Next in line are the regional distributors. If they go away, next in line are the contractors who bought from them. If those guys disappear, there are cases where we very legitimately are suing the neighborhood hardware store, because that's where the guy bought asbestos joint compound, or the lumberyard where he bought asbestos shingles, or the floor company where he bought floor tiles. They say, 'All of a sudden, why me?' One answer is: 'Consider yourself lucky that we left you alone for 20 years.' We're now higher in the tree.

See Parloff, *supra*, at 7. Already, companies in at least half of all industries have been sued and nontraditional defendants account for 60% of asbestos expenditures. *See* Hensler, *supra*, at 10-11. The fact that in 1983, 300 firms had been listed as defendants in asbestos cases, while by 2002, more than 6,000 companies had been listed demonstrates this trend. *See* Stiglitz, *supra*, at 55.

Further, bankruptcies tend to provide more incentives for manufacturing claims by the mass screening entities. As companies go bankrupt, they set up trusts with billions of dollars allocated for unimpaired claims. So long as these trusts conduct few audits and/or set up minimal medical criteria, they will continue to provide additional incentives for screening entities to manufacture claims. In essence, the involved screening lawyers look for nearly guaranteed payments from these trusts when few questions are asked. As a result, they can then file the same claims against the defendants who are in the tort system with less monetary risk. *See* Roger Parloff, *Mass Tort Medicine Men*, THE AMERICAN LAWYER, January 3, 2003.

B. The Public

Bankruptcies also affect the public and the bankrupt companies' employees. Asbestos-related bankruptcies have already led to a loss of tens of thousands of jobs. *See* Stiglitz, *supra*, at 52. These bankruptcies have also shrunk workers' life savings. For example, the average worker at a bankrupt company lost 25% of their 401k accounts. *Id.* When Federal-Mogul filed for bankruptcy, its employees held 16% of the company's stock, which lost 99% of its value, and when Owens Corning filed for bankruptcy, its employees held about 14% of its stock, which lost 97% of its value. *See* Parloff, *Asbestos — The $200 Billion Miscarriage of Justice, supra*, at 3.

As U.S. Senator Patrick Leahy (D-VT) noted, "[t]hese bankruptcies created a lose-lose situation. Asbestos victims deserving fair compensation do not receive it and bankrupt companies do not create new jobs nor invest in our economy." *The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. No. 108-118, at 189, 108th Cong. 1 (2003) (statements by Senators Leahy, Kennedy, Biden, Kohl, Feingold, Durbin and Edwards).

C. The Plaintiffs

Plaintiffs themselves suffer the most from the screening testing entities' manufacture of unimpaired nonmalignant claims. As defendants enter bankruptcy, the truly sick plaintiffs are left with a shrinking pool of compensation. Plaintiffs' attorney Mark Iola recognized this dilemma and concluded:

> The seriously ill now have no place to go for compensation. The companies that are responsible for their injuries are in bankruptcy, because they've had to pay billions of dollars to people who don't manifest any impairment or disability. Lawyers are the ones doing this, and they're doing it for the money. They are stealing money from the very sick.

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Thomas Korosec, *Enough To Make You Sick*, DALLAS OBSERVER, September 26, 2002. The Honorable Helen E. Freedman also noticed the problem:

> Recoveries by unimpaired or minimally impaired plaintiffs deplete the funds needed to compensate present and future claimants with serious illnesses, and resources are dwindling as the 'elephantine mass of asbestos cases' nationwide drives large numbers of potentially culpable parties into bankruptcy.

Order by the Honorable Helen E. Freedman, *In Re: New York City Asbestos Litigation*, Index No. 40000/88, at 1-2 (Supreme Court of New York, all Counties within the City of New York, December 19, 2002).

Further, when the mass testing entities manufacture unimpaired claims, they advise individuals that they have an incurable disease. The unnecessary stress this puts on someone is obvious. According to a St. Louis Post Dispatch article, one person who attended a screening and who was told he had an asbestos-related disease committed suicide. His suicide note, which was on the back of the form the law firms asked him to fill out, said, "I don't want to be an invalid." Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST DISPATCH, 2003 WL 3554893, February 9, 2002, at 9.

V. Mass Screenings Benefit Those Who Generate Unimpaired Claims (a/k/a 'Show Me The Money').

The people who benefit from the mass manufacture of nonmalignant claims are the law firms sponsoring the tests, the mass screening testing entities and anyone working for the mass screening entities. These individuals make huge amounts of money at other's expense.

For example, the mass testing entity American Medical Testing grossed $2 million in 2001. *See* Deposition Transcript of Guy Foster in *Marion Bentley, et al. v. Crane Co., et al.*, at 89, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (Dec. 12, 2001). The mass testing entity N&M charged a law firm over $230,000 for just nine days of tests. *See* Deposition Transcript of N&M, Inc., Representative: Charlie Heath Mason in *Curtis Johnson, et al. v. American Optical Corporation and James Underwood, et al. v. American Optical Corporation, et al.*, at Exhibit 2, Cir. Ct. of Copiah County, Mississippi, No. 2002-0030 and 2002-0027 (July 8, 2003). Another mass testing entity, which only shoots x-rays, charges $20,000 to advertise and conduct a single screening. *See* Deposition Transcript of Lloyd Criss in *Albert Deforest, et al. v. American Optical Corporation, et al.*, at 169, Dist. Ct. Bazoria County, Texas, No. 17165*JG01 (Dec. 10, 2002).

The physicians who work for the mass testing entities also have become instantaneous millionaires. Dr. José Roman-Candelaria and Dr. Gregory Nayden charged a minimum of $3,000 each for every day they participated in a screening. *See* Deposition of Guy Foster, *supra* at 145-146. However, rarely do these doctors only receive the minimum $3,000. American Medical Testing paid Dr. Nayden $80 for each report and he issued reports on approximately 15,000 people from 2000 to 2002. *See* Deposition Transcript of Dr. Gregory A. Nayden in *Marion Bentley, et al. v. Crane Co., et al.*, at 81, 86, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (March 28, 2002). American Medical Testing paid him about $1,200,000 in 2000 and 2001. *Id.* at 86.

The mass screening entities' personnel also profit well. American Medical Testing pays its pulmonary function technicians $20 per test. *See* Deposition Transcript of Guy Foster, *supra*, at 145. At this rate, it paid one pulmonary function technician $50,000 for performing pulmonary function tests in less than one year. *See* Deposition Transcript of Helen Robinson in *Marion Bentley, et al. v. Crane Co., et al.*, at 25 and 51, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (December 13, 2001). Another pulmonary function technician for American Medical Testing who only worked part-time made more money working part-time than she did working full-time as a respiratory therapist at a local hospital. *See* Deposition Transcript of Vanessa D. Hughes in *Marion Bentley, et*

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al. v. Crane Co., et al., at 55-56, Cir. Ct. of Jasper County, Mississippi, No. 92-7655, (December 13, 2001).

Most importantly, the law firms sponsoring the screening tests generate huge attorney's fees from the mass filings of unimpaired nonmalignant claims. Asbestos plaintiffs' attorney Fred Baron estimated that an average unimpaired asbestos plaintiff receives $60,000 in settlement money from the defendants. *See* Korosec, *supra*, at 36. Based on this average amount, it is easy to understand why law firms sponsor the mass tests. If the average unimpaired nonmalignant claim settles for $60,000 and the average contingent fee is 33 1/3%, then a law firm generates fees of $20,000 per claim. For every 1,000 unimpaired nonmalignant claims, the attorneys would generate $20 million in attorney's fees; for 10,000 claims they generate $200 million in fees and so on. With over 500,000 nonmalignant cases filed, one shudders when calculating the possible attorney fees involved — over $10 billion in fees. An example is the 25-lawyer Silber Pearlman firm in Texas which took in $100 million in revenue in 2000 with its inventory of unimpaired asbestos claims. *Id.*

VI. Manufacturing Unimpaired Claims

The cause of all these problems and profiteering is mass screening testing entities manufacturing unimpaired nonmalignant claims. These screening entities often test scores, if not hundreds of people, per day in motel rooms, trailers or union halls. Their sole purpose is to generate asbestos claims for law firms. *See* Deposition Transcript of Guy Foster, *supra*, at 52. If someone already has an attorney, they are not permitted to attend the tests. *See* Deposition Transcript of Lloyd Criss, *supra*, at 268-69.

It is this mass screening process which the defense bar must uncover. By doing so, the defense bar could put an end to the mass screenings by filing motions to strike/dismiss, using the evidence at trial and educating the courts about the mass screenings. Many of these testing entities are easy to spot. They include, among others, American Medical Testing; Consultants of Pulmonary and Occupational Medicine; Gulf Coast Marketing/U.S. Mobile X-Ray; Holland, Bieber & Associates; Healthscreen; Most Health; Netherland Enterprises; N&M; Respiratory Testing Services; and Workers' Disease Detection Services. These screening entities manufacture asbestos claims for law firms by generating or facilitating, to various degrees, the x-rays, the B-reads, the pulmonary function tests, the physical examinations and the diagnostic reports that serve as the medical basis for plaintiffs' claims.

While these mass screening entities have different testing techniques and processes, we generalize them in this paper for illustrative purposes. For example, some mass testing entities only administer the x-rays that are then sent to a B-reader and, thereafter, another or the same screening entity will administer the pulmonary function tests, conduct physical examinations and render diagnostic reports. Other testing entities provide x-rays, B-read reports, pulmonary function tests, physical examinations and diagnostic reports all on the same screening day.

A. Step 1: Generate Clients

The first step of a mass screening testing is to convince the masses to attend. This is generally done through mass mailings, often by local union officials on behalf of the mass screening testing entity or law firm, and through advertisements in local papers. For example, Gulf Coast Marketing[3] often sends newsletters to 15,000 to 20,000 people who are older than 50 and who live within 50 miles of the testing site. *See* Deposition Transcript of Lloyd Criss, *supra*, at 149-152. His newsletters are often titled "Senior Alert Newsletter." *Id.* at Exhibits 5 and 6. These "Senior Alert Newsletters" may recommend that: "If you have been tested before at another screening and the results were negative you are elgible [sic] for this screening and should be tested again." *Id.* at Exhibit 6.

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Mass advertising in local newspapers also is common. These Advertisements often use such catchy phrases as: "ASBESTOS & SILICA DUST SCREENING ATTENTION . . . THERE ARE NO OUT OF POCKET EXPENSES," *see* Advertisement by The Schmidt and McGartland Firm, THE DAILY JOURNAL, Tupelo, Mississippi, January 2, 2002, and "A PICTURE OF YOUR LUNGS COULD BE WORTH MILLION$." *See* Advertisement by Shapiro & Shapiro, THE LEADER, Corning, New York, November 4, 1999.

While these mass solicitations and advertisements are one way to attract individuals to a mass screening testing, there are also more seductive efforts. For example, during a mass screening in Texas by the testing entity N&M, several young women were seen near a street holding up signs for free tests to passing vehicles. *See* Complaint No. 1685, Texas Department of Health, Bureau of Radiation Control, Complaint/Technical Assistance Request Form filled out by Royce Harmon, X-Ray Inspector, 6-24-02, on file at Socha, Perczak, Setter & Anderson, P.C.

These tactics apparently work. Mass screening entities often test hundreds of people a day. In a solicitation letter to attorneys, Gulf Coast Marketing bragged that it administered x-rays to 540 people in two days (average of 270 people per day). *See* Deposition Transcript of Lloyd Criss, *supra*, at Exhibit 18. Similarly, N&M tested 3,257 people in 14 days (an average of 233 people per day). *See* Deposition Transcript of N&M, *supra*, at Exhibit 2. These numbers are not surprising. As one journalist reported about an individual who was at a mass screening in Missouri:

> I saw the notice in the union newsletter and said, 'Why not?' said an automotive worker from Ford. Sitting on the tailgate of his shiny, new Chevy pickup and lighting a fresh cigarette off the one he had just finished, he added: 'It's better than the lottery. If they find something, I get a few thousand dollars I didn't have. If they don't find anything, I've just lost an afternoon.'

Schneider, *supra*.

B. Step 2: 'Create' Sufficient Product Exposure

Once individuals arrive at the screening testing site, the next step is to make sure they have had exposure to viable defendants' products. This is often done by either the law firms' or the testing entities' personnel.

The alleged effort to identify specific products by the Baron & Budd law firm has been well publicized, but it is worth repeating. Here are a few of the reported tactics:

> Paralegals say — and neither Baron nor Budd denies — that workers are selectively shown pictures of asbestos products they should identify. [Paralegal] says that in meetings with clients, she would bring a "3- or 4- or 5-inch binder with pictures of asbestos products, divided up according to manufacturer. I'd go through page by page and encourage the client to recall the products they used. It would be pretty strong encouragement. Most of the time when I left, I had ID for every manufacturer that we needed to get ID for."
>
> [Paralegal] insists that, for certain periods of time when tactical reasons dictated it was better not to have exposure to a bankrupt company's products, identification of those products was discouraged. Thus, when a client would say he saw, for instance, a Johns-Manville pipe covering, [Paralegal] says, she would hand them a line. "You'd say, you know, we've talked to some other people, other witnesses, and they recall working with Owens Corning's Kaylo. Don't you think you saw that?' And they'd say, 'Yeah, maybe you're right.'"

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> Later, she says, Johns-Manville began paying settlements, and she was ordered to go out and "meet these guys again" and get them once again to name Johns-Manville products.

Christine Biederman, et al., *Toxic Justice*, DALLAS OBSERVER, August 13, 1998.

Not surprisingly, most who attend a mass screening testing also happen to have the proper exposure to bring a claim against viable defendants. In Texas, Dr. Mark S. Klepper testified that he works with potential plaintiffs to document an exposure history and he recalled that only about one out of every 50 workers could not establish a convincing asbestos exposure history. *See What Experts Are Saying*, HARRISMARTIN COLUMNS, May 2002, at 6 (citing portion of Deposition Transcript of Mark S. Klepper, M.D., *Betty Joe Applewhite, et al. v. Owens Corning Fiberglas Corp. et al.*, Nueces County District Ct., Texas, No. 98-2888-C (Jan. 29, 2001)).

C. Step 3: Manufacture The Diagnosis

Once the proper defendants' products are identified, the next step is to manufacture medical tests to show that the person has a nonmalignant asbestos-related disease. This includes x-rays, B-reader's interpretations of the x-rays, pulmonary function tests, physical examinations and a physician's diagnostic report.

1. The X-Ray

Usually the first test done involves the shooting of x-rays. The x-rays are often taken by full service testing companies or by subcontractors who are hired by the screeners or lawyers to provide chest x-rays. For example, Netherland Enterprises uses a mobile x-ray trailer that travels state to state shooting x-rays. *See* Deposition Transcript of David T. Netherland, D.C. in *Marion Bentley, et al. v. Crane Co., et al.*, at 57-58 and 89, Cir. Ct. of Jasper County, Mississippi, No. 92-7655 (February 14, 2002). David Netherland with Netherland Enterprises simply drives the trailer to a motel and parks it in the parking lot, ready to conduct chest x-rays. *Id.* at 163-65.

By traveling state to state, the mass screening entities have no problem finding enough individuals to meet the law firms' demands. The owner of Netherland Enterprises has administered x-rays to between 10,000 and 20,000 people in Alabama, Arkansas, Georgia, Mississippi and South Carolina. Deposition Transcript of David T. Netherland, D.C., *supra*, at 33-35 and 57-58. Gulf Coast Marketing/U.S. Mobile X-Ray has administered x-rays to over 17,000 people in Arkansas, Louisiana, Massachusetts, Mississippi, Oregon and Texas. Deposition Transcript of Lloyd Criss, *supra*, at 130 and Exhibit 18.

2. The B-Read

After the x-rays are shot, a B-reader interprets the x-ray films on or off site. For an x-ray to be read as "positive," mass screening entities and their customers (the lawyers) only require an ILO finding of 1/0.[4] The B-reads are usually conducted by the same few B-readers who are paid by the testing entity or the plaintiffs' law firm. For example, one B-reader, Dr. Ray Harron, may interpret between 100 and 150 x-rays in a day and charges $25 per B-read. Deposition Transcript of Ray A. Harron, M.D. in *In Re: Asbestos Personal Injury Litigation*, at 25-26 and 37, Cir. Ct. Kanawha County, WV, No. 01-C-9002 (Jan. 18, 2002). On average, it takes him only a few minutes to interpret or "read" an x-ray. Deposition Transcript of Ray A. Harron, M.D. in *Thomas Abbott, et al. v. 20th Century Glove Corp. of Texas, et al.*, at 183-4, Circuit Ct. of Saginaw County, Michigan, Case No. 94-003151-NP through 94-004526-NP (May 15, 1997).

At these rates, there is unquestionably an issue of bias as the B-readers want to continue to be in this lucrative business. Not surprisingly, the number of positive findings by these B-readers is highly suspect.

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In 1990, researchers re-evaluated 439 chest radiographs taken of tire workers. Reger, R.B., Ph.D., et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, J. Occ. Med. 32:1088-90 (Nov. 1990). Of the 439 x-rays that were reviewed, all had previously been thought to have conditions consistent with exposure to asbestos and all had filed legal claims for an asbestos-related injury. *Id.* at 1089. An independent panel of three board-certified radiologists reviewed the x-rays and determined that only 16 (or about 3%) of the subjects evaluated may have had a condition consistent with an asbestos exposure. *Id.* at 1088. In other words, the figures obtained by the independent panel were 40-fold lower than the results provided by the original screening doctors. *Id.* at 1090.

Also, in 1995, the Manville Trust initiated an audit of x-rays and by 1998, it required all asbestosis claimants to submit their x-rays for an audit by two independent B-readers. *See* Parloff, *Mass Tort Medicine Men, supra.* Under the audit, if either of the two independent B-readers agreed with the claimants' physicians' diagnosis based upon "subdiagnostic" indicia, then the Manville Trust would accept the claim. *Id.* Hardly a strenuous audit.

Nonetheless, the results were "mind-boggling." *Id.* The ten physicians whom plaintiffs' law firms used the most failed the audit an average of 63% of the time. *Id.* Additional research by National Economic Research Associates found that these ten physicians were responsible for 70,570 asbestosis claims in a six-year span and that one of these physicians was responsible for 30,467 claims. *Id.* His failure rate was 66%. *Id.* While plaintiffs' counsel effectively shut the audit down in 1999, it has been estimated from this audit that the Manville Trust overpaid at least $190 million for over-read claims. *Id.*

A more recent study is even more striking. United States Senator Jon Kyl (R-AZ), commenting on this recent x-ray study, stated the following:

> An even more extreme example of consistent misdiagnosis of asbestosis was provided directly to this committee by Mr. Otha Linton, who served for 25 years on the principal staff of the American College of Radiology Task Force on Pneumoconiosis, and Dr. Joseph Gitlin, a faculty member of the department of radiology at the Johns Hopkins Medical Institutions. Mr. Linton and Dr. Gitlin were asked to review over 500 chest x-rays that originally had been provided by an asbestos plaintiffs firm. The firm's medical reports had given 91.7% of these x-rays an ILO score of 1/0 or higher. (Which itself is only marginal evidence of asbestosis, see infra Attachment "E" (Letter of Dr. Crapo)). Mr. Linton and Dr. Gitlin arranged for a blind reading of those same x-rays by six consultants in chest radiology who were also B readers. These independent experts gave the same x-rays an ILO score of at least 1/0 in only 4.5% of their reports.

See The Fairness in Asbestos Injury Resolution Act of 2003 Report, S. Rep. No. 108-118, at 96, 108th Cong. 1 (2003) (statement by Senator Jon Kyl).

One even wonders if the B-readers actually interpret the x-rays and fill out the B-read forms. Dr. Harron admitted that he sends out blank pre-signed NIOSH B-read forms to law firms. Deposition Transcript of Ray A. Harron, M.D., *supra*, at 143 (May 15, 1997). Heath Mason, an owner of N&M, recently advised that it had copies of blank Dr. Harron pre-signed NIOSH forms at its screenings. *See* Deposition Transcript of N&M, *supra*, at 236-37.

3. *The Pulmonary Function Tests*

After the B-read, a mass testing entity will administer a pulmonary function test to measure impairment. As with the x-rays, the pulmonary function tests are often performed in trailers in motel and union hall parking lots. *See* Deposition Transcript of Guy Foster, *supra*, at 48; Deposition Transcript of Jeffrey H. Bass, M.D. in *Eddie Caffey, et al., v. Foster Wheeler Corporation, et al.*, at 87-

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88, Dist. Ct. of Cass County, Texas, No. B-150,896AD (May 10, 2003). Similar to the screening B-readers who often find positive x-rays, there are at times highly questionable methods employed to demonstrate impairment when individuals may not be impaired.

In their efforts to generate nonmalignant claims showing impairment for higher settlements, some of the mass screening entities may manipulate values involved with the pulmonary function tests. For example, the primary basis of Owens Corning's RICO and fraud lawsuit against the mass testing entity Pulmonary Testing Services involved the failure to have the tested individuals completely exhale during spirometry tests which resulted in diminished values that allegedly were interpreted as consistent with restrictive impairment. *See* Complaint in *Owens Corning v. Glenn E. Pitts, Jewell D. Pitts, Larry M. Mitchell, M.D., Leon Hammonds, Pulmonary Advisory Services, Inc., Pulmonary Advisory Services of Louisiana, Inc., and Pulmonary Testing Services, Inc.* (E.D. La., No. 96-2095, June 16, 1996).

In addition, Heath Mason, an owner of the mass screening entity N&M, stated that N&M hired a pulmonary function technician who had manipulated tests while working for another mass screening testing entity:

> Q. There's a graph bar on that [DLCO] test, is there not?
> A. Yes, sir, that is. That is the sample this is where the — it takes a sample of the — of when he blows out, basically, of what he's blowing out. That's the sample time. . . .
> Q. Has N&M had experiences with people moving that bar?
> A. I've had experience with — with employees that came from other companies who thought that they were going to show me how to make it easier to do a right DLCO.
> Q. And?
> A. And they were reprimanded in the fact that we explained to them that at N&M we do not move the bar.
> Q. [I]f I understood what you're saying, some employee that currently works for N&M or worked for N&M?
> A. When she first came over, we made her show us what her pulmonary function practice was. She's a respiratory therapist. She showed us. She did a DLCO on me. The first two were not within — the main problem was the breath hold time, so what she tried to do was, was to adjust the bar to match breath hold time, which is a major no-no in our book.
> Q. And when you do that, you decrease the DLCO, right?
> A. You got it.

See Deposition Transcript of N&M, *supra*, at 281-82.

Another instance of possible manipulation occurred with the mass screening entity Healthscreen and was uncovered when the defendants deposed the diagnosing physician, Dr. Jeffrey Bass, regarding the pulmonary function test results. At his deposition, Dr. Bass admitted that Healthscreen's pulmonary function technician may have deleted the best test results and might have "phantom" trials:

> A. And the tech — there were no error codes listed. And the tech apparently — after I consulted with Dr. Petrini, it appears the tech disabled the wrong test and disabled the better test accidentally, and so we got the poor lung volume readings. Now, this has happened a couple of the times in the past with other patients and it's rarely changed my diagnosis, but in this case it does.

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Q. It changes your diagnosis significantly, doesn't it, Doctor?
A. It does. Yes, it does.
Q. We're no longer restrictive; is that right, Doctor?
A. That is correct.
Q. How about any of these other values? The VC for 5.27, where does that come from?
A. I don't know where that came from.
Q. Doctor, could it be we have a phantom trial in here that's altering the values?
A. I suppose that's possible.

See Deposition Transcript of Jeffrey H. Bass, M.D., *supra,* at 130-33.

Besides possible manipulations and use of "phantom trials," mass screening entities may also manufacture impairment by employing questionable testing techniques. The American Thoracic Society (ATS) sets forth criteria and standards for the administration of pulmonary function tests. The mass screening entities, however, often do not always follow these standards. One example is from Dr. Segarra, who has worked for numerous screening entities, including Respiratory Testing Services and Holland, Bieber. He recognized Respiratory Testing Services may not have followed the ATS' recommendation of a fifteen-minute interval between the nitrogen washout trials for lung volumes and DLCO tests which could lead to a reduced DLCO value. Deposition of Jay Segarra, M.D. in *Richard Morehouse v. North American Refractories Co, et al.,* at 313-318, Circuit Court of Jackson County, Mississippi CI-2002-00253(2) (October 14, 2002). Further, Dr. Segarra acknowledged that issues may exist about whether Holland, Bieber followed the ATS' requirements for DLCO sample and collection volumes. *See* Deposition Transcript of Jay Segarra, M.D. in *Murrell, et al. v. Kellogg-Brown & Root, Inc., et al.,* at 142-43, Dist. Ct. of Harris County, Texas, No. 2002-28477 (August 15, 2003).

4. The Physical Examination And Diagnosis

After the administration of the pulmonary function tests, a potential plaintiff usually receives a physical examination. These physical examinations might occur in the very motel rooms that the technicians and physicians slept the night before. *See* Deposition Transcript of Dr. Jeffrey Bass, *supra,* at 87-88. The physicians and the technicians wake up, make their beds and then examine the prospective plaintiffs. *Id.*

Needless to say, the physical examinations are often cursory. Dr. Michael Conner, who worked for the mass testing entity Pulmonary Function Laboratory, said that he examined approximately 200 people on a single day. *See* Deposition Transcript of Michael G. Conner, M.D. in *In Re Asbestos Plaintiffs v. Borden, Inc., et al.,* at 67-68, Parish of Orleans, LA, No. 91-18397 (March 29, 1993).

Notwithstanding, the physical examination is the last step before a physician paid by the mass screening entity renders a diagnosis. This diagnosis, however, may be pre-determined before the physical examination. For example, Dr. Gregory Nayden, who works for the mass testing entity American Medical Testing, stated that he has never found someone who did not have asbestosis when he worked at a screening:

Q. [Y]ou're saying that all of the individuals are already considered by you as positive for asbestosis?
A. Well, like I said, I mean, they wouldn't reach me unless they had positive — a positive work history and a positive chest x-ray.
Q. And, for you, that's sufficient for a diagnosis of asbestosis?
A. Yes.

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Q. Have you seen any individuals that came through that you did not render a report saying that they had asbestosis?

A. No.

See Deposition Transcript of Gregory A. Nayden, M.D., *supra,* at 165.

Dr. Nayden apparently applied this assumption to approximately 14,000 people. *Id.* at 164-65. This 100% diagnosis rate is not much more than another physician, Dr. Roman-Candelaria. Since Dr. Roman-Candelaria began participating in asbestos screenings in 1999, he has examined between 4,000 and 5,000 people and has diagnosed approximately 90% of them with a condition consistent with asbestosis. *See* Deposition Transcript of José Roman-Candelaria, M.D., *Gary Koontz, et al. v. AC&S, Inc., et al.*, at 20, Sup. Ct. of Marion County, Indiana, No. 49D02-9601-MI-0001-668 (October 11, 2002), electronic version.

VII. Travel Woes: State Violations

Many mass testing entities travel throughout the country conducting tests to manufacture asbestos claims for law firms. For example, Most Health Services, Inc. has screened over 400,000 workers in every state plus Puerto Rico. *See* Memorandum In Support Of Motion For Case Management Order Concerning Mass Litigation Screenings, *In re: Asbestos Products Liability Litigation* (No. VI), Civ. Action Nos. MDL875, 2 MDL 875, at 10, (E.D. Pa., Oct. 12, 2001). Respiratory Testing Services has performed screenings in 40 states. *See* Deposition Transcript of Charles Foster in *Morehouse v. North American Refractories Company*, at 138, Cir. Ct. of Mobile, Alabama (August 6, 2002), electronic version. Gulf Coast Marketing/U.S. Mobile X-Ray has administered x-rays to over 17,000 people in Arkansas, Louisiana, Massachusetts, Mississippi, Oregon and Texas. Deposition Transcript of Lloyd Criss, *supra,* at 130 and Exhibit 18. The owner of Netherland Enterprises has administered x-rays to between 10,000 and 20,000 people in Alabama, Arkansas, Georgia, South Carolina and Mississippi. *See* Deposition Transcript of David T. Netherland, D.C., *supra,* at 33-35 and 57-58.

All these screenings in numerous venues, at times, lead to potential violations of state laws and regulations and possible illegal activities. Starting with the x-rays, mass testing entities often violate state x-ray regulations. First, most states require that a licensed physician individually order x-rays unless various exceptions apply. *See* 64E-5 Florida Admin. Code 64E-5.502(1)(a)(6) and MS ADC § 801.F.3(a)(7). Many testing entities sometimes disregard this law by not obtaining the required physician's order. *See* Deposition Transcript of Lloyd Criss, *supra,* at 37-47.

Other screening entities violate this law by using "blanket orders" by a doctor for x-rays without any individuals identified. For example, Dr. Vance Baucum wrote a letter on August 7, 1995 authorizing chiropractor David Netherland of Netherland Enterprises to administer chest x-rays for asbestos disease evaluations. *See* Deposition Transcript of David T. Netherland, D.C., *supra,* at Exhibit 4. Netherland Enterprises used this blanket prescription as authority to provide chest x-rays for asbestos evaluations as late as 2001 on numerous individuals and over the course of several years. *Id.* at 43-44.

However, Dr. Baucum's letter was written on August 7, 1995. Dr. Baucum even went so far as to say that this blanket x-ray prescription stayed in effect until Mr. Netherland's death. Deposition Transcript of Vance Baucum, M.D. in *Marion Bentley, et al v. Crane Co., et al,* at 87-88, Cir. Ct. of Jasper County, Mississippi, No. 11-0064 (September 12, 2002). Dr. Baucum wrote this blanket x-ray prescription upon the request of attorney Charles Blackwell of the Mississippi law firm Morris, Sakalarios & Blackwell. *Id.* at 86. Dr. Baucum and Charles Blackwell were personal friends and Dr. Baucum testified that he wrote the blanket prescription because "that's what friends are for." *Id.* at 94-95. Most importantly, under the blanket prescription, it is up to the lawyers or Mr.

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Netherland to determine if an individual has a sufficient history of exposure that warrants being subjected to x-rays. *See* Deposition Transcript of David T. Netherland, D.C., *supra*, at 114.

The South Carolina Department of Health investigated Mr. Netherland and found that 4,000-5,000 x-rays he administered in South Carolina were in violation of state regulations. *See* Orders in *In Re: A. Joel Bentley, Jr., Esq., Reginald D. Simmons, Esq. and David Netherland, DC*, South Carolina Board of Health and Environmental Control, January 8, 2001 attached as Exhibit 4 to Deposition Transcript of David T. Netherland. Mr. Netherland is not alone. Many of the x-rays administered by mass screening entities are in violation of state law.

In addition, the pulmonary function technicians are rarely licensed in the states where they conduct the tests, a requirement under many state laws. *See, e.g.*, Mississippi Regulations Governing Licensure of Respiratory Care Practitioners § 9-1 and § 1-3(i); Fl. St. §§ 468.351, 468.352, 468.359 and 468.366; and Ga. Code § 43-34-150(a). An example is Mr. Robert Mosher, a pulmonary function technician for Respiratory Testing Services and American Medical Testing. He admitted that although he has administered pulmonary function tests in states such as Alabama, Arkansas, Florida, Mississippi and possibly Louisiana, he was not licensed in any state. *See* Deposition Transcript of Robert B. Mosher in *Marion Bentley, et al. v. Crane Co, et al.*, at 48-50, Cir. Ct. of Jasper County, Mississippi, No. 11-0064 (Feb. 1, 2002).

Another common violation involves the requirement that pulmonary function tests be ordered by a licensed physician. *See, e.g.*, Miss. ADC § 1-3 (e), (f), & (i) (a licensed physician must prescribe a pulmonary function test). Some of Dr. Gregory Nayden's practices offer some insights about how this requirement may not be met. He testified that he allowed American Medical Testing to photocopy one of his orders for pulmonary function tests as his prescription for each new set of pulmonary function tests. *See* Deposition Transcript of Dr. Gregory A. Nayden, *supra*, at 239-40. Dr. Nayden further admitted that he has ordered pulmonary function tests in several states where he is not licensed to practice medicine. *Id.* at 128.

Next, some of the physicians who travel with the mass screening entities perform physical examinations, prescribe pulmonary function tests and render diagnoses, when they are not licensed in the states in which they perform these services. For example, Dr. Roman-Candelaria, who worked for Respiratory Testing Services, was only licensed in Puerto Rico, but had worked at mass screenings examining individuals, ordering pulmonary function tests, and rendering diagnoses in Alabama, Georgia, Indiana, Louisiana, Mississippi and Oklahoma. Deposition Transcript of Dr. Roman-Candelaria, *supra*, at 13-14. In many states, conducting physical examinations, prescribing pulmonary function tests and rendering diagnoses may constitute the practice of medicine requiring that the physician be licensed in the state. *See e.g.* Indiana Statute § 25-22.5-1-1.1(a) (defining the practice of medicine as the diagnosis of any disease).

VIII. How Is This Happening — The Blind Eye

The manufacturing processes conducted by these mass screening entities has been well publicized. Commentators, courts, medical groups and legislators all have expressed doubt over the validity of the medical results generated by the mass screening entities. Professor Lester Brickman has called it "a massively fraudulent enterprise that can rightfully take its place among the pantheon of such great American swindles as the Yazoo land frauds, Credit Mobilier, and Teapot Dome." Lester Brickman, *Asbestos Litigation: Malignancy in the Courts?*, Civil Justice Forum of the Manhattan Institute No. 30, Aug. 2002, at 7. Dr. David Egilman identified the mass screening tests as "rackets perpetrated by money-hungry lawyers, ..." Schneider, *supra*. Senator Jon Kyl wrote in his legislative statement: "[A]mong ordinary people, there is a word for this: Fraud. This is a legalized fraud." *See The Fairness in Asbestos Injury Resolution Act of 2003 Report*, S. REP. No. 108-118, at 98, 108th Cong. 1 (2003) (statement by Senator Jon Kyl R-AZ), quoting Robert J. Samuelson, *Asbestos Fraud*, WASH. POST. November 20, 2002, A25. The Association of Occupational and Environmental Clinics' President Rachel Rubin, M.D., MPH, voiced her concern: "These tests do not con-

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form to the necessary standards for screening programs conducted for patient care and protection." Rachel Rubin, M.D., MPH, *President's Column*, AOEC News, Winter 2001, Vol. 9, Issue 2.

If mass screening tests are as unreliable as these commentators note, then why are these mass manufactured unimpaired cases continuing to rise in numbers? And, why are the testing entities and those associated with them continuing to generate huge profits? It is because the defendants, the courts and even some of the commentators have turned a blind eye to this mass manufacture of unimpaired nonmalignant claims.

Examples abound. Dr. Nayden had diagnosed approximately 14,000 people with asbestos-related diseases for law firms until he was deposed for the first and only time on March 28, 2002. *See* Deposition Transcript of Dr. Gregory A. Nayden, *supra*. Similarly, Dr. Roman-Candelaria had diagnosed approximately 4,000 people with asbestos-related diseases for plaintiffs' law firms before he was deposed for the first and only time on October 11, 2002. *See* Deposition Transcript of Jose E. Roman-Candelaria, *supra*.

The mass screening entities are deposed even less than the physicians. Gulf Coast Marketing/ U.S. Mobile X-Ray had administered x-rays to over 17,000 people in Arkansas Louisiana, Massachusetts, Mississippi, Oregon and Texas before it was deposed for the first and only time on December 10, 2002. *See* Deposition Transcript of Lloyd Criss, *supra*, at 130 and Exhibit 18. American Medical Testing grossed over $2,000,000 in testing before it was deposed for the first and only time on December 12, 2001. *See* Deposition Transcript of Guy Foster, *supra*, at 89.

Similarly, Respiratory Testing Services and N&M have only been deposed once each even though they are actively testing people throughout the country. In fact, there are several other mass screening testing entities who have never been deposed even though they are responsible for manufacturing scores of claims. This may also be the case for many of the pulmonary function technicians who work for the mass screening entities. They may have pertinent information regarding systemic manipulative techniques used in administering pulmonary function tests.

Defendants, courts and some commentators choose to turn a blind eye to the mass testing entities' manufacture of claims for various reasons. First, the focus of the defense has generally been on the malignancy cases. While the malignancy cases are individually more expensive for defendants, they are not more expensive when the total number of nonmalignant claims is calculated. At least 65% of all asbestos compensation is paid on nonmalignant cases. *See* Carroll, *supra*, at 65. And this trend has only started to increase. With the huge pecuniary gain and the lack of discovery done against them, there is no reason for the mass screening entities to stop manufacturing claims. As Professor Brickman appreciated, "[f]or practical purposes, the supply of such plaintiffs claiming workplace exposure to asbestos but no injury is essentially infinite. Asbestos litigation will go on until the last dollar is extracted from an ever-widening group of defendants." Lester Brickman, *The Great Asbestos Swindle, supra*.

No doubt many defendants fear, and rightfully so, the threat of massive judgments in pro-plaintiff jurisdictions if they do not settle a massive inventory of unimpaired nonmalignant cases. Dickie Scruggs, a well-known asbestos and tobacco attorney, has acknowledged the use of these certain jurisdictions:

> What I call the 'magic jurisdiction' . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected. . . . They've got large populations of voters who are in on the deal. . . . And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.

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Jim Copland, Opinion, *The Tort Tax*, WALL ST. J., JUNE 11, 2003, at A16 (quoting Dickie Scruggs). In these pro-plaintiff jurisdictions, plaintiffs' lawyers often join hundreds of nonmalignant claims manufactured by mass screening entities to a few malignant claims. Defendants are reluctant to conduct discovery into the hundreds of nonmalignant claims manufactured by the mass testing entities because they fear the plaintiffs' lawyers will not settle the malignant claims with them and end up trying a case in a "magic jurisdiction."

By not focusing on the unimpaired nonmalignant claims and refusing to uncover the mass manufacturing of these claims, many defendants may have guaranteed their own downfall: "Looking back ruefully, many defendants now believe that by settling so readily for so many years they unwittingly encouraged the filing of increasingly marginal and dubious claims." Roger Parloff, *Asbestos — The $200 Billion Miscarriage of Justice*, FORTUNE.COM, March 4, 2002, at 6.

Another DRI presenter sadly forecasted this dilemma almost seven years ago:

> If the screenings are conducted properly, then defendants have nothing to fear. If the screenings are conducted improperly, then the defendants will find themselves defending, at great cost, thousands of meritless claims. And if the defendants pay settlement money on thousands of meritless claims, then there will be thousands more meritless claims. *And then, shame on us.*

Dwight E. Tarwater, *Plaintiffs' Mass Screening Programs: How Are They Done, What Do They Tell You, And How Can You Challenge Them?*, Asbestos DRI Seminar 1996, at C-17.

The time for a change is now. Tomorrow is too late.

ENDNOTES

1. For a more in-depth article about mass screenings, the processes involved and their effect on "the asbestos litigation crisis," please refer to Lester Brickman's article in the Pepperdine Law Review Symposium on Asbestos Litigation, which at the time of submission of this article had yet to be published. See Lester Brickman, "On the Theory Class' Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality," 31 PEPPERDINE L. REV. ___ (2003) (to be published).

2. There is also most likely a discrepancy between rates of "real world" asbestos-related lung cancer and rates seen in the tort arena. About 1200 new asbestos-related lung cancer claims were filed annually in the 1990s. *See* D.E. Lilienfeld, et al., Projection of Asbestos Related Diseases in the U.S., 1985-2009, 45 British J. of Indus. Medicine 283 (1988). Most lung cancer claims are brought on behalf of smokers who have also been exposed to asbestos but their injuries may more likely be attributable to their smoking. *See* The Fairness in Asbestos Injury Resolution Act of 2003 Report, S. Rep. No. 108-118, at 99, 108th Cong. 1 (2003) (statement by Senator Jon Kyl R-AZ).

3. The owners of Gulf Coast Marketing are Lloyd Criss and Richard Kirkpatrick. Mr. Criss is the father of a Galveston County, Texas District Judge. Mr. Kirkpatrick is an attorney who has used Gulf Coast Marketing to conduct screenings for his own cases. *See* Deposition Transcript of Lloyd Criss, *supra* at 26-27.

4. A 1/0 means that the B-reader determined that the x-ray was a category 1 (mild), but seriously considered a category 0 (normal). The ATS recommends a 1/1. American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, AM. REV. RESPIR. DIS. 134:363-368 (March 1986). ■

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NEWS

ASBESTOS LAWSUITS ANGER CRITICS ; MASS MEDICAL SCREENINGS, RUN BY LAWYERS, REEL IN MANY WHO DON'T FEEL ILL

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Workers from almost every city in the country have been swept up in legal wrangling over how sick they are from working with asbestos. The dispute centers on what compensation is available if they only have minor signs of asbestos disease, detected on X-rays taken for lawyers rushing them through mass medical screenings in union halls.

Court dockets nationwide are filled with more than 300,000 asbestos lawsuits, and as many as 70,000 new ones are added each year. Most are workers or retirees invited into medical screenings by lawyers offering quick money.

Insurance industry studies show that as many as 80 percent of the claims are filed for workers who feel no symptoms of disease. The remaining 20 percent are for former asbestos workers or their relatives who are near death with lung cancer or mesothelioma, a fast-killing cancer of the linings of the lungs, heart and abdomen.

Nationwide debates are raging among the largest lawyer groups, industry, the insurance lobbies, big business and physicians. Within weeks, the battle is expected to spread to the hearing rooms of Congress. The Republican-led House and Senate are expected to give favorable consideration to industry-written restrictions on new medical criteria for defining asbestos disease and which victims will be permitted to file suit. The focus of most of these debates is the mass medical screening of workers who might have dealt with asbestos.

The Post-Dispatch and most other major newspapers run scores of ads each year from law firms announcing the screenings. Radio and late-night television spout the same messages.

More than 700 law firms across the country have helped organize screenings of workers possibly exposed to asbestos or dangerous chemicals, according to a study last year by the Insurance Research

Institute.

The Hazelwood example

At least four days of screenings were held last year at the union hall for Local 837 of the International Association of Machinists and Aerospace Workers in Hazelwood. The gatherings had more the atmosphere of a retirement party than an all-day medical screening to determine whether the mechanics were dying of yet-to-be-detected disease caused by asbestos.

These men and a handful of women had put in 20, 30 or more years on the assembly lines of the Boeing, Ford and General Motors plants here. With the functionality of an Army induction center, various rooms in the union hall had been converted into stations where medical technicians were creating medical files on the workers.

At two desks, technicians tested pulse and blood pressure. Three other desks were set up to extract medical histories, as far back as the workers could remember. In another part of the makeshift operation, the most experienced surveyors were coaxing workers to remember every job they'd ever had - especially any job that might have put them, at any time, anywhere near asbestos in furnaces, boilers, pipes, production lines, operations where asbestos was being stored, used or removed. Even walking beneath or by asbestos in any form was "important," the workers were told.

The crucial piece of hardware to this operation was a 60-foot-long burgundy trailer parked outside the union hall's main door.

The trailer, which has "ASBESTOS TESTING" and a toll-free number painted on each side, was driven up from Mobile, Ala. Alabama is the home base of at least a dozen of these $100,000 screening units run by eight separate firms. More are based in Texas, California, Georgia and elsewhere.

"We were in Nashville and Indianapolis last week, and we'll be in Milwaukee, Dayton and Latrobe, Pennsylvania, next week," the driver said, proudly showing a map covered with scores of dots. "It has been a great year, and it's only half gone."

"Better than the lottery"

The "mobile clinic" has several examination stations separated by faux paneling. In addition to the X-ray machines and processing equipment, there are two stations with tubes attached to monitors and computers that are used to perform pulmonary function tests. If an X-ray shows a shadow in the lungs, the workers are given the pulmonary function test before being sent back inside the union hall to see a physician.

For a group in their late 50s, 60s or 70s, the workers appeared healthy. None complained of lung cancer or great difficulty breathing or any of the other symptoms of asbestosis or mesothelioma.

Two men and a woman said they worked with asbestos insulation years earlier and thought it was smart to get a checkup. Sixteen other workers or retirees who were interviewed admitted it might be a way to add a little cash to their retirement funds.

"I saw the notice in the union newsletter and said, 'Why not?'" said an automotive worker from Ford. Sitting on the tailgate of his shiny, new Chevy pickup and lighting a fresh cigarette off the one he had just finished, he added: "It's better than the lottery. If they find something, I get a few thousand dollars I didn't have. If they don't find anything, I've just lost an afternoon."

Standing nearby, a Boeing worker 10 days from retirement volunteered, "The lawyers said I could get $10,000 or $12,000 if the shadow is big enough, and I know just the fishing boat I'd buy with that."

Asked if he'd ever worked with asbestos, he said, "No, but lawyers say it's all over the place, so I was probably exposed to it."

"We're doing it as a favor"

The screenings at Local 837 were set up by Goldenberg, Miller, Heller and Antognoli, an Edwardsville law firm. Throughout the day, two lawyers from the firm hovered around the men being questioned at the various desks. The lawyers held screenings in March and again in December.

"We're here because the president of the retirees club called us and asked if we'd set up the screening. We're doing it as a favor," said Randy Gori, one of the lawyers.

"He said what?" Claude Barnes, the president, said. "Hell, they called me a half-dozen times to let them set this up. I didn't think it could do any harm and maybe some of the guys would get a little money. But it was the lawyers who wanted to do this."

In the two screenings in March, about half of 600 men and women examined "came back positive for asbestos-related disease," said Martin Mengarelli, the other lawyer at the screening.

In December, the firm did another screening at the hall, and about 25 percent of the 140 people screened "had signs of illness," Gori said.

When asked who his firm was going to sue on behalf of these more than 325 newly discovered asbestos victims, Gori answered with blunt honesty, "Anyone who made products with asbestos who hasn't gone bankrupt yet."

Barnes, when interviewed last month, said he got two settlement checks already, "one for $280 and another for $320." He said that was after the lawyers took their cut. He says he has no idea how much he'll eventually get but, "I'm guessing a few thousand dollars if I'm lucky."

Meanwhile, he said he feels fine.

"I was tested positive and I haven't felt bad," Barnes said. "I don't have a breathing problem. Four or five of my officers tested positive and they say they feel fine."

Barnes and the others have given up the right to sue again if they were to become seriously ill with lung cancer or mesothelioma. Those ailments can cost $300,000 to $500,000 to treat.

"We're gambling that we never get sick," he said. "We were gambling when we took that test."

Lawyer touts benefits of screenings

Will Miller, a senior partner in the law firm that ran the screenings, said the positive aspects of the examinations shouldn't be ignored.

"Critics of screening say law firms do it just to bring in business and, in reality, that may be correct, but people are often helped by the results of the screenings," Miller said.

He cited the 740 St. Louis aviation and automotive workers his firm screened last year.

"The final diagnosis of the December testing isn't in yet," he said, "but included in the 300-plus people that had asbestos-caused abnormalities, we also identified 32 cases of lung cancer, one case of mesothelioma and 20 cases of nonasbestos-related cancer."

Many members of the Association of Trial Lawyers of America conduct medical screenings for various purposes.

Richard Middleton, past president of the association, said, "Standards for screenings must meet high medical criteria.

"I think medical screenings, when they're done properly, can be a tremendous benefit to workers," Middleton said. "However, when they're done by people who aren't concerned as much about the

workers as they are identifying potential lawsuits ... and they simply use that information to treat these people like cattle, that's wrong."

Middleton said he knows of no complaints against screening brought to the association's ethics committee.

"The legal profession should be doing a better job of policing its own," he said.

Some of the hundreds of law firms engaged in this activity do the expensive multistep screening that apparently was done at Local 837 last March. But, "many firms used smoke and mirrors to conjure up diagnoses of disease that may not exist," the Insurance Research Institute's report said.

The most aggressive firms are based in Texas, the Carolinas and California. Most acquire help from local law firms in parts of Texas and Mississippi and in Madison County in Illinois - venues where juries have been shown to be generous to injured workers, the institute reported.

The push for tort reform from President George W. Bush's White House and now from the Republican-controlled Congress is forcing many firms to clean up their act and be more judicious when doing medical screenings, the report said.

The screening activity was hot and heavy in the '70s and '80s before major asbestos-using corporations like Johns Manville, W.R. Grace, Federal Mogul, Pittsburgh Corning and U.S. Gypsum sought bankruptcy protection.

With those deep pockets gone, plaintiffs' lawyers shifted to the second- and third-tier targets - those companies that sold, used or distributed products that contained asbestos. Now, many of them have also have become bankrupt because of the personal injury suits that have been filed.

Texas firm screens here

Last year, the Texas-based law firm of Provost Umphrey screened hundreds of construction workers in St. Louis.

"We screened 559 members of the building trades unions at two separate halls," said Larry Sartin, national director for occupational disease programs for Paper, Allied-Industrial, Chemical & Energy Workers. "We did carpenters, pipe fitters, insulators, painters and sandblasters. We got about 100 **asbestosis** cases and another hundred cases of silicosis from guys who were sandblasters."

Sartin, who has five full-time people to set up **screenings**

throughout the nation, works from an office in the law firm's headquarters, but he said he's paid by the union.

Provost Umphrey screened more than 10,000 workers in 2001, Sartin said.

"We used to get (a) settlement pretty quick, but now with 25 or so companies bankrupt, it can take three or four years," he said.

If their claims work like most of the others that are spawned by mass **screenings,** suits will be brought against between eight and 20 different companies who, at any time, sold products containing asbestos. For those with suspicious shadows on their X-rays - perhaps pleural plaque - the companies may settle for from $400 to $1,200 per person from each of the companies sued. If **asbestosis** can be claimed, the money could double or triple those amounts or more.

For lung cancer or mesothelioma, it could be a big payday, with settlements often in the millions. It is rare that any of the cases ever go to trial.

Some lawyers eschew **screenings**

Many trial lawyers, including St. Louis asbestos specialist Andrew O'Brien, refuse to do **screenings;** they work closely with individual clients. Many of these lawyers are angered that the courts are being swamped with cases of workers who don't feel ill or don't appear to be impaired.

"There is a limited amount of money available to properly compensate people who are really sick from asbestos disease," O'Brien said.

He thinks consideration should be given to "the needs of those who are seriously ill" by not "flooding the courts with those who are not sick today and may never become impaired to the point they can't lead a normal life."

One of O'Brien's clients was Luke Roth, who died a year ago this month from lung cancer caused by exposure to asbestos at one of the four St. Louis plants that processed vermiculite ore into insulation. The ore, tainted with a virulent asbestos fiber called tremolite, came from the W.R. Grace mine in Libby, Mont.

A father of three, Roth, 48, was a manager with a national company that sold drugstore franchises. He also ran George W. Bush's caucus campaign in Iowa.

Roth, who was interviewed shortly before his death, said he was exposed 25 years ago while working at the now-abandoned J.J. Brouk and Co. plant on Kingshighway. "It was a summer job and dusty beyond

belief, but no one told us that the dust contained asbestos," said Roth, who grew up in Webster Groves.

"I'm shackled to this," he said then, holding the plastic tube running from an large oxygen tank in his home in Des Moines, Iowa, "and I won't get to see my children grow up."

Joseph J. Brouk, who owned the plant, insists that his vermiculite came from South Africa. But government documents obtained by the Post-Dispatch show that Grace shipped more than 321 shipments totaling 57 million pounds of Libby vermiculite to the St. Louis plant.

"I'm dying, and I want to hold Grace accountable," Roth said before his death. "I can't take them into court because they filed for bankruptcy protection. I'll get no apology. I'll get no admission of guilt and I'll get nothing for my children. I'll never even get my day in court."

Doctors decry some lawyers

Dr. Michael Harbut has treated hundreds of miners from the Iron Ranges of Minnesota and Michigan. Years of pulling tremolite-contaminated taconite out of the mines have sentenced hundreds of men and women to live shackled to tanks of oxygen, he said.

"These people need help, but too many lawyers are dedicated to filling their own pockets rather than getting justice for their clients," said Harbut, who is medical director for the Center for Occupational and Environmental Medicine in Southfield, Mich.

"These lawyers come in and sell the union leaders a bill of goods, get these guys to sign an agreement, which gives them a few dollars and the lawyers a lot more," he said.

Dr. David Egilman has testified as an expert witness in more than 100 trials, "mostly on behalf of the injured worker," but also on the side of several asbestos companies.

"Some lawyers are great, and their efforts to help people injured by chemicals, asbestos or dangerous practices in the workplace may, in many cases, be the only way to eliminate the hazard," said Egilman, a specialist in occupational medicine from the Boston area.

"But all too often these medical **screenings** are little more than rackets perpetrated by money-hungry lawyers," he said. "Most workers usually don't know what they're getting involved in."

Plaintiffs' lawyers typically receive 25 percent to 50 percent of a settlement, and even though the settlements are small for the unimpaired victims, for the lawyers, their cut adds up to big money.

"The lawyers promise them money if they sign the papers. They may get $1,000 or $1,500, but what happens years later when the shadow on the X-ray develops into full-blown **asbestosis** and the poor guy has to spend $5,000 a month on medication and oxygen?" Egilman asked. "You can't go back and sue the same companies."

Can **screenings** lead to harm?

Egilman is worried that the **screenings** can be dangerous.

"The first rule of medicine is do no harm, and the **screenings** can do harm in a variety of ways," he said. "The first harm is to the actual person being screened who can be unnecessarily frightened by being told they have a disease, when they don't really have one, or being told that their risks are greater then may actually be."

Adam Gonsoulin was frightened. He worked in the construction industry for most of his 67 years. In 1998, he and other members of the building trades unions in Port Arthur, Texas, went to an asbestos screening set up by a local law firm.

Soon after, Gonsoulin got a letter from the law firm holding the screening telling him that he had some disease caused by asbestos and should see his doctor, according to court records. Seven months later, he killed himself with a shotgun. A suicide note to his son said it had been a long seven months and "I don't want to be an invalid."

The note was written on the back of the forms the law firm wanted him to fill out so a lawsuit could be filed. The physicians who examined the Gonsoulin's X-rays said the man had no sign of asbestos disease.

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PHOTO, GRAPHIC; (GRAPHICS) (2) Graphic / Illustration - This ad ran in the Post-Dispatch on Feb. 5 - ASBESTOS SCREENING If certain special interest groups have their way legislation will soon be passed eliminating most asbestos cases. This law should only apply to cases not yet on file when it is signed. If you worked in an industrial setting (i.e. steel mill, chemical plant, auto plant) prior to 1973 and have never been tested for asbestos or came back negative more than 2 years ago, you may be eligible to be screened.; Caption: (1) Photo by Kevin Manning / Post-Dispatch - Luke Roth, who suffered lung cancer caused by exposure to asbestos, hugs his daughters Clare and Anne in January 2002 at their home in Des Moines, Iowa. "I'm shackled to this," Roth said then, pointing to a large oxygen tank, "and I won't get to see my children grow up." He died the next month.

---- INDEX REFERENCES ----

NAMED PERSON: GORI, RANDY; BARNES, CLAUDE; MIDDLETON, RICHARD; ROTH, LUKE; EGILMAN, DAVID

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Dicta

MASS TORT MEDICINE MEN

Roger Parloff

In the world of asbestosis litigation, a scientific correlation has been discovered: between diagnoses and the firms that hired the doctors.

In November a Philadelphia federal judge sharply criticized two small New York plaintiffs firms for allegedly having submitted dubious claims to a fen-phen diet pill settlement trust. As reported in The Legal Intelligencer, a sibling publication of The American Lawyer, U.S. district court judge Harvey Bartle III found that 78 claimants did not, in fact, show evidence of heart valve damage, notwithstanding diagnoses to that effect by two physicians retained by the firms. One of those physicians had been paid $725,000 to interpret 725 echocardiograms, while the other was getting a contingent $1,500 bonus for each diagnosed claim that was paid by the trust, the judge found.

Quite shocking, of course. But very small potatoes compared to diagnostic irregularities that have been knowingly and routinely tolerated in the asbestos realm for years--all while drawing essentially no press attention. Consider, for the moment, the Manville Trust, the oldest and largest settlement fund paying asbestos claimants.

After asbestos manufacturer Johns-Manville declared bankruptcy in 1982, about $2 billion of its assets were used to form the Manville Trust, a fund that pays asbestos claimants who were exposed to JohnsManville's products. Claimants fill out forms identifying the disease category they allegedly fall into, and the trust pays out fixed sums based on a grid schedule--x amount for nonimpairing asbestosis, y for asbestosis with impairment, z for lung cancer, and so on.

In 1995 the then executive director of the Manville Trust, Patricia Houser, became concerned about a spike in claims by people reporting nonmalignant lung disease--primarily marginal or incipient asbestosis--after seemingly minor exposures. That April trustees initiated a medical audit to make sure those claims were real. Under the terms of the settlement that set up the trust, trustees needed the permission of a body called the Selected Counsel for the Beneficiaries (SCB) to launch such an audit. The SCB consists of three leading national asbestos plaintiffs lawyers: Fred Baron of Dallas's Baron & Budd; Ron Motley of Mt. Pleasant, South Carolina's Ness Motley; and Robert Steinberg of Los Angeles's Rose, Klein & Marias. The SCB initially consented to the trustees' plan.

As Houser later explained in an affidavit she filed in March 1999: "We intentionally designed the X-ray review process to operate in favor of confirming the disease documented by the claimant and to give the benefit of any doubt to the

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claimant." That procedure called for 5 percent of each law firm's claimants to submit X rays. Those X rays would then be examined by two independent, so-called B-readers--physicians with the highest medical certification for diagnosing occupational lung disease. If either of two B- readers confirmed the claimant's diagnosis, the trust would pay the claim. To make passing easier, the Breaders were told to accept "subdiagnostic" indicia of disease--less than the minimum ordinarily required by the American Thoracic Society.

At first, most firms simply did not submit X rays as requested. Of those that did, about half failed. (Failure meant reclassification to either a less remunerative category of disease or total rejection of the claim.) In April 1996 the trust announced that firms whose pass rates were lower than 80 percent would henceforth have all of their claims audited, as would firms that were still failing to submit X rays at all.

At that point, as Houser relates in her affidavit, the SCB first raised questions about the trust's authority to conduct audits after all. It argued that many compromises had been struck in settling the rancorous bankruptcy proceedings of the mid-1980s, and that one of those was that claimants would be assured of swift payment of claims--even at the risk that some unqualified claims would also get paid. The audits were upsetting the bargain that had been struck.

The SCB's immediate demand, however, was simply that audits be refocused to punish doctors rather than law firms. If a doctor were found to have a high rate of error, the SCB suggested, the trust could disqualify him or her. But it shouldn't impose added scrutiny on the law firm that had submitted the suspect claim.

Reasonable though that proposal might sound, Houser resisted it for two eyebrow-raising reasons. Both stemmed from the trust's early analyses of the audit data. In mid-1996, the trust had commissioned biostatisticians at Penn State University and the University of Pennsylvania to help them with that task. Houser quickly discovered that the failure rate of any given doctor often correlated with which law firm that doctor was working for at the time! A physician's failure rate might be markedly elevated when working for one firm, but quite average when retained by another. In fact, the biostatisticians concluded, in a written report submitted to the trust in February 1998, that the particular law firm that submitted any given claim was "a strikingly significant predictor" of whether that claim would fail the audit, and that those findings exhibited "huge levels of statistical significance." (The report does not identify any law firms by name.)

The other reason Houser was reluctant to focus on doctors, according to her affidavit, was that the pass rates of the doctors most commonly used by plaintiffs lawyers were so poor, and the volume of claimants they diagnosed so great, that the trust faced the prospect of having to reexamine literally tens of thousands of claims. Even if the trust disqualified only doctors who fell below a lenient 50 percent pass rate, Houser explained in her March 1999 affidavit, "it appeared that over 70 percent of all claimants would have their diagnoses rejected by the trust and then be required to obtain an additional medical report." In other words, of the approximately 60,000 new asbestosis claims that became eligible for payment in 1997, the trust would have had to reexamine 42,000 of them.

After dickering with the SCB over audit design for about a year, the trustees in

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1998 decided to require all asbestosis claimants to submit X rays, and to audit all of them. A month later a plaintiffs firm in Baltimore sued to stop the audits, arguing that they were unauthorized under the original bankruptcy settlement agreement. In April 1999 the challenge came before Judge Jack Weinstein, who indicated from the bench that he was tending toward ruling for the Baltimore plaintiffs. The parties then settled, and the audits came to an end.

What had they shown while they lasted? According to an April 1998 Manville Trust memorandum, the ten physicians most frequently used by plaintiffs firms at the time of the audits had an average failure rate of 63 percent. Nine had failure rates ranging from 50 percent to 70 percent, while the tenth failed 36 percent of the time. (The lung conditions being diagnosed are so marginal and subjective that even the trust's own Breaders frequently disagreed with each other's asbestosis diagnoses, rendering inconsistent interpretations between 3 and 36 percent of the time, depending on the pair of B-readers being compared.)

Extrapolating from the audit results, we can see that the total number of suspect claims being paid by the Manville Trust is mind-boggling. Portions of the trust's vast database have been made available to researchers, including those at National Economic Research Associates, which does mass tort consulting work for numerous corporations and insurers. Frederick Dunbar, an NERA senior economist, agreed to run some numbers for The American Lawyer. During the years 1995 through 2000, the ten high-volume doctors who had been monitored during the medical audit accounted for 70,570 asbestosis diagnoses filed against the trust, or 49.6 percent of all of the asbestosis claims that identified a doctor. (The Manville database identifies only the diagnosing doctor for roughly 65 percent of the asbestosis claims filed.) The most prolific diagnosing doctor, whose failure rate was 66 percent, was alone responsible for 30,467 asbestosis diagnoses during that six-year period.

It's impossible to quantify precisely how much the trust might have overpaid for misdiagnoses. But we do know that during the period from 1995 through November 2001 the trust paid out $940,636,943 to asbestosis claimants, suggesting that perhaps $190 million of that sum was paid for spurious or inflated claims (63 percent times 49.6 percent times 65 percent of all asbestosis claimants). And that's assuming--conservatively, perhaps--that most doctors who weren't monitored would have proven pure as driven snow.

But even those numbers don't begin to tell the whole story. Most claimants who file with the Manville Trust also file claims against numerous other bankruptcy trusts and then file full-fledged tort actions against scores of not-yet- bankrupt defendants as well. Most of those defendants and trusts can't scrutinize individual claims any more exactingly than the Manville Trust can. In fact, some accept the fact that the Manville Trust has already paid a claim as evidence of its validity!

Beginning to get the picture?

E-mail: rparloff@nyc.rr.com.

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Letter to the Editor

Asbestos Screenings

To the Editor:

For the past several years, I have served as an expert witness in areas related to state-of-the-art and liability primarily at the request of plaintiff lawyers. However, I have usually reviewed the medical records and X-rays of workers in the cases in which I have testified. Over the past 2 years, I have noted that many of these individuals could not (due to inadequate latency or exposure) and did not manifest any evidence of asbestos-related disease.

Most of these cases are generated by "screenings" which plaintiff lawyers have sponsored the past several years to attract new asbestos clients for lawsuits. These "screenings" raise medical and larger political and social issues. Many "screenings" consist of chest X-ray with a B-reading alone. No history, PFTs, smoking or continuing exposure-related counseling occurs. The B-reading manual specifically precludes the use of B-readings for individual diagnosis, yet this is often the only test performed prior to case settlement. Although the B-reader should be blinded as to exposure this is often not the case. In one series of ongoing screenings, the reader knows he is reading for an "asbestos screening" for litigation, knows the cut off (1/0) that would qualify for compensation and receives differing payments based on the nature of the reading. This payment plan based on the reading result is incorporated into his reporting style; he does not fill out a B-reading report if the "reading" is less than 1/0. Therefore, he is paid $70 for 1/0 and $35 for 0/1 or lower.

I was amazed to discover, that in some of the screenings, the worker's X-ray had been "shopped around" to as many as six radiologists until a slightly positive reading was reported by the last one of them.

The "shopping around" of X-rays is not sound or proper medical practice and may, in fact, result in harm to some of the screened individuals. Some workers end up being unnecessarily and incorrectly advised that they have a potentially or invariably fatal disease. A number, no doubt, suffer anxiety and stress as a result. Others may change their life plans for no valid reason.

The cost of treatment for patients with mesothelioma, lung cancer, and asbestosis far exceeds the cost of "treating" someone with questionable minimal asbestos related chest X-ray changes. Often cancer victims have medical bills in the $150,000–$250,000 range, while patients with only questionable minimal asbestos related chest X-ray changes have few expected medical costs. However, current litigation related compensation pattern settlements do not reflect these expense-disease disparities. For example, there is no medical cost justification for the current Johns-Manville bankruptcy disparity in payments where the mesothelioma victim receives $10,000 and the non-impaired pleural case can receive as much as $2000. This disparity in monetary compensation has created an incentive for lawyers to file as many cases as possible and, thus has created a market for "screened unimpaired" cases.

Finally, with respect to public policy, compensation dollars are now unnecessarily diverted from real victims of asbestos exposure and their families, to transaction costs and compensation of the uninjured and unimpaired. In an ideal world, the unimpaired would receive compensation. However, many of the culpable companies have diverted resources, filed bankruptcy or otherwise escaped from their obligation to compensate individuals they have injured. As a result the money for present and future death cases is drying up. To the extent that "litigation screenings" which require the participation of physicians are contributing to the problem, physicians and their organizations have a responsibility to speak out and intervene.

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SPECIAL REPORT THE ASBESTOS CRISIS - Growing chorus demands change in law - POLITICAL FIGHT.

From the 11th floor offices of Baron & Budd, a Dallas law firm, it is easy to see why the asbestos time-bomb has been so hard to defuse.

Fred Baron has 10,000 asbestos clients - probably more than any other lawyer in the US - and he has a simple message for those lobbying Washington's lawmakers to make it harder to bring his cases to court.

"There will be a jihad (holy war)," he says. "We will fight them with everything we've got".

The threat deserves to be taken seriously. Until recently, Mr Baron was also president of the Association of Trial Lawyers of America, which together with its wealthy members is the largest political donor in the land.

On one wall of Mr Baron's handsome office hangs a photograph of him and Bill Clinton. The reception area, like a doctor's waiting room, is crowded with unhealthy-looking visitors leafing through magazines while they wait to have application forms processed.

Few professions in the US enjoy as much political power and wealth as trial lawyers. Atla's money must carry enormous influence in the Democrat party. And the Republican White House will not intervene in the asbestos debate for fear it would be misinterpreted as an attempt to bail out asbestos-stricken Halliburton.

For Atla, the whole compensation culture - allowing lawyers to accept contingency fees for speculative claims - is at stake.

"I find it remarkable that people think Congress is going to pass a law that for the very first time restricts people's right to seek compensation for a common law injury," says Mr Baron.

In the past, companies and insurers hoping to persuade politicians to stem the flood of asbestos claims have made little headway against

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Atla's fierce defence of an individual's right to sue. "These people keep coming back for punishment," scoffed Mr Baron when he learnt of their latest attempt.

This autumn the smell of change is in the air. For the first time an influential group of trial lawyers has broken ranks.

Steven Kazan, once a friend of Mr Baron but now a bitter rival, represents a smaller number of very ill victims with cancers. His unlikely coalition of asbestos plaintiffs and corporate defendants aims to introduce a reform bill into Congress that would only allow claims to be filed by people with a minimum level of medical impairment.

Their argument is novel: the explosion in bankruptcies and legal costs is actually hurting the real asbestos victims most. The overwhelming number of claimants with only initial signs of exposure is preventing the really sick from getting compensation.

"In theory people with pleural plaques have a right to sue for injury," Mr Kazan says. "But they ought to wait their turn and let people who are sick get taken care of."

At the moment, those who have x-ray tests showing marks on their lungs have little choice but to sue immediately because a statute of limitations would prevent them from seeking compensation later if they go on to develop more serious illnesses. So, the reform bill also proposes to suspend this statute of limitations until more grievous injury develops.

This relatively moderate twin-track approach - minimum medical criteria, plus a right for all to have their day in court - is winning wider support than previousattempts to limit asbestos costs.

Two sympathetic Democrat senators - Tom Carper of Delaware and Carl Levin of Michigan - are expected to propose legislation in the next few weeks. Another attempt will probably be made after the mid-term Congressional elections in November.

Senator Patrick Leahy, a Democrat chairman of the Senate Judiciary Committee usually far from sympathetic towards tort reform, has even promised to hold a hearing on asbestos in September.

In part the backlash is driven by a growing sense of discomfort about

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the phenomenal wealth generated by a handful of lawyers with thousands of "unimpaired" asbestos cases.

"It's embarrassing and unsavoury that my colleagues are out there doing this," Mr Kazan says.

Judge Griffin Bell, the US attorney-general under US president Jimmy Carter, is another Democrat to have broken ranks with his party's traditional support for the trial lawyers. "There is a shortage of ethics in the legal profession. They are bringing the system into disrepute," he says.

However, Judge Bell differs from those advocating a legislative solution to the asbestos crisis, believing Congress will never be persuaded to act against the interests of its biggest donors. Instead he places the blame and solution at the feet of US judges.

One of the biggest problems facing defendants is the willingness of some judges to bring together mass cases involving seriously ill and unimpaired plaintiffs. These courts are often in poorer, rural states where juries are notorious for awarding high damages against rich corporate defendants.

To compound the problem of separating the sick from the healthy, some judges have been willing to hear cases involving plaintiffs and defendants from other states. Jefferson County, in Mississippi, has seen 21,000 asbestos cases filed in spite of having a population of just 9,740.

The US Chamber of Commerce recently commissioned a poll of defendants asking them which states had the most unfair procedures for settling claims.

It is no coincidence that the five worst - Mississippi, West Virginia, Alabama, Louisiana and Texas - are also the five where asbestos lawyers take the majority of their cases to be heard.

For critics such as Judge Bell the asbestos crisis represents a corruption of the judicial process itself. "Judges must restore order and fairness. It is their duty to fashion judicial solutions when Congress fails to act and miscarriages of justice stand uncorrected."

Some states are already responding to his call. Texas recently clamped

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down on cases brought from outside the state.

Other attempts to tackle the problem have brought a rare glimmer of hope for defendants. Bankruptcy courts are due to hear several appeals calling for stricter medical criteria in claims made against "honey pots" such as the Manville Trust.

The 250 companies facing the latest mass trial in West Virginia expect to deliver a petition to the Supreme Court today calling for the case to be blocked on the grounds that it is imposing a perverse local solution to the asbestos problem on the whole country.

"Without some limit on a state's authority to apply its own law, particular state courts can become magnets for resolution of critical national issues," argue the companies.

Such arguments strike at the heart of the historic independence enjoyed by state courts and would require an enormous U-turn by the Supreme Court. Even limited reform of the rules surrounding the ability to hear cases from out of state or lump together mass claims would require a giant leap forward by the legal establishment.

Many observers remain pessimistic. "I think asbestos litigation is going to go on for another 30 or 40 years," concludes Lester Brickman, a law professor at Yeshiva University in New York. David Austern of the Manville Trust also believes it will be a long struggle. "This decade there will be some reform, but probably not until about 2005," he said.

Others fear voluntary reform from within the legal system will not be enough. "There is a great capacity for venality and greed in the profession," Mr Kazan says. "Unless something is done, we are going to see 60,000-100,000 more claims a year almost indefinitely."

But the costs of doing nothing have soared to the point where most lobbyists believe the next 12 months will finally see a solution. Companies, investors, lawyers and insurers are pleading louder than ever that it cannot go on.

"The insurance industry is scared," says Leigh Anne Pusey, a lobbyist for the American Insurance Association. "This is a huge, huge potential liability and no one knows where the outer limit lies."

Perversely, the public backlash against corporate America caused by the

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collapse of Enron and WorldCom may even work in favour of those companies fighting the asbestos crisis.

"There is a heightened sensitivity to greed at the moment and the excesses of the legal system seen in asbestos litigation are doing as much damage to people's jobs and savings as Enron or WorldCom," Ms Pusey says.

If the defendant companies succeed in making themselves look like victims of legal greed rather than the other way around, the end may finally be in sight.

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---- INDEX REFERENCES ----

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Wednesday, November 20, 2002

Editorial

Asbestos Fraud

Robert J. Samuelson

Every law school should offer a course in legal ethics called "How Lawyers Abuse the Law." The first case study would be asbestos litigation, which shows how the thirst for profits has led a small group of trial lawyers to erode the rights of legitimate victims while driving dozens of companies into bankruptcy and -- worst of all -- corrupting the court system. If Congress does not fix this problem, shame on it.

Trial lawyers once did heroic work on asbestos. They forced old-line asbestos companies, which hadn't protected workers against known dangers, to compensate legitimate victims. Because asbestos had been widely used as insulation in shipbuilding (for hot pipes) and in construction, some companies couldn't survive. Johns Manville, the leading producer, went bankrupt in 1982. But litigation was expected to decline because asbestos use dropped sharply. In 2001 it was only 3 percent of its 1973 peak.

Instead, new claims have exploded. By 2000, they totaled 600,000 and were rising by about 50,000 a year, says the Rand Institute for Civil Justice, a think tank. Contrast these numbers with the Manville experience. After bankruptcy, it proposed a trust (to be funded by non-asbestos businesses) to pay victims. At the time, experts said the trust would receive from 83,000 to 100,000 claims. It's already six times that level.

What happened? The answer is that claims are paid to people who aren't sick. Asbestos litigation has become less about justice and more about business. Trial lawyers have -- by shopping for the right state courts and exploiting permissive liability laws -- turned asbestos into a cash cow. Already, asbestos claims have cost $54 billion, estimates Rand. Less than half has gone to actual victims. In the 1990s, they got only 43 percent. The rest went mainly to trial lawyers (who brought the cases) and defense lawyers (who fought them).

Projections of the ultimate costs now range from $200 billion to $275 billion. The final number of claimants is projected from 1 million to 3 million. These estimates could be low, because all estimates so far have been low. As costs and claimants have grown, more companies have been sued; the total now is about 6,000. Many simply used some asbestos product.

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When the costs become overwhelming, companies go bankrupt. More than 50 have already done so, a third in the past two years. Once in bankruptcy, companies suspend payments to asbestos claimants but continue normal operations. Ultimately a company may emerge from bankruptcy with a "trust," which owns most of its stock and resumes partial payments to claimants. There's a transfer of wealth from today's shareholders -- pension funds, mutual funds, retirees, workers -- to lawyers and victims.

The situation has become so absurd that even a few trial lawyers denounce it. Steven Kazan, who has represented cancer victims since 1974, testified recently before the Senate Judiciary Committee that the scorched-earth tactics of other trial lawyers have made it harder for genuine victims to recover. Payments to lots of undeserving claimants take away from people who actually die, or their families.

The most serious asbestos-related disease is mesothelioma, a cancer of the lining of the chest and abdomen. It usually kills in one to two years; asbestos is the only known cause. The number of annual cases is estimated from 2,000 to 2,500. Including lung cancer, all cancer cases account for about 10 percent of new claims, says Rand. There are some serious cases of asbestosis, a damaging of the lungs that can cause breathing difficulties.

But most people who sue suffer no "impairment" from asbestos, even if X-rays show some slight scarring of lung tissue, says Rand. In plain language, their health isn't affected. Trial lawyers actively recruit claimants who didn't know they were "sick." There are mass X-ray screenings and ads. Said one Internet ad: "Find out if YOU have MILLION DOLLAR LUNGS."

"We've gone from a medical model in which a doctor diagnoses an illness and the patient then hires a lawyer, to an entrepreneurial model in which clients are recruited by lawyers who then file suit even when there is no real illness," Kazan testified. "They are not patients. They are plaintiffs recruited for profit."

In theory, judges should prevent abuses. In practice, trial lawyers depend on a few states, whose expansive liability laws, procedural rules or well-known anti-corporate biases shift the odds in their favor. The Association of Trial Lawyers of America reports that 85 percent of cases are filed in 10 states. Mississippi, Texas and West Virginia are leaders. Facing hostile judges and juries, companies often settle -- even if the evidence is on their side.

Among ordinary people, there is a word for this: fraud. This is a legalized fraud. A fraud is a calculated deceit. The deceit here is that the legal system is being used primarily to compensate legitimate victims when something else is occurring. Many people suffering no sickness are paid small sums so that a few trial lawyers can be paid

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large sums. Fred Baron, a leading trial attorney and spokesman for the trial lawyers' association, estimates that about 700 trial lawyers are engaged in asbestos litigation.

Congress could end this lavish welfare program for lawyers. It could preempt state law on asbestos; it could set strict medical standards for damages; it could put a cap on lawyers' fees. It could channel more money to deserving victims and reduce the total costs of asbestos settlements. It could limit this economic scourge and restore some self-respect to the law, which ought to be an instrument for social good and not lawyer enrichment.

---- INDEX REFERENCES ----

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LAWYERS ON TRIAL

BY PAMELA SHERRID

SPECIAL REPORT

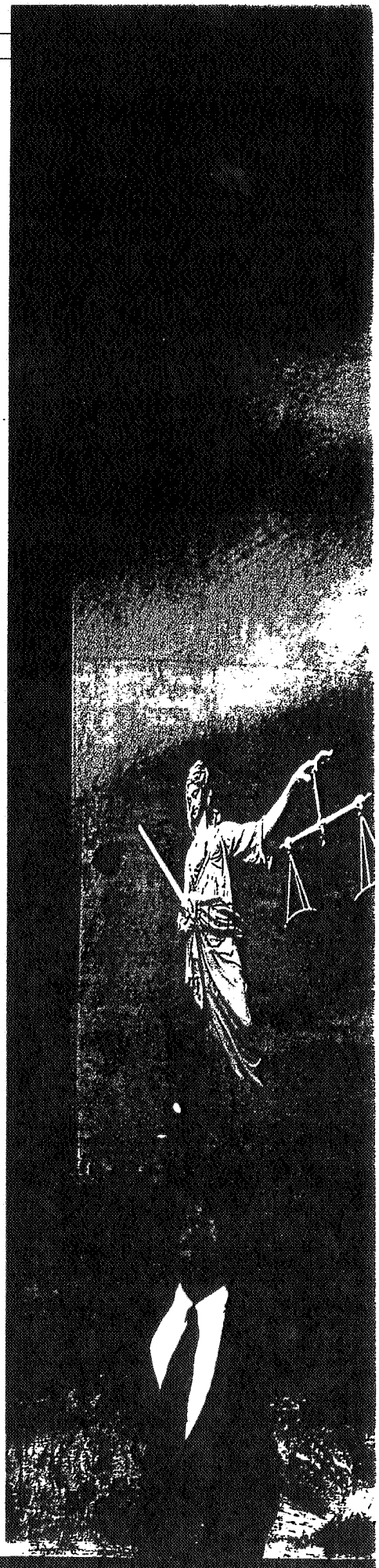
Bankrolled by the billions of dollars won in the fight against Big Tobacco, aggressive attorneys are targeting new industries, everything from house paint to hog farming. They are even, it turns out, complicating the war on terror. Drug makers, for instance, are afraid to supply the government with new vaccines to protect Americans against biological attacks unless the government protects them against lawsuits. And on Capitol Hill, the fight to rein in lawyers could derail efforts to get the government to help cover future terror-related insurance losses, a step some experts say is critical to the economy's health. Are lawyers out of control? Or, more important: Has litigation become more of a burden to society than a safeguard?

Lawyers are certainly more powerful than ever: Their coffers are flush, thanks to the $246 billion settlement with the tobacco industry in 1998. Plaintiffs' lawyers have cemented new alliances with state and local governments and with consumer groups to take aim at corporations. They have powerful friends: The Association of Trial Lawyers of America was top donor to Democratic candidates in the last election cycle. And, as any good lawyer might tell a jury, they have motive: The existing system of contingency fees, in the words of Supreme Court Justice Sandra Day O'Connor, can turn ordinary lawyers into "overnight millionaires."

Of course, in nature even sharks serve a purpose. "The plaintiffs' bar does an important service in vindicating the claims of injured persons and in keeping manufacturers from putting out defective products in the first place," notes Stephen Gillers, a professor of law at New York University. In the 1970s, it took hard work and their own money for plaintiffs' attorneys to prove that manufacturers were covering up the health damage caused by asbestos. The maker of the Dalkon Shield—which covered up the dangers of its birth control device to protect profits—might have gone unpunished had it not been for suits brought in the 1980s.

But the price of righting wrongs is steep. Add up the fees collected by plaintiffs' lawyers in a year, and the total tops $30 billion. Add in payments to injured people, as well as the costs of defense counsel and administrative expenses, and the overall annual tab for the American tort system is at least $179 billion, according to consulting firm Tillinghast-Towers Perrin. In an economy in recession, rising litigation costs take a bigger chunk of the nation's output. "That's generally not viewed as the best way to allocate society's resources," says Tillinghast consultant Russ Sutter.

Smokin'. The burden on the economy has grown since the 1998 tobacco settlement, which will deliver about $3 billion in fees annually to a cadre of top tort lawyers for the next 25 years. "The sheer volume of that money makes those fees the most destabilizing event in U.S. legal history," says James Wootton, president of the U.S. Chamber of Commerce's Institute for Legal Reform. "It gives lawyers more money for R&D, more money to pour



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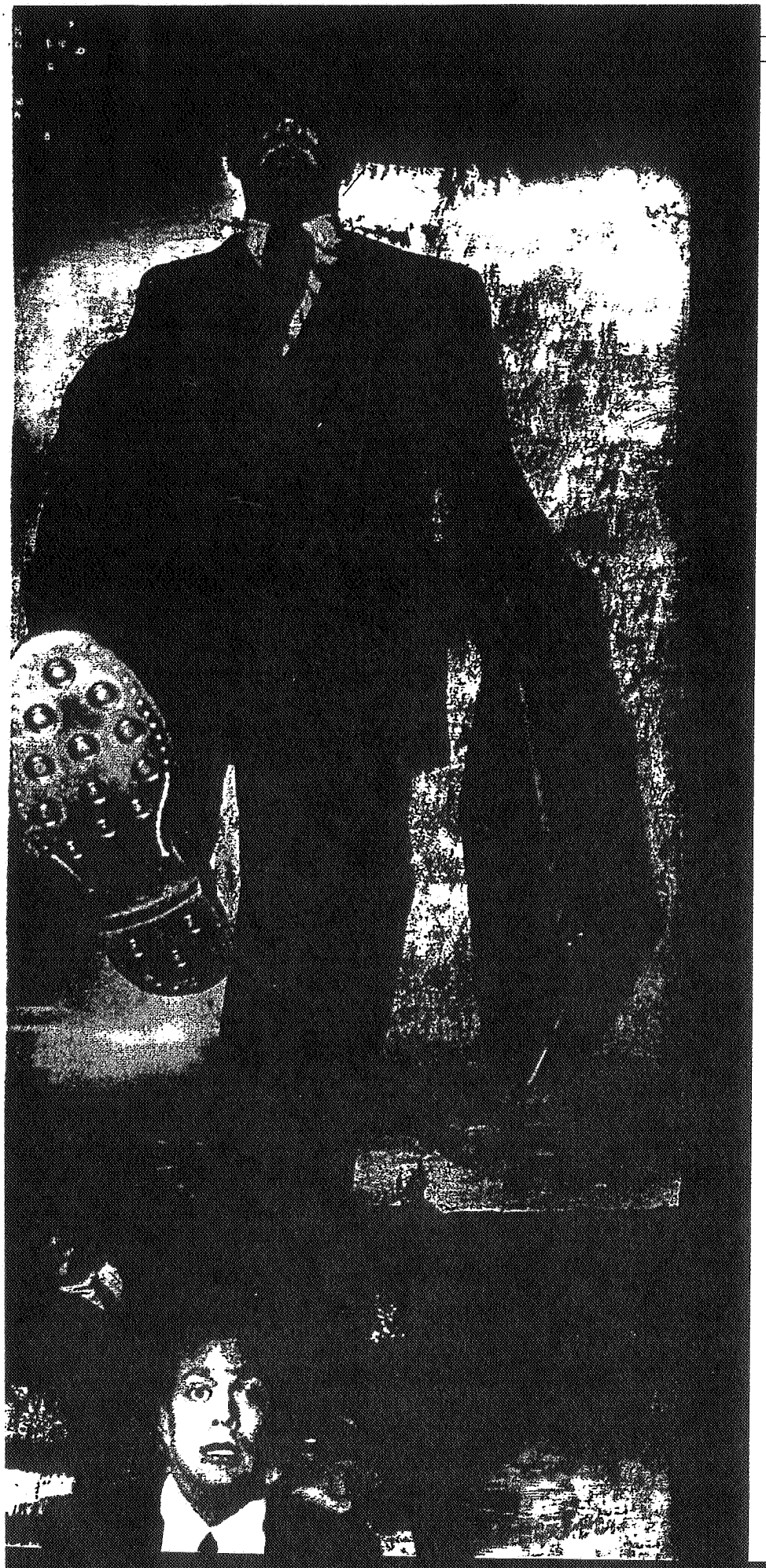


into the political system, and more leverage to force settlements."

Follow the money and you'll find Richard Scruggs, the Pascagoula, Miss., lawyer who pioneered the tobacco litigation and who stands to collect $300 million in fees. Scruggs, together with David Boies, who handled the federal government's case against Microsoft, is leading an assault on the HMO industry, charging several top managed-care companies with racketeering. The industry has already spent tens of millions of dollars defending itself, money that most likely will be recovered in premium hikes.

No fool. Then there is Ronald Motley. His South Carolina firm will collect an estimated $2 billion in tobacco fees over the next 25 years. Motley is masterminding a new legal campaign against paint manufacturers such as Sherwin-Williams and Glidden Paint. Motley believes that paint companies should be liable for the abatement of peeling lead paint and the medical costs of lead poisoning, even though the manufacturers stopped using lead in their products in 1978 and lead paint that hasn't peeled isn't considered dangerous by most experts. Lawsuits, though, are surely a hazard: When the Rhode Island Superior Court rejected the defendants' motion to dismiss Motley's case in April, Sherwin-Williams's stock price dropped 21 percent.

Private lawyers in the lead litigation are also borrowing an important tactic from the tobacco campaign: They're acting as hired guns for governments and other public entities. "It's an unholy alliance," says the Chamber of Commerce's Wootton. Trial lawyers like the efficiency of the new partnerships: They expect to win larger profits by representing a large number of people at once. Officials of cash-strapped governments can't resist the temptation to hire an attorney for a no-risk contingency fee without spending taxpayers' money on expensive lawsuits. "They get a free pot of money if they win, but take no financial risk," says Walter Olson, a researcher at the Manhattan Institute, a think tank. "This [joining of governments and tort lawyers] is something you'll see more of," says Dennis Connolly, a litigation expert at insurance broker Marsh.

Already, plenty of local governments are signing on. Motley's first lead-paint client was the state of Rhode Island, which filed in 1999. Since then, cities including San Francisco, Milwaukee, and St. Louis, as well as two Houston-area school districts, have hired Motley or others in similar lead suits. New York City had been going it alone in its 12-year-old suit against paint makers until this fall when it hired Mot-

ley's firm. "They wanted our firepower in court," says one of its partners.

One age-old tactic—some might call it ambulance chasing—didn't have to be lifted from the tobacco case. A Beaumont, Texas, law firm sent letters to school districts last year touting the lead litigation as a "win-win situation." The selling points: Districts had "nothing to lose" by suing, and any money recovered, the letter promised, could be used any way the district wanted, not just to remove old paint. The hunt for victims has been taken to remarkable lengths in ongoing asbestos litigation, as well (box).

Now the victims are even chasing the lawyers. Robert F. Kennedy Jr.'s Waterkeeper Alliance, a not-for-profit advocacy group, decided to turn to lawyers, not legislators, when it took on the hog-farming industry. Kennedy wants to put an end to the industry's practice of storing liquefied pig manure in open lagoons that can contribute to spillover into rivers. He persuaded several plaintiffs' law firms to take on his pollution case against Smithfield Foods, the nation's largest hog farmer. Earlier this year, they filed state and federal cases in North Carolina and a separate racketeering case in Florida. "They

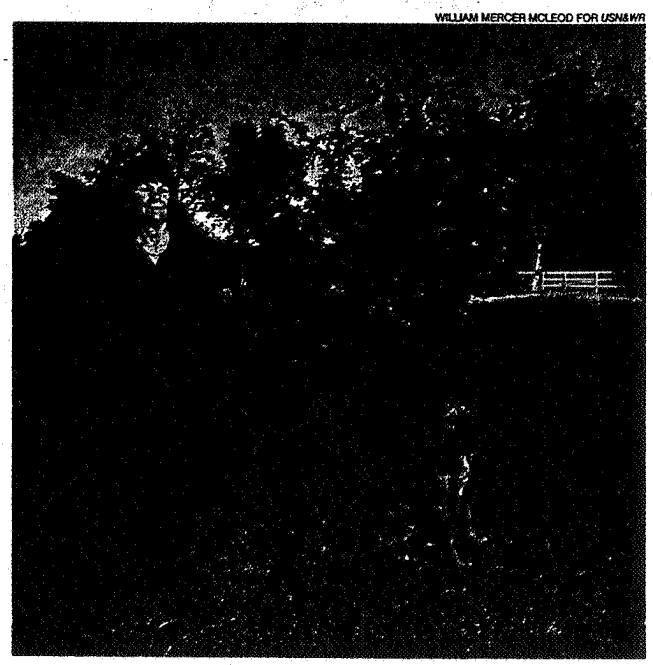
BEST OF ASBESTOS

Looking for some million dollar lungs

In late October, a Mississippi jury ordered three firms, including oil-services giant Halliburton and manufacturer 3M, to pay six plaintiffs $25 million apiece. It wasn't the price tag alone that stunned asbestos experts—victims of asbestos-related conditions have gotten huge settlements for years. What made jaws drop was that the plaintiffs weren't even sick—their X-rays just showed they stood an increased chance of *getting* sick. "Most of these guys have not missed a day of work in their lives," their lawyer said.

It's been 25 years since asbestos use was banned and almost 20 years since major producer Johns-Manville Corp. filed for bankruptcy. But asbestos claims have exploded in recent years, pushing nine major corporate defendants, including W. R. Grace and Owens Corning, into bankruptcy since January 2000. In the past year more than 50,000 new asbestos claims were filed. And because so many original defendants are already bankrupt, plaintiffs' lawyers have been expanding their target list until it now includes firms in at least half of all U.S. industries—including winemakers. "Less and less culpable companies are being drawn into the process," says a recent Rand study.

WILLIAM MERCER MCLEOD FOR USN&WR



Kenna Hall's husband died of an asbestos-related lung disease.

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: "Find out if YOU have MILLION DOLLAR LUNGS!"

Examining claims against one large defendant, Rand found that 30 percent of "victims" didn't even claim they had a disabling lung disease; the seriousness of an additional 50 percent of claims was clearly debatable. A 1990 study found that only 16 of the X-rays of 439 tire workers diagnosed with asbestos-related injury held up under closer scrutiny. Trial lawyers say state statutes of limitation force them to bring suits on behalf of clients who are not yet ill.

No relief. Weak cases are taking awards that might have gone to legitimate victims. "It means that more and more of my clients are not getting compensated," says Steven Kazan, an Oakland, Calif., attorney who limits his asbestos practice to victims of mesothelioma, a fatal asbestos-related lung disease. Firms forced into bankruptcy suspend payments, often for years, and victims get nothing in the interim. Kenna Hall's husband, Larry, who owned a tire shop near their Auburn, Calif., home, died at age 54 of mesothelioma last year. Her case against auto-parts maker Federal-Mogul is stalled, since the firm filed for bankruptcy in October.

One defendant is fighting back. After asbestos claims forced the parent company of GAF Materials Corp., the largest U.S. roofing materials company, into bankruptcy this year, it sued three law firms. The complaint reads like a *Sopranos* episode, alleging that the trial lawyers threatened to crush any company pushing for asbestos tort reform under an avalanche of new claims. It also alleges that doctors reading X-rays for one law firm received sexual favors from female paralegals and secretaries.

The law firms say those charges are trumped up. But the real smoking gun is a memo that GAF alleges law firm Baron & Budd used to prepare witnesses. The memo details facts that all clients, regardless of their actual experience, should testify to and comments all should avoid. For example: "Do NOT say you saw more of one brand [of asbestos-containing product] than another." The reason? "All the manufacturers sued in your case should share the blame equally!" Partner Fred Baron says few people were shown the document: "A paralegal did a memo she should not have done." *–P.S.*

are bringing as many suits as they can in the hope one will stick," says Richard Poulson, executive vice president at Smithfield. He would actually prefer more federal regulation rather than letting judges and juries decide complex scientific issues.

Even a top tort lawyer like Scruggs—perhaps because he has already pocketed so many millions—admits the system needs changing. "They may burn me at the stake at the next ATLA convention," he says. But tort reform is stalled. Most voters care more about holding corporations accountable for misdeeds than about the cost to the economy of unnecessary litigation and high lawyer fees. The Republicans' loss of the Senate earlier this year squashed most hopes in the business community that President Bush would fulfill his campaign promises for tort reform.

Inoculated. The events of September 11, however, have nudged both sides to act. Already the Bush administration has had to intervene to make sure the threat of lawsuits didn't prevent Americans from getting essential vaccines. The backdrop: In the late 1970s, suits alleging serious adverse side effects against makers of childhood vaccines helped drive many manufacturers out of that business. In 1986, a law was passed that compensates children while protecting companies from litigation. That framework wouldn't safeguard companies in today's crisis, though. So President Bush issued an executive order in October that lets the government treat drug makers as it treats defense contractors. The key provision lets the government agree to be liable if a drug maker has to pay damages in a bioterror-vaccine suit.

The trial lawyers have also been reining themselves in. The day after the World Trade Center attacks, ATLA President Leo Boyle called for a moratorium on lawsuits stemming from the terrorist attacks. The group has organized a volunteer effort to give free legal help to parties injured in the attacks who want to apply to a new federal victims' compensation fund and avoid litigation.

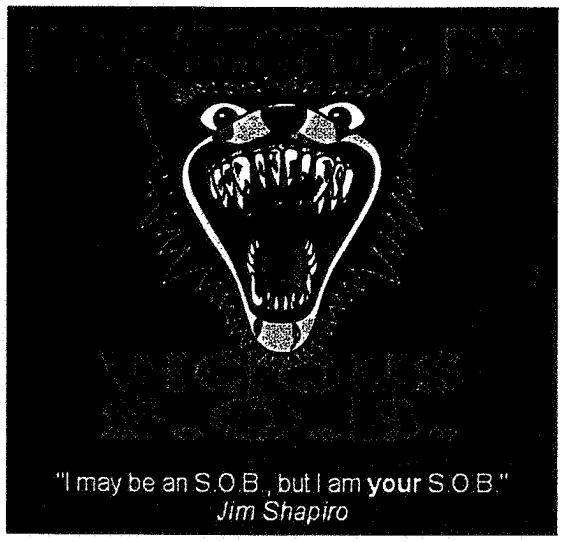
Have the trial lawyers overreached? Tobacco lawyer Scruggs is certainly acting as if they have. He recently signed on with the defense for the first time in years to plot strategy for Sulzer Medica, a medical device manufacturer that is being sued for defective hip implants. "Right now," he says, "there's no way for a company that makes an honest mistake—or any other kind of mistake— to extricate themselves from litigation other than bankruptcy." ●

A bear market bonanza

How investors' losses can convert into lawyers' gains

BY MATTHEW BENJAMIN

A client nicknamed him "The Hammer" for his aggressive courtroom demeanor. Indeed, Hollywood, Fla., lawyer Jim Shapiro claims to have won well over $100 million for clients in 18 years of personal-injury lawsuits ranging from common car crashes to complex asbestos cases. Lately, though, he has focused on a new class of "victims": investors who lost big on technology stocks. "Investment-loss cases just took off in January," says Shapiro, who represents about 700 investors in arbitration courts established by the major stock markets. Some $5 trillion in paper wealth disappeared in the 20-month-old bear market, and someone, somewhere, is to blame, Shapiro says. "People think they don't have a case because they assumed the risk of Nasdaq going down, but they do." Brokers who let clients load up on tech stocks were negligent, he argues, even if clients demanded it. Cases before the National Association of Securities Dealers will reach 6,800, up 23 percent from 2000, and cost Wall Street hundreds of millions of dollars. "The first thing you need for litigation is losses, and we certainly have that now," says John C. Coffee, a securities-law expert at Columbia University.



Lawyer Jim Shapiro argues ferociously for those who think they have been victimized by corporate America.

One Shapiro client, a retired veteran in Deerfield Beach, Fla., listened when his broker advised selling stocks like General Electric and Merck and buying Palm Inc. and MicroStrategy. Now he wants restitution for over $500,000 in losses. "He misled me," says the retiree, who requests anonymity. "Those weren't the right stocks for me."

Real class. The big money, though, is in class action lawsuits, 415 of which have been filed this year, shattering the previous record of 236 suits. Such cases, which routinely fetch settlements exceeding $10 million, are initiated by firms like Milberg Weiss Bershad Hynes & Lerach, which has class actions pending against about 300 companies, from Accelerated Networks to Z-Tel Technologies. In general, class action law firms sue companies on behalf of stockholders when their stocks plummet, citing fraud such as insider trading or improper accounting. Enron, the Houston energy firm that saw its stock plummet 99 percent as a result of dubious accounting and bad investments, faces multiple lawsuits from employees and shareholders, as well as a Securities and Exchange Commission investigation.

This year there's a new class action twist. Investors are targeting stock underwriters and at least 300 companies, claiming investment banks gave preferred clients access to coveted shares in initial public offerings in exchange for inflated commissions. They also allege the banks manipulated the market by asking favored customers to buy shares in the aftermarket, driving up prices. The SEC is investigating the matter. Jim Newman of Securities Class Action Alert Services predicts a settlement of as much as $6 billion. "It's probably the largest situation I've been in, in terms of complexity and size," says Melvyn I. Weiss of Milberg Weiss, who was recently appointed head of the IPO plaintiffs' group.

Wall Street protests its innocence. "When the market tanks, people go looking for scapegoats," says Securities Industry Association spokesman James Spellman. Plaintiffs' lawyer Shapiro takes a different spin. "The crash is what made their mistakes show," he says. ●

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LAWYERS' ETHICS AND FIDUCIARY OBLIGATION IN THE BRAVE NEW WORLD OF AGGREGATIVE LITIGATION

LESTER BRICKMAN*

I. INTRODUCTION

Over the past several decades and at a quickening pace, we have seen the rise of the mass tort phenomenon.[1] The term mass tort refers to an allegation of injury by large numbers of persons due to a calamity or exposure to defectively produced foods, drugs, products implanted in the body, or improperly designed or constructed vehicles, other products, materials or structures, which is sought to be redressed by combining (aggregating) large numbers of claims sharing like issues of fact and law[2] into a litigation against one or more defendants using such structural aggregative methods as class actions, consolidations, and other techniques.

Some mass torts are not a result of personal physical injury, but rather economic injury.[3] Typically, the injury to each claimant is small, but in the aggregate, the injury alleged is substantial. In actions based upon fraud, allegations are made that a bank, insurance company, credit

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* Professor of Law, Benjamin N. Cardozo School of Law of Yeshiva University.

[1] *See* 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, REPORT ON MASS TORT LITIGATION 9 et seq. (Feb. 15, 1999); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344-45 (1995). Class action litigation, for example, has increased dramatically since the 1980s, with most of the increases taking place in state courts. A survey done by the Federalist Society found that between 1988 and 1998 class actions increased by 338% in federal courts while the increase in state courts was more than 1000%. *Analysis: Class Action Litigation–A Federalist Society Survey*, CLASS ACTION WATCH 3, Vol. 1, No. 1 (1999).

[2] "[S]imilar factual issues and legal questions will arise in all claims in a mass tort litigation, or at least in a significant subset of claims. The same injuries will involve similar causation issues. Liability issues will be similar among claims alleging similar exposures to a particular defendant's products." Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 966 (1993).

[3] For an account of several class actions based upon economic injury, see DEBORAH HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 139 (2000).

issuer, airline or other goods seller or service provider, in the course of selling the service or product, defrauded thousands or even hundreds of thousands of consumers. While such actions, if brought individually, would usually be denominated as breach of contract suits, and attempts to convert the claims into tort actions would usually be rejected by courts,[4] the sorcerer's elixir of aggregation magically transforms them into tort claims replete with demands for punitive damages.

Changes in social and legal trends in recent decades have facilitated the rise of the mass tort phenomenon.[5] Among these trends are increases in product marketing that have led to mass consumption of goods and services and therefore greater exposure to their potentially dangerous effects, advances in medical technology that enable doctors to connect injury with exposure to products or chemical substances, epidemiological studies, increased mass media reporting of potentially dangerous products or circumstances including the increased role of television journalism shows—productions that are sometimes assisted by lawyers who are financially interested in sensationalizing coverage of an issue in order to affect public opinion or generate a client base. Increased litigation activity is also facilitated by widespread solicitation of potential claimants by use of mass advertising, "800" phone numbers, and websites; close association with union officials in a position to steer large numbers of claimants to specific lawyers; the formation of victim support groups that are overtly or surreptitiously underwritten by lawyers;[6] the formation of networks of lawyers specialized to particular product claims;[7] rising

[4] Attempts to convert a cause of action for breach of contract under state law into an action for fraud usually fail. *See, e.g.*, Richard A. Wagner, *When Contract Claims and Fraud Claims Intersect*, N.Y.L.J., Sept. 17,1999, at 1.

[5] Hensler & Peterson, *supra* note 2, at 1013-14.

[6] *See* Michael Moss, *Plaintiffs' Attorneys Back Groups that Help Nursing Home Residents*, WALL ST. J., Mar. 26, 1999, at 1 (indicating that persons calling a toll-free number expecting to reach an independent nursing-home advocacy group that fields complaints about nursing homes and lobbies for better treatment of elderly residents are instead first connected to a law firm which pays for the toll-free line and associated web sites; other lawyers provide direct financial support of similar advocacy groups). The article indicates that these undertakings by lawyers are shrouded in secrecy. *Id.*

[7] *See* Mike France, *The Litigation Machine*, BUS. WK., Jan. 29, 2001, at 114 (reporting on pleading and strategy sharing on websites and sales of litigation packets with step-by-step instructions for filing products liability lawsuits); Steven Keeva, *No Deficit of Attention Here: Ritalin Class Action Suits are Making Some Drug Companies Hyper*, A.B.A.J., June 2001, at 28, 30 (June 2001) (quoting high-profile plaintiffs' lawyers on their attempts to structure multiple massive tort suits like "joint ventures," allocating work to different plaintiffs' firms around the country to avoid "duplication of effort"). For an

corporate wealth; judicial decisions maximizing insurance coverage; and procedural rules that facilitate litigation against manufacturers.[8]

However, the single most important factor accounting for the rise of the mass tort claim in recent decades is the enormous financial incentives that lawyers have structured and courts have condoned for bringing aggregative actions.[9] Plaintiff lawyers, charging contingency fees, are able to earn substantial, indeed enormous, fees which are not commensurate with either the effort required, the risks assumed,[10] or

account of the coordination between lawyers involved in gun litigation which is described as exceeding that in the tobacco litigation, see Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 598-99 (2000).

[8] Hensler & Peterson, *supra* note 2, at 1013-30.

[9] Judith Resnick et al., *Individuals Within the Aggregate: Relationships, Representation and Fees*, 71 N.Y.U. L. REV. 296, 300 (1996) (the economic benefits to lawyers of large-scale litigation are well documented); *see also* Charles C. Wolfram, *Mass Torts-Messy Ethics*, 80 CORNELL L. REV. 1228, 1231 (1995) (stating "the class-action plaintiffs' bar is driven by . . . easy money—a great deal of it").

[10] The thesis that very high fees are being routinely obtained in contingency fee cases without meaningful risk, yielding what I have termed "windfall fees," is one that I have previously advanced. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 280 n.112 (1996); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 92-93 (1989); *see also* Derek Bok, THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA 140 (Free Press 1993) (noting that most plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely high probability of winning. In most instances, therefore, the contingent fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court.).

A particularly illustrative example of price gouging in a mass tort context occurs in asbestos litigation. When asbestos litigation first commenced in the early 1970s, contingency fees of 40% were common. This was a reflection of the high degree of risk posed by such litigation. But when *Borel v. Fibreboard Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), was decided, the risk equation changed considerably. By the mid-1980s, plaintiffs' lawyers had retooled their cases to reflect the *Johns-Manville* bankruptcy and the consequent need to perfect cases against thirty or so heretofore peripheral players. By then the risk in asbestos cases had shifted dramatically. Had lawyers' fees been responsive to market conditions, the contingency fee percentages would have dropped considerably to reflect the sea change that had occurred in the risk equation. It is a tribute to the power of the asbestos bar that contingency fees have remained at the extremely high levels that were set when litigation risks were considerable even though most claims today are settled through an essentially administrative process in batches of hundreds, thousands, and even tens of thousands with little or no lawyer time devoted to most of them and with effective hourly fees being generated ranging from

ethical limitations on the reasonableness of fees.[11] These fees frequently amount to thousands and tens of thousands of dollars an hour and even as much as hundreds of thousands of dollars an hour. In addition, by aggregating claims, lawyers gain enormous bargaining power, which enables them to extract settlements usually without the need for trial. For these reasons, lawyers are constantly searching out opportunities to initiate mass tort litigations.

Aggregative litigation provides for economies of scale that can improve judicial efficiency, especially by reducing repetitive litigation. However, at the same time, aggregative litigation may result in sacrificing both procedural and substantive fairness, or produce perverse effects or other undesirable results.[12] For these reasons, the increasing use of aggregative litigation mechanisms have led to calls for Congress to create administrative mechanisms for dealing with certain types of mass torts, especially asbestos litigation. However, the plaintiffs' bar, exercising considerable if not overwhelming political power, has successfully countered such efforts.[13] In the face of congressional failure to create

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$5,000 to $25,000. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need for An Administrative Alternative?*, 13 CARDOZO L. REV.1819, 1834 n.60 (1992) [hereinafter Brickman, *Asbestos Litigation*].

[11] The rules of ethics require that attorneys' fees be reasonable. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(a) (1980). In fact, an ordinary lawyer has a duty to reject a compromise providing generous fees but modest relief for the client. Paul C. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule* 23, 39 ARIZ. L. REV. 461, 468 (1997) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 206, cmt. F (1998)).

[12] *See* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695, 1696-97 (1998) ("A defendant's liability, which should be a critical factor in the fashioning of a just solution, becomes submerged beneath the overwhelming volume of claims and the huge transactional costs of defending them.").

[13] While Congress (and the states) may "make no law . . . abridging the right of the people peaceably to assemble, and to petition the Government for a redress of grievances . . . ." U.S. CONST., amend. I, such a prohibition does not extend to plaintiffs' lawyers. Consider, for example, the asbestos bar, which exercises enormous power as evidenced by the means they have used to oppose proposed legislation to create an administrative alternative to asbestos litigation that would limit compensation to only those with actual injury, essentially as per the terms of the *Amchem* settlement, and then according to a specific schedule. *See* Fairness in Asbestos Compensation Act, H.R. 1283, 106th Cong. (1999); S.758, 106th Cong. (1999). For a discussion of asbestos litigation, see *infra* text accompanying notes 90-151. The details of the proposed legislation and the determined opposition of the leading asbestos lawyers are set forth in an essentially first hand account

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in First Amended Complaint, G-I Holdings, Inc. v. Baron & Budd et al., No. 01 Civ. 0216 (RWS), U.S.D.C., S.D.N.Y., filed April 30, 2001:

> In the wake of *Amchem*, [see *infra* note 84] a number of companies formed the Coalition for Asbestos Resolution (CAR), the goal of which was to work toward the adoption of legislation establishing a fair and efficient administrative facility for resolving asbestos claims. When it was formed, CAR's members included Kaiser Aluminum Corporation (Kaiser Aluminum), Georgia Pacific Corporation (Georgia-Pacific), Westinghouse, United States Gypsum Company (U.S. Gypsum), ABB Combustion Engineering, Turner & Newell PLC (Turner), Armstrong, and GAF.
>
> [T]he Act was first introduced in October 1998, near the end of the 105th Congress. With the support of GAF and the CAR, it was reintroduced at the start of the 106th Congress, in early 1999. The Act was introduced in both houses of Congress and cosponsored by over 102 senators and congressmen, including nearly the entire Republican leadership and Democratic Senators Lieberman, Dodd, Toricelli, Schumer and Moynihan. This legislation was designed to compensate individuals who are actually sick and to defer resolution of the claims of "non-sick" individuals until such time as those individuals actually developed an asbestos-related illness.
>
> [P]ursuant to the Act, an industry-funded national claims facility was to have been created that would have applied essentially the same objective medical criteria that were embodied in the *Georgine* settlement [that was the subject of *Amchem*] . . . .
>
> The Act . . . [also] cap[ped] [plaintiffs' attorneys] . . . contingency fees, which were to be limited to 25% of a claimant's recovery . . . .
>
> In February 1999, [one of the leading asbestos lawyers on behalf of his firm and] . . . other firms working with them, invited the remaining companies supporting the Act and several other former asbestos producers to a meeting. The invitation stated that the plaintiffs' attorneys calling the meeting represented 80 percent of the pending asbestos plaintiffs' cases, and that they sought a meeting for a "frank discussion" of the current status of the national asbestos litigation.
>
> The February 24 meeting was attended, on the asbestos plaintiffs' side, by [many of the leading asbestos lawyers] . . . . Representatives of GAF, Kaiser Aluminum, W.R. Grace & Co., Owens Corning, Owens-Illinois, Inc., U.S. Gypsum and others were also present
>
> . . . .
>
> Acting as spokesman for the group, [a leading asbestos lawyer] . . . stated that efforts to promote or support the Act were viewed by [plaintiffs' attorneys] . . . as starting a "nuclear war." He said that the

alternative mechanisms to deal with mass tort litigation, courts have struggled to devise solutions using various forms of aggregative strategies. Indeed, an additional and critical factor in the increase of mass tort claims is that the very strategies courts have devised to deal with such claims facilitate the bringing of more mass tort claims and, in that sense, may be seen as perverse.[14] The most prominent and impactuous of these strategies is the Federal Rule 23 class action,[15] and, in particular, the manner in which courts have implemented the 1966 amendments to the rule, changing the procedure from claimants having to affirmatively opt-in to be a part of a class to allowing lawyers to seek certification of a class of claimants who are then automatically a part of the litigation unless they affirmatively choose to opt-out—a change that has yielded profound consequences, at least in part unintended by the drafters of the amendatory language.[16] Other strategies include: Federal Rule 42 consolidations;[17]

> [lawyers] . . . were prepared to "fight on whatever level necessary" to defeat the legislation. He also stated that further support for the Act would result in "war" that would break out on every front, and that any company that did not renounce its support for the legislation would be engulfed in asbestos litigation that "will rage like a fire you will never control."
>
> [T]wo days after the February 24 meeting, [the leading asbestos lawyer referred to above] . . . and the other asbestos plaintiffs' attorneys, invited the industry participants to a follow-up meeting to be held on April 8, 1999 . . . At the April 8 meeting, [it is alleged that the asbestos plaintiffs' attorneys] . . . made it clear that withdrawing support for the Act was no longer enough and that [they] . . . were now demanding that companies sign letters opposing the Act . . . [Following these meetings], Georgia-Pacific, . . . ABB Combustion Engineering, . . . Kaiser Aluminum, . . . Westinghouse, . . . U.S. Gypsum, . . . Turner, . . . [and] Armstrong [all] withdrew from CAR . . . .

Id. ¶¶ 95-128. For an account of these events, see Holman Jenkins, Jr., *Now on Video: America's Scariest Special Interest*, WALL ST. J., Apr. 21, 1999, at A23.

[14] *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1825.

[15] In order for the litigation to become a class action, it must first be certified under Rule 23(a). *See* FED. R. CIV. P. 23(a). There are four prerequisites for obtaining certification:

> (1) the class is so numerous that joinder of all members in impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Id.

[16] For the history of the 1966 amendments and an analysis of the intended effect versus actual effects of the amendment, see Appendix, included at the end of this article.

[17] Subsection (a) of Federal Rule 42 provides specifications for consolidating multiple

combinations of the class action and consolidation procedures; state court equivalents; joinder under Federal Rule 20;[18] settlement class actions;[19] use of "bellwether" plaintiffs as a model for disposition of large numbers of claims;[20] MDL proceedings;[21] as well as such other strategies as novel

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actions. The Rule states that:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42.

Therefore, under Rule 42(a), a court may, for reasons of cost efficiency or to avoid delay, merge all of the actions before it that share similar foundations in law or fact. *See* Rose v. Medtronics, Inc., 107 Cal. App. 3d 150, 155 (1980) (citing a list of federal court cases declining to certify mass tort class actions and stating that "consolidation of actions is the preferred procedure"); *see also* Ripa v. Owens-Corning Fiberglass Corp., 660 A.2d 521, 533 (N.J. Super. 1995) (observing that "tens of thousands of asbestos claims are proceeding in the federal courts on a consolidated basis"); *infra* note 46.

[18] The Federal Rules of Civil Procedure allow large number of plaintiffs to join a single action when claims arise out of the same transaction, occurrence, or series of transactions or occurrences. *See* FED. R. CIV. P. 19 (governing compulsory joinder of parties); FED. R. CIV. P. 20 (governing permissive joinder of parties); *see also* Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361 (1994) (governing statutory interpleader); FED. R. CIV. P. 14 (governing impleader); FED. R. CIV. P. 22 (governing rule interpleader); FED. R. CIV. P. 24 (governing intervention); Cal. Civ. Proc. Code §§ 378-79 (West 1973); N.Y. C.P.L.R. § 1002 (McKinney 1976).

[19] *See infra* notes 83-87.

[20] The use of "bellwether" or test plaintiffs has developed as an alternative to the use of class actions. *See* Richard Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 791-92 (1998); *see also* R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL OF RIGHTS J. 199 (1999). "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock." *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). The ultimate purpose was to determine the confidence of the flock "that the wether would not lead them astray." *Id.*

A similar analogy applies to the use of test plaintiffs in mass torts. The bellwether approach focuses on the trial of a small number of plaintiffs (sometimes referred to as "mini-trials"), usually with the claims of the other plaintiffs stayed pending resolution of the test cases. *See* Shawn Copeland et al., *Toxic Tort and Environmental Matters: Civil Litigation* 64 ALI-ABA 33 (Jan. 22, 1998). For a controversial example of the structuring of mini-trials to the great disadvantage of defendants and the extrapolation to non-bellwether plaintiffs, see Cimino v. Raymark Indus., 751 F. Supp. 649, 663-64 (E.D. Tex 1990) (using statistically significant plaintiffs to determine average value), *aff'd in part and vacated in part*, 151 F.3d 297 (5th Cir. 1998); *see also In re Chevron U.S.A., Inc.*, 109 F.3d at 1022 (granting mandamus relief to defendants

because, "[c]onducting an imperfect bellwether trial in this case threatens . . . to force defendants to settle even when they might have meritorious defenses.") (Jones, J., concurring); *In re* TMI Litig., 193 F.3d 613 (3d Cir. 1999) (reversing the extension of summary judgement to non-trial plaintiffs for failure to present sufficient evidence of exposure); Deluca v. Merrel Dow Pharmaceuticals, 911 F.2d 941, 952 (3d Cir. 1990) (explaining that collateral estoppel principles did not permit the extension of the findings of a multi-district litigation, consolidated common issues trial to plaintiffs not parties to that trial).

[21] MDL or "multi-district litigation" is a form of aggregating cases where several similar actions have been filed nationwide and federal court judges ask the Judicial Panel on Multi-district Litigation to consolidate the actions before one judge for pretrial purposes. *See* 28 U.S.C. § 1407 (1994). Multi-district procedure provides that upon the motion of any party or upon the court's own motion, the nine-member Judicial Panel on Multi-district Litigation will order transfer if the following prerequisites are met: (1) the actions to be coordinated or consolidated involve one or more common questions of fact; (2) transfer will promote the convenience of the parties and witnesses; and (3) transfer must result in the just and efficient conduct of the actions transferred. *See id.* For example, the Judicial Panel on Multi-district Litigation consolidated a number of asbestos cases before Judge Jack Weinstein of the Eastern District of New York. *See In re* Asbestos Prod. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991); *see also* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 24 (Northwestern Univ. Press 1995). Although the MDL procedures contemplate that actions are transferred for the purposes of pretrial proceedings and are to be remanded for trial to the district from which the action was transferred, in practice only a small percentage of actions are remanded. *See* Copeland et al., *supra* note 20, at 40. Most actions are either settled in the transferee court or tried in the transferee court pursuant to 28 U.S.C. § 1404(a), change of venue, or parties' consent. *See id; see also* 28 U.S.C. § 1404(a) (1994) (allowing transfer "[f]or the convenience of parties . . . in the interest of justice"). Under any of the consolidation mechanisms, the primary prerequisite is that the actions involve a common question of law or fact, and that the common issue be central to the actions to be consolidated. *See, e.g.*, Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976) (demonstrating the harmful effects of erroneous consolidation when there is not a "common question of law or fact").

Although the consolidation improves the efficiency of the pre-trial process, courts still face the daunting possibility of adjudicating numerous similar claims. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) 323 (1995) ("[I]n appropriate circumstances, a joint trial for common issues may be feasible, followed by separate trials of remaining issues."). Unlike a class action, consolidation of separate actions "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *In re* TMI Litig., 193 F.3d at 724 (quoting Johnson v. Manhattan Ry. Co., 289 U.S. 479, 497 (1933)); Advery v. Celotex, 962 F.2d 1177, 1180 (6th Cir. 1992) (explaining that consolidation "does not merge the independent actions into a single cause"); *see also* Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 497 (1991) ("[A] class action is a single lawsuit that binds a large number of people, while a consolidation is a set of independent lawsuits that are processed in a coordinated and relatively efficient way."). Accordingly, consolidated actions do not permit a claimant the right to "opt-out" as does a class action certified under Rule 23(b)(3). *See* WEINSTEIN, *supra* at 139.

procedural approaches;[22] successor liability rulings; revised evidentiary standards;[23] loosened standards for proving causation; and the interpretation of insurance contracts to maximize the availability of assets to meet claimants' demands.[24] In addition to these judicially crafted solutions, lawyers have also devised informal aggregative strategies that confer on them the same coercive powers as judicially crafted strategies.[25]

These judicially crafted solutions have generated a cornucopia of scholarly writings addressing the mass tort and class action phenomena.[26] Comparatively little, however, has been written about the perverse effect of these strategies on the generation of claims, including the creation of

[22] *See, e.g.*, Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 n.8 (5th Cir. 1986) (providing for the calculation of damages prior to a determination of liability—called a reverse bifurcation, in order to find the approximate tort value of a claim and thereby promote settlement); Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836 (E.D. Tex. 1980) (use of non-mutual offensive collateral estoppel to avoid duplicative litigation of such issues as the harmful effects of asbestos exposure).

[23] *See, e.g.*, Slaughter v. Southern Talc Co., 949 F.2d 167, 172-73 (5th Cir. 1991); Whatley v. Armstrong World Indus., 861 F.2d 837, 840 (5th Cir. 1989) (allowing the liberal use of circumstantial evidence to overcome plaintiff's inability otherwise to establish proximate cause in cases where proving exposure to particular products was not realistically possible); *see also infra* note 142.

[24] For an analysis of how these other strategies have come to play a key role in asbestos litigation, see Brickman, *Asbestos Litigation, supra* note 10, at 1832 n.51, 1840-52, 1873-84. Litigation brought by governmental entities against tobacco or gun manufacturers, even though not aggregative in form, may be seen, nonetheless, as functionally aggregative in nature because the amounts of damages sought can have the same coercive effects as described in Part I.A of this Article.

[25] Claims can also be aggregated by lawyers coordinating their activities to such an extent that even though the claims they bring are independent and proceed as separate lawsuits, the "litigation" is effectively "a single integrated whole." *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 383-84 (2000).

[26] *See, e.g.*, Symposium, *Complex Litigation at the Millennium*, 64 LAW & CONTEMP. PROBS. 1 (2001); Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000); Mark C. Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DEPAUL L. REV. 463 (1998); Symposium on Mass Tort, 31 LOY. L.A. L. REV. 353 (1998); Richard A. Nagareda, *The Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295 (1996); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995).

substantial financial incentives for lawyers to recruit new claimants to supplement or replace those whose claims have been resolved.[27] This cycle maintains pressure on courts to devise new solutions in a continuing and ultimately unsuccessful effort to clear their dockets.[28] These recruitment efforts are one of several systemic strategies that may be seen to be abusive as they advance lawyers' interests but arguably do not increase social welfare.

A. *Systemic Issues Raised by Mass Tort Litigation*

1. The Coercive Effect of Aggregation

In response to burgeoning mass tort litigation, the tort system has struggled to get its arms around this relatively recent phenomenon of thousands of claimants alleging similar injuries that run the gamut from the severe to the minor to the nonexistent, asserting claims against one or a handful of corporate actors, posing problems of equity amongst the claimants and problems of fairness for the defendants. The fairness issue arises mainly because the aggregation of claims often pressures a defendant or defendants to settle claims irrespective of their merits.[29] Even if a defendant perceives that it has a substantial likelihood of prevailing, if the number of claims is high enough to constitute a threat to the economic viability of the company, a corporate decision maker, motivated by the short-term consideration of fear of losing the company on his or her watch, will often agree to settle the claims even if the long-term interests of the corporation are to litigate the claims fully. This is so because the aggregated claims, which invariably include a demand for punitive

[27] For one such analysis, 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, 248-51 (2000). For an account of how a massive consolidation generated dramatic increases in claim filings, see Brickman, *Asbestos Litigation*, *supra* note 10, at 1873 n.231.

[28] "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." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

[29] Aggregation "enables some plaintiffs' lawyers to bring weak if not false claims in sufficient quantity as to require defendants to choose between settlement and bankruptcy." Judith Resnick et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306 n.31 (1996).

damages,[30] potentially exceed the combined assets of the corporations and any available insurance. This presents a "bet-the-company" scenario especially since, if the claims are tried to verdict and yield a huge judgment, they become, in reality, essentially unappealable because of the typical requirement that a cash bond be posted of at least the amount of the verdict in order to stay execution of the judgment during appeal.[31] Thus, the incentive for plaintiff lawyers is to generate a sufficient number of claims in order to achieve a threat level that will compel settlement. "The more the merrier" approach induces lawyers to include as many persons as possible in aggregated claims irrespective of whether those included have suffered injury.

In re Rhone-Poulenc Rorer, Inc.[32] presents the most cogent discussion in the judicial literature of the effects of the bet-the-company scenario that are created when a court grants certification of a class in a class action. In that case, a group of hemophiliacs infected with HIV brought a nationwide class action against drug companies that manufactured blood solids infected with the virus. The district court certified one of the 300 cases that had been brought as a class action.[33] On appeal, Judge Richard Posner ordered that the class be decertified, adding that it was important that the Circuit Court do this at an early stage of the proceedings, rather than wait to decide the certification issue after a final

[30] The threat of punitive damages exerts substantial pressures on defendants to settle mass tort cases. *See* Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WISC. L. REV. 169, 208 (1998). Even when the plaintiff has very little chance of prevailing, inflates the settlement amount. *See* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 625 (1997).

[31] It may be thought that Fortune 500 companies, with their extensive lines of credit, could readily pass a bond of at least several billion dollars. No doubt several of the largest corporations with considerable liquid assets could do so, but most could not. If a multi-billion dollar judgment were assessed that threatened the economic viability of the corporation, banks would likely cancel lines of credit on the grounds of insolvency, leading to an eminent bankruptcy filing. It is precisely such a scenario that the general counsel of a Fortune 500 company would present to the CEO in assessing whether to settle an aggregated set of claims or litigate them. While CEOs have both short-term and long-term objectives in managing the corporation, the prospect, even though remote, of a judgment forcing a bankruptcy filing, the virtual equivalent of capital punishment for that set of managers, usually elevates short-term considerations ("not on my watch") over a corporation's longer term interests which may include stoutly resisting extortive litigation.

[32] 51 F.3d 1293 (7th Cir. 1995). For a discussion of the implications of *Rhone-Poulenc*, see Research Memorandum No. 10 by Lester Brickman, Class Action Reform: Beyond *Rhone-Poulenc Rorer*, to the Manhattan Institute (Oct. 1995).

[33] *See Rhone-Poulenc*, 51 F.3d at 1296.

judgment was brought up on appeal, because the defendants would then be exposed to a great risk, which would likely lead to a settlement and thus foreclose the possibility of appeal.[34] It was therefore necessary to determine whether the level of risk necessarily created by certification was outweighed by the benefits that would accrue to the class.[35] Here that balancing test weighed heavily in favor of the defendant. First, this was not a case where the individual claims were small as compared to the cost of litigation and thus not otherwise litigable. In addition, the merits of the claim were doubtful.[36] It would therefore be unfair to the drug manufacturers to have to decide whether to put the company at grave risk by going forward with their defense against possibly meritless claims or to succumb to the financial pressures created by certification and settle early in the proceeding. Accordingly, the court reversed the class certification granted by the district court.

The cogency of Judge Posner's argument has had an ameliorating effect on the propensity of federal judges to certify class actions;[37] it may

[34] Whereas without certification, individual plaintiffs could maintain separate actions against the drug manufacturers, who would then only be required to pay damages in successful cases, if the class certification remained, the drug manufacturers would have to defend against thousands of plaintiffs. Litigating against so many plaintiffs would expose the company to enormous risk, thus subjecting it to "intense pressure to settle." *See id.* at 1297-98. ("They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy.").

[35] *Id.* at 1299. The court discussed the types of factors that should be considered:

> The first concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions; and when, in addition, the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the members of the class. These qualifications are important.

Id.; see also FED. R. CIV. P. 23(b)(3).

[36] To that point, thirteen cases had previously been litigated and defendants had prevailed in twelve of these. *See Rhone-Poulenc*, 51 F.3d at 1296, 1299.

[37] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996). "[C]lass certification magnifies and strengthens the number of unmeritorious claims . . . [and] creates insurmountable pressure on defendants to settle, whereas individual trials would not." *Id.* at 746. The court noted that this phenomenon has been referred to as "judicial blackmail." *Id.; see also In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1022 (5th Cir. 1997)

also have contributed to a sea change in some state courts' propensities for certifying class actions, as well.[38]

(granting mandamus relief to defendants because "[c]onducting an imperfect bellwether trial in this case threatens a similar effect . . . [to the effects that certification would have had in *Rhone-Poulenc* and *Castano* due to] its tendency to force defendants to settle even when they might have meritorious defenses"); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (granting petitioners mandamus relief based on the abuse of discretion exercised by the district court judge in certifying the class despite the fact that "the economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff," along with many other misjudgments made by the lower court); Andrews v. Am. Tel. & Telegraph Co., 95 F.3d 1014, 1023 (11th Cir. 1996) (reversing the class certification order largely due to appellants' assertion that "insurmountable difficulties in managing these actions make class action inferior to other available methods, specifically case-by-case litigation of individual claims"); *In re* Ford Motor Co. Bronco II Prod. Liab. Litig, 177 F.R.D. 360, 375 (E.D. La. 1997) (refusing to grant class certification because certification may create undue pressure on defendants to settle). *See generally* Mullinex, *infra* note 50, at 1709 (stating [F]ederal courts have articulated an increasingly conservative class action jurisprudence that has directed federal courts to stringently scrutinize proposed litigation and settlement classes. Consequently, it has become increasingly difficult for plaintiffs to pursue certain types of class actions in the federal arena"). *See* Glenn A. Danas, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1306 (2000) ("[B]y the mid-1990's, federal courts became increasingly hostile towards damages class certification.").

[38] *See* Linda Mullenix, Remarks at the New York ABA National Institute on Class Actions Meeting (Oct. 13, 2000), *quoted in* Gary Weinstein, *Class Actions: A Look at the Future, and Some Controversies in Class Action Law*, 8 METRO. CORP. COUNS. n.12, Dec. 2000, *available at* WL 12/00 METCC 40 (col.1):

> An example of a quick change in class certification jurisprudence was cited by Professor Linda S. Mullenix, who reviewed state court rulings. This year in Texas, Mullenix noted, three decisions by the Texas Supreme Court resulted in significant restrictions on class certifications: Southwestern Refining Co. v. Bernal (960 S.W.2d 293, 1 CLASS 82, 5/26/00), Ford Motor Co. v. Sheldon (965 S.W.2d 65, 1 CLASS 85, 5/26/00), and Intratex Gas Co. v. Beeson (22 S.W.3d 398, 1 CLASS 119, 6/9/00).
>
> In *Bernal*, the Texas Supreme Court overturned certification of a class of 904 plaintiffs allegedly harmed by a refinery explosion. The court said the plaintiffs failed to show a predominance of common issues of law and fact. The *Sheldon* court decertified a class of motor vehicle owners who alleged their cars were damaged by Ford Motor Co.'s paint process, holding that individual class members could not be easily identified. The Texas court in *Beeson* ruled that the parameters of a plaintiff class cannot be defined by a de facto determination of the merits of the class claims.
>
> These cases, Ms. Mullenix said, establish strict new standards on class definitions in Texas and make it "much more difficult for

The Seventh Circuit has again focused on the coercive effect of class certification in *Szabo v. Bridgeport Machines, Inc.*[39] In *Szabo*, the District Court had certified a nationwide class of all persons who purchased a certain computerized machine after January 1996 and claimed breach of warranty, fraud, and negligent misrepresentation.[40] In response to the parties' factual dispute, the District Court held that is was obliged to accept the substantive allegations of the complaint as true and rejected Bridgeport's arguments as an inappropriate attempt to litigate the merits of the claims.[41] Judge Frank Easterbrook, joined by Judges Richard Posner and Ann Williams, granted Bridgeport's request for discretionary appellate review under new Federal Rule 23(f),[42] and vacated the district court's certification of the class, stating that the class certification:

> turns a $200,000 dispute . . . into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement even if the customers' position is weak. This is a prime occasion for the use of Rule 23(f), not only because of the pressure that class certification places on the defendant but also because the ensuing settlement prevents resolution of the underlying issues.[43]

The *Szabo* case thus instructs the trial court not to simply defer to a

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> plaintiffs to obtain class certification."
>
> The impact of the Texas rulings, which have come to be known as the "Texas trilogy," is profound and immediate. The rulings may be followed by federal district courts, she said. And in Texas, there have been four class certifications that were withdrawn, remanded, or reversed, based on the trilogy.

Id.

[39] 249 F.3d 672 (7th Cir. 2001).

[40] Szabo v. Bridgeport Mach., Inc., 199 F.R.D. 280, 284 (N.D. Ind. 2001).

[41] *Id.* at 284, 286, 293-94.

[42] Fed. R. Civ. P. 23(f), added in 1998, provides that "[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification." FED. R. CIV. P. 23(f). Judge Easterbrook contended with the absence of guidelines for the exercise of discretion in Rule 23(f) appeals in *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999), stating that "[d]isputes about class certification cannot be divorced from the merits—indeed, one of the fundamental unanswered questions is whether judges should be influenced by their tentative view of the merits when deciding whether to certify a class." *Id.* at 835.

[43] *Szabo*, 249 F.3d at 675.

plaintiff's allegations either as to the facts or as to the appropriate composition of the class and to instead at least preliminarily inquire into the merits of the claims because the coercive effect that certification and over-broad class periods or over-inclusive classes have on defendants deprives them of any realistic opportunity to later contest these issues.[44]

A "kissing cousin" of the extortive power granted to attorneys by Federal Rule 23 and state court equivalents is the use of Federal Rule 42 consolidations[45] and state court equivalents. By bringing hundreds and even thousands of individual lawsuits alleging substantially identical claims against a single or small group of defendants, lawyers are able to exert great pressures on judges to consolidate the cases for trial. The more cases filed, the greater the pressure on judges to consolidate them and resort to various short cuts such as "mini-trials" that invariably work to the disadvantage of defendants.[46]

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[44] The Seventh Circuit thus adopted an argument that Professor George Priest had previously urged in commenting on *Rhone-Poulenc*:

> I think given the great hydraulic pressure that is created by the aggregation of cases, that it's necessary to evaluate the ultimate merits of the case as best as possible at the point of certification. If the economic power of the certification of the class is such that, if certified, the defendant will settle on some terms, then it seems to me that it's necessary in order to achieve the goals of justice in our society, to evaluate the merits of the claims as to whether the claims have sufficient merit on their face without a lot of discovery and to examine whether the claims have sufficient potential merit to justify the creation of great economic power through class certification."

George Priest, *Economics of Class Actions*, 9 KAN. J.L. & PUB. POL'Y 481, 483 (2000). The implications of *Szabo* for Rule 10b-5 litigation is explored in Sarah S. Gold & Leon P. Gold, *No Deference Given to Plaintiff Allegations in Class Certification*, N.Y.L.J., July 11, 2001, at 3.

[45] *See* FED R. CIV. P. 42(a).

[46] Consolidations typically enable plaintiff lawyers to literally overwhelm juries' capacities to distinguish between claims of those actually injured and claims on behalf of unimpaired persons. *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1873-81. It is not a matter of venal or incompetent judges but rather the ineluctable pressures generated by burdens on dockets. As noted by Conrad L. Mallett, Jr., former Chief Justice of the Supreme Court of Michigan:

> 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 efficiently?" The judge does not purposely ignore, fairness and truth, but the demands of the system require [that certain values be sacrificed].

Indeed, once consolidated, the pressure is then on defendants to settle the cases because the aggregative strategy creates economic threats similar to those created by the certification of a class in a class action. Lawyers therefore have a strong incentive to bring claims not only on behalf of seriously injured claimants but also on behalf of claimants without any injury.[47] By including these latter claims in the consolidation, lawyers are able to gain settlements for unimpaired persons.

2. Other Systemic Abuses of Mass Tort Litigation

While forum shopping has always been an occasional form of litigation abuse, with the increased frequency of mass tort litigation, forum shopping abuse has become both more prevalent and has taken on new importance. Filing a case before a judge known or believed to be likely to act favorably toward plaintiffs' counsel or likely to be predisposed to finding in favor of the cause of action and where juries have a high propensity for favoring claimants over "big business" defendants is often a critical factor in coercing defendants to settle the claims.[48] Indeed, even as many jurists have come to realize the perverse nature of aggregating litigation as a "solution" for the mass tort phenomenon, a mere handful of state and federal judges, carefully and meticulously selected by lawyers exercising a choice of whether to file claims virtually anywhere in the country in state or federal courts, have nonetheless continued to approve aggregative strategies and thereby coerced defendants into paying billions of dollars to settle aggregated claims. For this reason, forum shopping has become a prominent factor in accounting for increased class action filings, particularly in state courts.[49] The "Gulf States" (Mississippi, Florida,

The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 155 (1999) (statement of the Hon. Conrad L. Mallet, Jr.).

[47] Schwartz & Lorber, *supra* note 27, at 252-56.

[48] As stated by Professor Wolfram:

> [T]he most critical element of luck is having the case end up before the right judge. Successful class-action fee awards require either a judge who is decidedly pro-plaintiff or one who is emphatically pro-settlement. Either will do and a combination of the two is optimal. The chances for judge-shopping are significant (although hardly infinite), particularly when dealing with a class with membership in many states.

Wolfram, *supra* note 9, at 1232; *see also* Gregory C. Read, *Stand Up and Be Counted*, 67 DEF. COUNS. J. 423, 424 (2000).

[49] These lawyers manipulate the legal system by filing massive class actions in

Alabama, Louisiana, and Texas), along with other rural areas, are particularly notorious venues for such forum shopping.[50]

"hometown state courts." *See* Eddie Curran, *Legal Growth Industry Has Made Plaintiffs of All of Us*, MOBILE REGIS., Dec. 26, 1999 *available at* http://www.al.com/news/mobile/Dec1999/5pt-1 1.html (last visited Dec. 1, 2001) [hereinafter Curran, *Legal Growth*]. In these smaller, rural forums they will often find "supportive judges, plaintiff-friendly rules, and generous juries." *Id.; see generally* Geoffrey P. Miller, *Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype*, 74 TUL. L. REV. 1681 (2000).

[50] *See* Miller, *supra* note 49, at 1681 (stating that "These states are paradise for plaintiffs' attorneys and purgatory for the defense"); Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing For Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709 (2000) (stating that "[m]any class counsel have abandoned the federal courts in favor of what are perceived to be more receptive state court forums. Against this backdrop, the Gulf States have earned the reputation as 'magnet forums' for class action litigation"). Other jurisdictions that have become favorite venues for lawyers bringing class actions are: Madison County, Illinois, where 70 class actions were filed between January 1, 1998 and March 7, 2001; Jefferson County, Texas, where 41 class actions were filed between January 1, 1998 and January 31, 2001; and Palm Beach County, Florida, where 91 class actions were filed in the 1998-2000 period. *See* John H. Beisner & Jessica D. Miller, *They're Making a Federal Case Out Of It . . . In State Court*, Manhattan Inst., Sept. 2001, at 12, 19, 23.

These states are chosen for a multitude of reasons. Some believe that class counsel selects these fora because they are so remote, thereby making the entire procedure more difficult for defendants. *See* Glenn A. Danas, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1322 (2000) (quoting Susan Koniak about an approved settlement in Union County, Tennessee: "no one could get there, you couldn't fly to object. And that's common. Often these state courts are picked, and they are in the middle of nowhere. You can't have access to the documents.").

Others propose that these states' popularity with plaintiffs' lawyers may be due to their bias against out-of-state businesses and corporations, and their propensity not to be as rigorous as federal courts in applying the certification standards for a class action. *See* Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 484 (2000). "Unlike the scrupulous practice of federal judges, some state judges have taken laissez-faire attitudes toward class certification. As a result, entrepreneurial contingency fee attorneys can bypass the rigorous review given by the federal judges and obtain certification of questionable claims and approval or outrageous settlement agreements." *Id.* at 499; *see also* Eddie Curran, *Plaintiffs-Friendly County*, MOBILE REGIS., Dec. 26, 1999, *available at* http://www.al.com/news/mobile/Dec1999/5pt-1-5.html (last visited Dec. 1, 2001) (discussing why plaintiffs' lawyers flock to Greene County, Alabama, which has a strong reputation for being pro-plaintiff).

Another theory advanced is that these rural state courts are more receptive to plaintiffs because state court judges are more likely to fraternize with local attorneys who initiate these lawsuits. *See, e.g.*, Eddie Curran, *Should Judges, Lawyers Travel Together?*, MOBILE REGIS., Dec. 27, 1999, *available at* http://www.al.com/news/mobile/Dec1999/5pt-2-2.html (last visited Dec. 1, 2001) (citing many instances of such

One abuse that has become prevalent in this region is the use of *ex parte* or conditional certifications.[51] Also known as "drive-by certifications," these class certifications are provisionally granted by the court after a request by plaintiffs' lawyer before the defendant has been served with a complaint, thereby denying defendants' right to contest the certification.[52]

Up until 1997, when the Alabama Supreme Court, following a change in its elected membership, started to reverse lower courts' class certifications,[53] Alabama was the forum where "drive-by" certifications

activity, such as state judges accompanying local firms to the Super Bowl, flying in their private planes, and in some cases joining those local firms after they retire from their judgeships. Federal judges, by comparison, are less likely to socialize with lawyers who regularly appear before them.). Aggregative strategies have been widely used in asbestos litigation and have contributed significantly to the enormous expansion of that litigation over the past decade. *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1868. In addition to the use of aggregations, another major factor in that enormous expansion has been the use of forum shopping. As set forth in *infra* text accompanying notes 89-151, a defining characteristic of asbestos litigation is the mass production of claims on behalf of unimpaired persons. The geographical distribution of these claims varies on the basis of the propensity for success in that jurisdiction.

> In jurisdictions known to be favorable toward asbestos plaintiffs, the ratio of unimpaired, non-malignant claims to malignant claims is dramatically higher than in other jurisdictions, with no rational explanation attributable to medical or biological factors. A recent actuarial study graphically shows this wide variability among states which is not driven by disease but rather by the ability of plaintiffs' lawyers to bring unimpaired claims in pro-plaintiff jurisdictions . . . .

Babcock & Wilcox's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claims Filed Here at 13, *In re* Babcock & Wilcox Co., Civ. No. 00-0558, Bankr. Case No. 00-10992 (E.D. La. Oct. 18, 2001). Particularly pro-plaintiff courts for the bringing of unimpaired asbestos claims are located in certain counties in Texas and Mississippi. *Id.* at 16 (citation omitted). In Mississippi, the ratio of unimpaired non-malignant claims to malignant claims has been 47:1 since 1998 whereas in California, the ratio has been 2.8:1. *Id.* at 34 (citation omitted).

[51] *See* Read, *supra* note 48, at 424.

[52] *See* Max Boot, *In the Land of Lawsuits*, WALL ST. J., Oct. 30, 1996, at A22. (reporting that "the first the companies heard about [the class certification] was when they received notice in the mail that a class action had already been certified . . .").

[53] *See, e.g.*, Ex parte Government Employees Ins. Co., 729 So. 2d 299 (Ala. 1999); Ex parte Water Works and Sewer Board of City of Birmingham., 738 So. 2d 783 (Ala. 1998); Ex parte AmSouth Bancorporation, 717 So. 2d 357 (Ala. 1998); Ex parte Citicorp Acceptance Co., 715 So. 2d 199 (Ala. 1997); Ex parte First Nat'l Bank of Jasper, 717 So. 2d 342 (Ala. 1997).

flourished most, and where a hand-full of judges readily certified all class action filings almost without exception.[54]

Forum shopping abuse also occurs when plaintiff lawyers are denied class certification in a federal court and thereafter seek nationwide class action certification in a state court.[55] The propensity of certain state courts to grant certification under these circumstances has diminished in recent years as some state courts have begun to apply similar standards of certification as those set by the federal courts.[56] Still, in other state courts, forum shopping abuses continue unchecked.[57]

[54] Certain rural counties in Alabama have been favorite havens for the filing of class actions because of the unusual propensity for certain state court judges in that county to certify class actions. *See generally* Curran, *Legal Growth*, *supra* note 49 (discussing the general history of class actions with special focus on the controversial role played by some Alabama attorneys and judges).

Although Alabama trial courts use a "blind lottery" for assigning new cases to judges, out of the seven judges in the Mobile court system, two law firms that specialize in class action suits were frequently able to get their cases assigned to two plaintiff-friendly judges, Judges Braxton Kittrell and Robert Kendall. In fact, in one two year period from 1996 to 1997, eleven consecutive class action suits filed by one of these firms were assigned to one of these two judges, whereas no other class actions filed by that firm were assigned to any of the other five Mobile circuit judges. Suspicions raised by this supposedly random "blind lottery" were magnified when following Judge Kittrell's retirement, he was hired as a partner by one of these firms that often sought him out for class certification. *See id.*

[55] As stated by Professor Mullenix:

> Perhaps the most notorious example of [this] . . . occurred in the General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, a consumer class action rejected by both the United States Court of Appeals for the Third Circuit and (subsequently) the Texas Supreme Court. Notwithstanding these well-reasoned and articulated decisions, the plaintiffs' attorneys simply regrouped and pursued separate statewide settlement classes in Louisiana and Georgia.

Mullenix, supra note 50, at 1716.

[56] *See id.* at 1753-80 (stating that since 1997, the Louisiana Supreme Court and appellate courts have overturned at least five class certifications based on the Supreme Court decision of *Amchem Prods., Inc. v. Windsor*, 84 F.3d 734 (5th Cir. 1998). As noted, the Alabama Supreme Court has begun to follow many of these same federal standards set primarily by the Fifth and Eleventh Circuit, and the Texas Supreme Court has, since Spring of 2000, reversed class certification on three separate claims); *see also* Mullenix, *supra* note 38 (labeling these three Texas rulings as the "Texas trilogy," and further hypothesizing that these cases make it, "much more difficult for plaintiffs to obtain class certification").

[57] This is especially the case in Mississippi, where, since 1995, juries have returned at least nineteen verdicts of nine million dollars or more in litigation involving the manufacturers of prescription drugs, cigarettes, lead paint, and asbestos products,

Forum shopping abuses in federal court also occur, though to a much lesser extent and involve the use of strategies designed to select a particular federal judge known or believed to be favorable to the interests of the plaintiffs' lawyers to hear a matter. An example of one such strategy is filing a claim in a federal district in which there is a sole judge.[58]

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including five verdicts that were over one hundred million dollars each:

> [T]he Circuit Court in Jefferson County in rural southwest Mississippi—one of the poorest counties in one of the nation's poorest states—has indisputably become a popular destination for lawyers suing makers of prescription drugs, cigarettes, lead paint and asbestos products . . . . [The] president of the Mississippi Trial Lawyers Association, which represents plaintiffs' lawyers, said: "The general public may say, 'Who cares state court, federal court, what difference does it make?' In our state, it's the difference between winning and losing. I've gotten many multimillion-dollar judgments in state court over my 17-year career, but I've never won a judgment of any significant size for plaintiffs in federal court."

Robert Pear, *Mississippi Gaining As Lawsuit Mecca: High Jury Awards Raise Stakes in Patients' Right Debate*, N.Y. TIMES, Aug. 20, 2001, at A1. It is notable that in Jefferson County with only 9,740 occupants, more than 21,000 people were plaintiffs in the period 1995 to 2000. *Id.*; *see also* Mullenix, *supra* note 50, at 1778-80 (reinforcing that this trend of a more stringent standard is still tentative, and that it does not even hold true for all of the "Gulf States." "These federal decisions have had relatively no impact on Mississippi; Florida also remains a popular venue for forum shopping . . . .").

[58] This was the method used in *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) where plaintiffs' lawyers ("private counsel"), hired on a contingency fee basis by Texas Attorney General Dan Morales, filed an action against the tobacco manufacturers in federal district court in the Eastern District of Texas, Texarkana, Division, where U.S. District Court Judge David Folsom solely presided. Of the approximately forty cases filed by the states against tobacco manufacturers, this was the only one filed in federal court. *See generally* Complaint, Texas v. Am. Tobacco Co., No. 5:96-CV-91 (E.D. Tex. 1996). While Judge Folson did dismiss several of the State's claims, he did sustain the critical parts of the suit, and approved the State's proposed proof of damages by use of a statistical model, the details of which were not available to him when he made his decision. *See* Patterson & Philpott, *supra* note 7, at 563-64, 574-75. Most importantly, however, Judge Folsom fully merited the unusual efforts of private counsel to select him to preside over Texas' action against the tobacco companies by consistently ruling in favor of the financial interests of private counsel.

In January 1998, several Texas legislators filed a mandamus action in Texas state court challenging the authority of Attorney General Morales to bind the state to a contingency fee agreement. Private counsel removed that action to the federal court. *In re* Senator Troy Fraser, No. 5:98-CV-45 (E.D. Tex. 1998). Later, for procedural reasons stemming from an arbitration panel's award of 3.3 billion dollars in fees over a 25-year period, the challenge to Morales' action was found mooted. Fraser v. Real Parties, Nos. 00-40024, 00-40036, 00-40038 (5th Cir. 2000). The effect of this maneuvering was to

Another method is to invoke the policy of assigning cases to a specific judge if the claim is "related" to an existing case that the judge is hearing or has heard.[59] Because of his propensity for using tort litigation as

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deny to Texas state courts any role in determining the reasonableness of the fees awarded private counsel under the disciplinary standards adopted by the Texas Supreme Court. Effectively then, Texas courts, and ultimately the Texas Supreme Court, were precluded from applying the Texas Rules of Professional Discipline to determine whether the fees in the tobacco litigation violated the ethical standards adopted by the Texas Supreme Court.

While these and other related proceedings were wending their way through the courts, the Texas press reported that noted Texas attorney, Joe Jamail, had been invited by Morales to be one of the private counsel but, as a condition of selection, would have to pay Morales one million dollars. Jamail stated that he refused the demand and was not one of those selected. *See* Deborah Tedford, *Jury Eyes Tobacco Legal Fees*, HOUS. CHRON., Nov. 30, 2000, at 37.

Attorney General Morales did not run for re-election, and in April 2000, a new Texas Attorney General, John Cornyn, filed an action in state court seeking to depose private counsel "to investigate potential claims it [the State of Texas] believes it may possess for conversion and breach of fiduciary duty." State of Texas v. Walter Umphrey et al., No. 00-40999, (5th Cir. 2001). Among the information the State was seeking was to discover whether they should have known that the fee agreement was unenforceable, whether they improperly sought to benefit themselves at the State's expense, and whether tobacco litigation documents were withheld from the state. *Id.* at note 6. Private counsel removed this action to federal court and Judge Folsom denied the State's motion to remand, invoking the All Writs Act, 28 U.S.C § 1651 (1994), to protect the federal court's judgment. This had the effect of quashing Attorney General Cornyn's investigation. The Fifth Circuit reversed, stating that the federal courts "cannot preclude the State of Texas from *investigating* potential claims in the milieu of the Texas courts pursuant to Texas law—unless and until such investigation poses an actual threat to the settlement agreement." *Id.*; *see also* Mark Ballard, *Biggest Little Court in Texas: Plaintiffs Flock to Texarkana, with Billion-Dollar Suits*, NAT'L L.J., Aug. 30, 1999, at A1. (The author was retained by the Counsel to the Governor of Texas who was seeking to intervene in the tobacco litigation fee-setting process, to provide an affidavit with regard to: (1) fiduciary issues raised by the actions of Attorney General Morales; and (2) the reasonableness of the attorney fee award. *See* Texas v. Am. Tobacco Co., No. 5:96-CV-91 (E.D. Tex. 1998) (affidavit of Lester Brickman)).

[59] There are various jurisdictions that require counsel to indicate on a document filed along with their complaint whether any related litigation has been filed in that court. The intent is to assign any such "related" case to the judge already hearing the case to which the new one is "related." Some lawyers use this to their advantage by filing a particular case first to ensure that subsequent related cases are assigned to the judge that presided over the initial case. Georgene M. Vairo, *Forum Selection: Judge Shopping*, NAT'L L.J., Nov. 27, 2000, at A16 (describing how judge shopping, unlike forum shopping is universally condemned because it "tends to undermine public confidence in the judicial system. Judge-shopping suggests that justice is not impartial."). Other strategies that counsel have used to better control which judge will be assigned their cases include: filing suit against the assigned judge to pressure him or her to decline presiding over the

a tool for social and political reform, the Honorable Jack B. Weinstein of the Eastern District of New York, is one of the most sought after federal district court judges in the country by plaintiff lawyers filing mass tort actions.[60] Judge Weinstein has been selected by plaintiffs' lawyers to preside over several important mass tort litigations.[61] By his rulings,

case; making false accusations against judges to force recusal; filing various lawsuits in a single district and dismissing all of the cases except the one assigned to the plaintiff-friendly judge; refiling previously dismissed lawsuits in the same or a different forum in attempting to win their favored judge; and securing a plaintiff-friendly judge with the assistance of a helpful filing clerk. *Id.*; *see also* Weyman I. Lundquist, *The New Art of Forum-Shopping*, 11 LITIG. 21, 22 (Spring 1985).

[60] Judge Weinstein is "a judge with senior status who is known for unconventional rulings that often push the limits of tort law." *See* Bob Van Voris, *N.Y.'s Judge-Shopping Channel: Tobacco and Gun Plaintiffs Steer Cases to a Brooklyn Court*, NAT'L L.J., July 26, 1999, at A4; *see also* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999) ("Judge Weinstein, famously the federal judge who negotiated the agent orange settlement and has since managed numerous other mass tort cases, readily analogized mass tort litigation to the 1960s institutional reform litigation with which he was very familiar."). As explained by Judge Weinstein:

> Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions to protect constitutional rights. In dealing with such mass tort cases . . . I have sensed an atmosphere similar to that of public interest cases I have supervised . . . . Mass tort cases and public litigations both implicate serious political and sociological issues. Both are restrained by economic imperatives. Both have psychological underpinnings. And both affect larger communities than those encompassed by the litigants before the court.

Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472-74 (1994). Judge Weinstein's activist philosophy is also reflected in his book on mass tort litigation, in which he states: "by their very nature, these [mass tort] cases involve unanticipated problems with wide-ranging social and political ramifications. A judge does not legislate from the bench simply because he or she considers the broadest implications of his or her decision in such a case. Judges not only may take such a view, they must." WEINSTEIN, *supra* note 21, at 92-93 (1995); *see also* William Glaberson, *A Judge Shows Who's the Boss: Dressing Down Lawyers, and Dressing Up Gigante*, N.Y. TIMES, July 20, 1997, at 21. "To liberals, [Weinstein] is an emblem of the 1960s notion that the country's problems can be solved by good intentions and that the legal system can be a tool for reform. To conservatives, he is the epitome of judicial power run amok." *Id.*

[61]

> Separate groups of plaintiffs' lawyers targeting Big Tobacco and the gun industry are steering cases to a maverick federal judge in Brooklyn, N.Y., apparently hoping he will accept novel theories of industry-wide liability that might not succeed in any other courtroom in America.
>
> In April, plaintiffs' lawyers quietly filed a nationwide smokers' class action against seven tobacco industry defendants in the Eastern

Judge Weinstein has single-handedly changed the course of mass tort litigation in the federal arena.[62]

> District of New York. They had gotten the case assigned to Judge Jack B. Weinstein, a judge with senior status who is known for unconventional rulings that often push the limits of tort law. *Sturgeon v. Philip Morris Inc.*, No. 99-1988.
>
> Then on July 12, 1999, the National Association for the Advancement of Colored People (NAACP) announced that it planned to sue gun manufacturers and distributors throughout the country, in an effort to change radically the way guns are distributed and sold in the United States. The intended forum? Judge Weinstein's court.
>
> Judge Weinstein was on the sidelines of the cigarette wars until asbestos industry lawyers sued Big Tobacco in 1997, trying to recover a share of the money paid to asbestos workers who smoked. That case was assigned to Judge Weinstein as a case related to his role in the asbestos litigation. The cases were seen as related because the Manville Trust, reformulated under the supervision of Judge Weinstein, had sued "Big Tobacco" in 1997 in an attempt to recover some of the damages they paid to claimants alleging lung cancer caused, at least in part, by exposure to asbestos-containing products, but who also smoked and had not sued tobacco companies for their injuries because suits against asbestos defendants were far more successful. Since then three major tobacco cases, including *Sturgeon*, have been assigned to Judge Weinstein, all on the ground that they are related to earlier cases.
>
> Similarly, lawyers representing the NAACP plan to claim that their case is related to *Hamilton v. Accu-tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999), a gun liability case tried in front of Judge Weinstein. *Hamilton*, in turn, was assigned to Judge Weinstein based on claims by plaintiffs' lawyers that it was related to a 1981 gun liability case and a case over the drug diethylstilbestrol (DES). *Id.*
>
> Along the way, tobacco and gun defendants have challenged the assignment of Judge Weinstein, but to no avail. Normally, cases in the eastern district are assigned at random. When the complaint is filed, however, plaintiffs' lawyers state whether the case is "related to" another case in the courthouse.

Van Voris, *supra* note 60, at A4.

[62] Judge Weinstein's attempts to change the law with regard to the manufacture, sale, and distribution of guns failed. In *Hamilton*, he held that gun manufacturers had a duty to control the marketing decisions of retailers in the distribution chain. *Hamilton*, 62 F. Supp. 2d at 808. This was an unprecedented expansion of existing tort law. *See* Patterson & Philpott, *supra* note 7, at 593. Judge Weinstein was essentially reversed by the New York Court of Appeals in *Hamilton v. Beretta*, No. 36, 2001 N.Y. LEXIS 946 (N.Y. Apr. 26, 2001), when that court resoundingly answered "no" to two questions certified to it by the Second Circuit that emanated from Judge Weinstein's ruling in *Hamilton*. Hamilton v. Accu-tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) *questions certified*, Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36 (2d Cir. 2000), *questions certified answered*, No. 36, 2001 N.Y. LEXIS 946 (N.Y. Apr. 26, 2001). The questions

B. *Client Abuses in Mass Tort Litigation*

In addition to the foregoing systemic abuses, mass tort litigation has created a new set of client abuses that current ethical rules are not equipped to address.[63] Many of these abuses are a function of the financial incentives that motivate the litigation.[64] In class action litigation, for example, plaintiffs' counsel have intrinsic incentives to seek excessive fees and at the time of settlement to often compromise the interests of the class in exchange for a defendant's agreement to support (or not to oppose) such a fee request.[65]

In addition to promoting systemic abuses and self-interested behavior, mass tort litigation invites large scale deviation from the standards of care and conduct owed by the lawyer to the client, including malpractice, breaches of ethical duties and therefore of the correlative ethical rights of clients, and breaches of fiduciary obligation—including the duty not to represent clients with conflicting interests.[66]

For example, lawyers may structure a mass tort settlement in order to maximize their fees.[67] In addition, when lawyers receive funds in settlement of consolidated actions, there is often little or no supervision of how they allocate the proceeds among their clients—leading to the possibility that such divisions reflect self-interested behavior—particularly

certified were: "(I) Whether the defendants owed the plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?, [and] (II) Whether liability in the case could be apportioned on a market share basis, and, if so, how?" *Hamilton*, 222 F.3d at 36. For a discussion of the *Hamilton* cases and of the failure of negligent marketing claims in firearm litigation, see Anne G. Kimball & Sarah L. Olson, *When All Else Fails, Blame Madison Avenue: Negligent Marketing Claims in Firearm Litigation*, 36 TORTS & INS. L.J. 981 (2001).

[63] *See* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1189-90 (1995).

[64] In class actions and other aggregative forms of litigation, there is a conflict between the financial interests of the lawyers and the class they represent. MANUAL FOR COMPLEX LITIGATION (THIRD) § 23.24 (1995); *see also supra* notes 9-11.

[65] *See* WEINSTEIN, *supra* note 21, at 74-76 (stating that "plaintiffs' attorneys in class and derivative cases . . . operate with nearly total freedom from traditional forms of client monitoring"). Because most settlements are rarely the subject of published judicial decisions, it is likely that at least some of the most abusive settlements escape attention.

[66] For discussion of ethical issues raised by mass tort litigation, see Sarah A. Toops, *Ethically Representing Thousands of Plaintiffs: Conflict Problems in Mass Toxic Harm Cases*, 67 DEF. COUN. J. 462 (2000).

[67] *See id.* at 465-66.

when the contingency fee percentages of the aggregated clients vary so that certain allocations yield higher fee monies than others or when the lawyers use their distributive power to reward claimants such as union officers or their relatives who were instrumental in recruiting other claimants, or when the lawyers discriminate in favor of clients in certain jurisdictions at the expense of other clients living elsewhere.[68]

When lawyers represent one class of clients today and other classes of clients in the future, the opportunistic behavior possibilities collide with such traditional fiduciary obligations as avoidance of conflicts of interests. Consider one such intersection of tobacco and asbestos claims found in the 1997 Global Tobacco Settlement (the "Tobacco Settlement").[69] The Tobacco Settlement included a provision that prohibited claims against the tobacco companies by third-party payors[70] such as the Manville Trust,[71] which was established under the *Manville* bankruptcy to be the registry for all tort claims based upon exposure to asbestos-containing products against the Manville Corporation. Trust payments to claimants from the Manville Trust are heavily discounted,[72] in part because of the huge numbers of claimants,[73] and also because so much of the Trust's funds

[68] *See e.g.*, Eric Felton, *The Asbestos Gospel of Baseball's St. Peter*, WKLY. STANDARD, Sept. 18, 1995, at 46; Kate O'Beirne, *How Trial Lawyers Bankroll the Democratic Party*, NAT'L REV., Aug. 20, 2001, at 26; Peter Passell, *Challenge to Multimillion Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6.

[69] For an official report of the terms of the prospect settlement, see Proposed Resolution, June 20, 1997 (on file with author).

[70] *Id.* Tit. VIII(B)(5).

[71] For the history of the setting up of the Manville Trust, see *Findley v. Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 129 B.R. 710, 752-54, Civ. A. No. 90-3973 (Bankr. E. & S.D.N.Y. 1991); *see also infra* note 114.

[72] Currently, the Trust will pay five percent of the liquidated value of claims filed with it. *See* DEBORAH HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, DOCUMENTED BRIEFING, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE 35 (2001).

[73] Future claims reduce the percentage paid of past claims because the percentage of the full value of claims that the Trust pays is a function of the total number of claims. Accordingly, plaintiff lawyers routinely violate Model Rule 1.7 when they represent new clients whose potential awards will be jeopardized by the lawyers' actions to secure full compensation for their previous clients, as well as violate their fiduciary obligations to their previous clients because the new clients' claims will reduce the amounts to be actually paid to the previous clients. *See* Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 585 (1996). This problem is illustrated in *Findley v. Falise*, 878 F. Supp. 473 (E. & S.D.N.Y. 1996). If the attorney was successful in getting the earlier asbestos claims paid in full, there would be nothing for the later claimants that he also represented. The attorney therefore

were dissipated in a first round of frenzied profit taking by lawyers.[74] Approximately 5-7% of claimants against the Trust have lung cancer. The dominant cause of lung cancer is cigarette smoking. Asbestos exposure is regarded as an adjuvant, that is, a factor that increases the likelihood that cigarette smoking will result in lung cancer. Lawsuits seeking damages for lung cancer are usually brought against former asbestos product manufacturers rather than tobacco companies because of the difficulty, at least to this point, in suing the latter. The Trust has been pursuing claims against the tobacco companies to recoup the cost of payout to lung cancer victims and thereby add assets that will enable higher payout amounts to claimants against the Trust. The Tobacco Settlement was negotiated by many of the same lawyers who represented and continued to represent lung cancer claimants against the Manville Trust. In negotiating the Tobacco Settlement, these lawyers agreed to a provision prohibiting third party payor claims against the tobacco companies even though it was diametrically opposed to the interests of their asbestos clients. In permitting this provision in the Tobacco Settlement, these attorneys agreed to foreclose their former clients' ability to recover greater compensation. Elsewhere than in the world of mass tort litigation, this would be seen as a conflict of interest.[75]

Another self-interested strategy that lawyers use in mass tort-type proceedings is to maximize fee income at the expense of some clients by structuring Federal Rule 42 consolidations or state equivalents thereof to include a small number of seriously injured claimants in a much larger group of lesser injured or arguably non-injured claimants. Empirical evidence indicates that such aggregations often lead to lower claim values for the seriously injured claimant and much higher claim values than would otherwise be the case for the lesser injured claimant.[76] Moreover,

had an ethical obligation to disclose this conflict of interest to his clients and secure their waiver, which of course, he did not do.

[74] Brickman, *Asbestos Litigation*, *supra* note 10, at 1835 n.62 (estimating that lawyers paid themselves between $226,600,000 and $306,000,000 at the rate of $5,000 an hour for the administrative task of settling the first round of claims against the Trust, in groups of hundreds and thousands).

[75] The fact that the prohibition against the Trust bringing suit did not ultimately survive does not exonerate the asbestos/tobacco lawyers from having placed their financial self-interest above that of their clients' interests.

[76] *See* Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1783-84 (1994). This article states that:

> In mass consolidations, one of the specific mechanisms by which higher valuations are created is the lumping together in one or more minitrials which are often a part of a mass consolidation, the claims of a few seriously injured claimants who merit substantial compensation with the claims of many who are unimpaired. In such circumstances juries apparently "lend" some of their sympathy for the seriously injured claimants to those who are unimpaired and significantly under compensate the seriously injured while substantially overcompensating those who are unimpaired. In the aggregate, however, the total valuation for the claims far exceeds what individual trials would yield.

Id. at 1783-84; *see also* Weinstein, *supra* note 60. Weinstein argues that:

> [C]onsolidations do tend to encourage the commencement of suits of questionable merit. Since consolidated cases probably will be settled in large groups, the less defensible claims are likely to obtain more than they would if they were litigated (assuming they would have been brought at all), while the more serious claims will probably be settled for less then they would in individual suits.

Id. at 480.

by diluting the plaintiff class with less injured people, plaintiffs' attorneys are transferring money that would have gone to the seriously injured had the others not been in the class. As Professors Carrington and Apanovitch have observed:

> [T]he guesswork associated with mass tort aggregation action settlement effects a substantial modification of the property rights of class members. The modification of rights from those that can be enforced at trial to those that will be measured by weak conjecture effects a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious. Intangible property rights are thus modified by any law conferring authority on a court to approve en masse a settlement of personal injury claims.[77]

This strategic positioning by plaintiff lawyers is done because it yields far higher contingency fee income than if the aggregations were limited to claims of similar severity.[78] While the fact of such self-interested behavior has been noted by some scholars, there has been little focus on whether such lawyer conduct breaches the ethical and fiduciary

[77] Carrington & Apanovitch, *supra* note 11, at 471.

[78] *See* WEINSTEIN, *supra* note 21, at 64 (noting that "mixing the case 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").

obligations of the lawyer to severely injured clients who receive less so that their lawyers may receive more.

Another abusive technique that lawyers use to avoid the even meager fee superintendence that is involved in class actions is to aggregate hundreds and even thousands of individual cases into a single proceeding and then settle those claims *en masse*. Lawyers are then able to charge retail prices—standard contingency fees of 33?-40% and higher—against wholesale settlements, insulated from any ethical oversight.[79]

Still another abuse occurs when plaintiffs' counsel enter into aggregate settlements with a defendant without the informed consent of their clients.[80] In an aggregate settlement, the defendant provides a lump sum of money for distribution to the claimants in the sole discretion of plaintiffs' counsel.[81] It is thus a zero sum game; whatever one client receives is at the expense of the other clients. Because of the conflicting interests of the clients, both the Model Rules and the Model Code require that each participant in an aggregate settlement must be informed of the nature of the settlement and give his or her informed consent to the distribution as determined by counsel.[82] Nonetheless, as aggregate

[79] See *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428 (Tex. App. 2000), where the appellate court gave its blessing to the enforcement of 37,100 individual fee contracts, most of them providing for a 40% contingency fee, totaling $88.8 million in attorneys' fees, and reversing the district court's treatment of the case as in effect a class action. The lower court also had reduced the fee total to 20% for the cases that did not go to trial, and awarded a total fee of $33.1 million (a $55.7 million reduction).

[80] *See* Menkel-Meadow, *supra* note 63, at 1181 (noting that "mass tort lawyers have long been settling 'inventories' of cases in which they settle for large amounts of 'fixed funds' and then allocate specific awards themselves to individual plaintiffs"). For an account of an aggregated settlement found to have violated Rule 1.8(g), see *Arce v. Burrow*, 958 S.W.2d 239 (Tex. App. 1997).

[81] *See generally* Joshua H. Threadcraft, Note, *The Class Action Settlement: When the Good Can Become the Bad and the Ugly*, 25 J. LEGAL PROF. 227 (2001).

[82] MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (1983):

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims involved and of the participation of each person in the settlement.

See also DR 5-106 (22 NYCRR § 1200.25), entitled "Settling Similar Claims of Clients:"

> A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and risks involved, including the existence and nature of all the claims involved and the participation of each person in the settlement.

settlements have become more common, the application of ethical rules to aggregate settlements has become less common.[83]

The final abusive element of mass tort litigation that I will discuss is a reprise of my earlier discussion of the conflict of interest that lawyers face when they represent a large group of claimants alleging injury due to exposure to a toxic substance such as asbestos. When these claims include both presently injured claimants and potential claimants whose injuries have not yet—and may not ever—manifest themselves, such representation is tainted by an irremediable conflict of interest. The issue arises in its most pronounced form as the "settlement class action," a device based upon Federal Rule 23 that the United States Supreme Court essentially rejected in *Amchem Products, Inc. v. Windsor*[84] and in *Ortiz v. Fibreboard Corp.*,[85] primarily because of the inherent conflict between the interests of present claimants and future claimants and the conflicting loyalties of the attorneys for the present claimants who purported to also represent the interest of the future claimants.

When proposed amendments to Rule 23 were published in March 1996,[86] which included a proposal to legitimate Rule 23 settlement

[83] Menkel-Meadow, *supra* note 63, at 1181 n.93. Judge Weinstein has acknowledged that although aggregate settlements violate ethical rules, judges encourage them in order to rid their docket of many cases:

> Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases. The defendants generally prefer them because they save transaction costs and usually result in savings per case. Plaintiffs' counsel like them because they generally do not reduce their percentage fee per case so that, because of the large settlement amounts, their lawyer's hourly fees jump spectacularly.

WEINSTEIN, *supra* note 21, at 74.

[84] 521 U.S. 591 (1997), *aff'g* 83 F.3d 610 (3d Cir. 1996), decision below, 878 F. Supp. 716 (E.D. Pa. 1994); *see also* Flanagan v. Ahearn, 134 F.3d 668 (5th Cir. 1998); *see generally* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995) (discussing unethical behavior of class counsel).

[85] 27 U.S. 815 (1999). *Ortiz* also involved the issue of whether the class action settlement qualified as a "limited fund." George M. Cohen, *The "Fair" Is the Enemy of the Good:* Ortiz v. Fibreboard Corporation *and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23 (2000).

[86] Committee Note, *Proposed Rules: Amendments to Federal Rules, Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23. Class Actions*, 167 F.R.D. 523 (1996).

classes,[87] the academic community condemned the proposal.[88] Let me offer a distinct view from that of the academic community and the Supreme Court. Of course, lawyers in these two cases sold out the interests of potential future claimants in exchange for huge fees for settling their inventory of current claimants. Where I differ from the academics and the Court is that such actions cannot violate the rights of future claimants. To explain how I have come to this conclusion, I will first need to paint a picture of modern asbestos litigation.[89]

Today, perhaps 80% or more of the 70,000 asbestos claims that have been brought in the past year are on behalf of uninjured persons, so-called "exposure only" cases and a new generation of asbestosis claims.[90]

[87] For a discussion of the proposed amendments, see Darren M. Franklin, *The Mass Tort Defendants Strike Back: Are Settlement Class Actions A Collusive Threat or Just a Phantom Menace?*, 53 STAN. L. REV. 163 (2000).

[88] *See* Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 794 (1997). Recent efforts to introduce settlement classes into the regime of Rule 23 "set off a firestorm of opposition by the academic community" leading more than 120 law professors to organize a steering committee to oppose the changes. *Id.*

[89] For a description of asbestos litigation, see generally Brickman, *Asbestos Litigation*, *supra* note 10; Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891 (1992); *Effects of Asbestos Injury Litigation on Federal and State Court Systems: Hearings Before the Subcommittee on Intellectual Property and Judicial Administrations of the House Judiciary Comm.*, 102nd Cong., 1st (1991) (statement of Lester Brickman).

[90] The number of unimpaired "exposure only" pleural plaque claims, *see infra* note 93, has been far eclipsed in the past several years by a huge increase in the number of asbestosis claims brought on behalf of unimpaired persons. Asbestosis is defined *infra* note 112; the proposition that huge numbers of asbestos claims are being brought on behalf of unimpaired claimants is set forth in the *infra* text accompanying notes 112-36.

Overall, asbestos claiming activity has increased substantially in recent years—more than doubling in the past five years. The huge increase appears to be a function of the beginning of the end game in asbestos litigation. Plaintiff lawyers fear that the defendants they anointed in the mid-1980s to take the place of the Johns-Manville Corporation are on the verge of extinction—most have filed for bankruptcy and as for the few that have not yet done so, it is only a matter of time. Attempts to inculpate so-called non-traditional defendants such as Ford Motor Co., Pfizer, Dana (an auto parts manufacturer), Viacom (as successor to parts of Westinghouse Electric Corp.), Dow Chemical, 3M, Georgia-Pacific, IBM, AT&T, and Sears have sputtered along, athough recent litigation against Metropolitan Life Insurance Co. and Halliburton has been quite successful. *See* Richard B. Schmitt, *How Plaintiff Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001 at A1; J. David Isaac, *Asbestos Claims Run Amok: Is Halliburton Next Victim?*, INVESTORS BUS. DAILY, Jan. 23, 2002, at A18; *see also* Gregory Zuckerman, *Specter of Costly Asbestos Litigation Haunts Companies*, WALL ST. J., Dec. 27, 2000 at C1; Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14 ("[T]he net has stretched from asbestos makers to companies far removed from the scene of any punitive wrongdoing."). While "there is reason to believe that non-traditional defendants are paying an increasing share of the costs to resolve asbestos injury claims," HENSLER, *supra* note 72, at 11, it is yet unclear whether the attempts to inculpate a whole new set of defendants will succeed. Plaintiff lawyers, however, fearing that the end game may have begun, are rushing to bring new claims against the traditional defendants before all of their assets are totally dissipated. *See also infra* note 151.

It is important to emphasize at the outset that without these claims, the "asbestos litigation crisis" would never have arisen and would not exist today. These claimants have a work history that includes exposure to asbestos-containing products. Though most "exposure only" claimants have no symptomatology, no impaired lung function,[91] no restrictions on movement, etc., their claims are supported by medical testimony [92] that exposure has resulted in the formation of "pleural plaques" which are areas of thickening of the pleura of the lungs that are observable on x-rays.[93] Moreover, while there is often expert testimony that the exposed claimants are therefore more likely to contract an asbestos related disease than non-exposed persons, there is no credible medical evidence to support that testimony. Nonetheless, while some jurisdictions hold that therefore there is no injury, other jurisdictions hold that there is enough "injury" to get the case to the jury and to thus enter the asbestos lottery sweepstakes where some are awarded zero and some get millions and lawyers, because of the huge numbers of such claimants, get hundreds of millions.[94]

Here then is how a typical "exposure only" case arises. First, the client is recruited. Often this is done through a union intermediary.[95] Let

[91] For an account of how lung function tests are manipulated to produce "positive" results, that is, to indicate impaired lung function, see *infra* note 110.

[92] There is ample reason to conclude that much medical testimony presented in asbestos litigation is specious. *See infra* notes 110-141.

[93] *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1852.

[94] *Id.* at 1855-59.

[95] *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1853-54; *see also In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 748 (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"); Eagle-Picher Indus. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass 1989) (stating that "many of these cases result from mass x-ray screening at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed"); Christine Biederman et al., *Toxic Justice*, DALLAS OBSERVER, Aug. 13, 1998, *available at* http://www.dallasobserver.com/issues/1998-08-13/feature.html/page1.html (last visited Dec. 1, 2001):

us assume that the claimant-to-be is a former construction worker who worked on multiple sites. In order to "process" his claim, it will be necessary to establish that he was exposed to large quantities of asbestos-containing materials in friable or breathable form, the specific products to which he was exposed, and the nature of the consequent injury.[96] Those requirements are met in the following fashion.

After being recruited, upon his first visit to the law firm, a

> Asbestos workers often find their way to [a leading Texas law firm which specializes in asbestos litigation, hereinafter, the "Firm"] . . . after a health screening arranged by another law firm and a trade union. Together, the union and the local law firm round up a group of the skilled laborers who constitute [the Firm's] . . . clientele, sending out notice of the free screening. The men, many of whom know someone who died from asbestos disease, come from miles around.
>
> According to trial testimony from doctors, the union and the law firm pay for a lung doctor to examine up to 200 men a day using equipment rented from a local hospital or hauled in by the doctor in a tractor-trailer rig. The union men are X-rayed, and the films are usually developed on the spot. Frequently, an attorney is standing by to sign up anyone whose examinations show any evidence of asbestos exposure.
>
> After the workers are X-rayed and referred to a lawyer, the local attorney typically sends the case to [the Firm] . . . . (According to [a principal of the Firm] . . . the referring firm usually gets up to one-third of [the Firm's] . . . 40 percent contingency fee.)

Biederman et al., *supra*, at 14.

For commentary on the 40% contingency fee, see *supra* note 10. The use of medical screenings to amass large numbers of claimants is not restricted to asbestos-related claims:

> Lawyers find potential clients through advertisements that offer "free screenings" and consultations. A typical advertisement this month in the Fayette Chronicle appealed to Jefferson County residents who had used two popular arthritis drugs.
>
> . . . .
>
> "If you or someone you know has taken Vioxx or Celebrex and suffered any serious side effects (including death, heart attack, stroke, seizure, kidney and liver damage, pregnancy complications, birth defects or high blood pressure), you may have a claim!" the advertisement said. "Contact Stamps & Stamps, attorneys at law, to discuss your legal rights."

Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1.

[96] As for proximate cause, that step is basically finessed by evidence of exposure and medical testimony, which is always available, that exposure can lead to an asbestos-related disease. The jury then fills in the missing link by concluding that there is causation. *See infra* note 142.

paralegal[97] will quiz him about his work history—what projects he worked on and what products he was exposed to. Assume, as is likely the case, that the would-be claimant has insufficient recollection of work sites 20-40 years in the past, let alone the products used at that site. To overcome this defect, the law firm will file a request with the Social Security Administration on behalf of the claimant for his work history.[98] Assume then the paralegal now has the Social Security work history summary.

Selecting a particular work site, say one from the early 1960s, the paralegal will ask what asbestos containing products were used at that site. Assume, as is likely the case, that the would-be claimant has no recollection. The paralegal will then consult the law firm's extensive data base[99] and then indicate: "Charlie and Ed worked at that site—you remember them, of course, and they have testified that there were five specific asbestos containing products used at that site in those years."[100]

[97] Because of the high volume of asbestos claims and the automated nature of the claim preparation process, most if not all of the intake is done by paralegals. The claimant will typically not see a lawyer until the actual deposition. *See* Thomas Korosec, *Homefryin' with Fred Baron; Dallas' Largest Plaintiff's Firm, Baron & Budd, Cultivates Friends, Punishes Enemies and Beats Allegations It Prompts Clients to Lie and Win*, DALLAS OBSERVER, Mar. 29, 2001, *available at* http://www.dallasobserver.com/issues/2001-03-29/feature.html/page1.html (last visited Dec. 1 2001) (describing the firm's "high-volume legal assembly line," which consisted of seventy lawyers and 400 paralegals who move "tens of thousands of asbestos claims through the courts").

[98] According to a paralegal that had worked at the Firm, the methods used by the Firm's product-identification staff included "start[ing] with a printout from the Social Security Administration listing every job the workers ever held. She would set up a meeting with the clients, usually at their homes, and she would spend weeks on the road traveling from interview to interview." Biederman et al., *supra* note 95, at 18.

[99] *See* Korosec, *supra* note 97 (indicating that the Firm keeps a database on what asbestos products were used at various workplaces).

[100] From here on in this hypothetical exposure-only claim development description, I am relying in part on a memorandum used by the firm in Texas and possibly elsewhere to "prepare" exposure-only claimants for depositions, which was inadvertently produced in response to a discovery request (on file with author). *See* testimony of Eugene Cook, former justice of the Texas Supreme Court; *In re* All Asbestos-Related Personal Injury or Death Cases Filed or To Be Filed in Bexar County, Texas, No. 94-CI-10078, 285 Jud. Dist. Bexar Cty. Dist. Ct., Oct. 20, 1997, at 73 (describing the Script Memo as "a cancer in the legal system"). The Script Memo has been the subject of extensive discussion. *See, e.g.*, Abner et al. v. Elliot, 85 Ohio St. 3d 11 (Ct. App., Mar. 17, 1999); *In re* Beverly Jean Brown et al., No. 03-97-00609-CV (Tex. Ct. App., Jan. 29. 1998) (unpub. op.); 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; Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What To Say*, WASH. POST, Jan. 13, 1998, at A15; Witness Preparation Memos Raise Questions About Ethical Limits, [Current

The paralegal will then show the claimant pictures of the bags and boxes in which the products were contained, fill out a "work history sheet" listing the products to which the claimant was exposed[101] and instruct the claimant to memorize the details on the product label (as provided) because later the claimant will take a "test" in which he has to identify the

Reports] Laws. Man. on Prof. Conduct (ABA/BNA) at 48-54 (February 18, 1998); Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1383, 1398-1401 (1999); W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343 (1999); Bob Van Voris, *A Cautionary Tale, Client Memo Embarrasses Dallas Firm, Baron & Budd Coaching of Witnesses Called Improper*, NAT'L L.J., Oct. 13, 1997, at A1.

[101] *See* Biederman et al., *supra* note 95:

> The case then goes to [the Firm's] . . . foot soldiers, the product- identification paralegals. These mostly young women make the initial face-to-face contact with the clients. They help the clients draft work histories and show them the "picture books" from which the clients, in theory, pick out the products they recall using.
>
> The paralegals have the primary contact with the workers, helping them prepare their answers and readying them for deposition and possible trial. ("Depo prep," as it is called at the firm, is an essential part of the process. By [a principal of the Firm's] . . . own estimate, about 97 percent of the cases [the Firm]. . . files do not go to trial, so the answer the workers give during depositions can play an important role in determining whether they get a settlement.)
>
> . . . .
>
> Paralegals say—and neither [of the two principles of the Firm] . . . denies—that workers are selectively shown pictures of asbestos products they should identify. Kuntze [the paralegal] says that in meetings with clients, she would bring a "3-or 4-or 5-inch binder with pictures of asbestos products, divided up according to manufacturer. I'd go through page by page and encourage the client to recall the products they used. It would be pretty strong encouragement. Most of the time when I left, I had ID for every manufacturer that we needed to get ID for."
>
> She already had the answers, she says. Kuntze just needed the worker to agree she had the correct ones. Most would wise up pretty quickly, she says. "Clients understood that products need to be ID'd for the manufacturers we sued," she says.

Id. at 15, 18; *see also* Korosec, *supra* note 97 (The article describes an interview with a former paralegal at the Firm in which the paralegal "says he was pretty good at his job [of finding witnesses to support claims] and he'd usually end up getting many men to say many things they had no idea about before he called. 'I'd get 'em to identify every one,' he says of his list of 20 or more products.").

products and if he passes the test, he will be rewarded financially.[102] He is also instructed that if asked at the test, that is, at the deposition, if he saw any warning labels, to answer: "No."[103]

He is also instructed to say that there were certain products with which he did *not* come into contact.[104] These, of course, are the products of companies that have entered into bankruptcy and hence any portion of the product exposure that is attributed to these companies will only be paid at 5-10% on the dollar.[105]

[102] "[Y]ou must study your work history sheets [that I have prepared for you] *Over and Over and Over* . . . How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement." Script Memo, *supra* note 100, at 1. The Script Memo then goes on to describe in detail the various asbestos-containing products used at specific work sites, and how the product was used. *Id.* at 2-12. The claimant is instructed to say "you saw the NAMES [of the product] on the BAGS." *Id.* at 2. "The more often you were around the product [as indicated by your testimony], the better for your case." *Id.* The claimant is also told to know the names of his co-workers who have been designated as his witnesses, including being able to describe their appearance. *Id.* at 1. Finally, he is instructed to "[s]tudy hard, memorize as much as you can and practice saying all the product names out loud." *Id.* at 19.

[103] "You will be asked if you ever saw any WARNING labels on container of asbestos. It is important to maintain that you NEVER saw labels on asbestos products that said WARNING or DANGER. You might even be asked to spell 'WARNING' or 'DANGER' to prove you would know what it meant if you saw it." *Id.* at 14. He is also instructed that if asked whether he ever used respiratory equipment to protect him from asbestos, the answer is "No" even if he did wear a mask for welding or other fumes. *Id.*

[104] "Do not mention product names that are not listed on your Work History Sheets." *Id.* at 15; *see also* Biederman et al., *supra* note 95, at 19 (indicating that a paralegal at the firm stated that "her supervisors, two lawyers, told her to discourage identification of Johns-Manville products because the Manville Trust was not paying claims rendered against it at the time"); HENSLER, *supra* note 72 (indicating that Manville Trust claims today are being paid at 5 percent of their liquidated value).

[105] At the time of the Johns-Manville bankruptcy in 1982, plaintiffs had testified that Manville's products constituted 75-80% of the asbestos-containing products used at the U.S. Navy shipyards. However, once the bankruptcy took place, the larger the Johns-Manville share of the asbestos-containing products to which plaintiffs alleged exposure, the less the value of any judgment because judgments against Manville were all stayed for a significant period and then heavily discounted due to the bankruptcy. A sea change in plaintiffs' testimony then took place and the Johns-Manville share of the asbestos-containing products used at the work sites, ten, twenty and thirty years earlier, dropped dramatically. One witness who had apparently not sufficiently studied his script, testified after the bankruptcy that "basically, most of the material, Johns-Manville, I'm sure, was used on all of them." He then quickly added: "I wasn't supposed to mention that, was I?" Andrew T. Berry, *Asbestos Personal Injury Compensation and The Tort System: Beyond "Fix It Cause It's Broke,"* 13 CARDOZO L. REV. 1949, 1951 n.9.

He will also be told that the attorneys who will be administering the test will have no way of knowing what products were used on that job site so that anything the claimant says is not subject to challenge.[106] The inference is obvious and I need not spell it out for you.[107] In addition, he will be told never to mention the Script Memo, which has been provided to him.[108]

He will also be told that he will have to testify about how his health has been affected by his exposure. Let me read to you a sample of the instructions that have been used in this regard:

> This part of your deposition is about your health. It is very IMPORTANT that you give concrete examples of how your life has been "damaged" by your exposure to asbestos. While the answers to questions about your work history and the products you were exposed to should be as SHORT as possible, THIS part of your deposition is YOUR opportunity to state, for the record, why you DESERVE to be compensated for damage to your health caused by asbestos. The defense attorneys will not ask as many questions about your health. It will be up to YOU to give as many examples as you can.
>
> SHORTNESS OF BREATH. Think about it. There are very few things in life, which are not affected by your ability to breathe. Between now and your deposition, be thinking about all the activities you have given up or must do more slowly because of shortness of breath. Some examples might be:
>
> Do you have trouble sleeping at night because it is difficult to breathe lying down?
>
> Do you sleep propped up with pillows or sitting up in a chair in order to breathe easier?

[106] Script Memo, *supra* note 100, at 12.

[107] *See* Korosec, *supra* note 97 (describing the interview previously referred to *supra* note 101, stating that the paralegal "recalls being uncomfortable from the start with telling witnesses how to testify. 'What I was doing was fraudulent. There was never any doubt in my mind about it.'").

[108] Script Memo, *supra* note 100, at 14.

> Do you wake frequently at night to cough or do you wake up in the morning coughing?
>
> Do you take medications for breathing or anxiety or any other health problem? Bring ALL your medications along with you to the deposition so the Court Reporter can type the names onto the record, even if you don't take the medications regularly.
>
> You will be asked how much money you have spent on asbestos-related health problems. Since there is really no way to know exactly, it is best to say that your DOCTOR will have to answer that question . . . .
>
> WORK: Your ability to support your family and yourself has always been very important to you. The wages you have lost by not being able to work as long as you would have liked to are solid proof that you have been damaged financially by exposure to asbestos. Some examples of financial "damage" you have incurred from lost wages might be:
>
> Did you have to retire early because you could not keep up with the other workers your age?
>
> Did you take a lower-paying position because you could no longer perform the strenuous tasks that typically pay more money? Have you turned down any overtime? Be thinking about how much money you have lost by having to refuse overtime, retire early or take a lower paying job.
>
> HOUSEHOLD MAINTENANCE: The household repairs you can no longer do yourself or must PAY SOMEONE ELSE to do is another way to prove you have been "damaged" by asbestos exposure.
>
> Do you pay someone else to mow your yard? If so, how much do you pay? Did you purchase a rider mower because you just couldn't use a push mower anymore?

How big a yard do you mow?

Have you given up growing a vegetable garden? Do you have a much smaller garden than you used to? How big did your garden used to be? How small is it now? Have you lost any money by not being able to sell the extra produce?

Do you pay SOMEONE ELSE to do household repairs such as plumbing, electrical and roof repairs? Did you have gas heat installed because you can no longer cut firewood? Did you have aluminum siding put on because you don't have the energy to paint anymore? Can you think of more?

HOBBIES: The hobbies you once enjoyed gave meaning to your life. You worked all your life looking forward to retirement so you could enjoy them!

Have you given up or cut down on hunting, fishing, camping, boating, softball, golfing, travel, raising animals or any other activities you once enjoyed? Name as many as you can think of.

FAMILY: Your relationship with your family is one of your greatest joys in life.

Are you spending less time with young children or grandchildren because they make you too tired or irritable?

Would your spouse and other relatives say that you are short-tempered or easily frustrated because you are not able to do the things you once enjoyed?

Has your sex life been affected by shortness of breath?

ANXIETY: It is natural to be afraid about how your future will be affected by your health. Your fear is caused in part by health problems you might not have had if you had not been exposed to asbestos.

Are you depressed because of all the activities you have had

to give up or cut down on?

Are you afraid that your asbestos disease might develop into cancer?

Do you wonder if your life will be cut short by asbestos-related disease and you will leave your family with no one to provide for them?

Have you seen or heard about co-workers who have died from asbestos-related disease? Are you afraid the same thing will happen to you? If you are afraid YOU MUST SAY SO! . . .
Can you think of other ways your life has been affected by your exposure to asbestos? This is YOUR DAY IN COURT, so to speak, although you won't actually be in a courtroom. It is YOUR opportunity to STATE FOR THE RECORD how your life has been "damaged" by these asbestos manufacturers

. . . .

If you can give good, concrete examples of how your life has been damaged by your exposure to asbestos products made by these manufacturers they will want to offer you a settlement instead of taking a chance that a jury will award you more money.

Study hard, memorize as much as you can and practice saying all the product names out loud. The more you practice the more you will remember when you are under stress at your deposition. Try not to worry. Your deposition will be over before you know it![109]

Now let me go on to discuss how the medical evidence that is used to support the claim is produced. A pulmonary function test ("PFT") will be done and will usually show that there has been some loss in lung

[109] *Id.* at 17-19.

function.[110] A chest x-ray will have been done and a medical doctor will

[110] In some cases where impaired lung function is claimed, it is evidenced by a PFT test, which measures total lung capacity, forced vital capacity, and diffusion capacity by blowing into a tube as forcefully as possible. Any failure on the part of the claimant to blow into the tube as forcefully as possible can result in "evidence" of impaired lung function. However, the test administrator is required to note whether the patient has used "poor effort." In 1996, Owens-Corning-Fiberglass, Inc. ("OCF") filed suit in federal court in Louisiana against several businesses that were established to administer pulmonary function tests to would-be asbestos claimants. *See* First Amended Complaint, Owens-Corning v. Glenn E. Pitts, Jewel D. Pitts, Larry M. Mitchell, M.D., Leon Hammonds, Robert Colgan, Pulmonary Advisory Services, Inc., Pulmonary Advisory Services of Louisiana, Inc., and Pulmonary Testing Services, Inc., Civil Action No. 96-2095 (E.D. La., filed Aug. 14, 1998). The PFT enterprises were set up by an accountant with no medical training or experience in pulmonary testing. *See* Deposition of Glenn Pitts (a principal of the testing enterprises), Jackson, Mississippi, April 21, 1997 at 38-40, *taken in* Scott v. Metropolitan Life Ins. Co. et al., No. 74-681 (34th Judicial Dist. For Parish of St. Bernard, La., filed Aug. 1, 1994). Pitts states that he went into the PFT testing business because of the "big potential out there . . . ." *Id.* at 62. Much of the original business that the enterprises received was from law firms that wanted the enterprises to do *retesting* of would-be clients. *Id.* at 83-84. The x-ray work was performed at a chiropractic clinic across the street from the shopping center where one of the testing enterprises was located. *Id.* at 49. In August 1998, OCF filed its First Amended Complaint in this matter [hereinafter OCF, First Amended Complaint]. In it, OCF charged that defendants manipulated the administration of PFT tests in order to obtain false positive results, and alleged that:

> In tens of thousands of cases, Defendants, with the intent to defraud Owens Corning, systematically and deliberately deviated from [the] established [PFT testing] standards in order to create false "positive" PFT results, i.e., results, which falsely indicate pulmonary impairment. Specifically, Defendants, in performing spirometric PFTs:
>
> - Systematically disregarded the well-established PFT requirement that, in order to produce valid PFT results, each subject must exhale for at least 6 seconds;
> - Systematically disregarded the well-established PFT requirement that, in order to produce valid PFT results, each subject must be administrated three reproducible tests;
> - Systematically disregarded the well-established PFT requirement that, in order to produce valid PFT results, each subject must be retested if the variability of his two highest test results exceeds 5%;
> - Repeatedly instructed individuals not to exhale forcibly, as required to produce valid PFT results;
> - Repeatedly instructed technicians to prevent the computerized PFT equipment from producing readily available data demonstrating the gross inadequacy of the tests being performed; and
> - Repeatedly instructed technicians to produce PFT reports that disguise the testing procedures used to generate the false-positive results.

OCF, First Amended Complaint ¶ 4.

OCF further alleged (and supplied documentary evidence in support) that these enterprises charged the attorneys who supplied most of the test-takers $700 if the tests were positive for diminished lung function but only $400 if the tests were negative. *Id.* ¶ 38. *See* Bill sent by Pulmonary Testing Services of LA, Inc. to Maples & Lomax, a Mississippi law firm, stating charges of $700 each for 33 positive test-takers and $400 apiece for 34 negative test takers, Mar. 15, 1993 (on file with author); a Bill dated May 10, 1993 stating 49 positive test takers at $700 apiece and 20 negative test takers at $400 apiece (copy of exhibit on file with author).

The complaint further alleged that in cases where test takers were not represented by an attorney at the time of the testing but then tested "positive," the enterprises referred those individuals to plaintiffs' asbestos law firms which had established relationships with the testing enterprises and which had agreed in advance with the testing enterprises to pay for the tests done on unrepresented individuals who produced "positive" PFT results. OCF, First Amended Complaint ¶ 39.

The complaint further alleged that several union officials were on the payroll of one or more of the testing enterprises. *Id.* ¶ 40.

The complaint further alleged that at one point in time, the testing enterprises had entered into fee splitting arrangements with certain plaintiffs' asbestos law firms. *Id.* ¶ 40. One such arrangement involved a 15% contingency fee paid attorney for which the enterprise did PFTs. *See* Deposition of Glenn Pitts, *supra*, at 132-35, 198.

The complaint further alleged that over a period of a few years, the testing enterprises were paid millions of dollars for their services. OCF, First Amended Complaint, ¶ 43.

OCF apparently discontinued this lawsuit when it entered into a global settlement with asbestos attorneys.

[111] One of the ways in which the claims of unimpaired persons are monetized is through the testimony of medical experts. There is ample reason to believe that much medical testimony presented in asbestos litigation is specious. *See*, Brickman, *Asbestos Litigation*, *supra* note 10, at 1847 n.120. Dr. Robert Jones, an expert in internal and pulmonary medicine, has testified to the effect that "most asbestos-related disease claims are specious because they are manufactured for the purpose of litigation . . . A lot of the claims in this case had been fabricated specifically to bring to court and to enrich attorneys." *See* Abadie et al. v. Metropolitan Life Ins. Co, 784 So. 46, 47 (La. Ct. App. 2001). "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 Society of the American Medical Association, which has no affiliation with or control by defendants." Schwartz &

read the x-ray to see if there are pleural plaques visible. In many cases, reading the x-ray is like taking a Rorschacht test; whatever is there is totally in the eye of the beholder.[111] Not surprisingly, therefore, the reader

will virtually always conclude that there are pleural plaques.

In addition to pleural plaque claims, there have been very large increases in the number of asbestosis claims[112] brought on behalf of unimpaired claimants. Indeed, much medical evidence presented in support of asbestosis claims also suffers from the same malady as the evidence produced in support of pleural plaque claims. A United States District Court judge, using impartial medical expects and excluding the

Lorber, *supra* note 27, at 252-53 (citation omitted).

[112] Asbestosis is interstitial lung fibrosis, or scarring, caused by asbestos. *See* Andrew Chung, *Nonneoplastic Disease Caused by Asbestos*, *in* PATHOLOGY OF OCCUPATIONAL DISEASE 313 (Andrew Churg & Francis H.Y. Green eds., 2d ed. 1998). For a discussion of asbestosis, see Brickman, *Asbestos Litigation*, *supra* note 10, at 1846 n.112. Out of 221,375 personal injury Proofs of Claim filed by the July 30, 2001 Bar Date in the Babcock & Wilcox bankruptcy, 176,982 (80%) asserted an asbestosis claim. Babcock & Wilcox's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claims Filed Here at 50, *In re* Babcock & Wilcox Co., Civ. No. 00-0558, Bankr. Case No. 00-10992 (E.D. La. Oct. 18, 2001). Of these, the vast majority, 130,945, showed no clinical impairment. *Id.* The sheer number of the claims asserted in the post-petition period is especially indicative in view of the fact that in the prior two decades, a total of 410,000 asbestos-related claims were submitted to Babcock & Wilcox. *Id.* at 49. The huge increases in asbestosis claims being brought on behalf of unimpaired claimants has been attributed to the massive *Georgine* settlement which was invalidated in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996), and in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *aff'g* 83 F.3d 610 (3d Cir. 1996), decision below, 878 F. Supp. 716 (E.D. Pa. 1994). Under the terms of that settlement, future pleural plaque claims were awarded no compensation, *see* Babcock & Wilcox's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claims Filed Here at 34, *In re* Babcock & Wilcox Co., Civ. No. 00-0558, Bankr. Case No. 00-10992 (E.D. La. Oct. 18, 2001); *see also infra* text accompanying note 115, whereas future asbestosis claims were to be compensated. According to the filing in the Babcock & Wilcox bankruptcy, from 1993 to 1994, the number of asbestosis claims received by Babcock & Wilcox rose from 15,353 to 21,844 and in 1995, increased to 31,399. Babcock & Wilcox's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claims Filed Here at 34, *In re* Babcock & Wilcox Co., Civ. No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Oct. 18, 2001). For the Manville Trust, the number of (mostly unimpaired) asbestosis and pleural plaque claims increased from 28,059 in 1999, to 53,094 in 2000 to 65,672 in 2001 (up through November 30, 2001). *See* Chart, Evaluated TDP Claim Filings, filed by the Manville Trust in response to order of November 7, 2001 scheduling a hearing for December 13, 2001 to determine whether "changed circumstances warrant . . . modifications of "prior judgments regarding use of medical audits. *In re* Asbestos Litigation, CV 91-875, CV 90-3973 (before J. Weinstein and J. Lifland). "[C]laimants' counsel were [thus] reclassifying their clients' unimpaired pleural claims as 'asbestosis' to defeat the *Georgine* exclusion for pleural claims." Babcock & Wilcox's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claims Filed Here at 34, *In re* Babcock & Wilcox Co., Civ. No. 00-0558, Bankr. Case No. 00-10992 (E.D. La. Oct. 18, 2001).

parties' use of their own experts, determined that of 65 plaintiffs claiming to have contracted asbestosis—who, but for the court's order, would have offered their own medical experts' testimony in support of their claims and on that basis would very likely have been awarded significant compensation by the jury—only 10 (15%) in fact had in fact contracted asbestosis.[113]

Judge Rubin's finding is confirmed by the extensive experience of the Manville Personal Injury Settlement Trust (the "Trust") which was established as part of the Johns-Manville bankruptcy proceeding, as the entity to provide compensation to tort claimants, using assets transferred to it from Johns-Manville under the bankruptcy.[114]

[113] *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 sixty-five (65) asbestos personal injury 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 (15.38%), 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.

Judge Rubin's data is consistent with what the Manville Personal Injury Trust has determined with regard to claims of asbestosis filed against the Trust. Based upon independent medical audits of x-ray's, the Trust concluded that 55-60% of asbestosis claims are unsupportable by the medical evidence. Moreover, as a general rule, the more recent the asbestosis claim, the more likely it is that it is unsupportable by the medical evidence presented. *See* Letters from David T. Austern, General Counsel, Manville Personal Injury Settlement Trust, to Lester Brickman (Mar. 5, 1998 and Apr. 30, 1998) (on file with author).

[114] *In re* Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710 (E. & S.D.N.Y. 1991). The Manville Personal Injury Settlement Trust Agreement (the "Trust Agreement") provides at § 2.02 that the main purpose of the Trust is:

> to use the assets of the Trust Estate to deliver fair, adequate and equitable compensation to bona fide Beneficiaries, whether presently known or unknown, without overpaying or underpaying any claims and with settlement to be preferred over arbitration, arbitration to be preferred over resort to the tort system, and fair and efficient resolution of claims to be preferred over all else.

Affidavit of Patricia G. Houser ¶ 3, *In re* Manville Pers. Injury Settlement Trust Med. Audit Procedures Litig., No. 98 Civ. 5693 (E. & S.D.N.Y. Mar. 31, 1999). Ms. Houser

The Trust implements a schedule of "settlement values" for seven categories of asbestos-related disease, ranging from pleural plaques to asbestosis to malignancies,[115] and has the authority to require an x-ray from all claimants[116] and to audit all claim filings.[117] In 1995, the Trust instituted a medical audit program providing for a random audit of 5% of each law firms' claims submitted per payment cycle.[118] The core of the audit program was a process of review of claimants' x-rays by independent medical experts.[119] The review process was intentionally designed to operate in favor of confirming the disease documented by the claimants.[120]

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is the President of the Claims Resolution Management Corporation, a wholly-owned subsidiary of the Trust, which provides claims resolution services to the Trust. *Id.* ¶ 1.

[115] The seven categories are:

> (I) bilateral pleural disease; (II) non-disabling bilateral interstitial lung disease ("non-disabling asbestosis"); (III) disabling bilateral interstitial lung disease ("disabling asbestosis"); (IV) other cancer; (V) lung cancer (one); (VI) lung cancer (two); and (VII) malignant mesothelioma. Each category of disease also calls for particular medical evidence to be submitted in support of a claim, including, among other things, documentation showing a diagnosis of disease on the basis of an x-ray, CAT scan, or high resolution CAT scan.

Houser Affidavit ¶ 4. For a schedule of the values ascribed to each disease category, see Manville Personal Injury Settlement Trust "Trust Distribution Process," at 8 (undated).

[116] Houser Affidavit ¶ 5.

[117] *Id.* ¶ 6.

[118] *Id.* ¶¶ 10-11.

[119] Houser Affidavit ¶ 13 states:

> The hallmark of the 1995 program was a two-tiered review of claimants' x-rays by independent B-readers. B-readers are physicians who have received the highest possible certification in the use of the International Labour Organization ("ILO") system of classifying x-rays for the presence of asbestos-related and other lung conditions. All B-readers are required to pass a rigorous National Institute for Occupational Safety and Health ("NIOSH") proficiency examination. We sought, received and acted upon suggestions from the plaintiffs' bar with regard to acceptable B-readers . . . . Ultimately, the Trust retained five B-readers to participate in the 1995 program, none of whom (to our knowledge) had testified on behalf of an asbestos defendant.

[120] Houser Affidavit ¶¶ 14-18 states:

> Because the Trust is first and foremost a claims payment facility and seeks to avoid dispute, we intentionally designed the x-ray review process to operate in favor of confirming the disease documented by the claimant and to give the benefit of any doubt to the claimant. We began by providing for two independent B-readings. Even among certified experts, not all physicians reading the same x-ray will make the same

> finding—this is known as "inter-reader variability." Especially in the case of borderline asbestosis, there is significant inter-reader variability among B-readers, including the independent B-readers who review claims in the Trust's medical audit program. In order to offset the risk associated with inter-reader variability, each claim subject to medical audit was read by up to two B-readers. If the results of the first B-reading supported the same or a higher disease category than was documented by the claimant, the claim was released from audit and paid according to the B-reader's findings (even at a higher disease category than originally alleged by the claimant). If, however, the first B-reader's findings instead showed no compensable disease or a lesser compensable disease than documented by the claimant, the x-ray was sent to a second independent B-reader. The second B-reader was not aware of the results of the first review, or that he or she was the second B-reader to review the film. Again, if the second B-reader's findings supported the same or a higher disease category than was documented by the claimant, the claim was released from medical audit, valued consistently with those findings, and paid. But if the second B-reader's findings also showed no compensable disease or a lesser compensable disease than was asserted by the claimant, the claim would be re-categorized based on the most serious disease findings of the two independent B-readers. In other words, both B-readers had to disagree with the claimant's physician's diagnosis for the claim to be downgraded on the basis of their findings; if either B-reader agreed with the diagnosis, the claim was released from audit and paid. In addition, we told the independent B-readers to assume asbestos exposure for each claimant. By virtue of the very fact that a claim had been filed, the B-reader also knew that a doctor had already diagnosed disease.
>
> Another way we attempted to give claimants the benefit of the doubt was to design the program to compensate even claimants who could demonstrate only "sub-diagnostic" indicia of disease. Under the standards of the American Thoracic Society there must be a minimal "profusion" level (densities on the lungs that show up on x-ray film as opacities) of 1/1 on the ILO Scale for an x-ray to be diagnostic of asbestosis . . . . The ILO scale is a standard scale used by x-ray readers to judge, among other things, opacities on the lungs . . . .
>
> Despite this well-recognized "1/1" threshold for the diagnosis of asbestosis, in the interest of settling claims, the Trust paid claimants for whom a lesser profusion of "1/0" was supported. Only when even that low-level, sub-diagnostic x-ray evidence of interstitial fibrosis was not corroborated by either of two independent B-readers did the Trust conclude that the claimant's submission was unreliable, and downgrade the claim accordingly.
>
> An additional way in which the medical audit program was designed to operate in favor of claimants was to provide claimants with a variety of remedies if their claims were downgraded as a result of

Upon reviewing claims using the audit procedure, the Trust discovered both a dramatic increase in the filing rates of asbestosis claims and a very high medical audit failure rate for these claims.[121] In light of this data, the Trust:

> had reason to believe, on a statistical basis alone, that a portion of the asbestosis claims might not be based on reliable medical evidence. At the same time, [the Trust] . . . also observed that the nature of the claims being submitted had fundamentally shifted—it became widely known that the vast majority of new claims were being submitted through mass litigation screenings. In addition, many claimants appeared to have had lower or less direct exposure to asbestos than had been seen in pre-1995 claims filings and the documentation regarding both exposure and medical evidence became extremely limited.[122]

Against this background, the Trust became increasingly concerned about the high volume of questionable asbestosis claims[123] and based upon the results being obtained, placed some law firms on a 100% audit for the

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> medical audit. Claimants whose claims were downgraded following medical audit could submit newer x-rays for this progressive disease or other medical evidence and their claims would be re-evaluated by another randomly selected B-reader (or B-readers) and, where warranted, re-categorized. The Trust placed no limit on the number of times an audited claimant could submit a new x-ray or medical report to the Trust. Claimants could also choose to challenge the Trust's actions through . . . arbitration and . . . request independent evaluation of medical evidence by a member of a designated panel of experts . . . .
>
> [S]hortly after implementation the program was modified to provide for the admission of evidence of co-defendant settlements and corroborating medical evidence in lieu of x-rays in appropriate circumstances . . . .

[121] Houser Affidavit ¶ 20. "[T]he Trust's medical audit program has resulted in a significant number of claims being downgraded in severity." Quarterly Report of the Manville Personal Injury Settlement Trust at 4 (July 31, 1997). "Medical evidence of . . . [asbestosis] has proven to be generally *unreliable*, and is confirmed by independent B-readers only approximately half the time." Quarterly Report of the Manville Personal Injury Settlement Trust at 4 (July 31, 1998) (emphasis in original).

[122] Houser Affidavit ¶ 20.

[123] *Id.* ¶ 21.

next payment cycle.[124] To that point, the plaintiff lawyers' representative with an official role in the operation of the Trust had not seriously questioned the Trust's authority to require x-rays from claimants or to downgrade individual claims based on audit results.[125] However, in response to the results of the audit program, the plaintiff lawyers' representative pressed the Trust to re-design the audit program to focus on attempting to identify fraudulent doctors instead of focusing on law firms with high failure rates.[126] The Trust's staff, after extensive examination of various alternatives concluded that refocusing the medical audit program on doctors or medical facilities would be impractical and inefficient.[127]

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[124] *Id.* ¶ 22.

[125] *Id.* ¶ 23.

[126] *Id.*

[127] The reasons given were:

> First, there are significant complexities in measuring the doctor pass/fail data. Some claims include multiple medical reports with diagnoses of varying severity, making it difficult to identify accurately the physician primarily responsible for the diagnosis on which basis the claim was categorized. Second, a given doctor's pass rate varied considerably depending on the law firm submitting the claim, suggesting that focusing on doctors alone would be unfair to those claimants represented by law firms with better screening processes or higher quality claim populations. Third, a doctor-based audit meant that we would find ourselves in a perpetual search for the next "Dr. Bogus." The reliability of claims reported by any doctor with whom the Trust had not sufficient prior experience would be unknown until a sufficient number of claims supported by that doctor had passed medical audit. Fourth, once a doctor was found to be unreliable, all claimants who had been diagnosed by that physician—even *bona fide* claimants—would be forced to submit new medical reports. Thus, for example, of the nearly 60,000 claims that became eligible for payment in 1997, approximately 70% were diagnosed by doctors with less than a 60% pass rate. Under a doctor-based audit system all of those claimants would be required to obtain new medical reports, which would then be subject to further audit.
>
> Due to the sheer number of claims being diagnosed by doctors with low pass rates, plus the administrative burden of discriminating among "good" doctors and "bad" doctors, confounded by the ongoing need for additional perpetual audits, we again concluded that the most efficient and equitable audit process was simply to require a chest x-ray from every claimant alleging a non-malignancy claim . . . . This approach would remove the need for costly, time-consuming and burdensome medical audit reporting and procedures and achieve the highest level of certainty regarding the reliability of medical evidence

Based upon the data that was being accumulated and the review of the x-ray portion of the audit program by bio-statisticians at two major universities,[128] the staff of the Trust recommended that the Trust implement an audit program requiring x-ray review for all non-malignancy claims (categories I-III).[129] The plaintiff lawyers' representative objected that the requirement was too burdensome.[130] Ultimately, the Trust adopted a less comprehensive new medical audit program in August 1998 providing for review of "x-rays for all Category II and Category III asbestosis claims and would no longer accept corroborating medical evidence or evidence of co-defendant settlements in lieu of x-rays for such claims."[131] The Trust's experience with the prior limited audit program indicated a reduction of $925 per claim in 1995 and "concluded on that basis that a 100% medical audit program would be beneficial to the Trust's *bona fide* claimants."[132]

The Trust's medical audit program was challenged by nine law firms in September 1998.[133] The case was heard by U.S. District Court Judge Jack Weinstein sitting without a jury in April 1999.[134] From the onset of the litigation, Judge Weinstein made known his view:

> that the Trust had no business medically auditing claims (regardless of any authority to do so in the Trust documents) and that absent "manifest fraud" . . . the Trust

submitted to the Trust.

Houser Affidavit, ¶¶ 27-28.

[128] *Id.* ¶¶ 29-30.

[129] *Id.* ¶ 32; *see also supra* note 115.

[130] Houser Affidavit ¶¶33-34.

[131] *Id.* ¶38; *see also* Quarterly Report of the Manville Personal Injury Settlement Trust (Oct. 30, 1998); Memorandum titled Changes in Medical Audit/X-Ray Submission Policy (Aug. 20, 1998).

[132] Houser Affidavit ¶40. Because the Trust was paying out only a fraction of the established settlement values of the claims presented, elimination of payment of unsustainable claims would result in greater payments to *bona fide* claimants.

[133] *See* Quarterly Report of the Manville Personal Injury Settlement Trust, at 2-3 (Oct. 30, 1998).

[134] Judge Weinstein took over judicial supervision of the Trust, including the power to appoint Trustees, after it became insolvent. Prior to the Trust's insolvency, it had paid out $677,445,619 in claims, of which plaintiffs' counsels' fees totaled approximately $250,000,000 despite the fact that claims were settled in groups of hundreds and thousands. *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1835 n.61. For an account of Judge Weinstein's role in mass tort litigation, see *supra* notes 60-62.

> was expected to pay every claim filed for the full amount of the claim . . . . By the fifth day of the trial, the Trustees decided to settle the matter and except for several doctors that the plaintiffs' bar agreed filed x-ray reports of a suspicious nature, the Trust was required to accept (absent manifest fraud) all claims filed . . . with respect to medical evidence [and to discontinue its medical audit program including its requirement that x-rays be submitted].[135]

Since the full impact of the settlement realized in fall 1999, Manville Trust Claim Filings, on an annual basis, have almost doubled.[136]

[135] *See* Letter from David T. Austern, President of the Claims Resolution Management Corporation for the Manville Personal Injury Settlement Trust, to the author (Oct. 3, 2001) [hereinafter Austern Letter] (original on file with author).

[136] *Id.* Recently, Judge Weinstein has, on his own motion, decided to hold hearings on whether to revisit a number of his prior rulings, stating:

> The courts have received and reviewed the Financial Statements and Report of the Manville Personal Injury Settlement Trust for the period ending September 30, 2001. The courts note that there is a continuing rise in the number of claims and that the amount payed pro rata on claims has been reduced from 10 percent to 5 percent of the original value. The courts take judicial notice of the continuing media and other campaigns encouraging a flood of new claims.
>
> This combination of events, together with the increasing number of bankruptcy filings by asbestos related entities, suggests that there may be a misallocation of available funds, inequitably favoring those who are less needy over those with pressing asbestos related injuries.

Findley v. Trustees (*In re* Joint E. & S. Dists. Asbestos Litigation), 90 CV 3973 (JBW) (E.D.N.Y. Nov. 7, 2001).

In its response to the November 7, 2001 Order, the Trust recommended a change in the Trust Distribution Process ("TDP") and provided additional data on the flood of new claims on behalf of those with no asbestos-related physical impairment:

> [T]he Trustees . . . recommended modifying the causation criteria of the TDP . . . Currently, the criteria for each of the seven Scheduled Disease Categories simply require that a proof of a claim "identfy exposure to Manville asbestos products." We recommend adding that to qualify for compensation a claimant generally must identify *industrial* exposure to Manville asbestos products, meaning direct exposure to asbestos products when the products were manufactured, applied, disturbed, or otherwise altered in a manner that would normally produce asbestos dust. Where industrial exposure to Manville asbestos products is absent there would be a rebuttable presumption that the claimant has no asbestos-related disease.
>
> While most trust claimants experienced industrial exposure to

asbestos, during the past two years the Trust has been receiving large volumes of claims filed on behalf of claimants exposed only to "in-site" asbestos. Such claimants worked in factories or facilities where asbestos insulated pipes or other asbestos products were located, although the claimants were not present when the insulation was installed, which is substantially more likely to lead to the inhalation of asbestos fibers. Nonetheless, these claimants meet the current criteria TDP scheduled diseases. Needless to say, given the ubiquitousness of asbestos insulation and other products in American industrial sites through much of the last century, the population of potential Trust claimants would rise by tens of millions when non-industrial exposures to asbestos are considered.

The flood of new claims reported in our quarterly reports to the Courts and noted in the Courts' November 7, 2001 Order reflects an unforeseen, disproportionate increase in claims filed on behalf of claimants with no asbestos-related physical impairment whatsoever, whose daily life is unaffected by their past asbestos exposure. Indeed, a large share of the Trust's claimants now have "injuries" which are imperceptible, even to themselves, without the aid of x-ray or other imaging technology. These claimants are marshaled in mass screenings that have as their primary purpose the rounding up of claimants whose settlements will generate fees for the sponsors of the screenings. While each unimpaired claimant generates smaller fees, screening sponsors achieve desired aggregate fees through increased volume. Advances in data processing have greatly reduced the difficulty and costs of generating and tracking huge volumes of claim files. Together with the large number of potential claimants, this ensures that the number of unimpaired claims and the amount paid to them will continue to increase so long as they remain compensable.

For instance, from TDP inception (February, 1995) through November 30, 2001, the Trust has paid 76,268 Bilateral Pleural Disease claimants (a growing number of state courts have held that asymptomatic pleural disease is not a compensable disease) [citing to Simmons v. Pacor, Inc. et al., 543 Pa. 664, 674-76; 674 A.2d 232, 237-38 (Pa. 1996) (holding that asymptomatic pleural thickening is not a compensable injury that gives rise to a cause of action, and citing court decisions in other states which have held similarly)] . . . .

The flood of unimpaired claims can no longer be stopped simply by reviewing the quality of the x-ray evidence supporting the claims, as the Trust once tried to do, which in 1998, resulted in the plaintiffs' bar suing the Trustees in Judge Weinstein's Court, which suit terminated in a Court-approved settlement. There are millions of workers still living who were occupationally exposed to asbestos. A significant proportion of those workers genuinely exhibit x-ray changes, which meet the current TDP categorization criteria for Scheduled Diseases. In a report the Trustees reviewed just before concluding that the pro rata payment share had to be lowered, it was estimated that if

In assimilating and assessing the issue of the medical evidence presented in asbestos litigation, it is useful to understand the financial incentives that undergird the medical evidence producing business.[137] X-rays are usually read by specialized medical doctors called B-readers[138] who are paid for each x-ray. Since asbestos claiming is a high volume business, payments are substantial. Moreover, as noted by the Manville Trust, even as the quality of the medical evidence provided in support of asbestos claims declined, there has "been an increasing trend toward the use of a relatively small number of physicians."[139] The influence of lawyers who select the B-readers on the interpretation of the results is pronounced. Different asbestos lawyers have different disease mixes[140] that characterize their portfolio of claims. To meet these objectives, B-readers conform their outcomes to the preferences of the lawyers who hire them.[141] In light of this evidence, it may reasonably be presumed that a B-reader who reports results incompatible with a law firm's preferences is

current claim filing trends under the TDP as it now stands continued, the Trust could expect to receive as many as 2.5 million additional claims (after 2000) . . . .

[A]s long as the Trust remains obligated to pay the ever-increasing number of unimpaired claims it receives, it will be unable to [properly] compensate its most deserving claimants . . . .

Letter from Robert A. Falise, Chairman and Managing Trustee of the Trust, to Judges Jack B. Weinstein and Burton R. Lifland (Dec. 5, 2001); Findley v. Falise (*In re* Joint E. & S. Dist. Asbestos Litig.) Case Nos. 82 B 11656 (BRL)—82 B 11676 (BRL), inclusive; (E.D.N.Y.) 90 CV 3973 (JBW).

[137] For an account of that business, see *supra* note 111. For another account of a medical practice set up to generate medical evidence in asbestos cases, see Brickman, *Asbestos Litigation*, *supra* note 10, at 1878 n.249.

[138] *See supra* note 119.

[139] Quarterly Report of the Manville Personal Injury Settlement Trust at 4 (July 31, 1998).

[140] For discussion of the disease mix in asbestos claiming, see Brickman, *Asbestos Litigation*, *supra* note 10, at 1860-61.

[141] *See* Affidavit of Patricia G. Houser ¶ 27, *In re* Manville Pers. Injury Settlement Trust Med. Audit Procedures Litig., No. 98 Civ. 5693 (E. & S.D.N.Y. Mar. 31, 1999) ("[A] given doctor's pass rate [on the medical audit procedure] varied considerably depending on the law firm submitting the claim . . . ."); Exhibit 24 at 3, Houser Affidavit ("A doctor's pass rate can differ significantly by [law] firm."); Houser Affidavit at tbls. 2-4 (indicating the correlation between the x-ray readings by the same doctors as they differed depending on the law firm that had hired them). Thus, one B-reader's results for law firm A's clients might show a 95% pass rate in the audit procedure but that same B-reader may have only a 50% pass rate when reading law firm B's chest x-rays submitted in support of claims of asbestosis.

likely to be an ex-B-reader.

So much for medical evidence and client testimony. Now let us look at the trial of the case, keeping in mind that it is virtually certain that the case will be settled—in part because of what happens at the relatively few trials that do take place. Evidentiary rulings by courts make it unnecessary for usual standards of causation to be satisfied.[142] If the

[142] *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1840-52; *see also* Ruffing v. Union Carbide Corp., N.Y.L.J., Jan. 29, 2001, at 33 (N.Y. Sup. Ct.) (rejecting plaintiffs' claims for damages for alleged toxic chemical poisonings at an IBM semiconductor plant for failure to show that they had been exposed to a harmful level of the substances). That decision is expected to set the ground rules for nearly 200 pending claims. *See* Michael Riccardi, *IBM Toxic Plaintiffs Face Strict Test*, N.Y.L.J., Jan. 25, 2001, at 1. The court rejected plaintiffs' assertion that proof of the existence of the alleged harm, birth defects, is sufficient to support the conclusion that there had been exposure to a harmful level of the chemical, stating that "injury, no matter how horrible in dimension, cannot substitute for evidence that another is responsible for its cause." *Ruffing*, N.Y.L.J., Jan. 29, 2001, at 41. The court stated:

> As support for their contention that a more liberal approach is taken in this State with respect to the exposure level issue, plaintiffs rely upon several State and Federal court decisions in which plaintiffs sought damages for injuries resulting from their exposure to asbestos or asbestos-containing products. As relates to the State court litigation, plaintiffs assert that "[t]he Appellate Division has repeatedly stressed that a plaintiff need only show that the dangerous substance was present at his work site in a form (i.e., out of its package or container), as in the present case, that would render the plaintiff vulnerable to being exposed." . . . Similarly, plaintiffs maintain that "the federal courts applying New York law in toxic exposure cases have repeatedly held, on proofs not even remotely as rigorous as those in the present case, that plaintiffs' circumstantial exposure and causation proofs were fully adequate to support plaintiffs' verdicts."
>
> . . . .
>
> As plaintiffs correctly observe, in our State courts causes of action for asbestos exposure have survived summary judgment motions where the plaintiffs' proofs established that they "worked with asbestos in confined, dusty areas" . . . . or worked in a location where spraying of an asbestos-containing product "was going on all the time" . . . . Notably, the courts hearing these cases did not require greater proof of exposure because, in each, "plaintiffs showed the facts and conditions from which defendants' liability may be reasonably inferred" . . . .
>
> Addressing New York-based claims for asbestos exposure, the Second Circuit Court of Appeals has taken a similar approach to proof of exposure levels . . . .
>
> In view of the lack of a "signature" relationship between Zachary's birth defects and the Causation Chemicals, there is no basis for adopting the approach taken in asbestos exposure litigation, as urged by plaintiffs.

Ruffing, N.Y. L.J., Jan. 29, 2001, at 39-40 (citations omitted).

worker was at the site and there is testimony that the product was used at the site and the worker claims a pleural plaque or other asbestos-related condition, then the jury can draw the necessary inference and conclude that the product caused the "injury."[143] Moreover, for good measure, a demand for punitive damages will be included, often successfully.[144]

So why do I conclude that this branch of the *Amchem*[145] and *Ortiz*[146] decisions was wrongly decided? Consider the details of the settlements. The lawyers' present inventory of claims were settled for substantially inflated values. These included thousands and thousands of exposure only claims. "Future" claims—that is, claims of those who may at some point in the future present with injury, were also settled by setting aside funds to pay those claims. As for the "future" exposure—only claims, no moneys were set aside for them. They were valued at zero.[147] Instead of money, these "futures" were relieved of meeting any statute of limitations burden so if they did present with an actual injury, they could then seek compensation from the fund set up by the settlement.

The settling lawyers in *Amchem* and *Ortiz* received huge rewards, fees totaling several hundred million dollars, in part, for purporting to sell out the interests of future "exposure only" claimants by agreeing to a procedure which valued those claims at zero unless and until actual injury was manifested.[148] That zero value is correct because the "futures"

[143] *See* Brickman, *Asbestos Litigation*, *supra* note 10, at 1841 n.87. Aiding the jury in this regard is the presentation of documentary evidence inculpating one defendant, which is for the purpose of and has the effect of substantially increasing the verdicts against other defendants even though the evidence in question does not pertain to them. *See id.* at 1845 n.110.

[144] *See id.* at 1862-68 (stating the role of punitive damages in asbestos litigation cases that are tried). About one percent of asbestos claims are tried. Findley v. Blinken (*In re* Joint E. & S. Dists. Asbestos Litig.) 129 B.R. 710, 747 (E. & S.D.N.Y. 1991).

[145] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *aff'g* 83 F.3d 610 (3d Cir. 1996), decision below, 878 F. Supp. 716 (E.D. Pa. 1994).

[146] Ortiz v. Fibreboard Corp, 527 U.S. 815 (1999).

[147] Indeed, the very basis for the settlement was the zero valuation for "futures" claims of exposure-only claimants. The defendants' agreement to a global settlement was driven by their desire to cap future claims and bring asbestos litigation to a foreseeable conclusion. The only way that could be accomplished, short of a legislative solution, was to include the provision eliminating future exposure-only claims.

[148] See First Amended Complaint, *G-I Holdings, Inc. v. Baron & Budd et al.*, 179 F.

claimants have not suffered any injury and therefore ought not to be entitled to any compensation. That truth, however is not the basis for my conclusion that the settlements should not have been invalidated because of a conflict of interest. The value of exposure-only claims in the tort

Supp. 2d 233 (S.D.N.Y. 2001) (No. 01 Civ. 0216 (RWS)) (filed Apr. 30, 2001) for an essentially first hand account of the *Georgine* settlement process:

> In connection with the negotiation of the *Georgine* settlement, the CCR [an association of 20 of the leading asbestos litigation defendants which had banded together in joint defense of asbestos lawsuits, *see*, Queena Sook Kim, *Asbestos Claims Continue to Mount*, WALL ST. J., Feb. 7, 2001, at B1] had entered into so-called futures agreements ("Futures Agreements") with many of the nation's leading plaintiffs' asbestos law firms . . . .
>
> The Futures Agreements served as corollary to the *Georgine* settlement by incorporat[ing] the *Georgine* medical criteria and providing a mechanism by which any future filing of claims by "non-sick" individuals would be deferred . . . . The Futures Agreements provided that they would take effect if the *Georgine* settlement was not ultimately upheld and further provided that, in that event, the CCR would, as an alternative dispute mechanism, toll the running of the statute of limitations for defendants' clients (and future clients) who did not have any of the conditions set forth in the *Georgine* medical criteria (and whose claims were not already time barred). The defendants agreed, in turn, to recommend to their clients that they defer filing an asbestos claim until they met the criteria . . . .
>
> In entering into their Futures Agreements at the time of the *Georgine* settlement, [plaintiff alleges that] defendants represented that they believed that the *Georgine* medical criteria were "reasonable" and that acceptance of the ADR procedure "will be in the interest of its future clients who do not have a medical condition" defined by the criteria in the Agreement "in that it offers such clients an alternative to immediate litigation or settlement and release of their claims for asbestos injury."
>
> The typical Futures Agreement expressly states that the subscribing firm will: recommend that its clients seriously consider this alternative dispute resolution procedure. With respect to all clients who accept this alternative dispute resolution procedure, [defendant law firm] agrees to defer filing any asbestos-related personal injury claims against CCR or any of its current members until such time if ever, as the claimant develops one of the asbestos-related diseases described [herein].
>
> The consideration for the Futures Agreements included CCR's agreement to settle some 50,000 pending asbestos cases for approximately $750 million. That sum was paid to defendants by CCR . . . .

Id. ¶¶ 134-138.

system is purely a function of the scheme that asbestos lawyers have created and which I have previously described. Because the claims are specious and only have value because of that scheme, the valuation is a property right rightfully belonging to the lawyers who invested substantial time, effort and money in creating those rights and not to their exposure-only clients, who have suffered no injury, have no impaired lung function, and are asymptomatic.

In a capitalist system, the rewards for the successful monetization of these claims rightfully ought to belong to the lawyers.[149] Future claimants who have no injury or impairment have no just cause for complaint that their specious claims have been assigned a zero valuation.

When the U.S. Supreme Court struck down the settlements, asbestos lawyers, of course, seized the opportunity to reestablish their fee stream. Not only have the lawyers been able to keep the hundreds of million dollars that they were paid as part of the settlements, they have regarded the striking down of the settlements as freeing them to file claims on behalf of the very future claimants for whom they had agreed to value claims at zero, but shorn of that limitation.[150] Thus, these lawyers are

[149] *Cf.* Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490 (W.D. Pa. 1938). A similar argument has been to justify a million dollar fee in the "Adhesive Denture Menace." "This national peril arose after a manufacturer recalled certain [dental] adhesives containing traces of benzene, a potential carcinogen. Without evidence of any actual injuries, vigilant attorneys brought suit on behalf of purchasers unaware of their 'victimhood.' The settlement gave several hundred known buyers $7 and some twenty-eight hundred undocumented buyers the opportunity to fill out forms and receive a package of discount coupons." DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 176 (2001). While the nearly million dollar fee may seem like "a lot of money . . . it cannot be easy, taking a case wherein it appears to the naked unarmed layperson eye that nobody has suffered any observable harm, and using legal skills, turning it into a financial transaction that involves thousands of people and a million dollars! Plus coupons!" *Id.* (quoting Dave Barry, *Lawyers Put the Bite on Denture—Adhesive Maker*, ORLANDO SENTINEL, Nov. 23, 1993, at 22.)

Lest anyone be misled by the merits of the arguments I have advanced, let me state explicitly that I proffer them in the same vein as did Johnathan Swift in proposing to prevent Irish children from being a burden by selling them as food for the table. *See* JOHNATHAN SWIFT, A MODEST PROPOSAL (Charles Beaumont ed., C. E. Merril Pub. Co. 1969) (1729).

[150] In June 1997, the Supreme Court issued its decision in *Amchem* rejecting the *Georgine* settlement. By their express terms the Futures Agreements [*see supra* note 147] were thereupon triggered and became binding upon the participants.

> Nonetheless, despite the plain language of their Futures Agreements and the hundreds of millions of dollars they received in connection with them, defendants . . . [are not] recommend[ing] deferral of filing of

building up new inventories of cases to sell off, consisting of those exposure-only claimants who were formerly in the "futures" class, and doing so at a more rapid rate than at any time during the course of the asbestos litigation crisis.[151]

C. *Judicial Response to Aggregative Abuses*

The abuses of aggregative litigation are compounded by recent judicial decisions that grant attorneys full rein to run roughshod over client interests. While individual clients have the right to seek redress from their attorneys for breaches of the standard of care, self-interested behavior, engaging in conflicts of interest, other breaches of fiduciary obligation, and, in some cases, for breaches of lawyers' ethical obligations, in aggregated actions involving large numbers of clients, particularly in class actions where the lawyer conscripts the client, such client rights have been largely eviscerated.[152] Even lawyers who submerge their clients' interest or who engage in self-dealing at their clients' expense are virtually immune from the traditional disciplinary systems.[153] This is so because

> claims on behalf of non-sick clients . . . [and have] begun filing non-sick claims at an even greater rate than they had filed them before the *Georgine* settlement . . . .

First Amended Complaint, *G-I Holdings* (No. 01 Civ.0216 (RWS)) ¶¶ 139-40.

[151] *See id.* Standard and Poor's has reported that insurers will set aside an additional 5 to 10 billion dollars in reserves in 2001 to cover asbestos-related claims because of the significant increase in asbestos claims being filed. *See* Christopher Oster, *Insurers to Set Aside Additional Billions for Asbestos Claims*, WALL ST. J., Aug. 1, 2001, at B10. Previously, insurers had paid out $21.6 billion in asbestos claims, and had already set aside $10.3 billion for new claims. *Id.* Other analysts and ratings agencies recently have estimated that the insurance industry will need to put up as much as $20 billion to $40 billion more to cover their asbestos exposure. *Id.* These amounts do not include the considerable amounts spent by asbestos defendants which were not covered by insurance and which has precipitated more than 30 bankruptcies. It is noteworthy that no reserve established by any of the asbestos defendants or their insurers has ever proved sufficient. *See also* Schmitt *supra* note 90.

[152] "We agree with those who argue that lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds." Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996).

[153] *See* Wolfram, *supra* note 9, at 1233 (arguing that class action lawyers are beyond reform, especially given the lack of policing methods and stating that "[w]hat is badly broken, and what badly needs mending, is the basic class action and mass-litigation system of litigation. The only effective way to rid the judicial system of Willie Suttons is to take the profit out of robbing banks.").

"[c]ourt approval of a settlement . . . insulates class counsel from collateral attack by clients' aggrieved by an apparent sell-out of their claims by lawyers laden with conflicts of interest."[154]

This is borne out by three recent cases. In *Kamilewicz v. Bank of Boston Corp.*,[155] plaintiffs Dexter and Gretchen Kamilewicz, mortgage holders with BancBoston, were two out of 715,000 conscripted plaintiffs in an Alabama state court class action, entitled *Hoffman v. BancBoston Mortgage Corp.*,[156] involving the manner in which BancBoston calculated the amount of escrow surplus that each mortgage holder had to maintain (the "*Hoffman* action"). The claim in the Hoffman action was that BancBoston overcharged mortgage holders, whose mortgages it serviced, so that a very small surplus existed in the mortgage holders' escrow accounts.[157]

The plaintiff class in the *Hoffman* action was granted summary judgment, and a notice of proposed settlement was sent to the plaintiff class.[158] The Alabama state court held a fairness hearing on the proposed settlement and in January 1994, approved the settlement, which provided that class members would be awarded amounts between $0.00 and $8.76.[159] The court also found the attorneys' fees requested reasonable, and under the terms of the settlement, BancBoston would deduct the attorneys' fees from the mortgage holders' escrow accounts.[160] The method of calculation of these fees was designed to defraud the members

[154] Carrington & Apanovitch, *supra* note 11, at 469.

[155] 92 F.3d 506 (7th Cir. 1996), *reh'g denied*, 100 F.3d 1348, *cert. denied*, 520 U.S. 1204 (1997).

[156] No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994).

[157] There was no question that the excess moneys belonged to the mortgage holders. Instead, the main issue in the case was "the propriety of BancBoston's holding the surplus until the time it would be returned to the mortgagor." *Kamilewicz*, 92 F.3d at 508. It was an issue of timing—at which point should these excess moneys be credited to the mortgage holders' accounts. *See* Kamilewicz v. Bank of Boston Corp., No. 95-C6341, 1995 U.S. Dist. LEXIS 18973 (N.D. Ill. Dec. 15, 1995).

[158] *See Kamilewicz*, 1995 U.S. Dist. Lexis 18973, at *3. The defendants in the *Hoffman* action objected to the proposed settlement on the basis that it did not disclose to the plaintiff class that there were "'substantial adverse effects' to the proposed settlement, including . . . [that] the plaintiff class would suffer an actual out-of-pocket loss as a result of the lawsuit." *Id.* at *3-*4. According to the district court, this objection was withdrawn as moot. *See id.* at *4 n.1.

[159] *See Kamilewicz*, 92 F.3d at 508.

[160] *See id.* at 508-09.

of the class.[161]

As part of their recovery, the Kamilewiczes were awarded $2.19, which was credited to their account, but their statement from BancBoston

[161] Monthly mortgage bills are based on three components: principal, or the amount that was borrowed; interest on that principal; and escrow, which is money for property taxes and homeowners insurance that mortgage companies collect and then pay:

> Because taxes and insurance fluctuate from year to year, banks estimate those costs and divide those estimates into 12 equal portions to smooth out monthly payments and prevent homeowners from getting slammed a couple of times a year, such as when property taxes come due. For decades, the industry used what's called the "itemized" method to calculate escrow. One lawyer described it as "like having separate little buckets" for each cost, then adding them together.
>
> For various reasons, the itemized approach often overestimated people's escrow requirements and created surpluses, called cushions. The banks claimed that these cushions protected them from paying bills that come due when homeowners defaulted. They also argued that the itemized method was allowed by law, and noted that virtually every lender in the country used that method.
>
> No one was accusing the banks of stealing the cushions. Annual statements sent to homeowners listed the balances, and the banks returned the money in full when customers paid off their loans, such as when they sold or refinanced their houses . . . .

Eddie Curran, *You Win, You Pay*, MOBILE REGISTER, Dec. 29, 1999, *available at* http://www.al.com/news/mobile/Dec1999/5pt-4-2.html (last visited Dec. 1 2000).

> [In the settlement] BancBoston had agreed to give lost-interest credits to homeowners of no more than $8.76 apiece, and usually a fraction of that. If the value of the settlement was the total of those credits, a third of that amount probably would have resulted in a fee of several hundred thousand dollars.
>
> But the . . . [lawyers] contended that the settlement was worth something else entirely: It was, they said, the total of the surplus that would be returned early to the class. At the hearing, it was estimated that BancBoston would reduce the $223 million then held in escrow by 19 percent, or by more than $42 million. [The lawyers] . . . told [Judge] Kittrell that the benefit to class members was equal to the size of that reduction.

Eddie Curran, *Bottom of the Class*, MOBILE REGISTER, Dec. 30, 1999, *available at* http://www.al.com/news/mobile/Dec1999/5pt-4-2.html (last visited Jan. 24, 2000).

The $8.5 million attorneys fees that was thus approved was based on a percentage of the total amount held in the escrow accounts, not the much smaller benefit actually received by the plaintiffs in the settlement, that is, the time value of the escrowed surplus funds. The *Hoffman* action attorneys did not secure the escrow amount for the plaintiff class because they would have received this amount at some point in the future. The only recovery the attorneys got for their clients was that they had earlier access to excess monies held in their escrow accounts.

also indicated a miscellaneous disbursement of $91.33.[162] When they discovered that this deduction was to cover the expense of the attorneys' fees in the *Hoffman* action (the "*Hoffman* attorneys"), they and another plaintiff (the "*Kamilewicz* plaintiffs") brought a class action against the *Hoffman* attorneys in federal district court in Illinois.[163]

The Illinois federal district court (Plunkett, J.) granted the *Hoffman* action attorneys' motion to dismiss for lack of subject matter jurisdiction. It held that the *Rooker-Feldman* doctrine[164] precluded it from reviewing a decision of the Alabama state court because that would amount to a collateral attack on a state court judgment in a federal court proceeding. The doctrine recognizes the principle that the inferior federal courts do not have the power to exercise appellate review on state court decisions.[165] The district court found that during the fairness hearing in Alabama, the *Hoffman* action plaintiffs were in an adversarial position against their

[162] *See Kamilewicz*, 92 F.3d. at 508. For an extensive analysis of the *Kamilewicz* facts, see Koniak & Cohen, *supra* note 152, at 1056.

[163] *See Kamilewicz*, 92 F.3d. at 509. The causes of action included: violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.§ 1962 (1994); violations of the Civil Rights Act, 42 U.S.C. § 1983 (1994); common law fraud; negligent misrepresentation; attorney malpractice; breach of fiduciary duty; and conversion. *Kamilewicz*, 92 F.3d. at 509.

[164] The *Rooker-Feldman* doctrine was set out in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *See, Kamilewicz*, 92 F.3d. at 509. The *Rooker-Feldman* doctrine "bars federal suits where, although the claims were not argued in the state court proceedings, they are 'inextricably intertwined' with the state court judgment." Kamilewicz v. Bank of Boston Corp., No. 95-C6341, 1995 U.S. Dist. LEXIS 18973 (1995) (citing Wright v. Tackett, 39 F.3d. 155, 157 (7th Cir. 1994)). This doctrine "is a recognition of the principle that the inferior federal courts generally do not have the power to exercise appellate review over state court decisions." *Kamilewicz*, 92 F.3d at 509.

[165] *Kamilewicz*, 92 F.3d. at 509. The district court found that during the fairness hearing in Alabama, the *Hoffman* action plaintiffs were in an adversarial position against their attorneys. Since the *Hoffman* action attorneys were asking the court to grant them their fees, they were in the position of plaintiffs. The *Hoffman* action plaintiffs, on the other hand, were in the position of defendants because they did not have to put up any evidence on the issue of fees, but were allowed to object and cross-examine the *Hoffman* attorneys. Therefore, when the Alabama state court rendered judgment on the settlement—by providing its approval—all of the issues between the *Hoffman* action plaintiffs and their attorneys had been already litigated. Thus, the district court found that in order to adjudicate the *Kamilewicz* plaintiffs' claims, it would have to reexamine the papers filed in the action below, and it was precluded from doing so under the *Rooker-Feldman* doctrine. The district court found that the only forum available to the *Kamilewicz* plaintiffs was the Alabama state court system. *Id.*

attorneys. Because the *Hoffman* action attorneys were asking the court to grant them their fees, they were in the position of plaintiffs. The *Hoffman* action plaintiffs, on the other hand, were in the position of defendants because they did not have to put up any evidence on the issue of fees, but were allowed to object and cross-examine the Hoffman attorneys. Therefore when the Alabama state court rendered judgment on the settlement—by providing its approval—all of the issues between the *Hoffman* action plaintiffs and their attorneys had been already litigated.

On appeal, the Seventh Circuit affirmed the district court's decision.[166] It later denied rehearing of the motion *en banc*, but there was a strong dissent written by Judge Easterbrook who disagreed that the *Rooker-Feldman* doctrine was applicable to the *Kamilewicz* action.[167]

Judge Easterbrook went on to say that this action was not a collateral attack on the *Hoffman* action. Instead, this was a malpractice action, and since there is no requirement that a malpractice action be filed with the court that rendered the underlying judgment, the *Rooker-Feldman*

[166] *Id.* The court held:

> The Kamilewiczes were class member/plaintiffs in the Alabama suit. The part of the judgment they are unhappy with is the approval of the settlement as to the fees to be paid to their attorneys—fees that were assessed against them. The district court concluded that the *Kamilewicz* plaintiffs were in the position of defendants in this aspect of the state court proceedings. That conclusion has some support in logic and bolsters a finding of a *Rooker-Feldman* bar. More important, however, is the fact that the plaintiffs' injuries are a result of the state court judgment. Their claim in federal court is a multi-pronged attack on the approval of the settlement regarding the attorney fees issue. Regardless of which of the specific federal claims that district court were to consider, it would run directly into the state court finding, entered after a two-day fairness hearing—that the fees were reasonable. The federal claims are "inextricably intertwined" with the state court judgment, whether that judgment is right or wrong.

Id. at 511.

[167] *See* Kamilewicz v. Bank of Boston Corp, 100 F. 3d. 1348 (7th Cir. 1996) (Easterbrook, J., dissenting). In his view, the *Kamilewicz* plaintiffs were seeking to collaterally attack the Alabama state court judgment based on lack of jurisdiction. If a court renders a decision without subject matter or personal jurisdictions, no court can give full faith and credit to that judgment. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). If the Alabama state court did not have jurisdiction over the *Kamilewicz* plaintiffs, as they argued, then there would be no reason why an action could not be brought in federal court to attack such a judgment. Therefore the *Rooker-Feldman* doctrine should not be an obstacle for the *Kamilewicz* plaintiffs to obtain review.

doctrine was again inapplicable.[168] Judge Easterbrook further stated that if a malpractice action could only be brought in the same court, then that would have the effect of eliminating all malpractice actions in federal court, even if the requirements of diversity jurisdiction were met.[169] Judge Easterbrook highlighted that the difference with malpractice actions is that "it is a suit against a nonparty (the lawyer) alleging harm from incompetent or deceitful acts. That the lawyer's misconduct occurred in a judicial proceeding doesn't insulate the lawyer from liability, even when the *Rooker-Feldman* doctrine insulates the *judgment*."[170]

Furthermore, he stated that the *Kamilewicz* plaintiffs could not have petitioned the Supreme Court for certiorari because their claims are outside the scope of §1257:[171]

> [T]hey did not discover the malpractice until later (it was not reflected in the record of the state proceeding); it was not litigated in the Hoffman case; class members can't seek appellate review without intervening, which further illustrates their non-party status; and of course malpractice is not a federal claim . . . .[172]

Judge Easterbrook was most troubled by the idea that if the panel's decision was adopted by other courts, there would be an end to malpractice litigation in any court.[173] He reiterated that a malpractice action is separate from the underlying action:

[168] *Kamilewicz*, 100 F.3d. at 1351.

[169] *See id.*

[170] *Id.*

[171] *See* 28 U.S.C. § 1257 (1994).

[172] *See Kamilewicz*, 100 F.3d. at 1352. Moreover, Judge Easterbrook noted that the only way that the *Kamilewicz* plaintiffs could have been parties to the *Hoffman* action was if their interest was adequately represented by the named plaintiffs and that they had received adequate notice and opportunity to opt out of the class. Since the *Kamilewicz* plaintiffs were attempting to show that they had not been adequately brought into the action, Judge Easterbrook wrote that not enabling these plaintiffs to bring this claim "gets the cart before the horse." *Id.* He further rejected the notion that a fairness hearing provided the plaintiffs with a full and fair litigation. *Id.*

[173] *See id.* at 1353. "If the *Rooker-Feldman* doctrine applies to suits by the absent class members because a malpractice action is a collateral attack on the order approving the settlement and awarding attorneys' fees, then the law of preclusion (res judicata) should bar malpractice actions in any court, state or federal, and without regard to which judicial system handled the first case." *Id.*

> A (potential) defense of issue preclusion is defeated by the very theory of the claim: that the first judgment is unreliable because of the attorney's bungling. The bungler cannot point to the adverse judgment produced by his own incompetence to ward off the client's demand. The *Kamilewicz* class may fail in its proof, or it may encounter other obstacles, but the *Rooker-Feldman* doctrine does not close the door to the federal courthouse.[174]

Because the United States Supreme Court denied certiorari,[175] the *Kamilewicz* plaintiffs are now foreclosed from receiving any redress against the *Hoffman* action attorneys. Basically under the federal courts' holding, lawyers are immunized by a fairness hearing from a malpractice action by their clients no matter how egregious their conduct.

In *Epstein v. MCA, Inc.*,[176] the Ninth Circuit reversed the decision of a three judge panel and essentially agreed with the Seventh Circuit in a decision effectively concluding that clients' rights vis-a-vis their class lawyers are essentially terminated by a so-called "fairness" hearing. Judge Sporkin, in *Thomas v. Albright*,[177] barred a malpractice action brought by class members against class counsel, effectively holding that the adequacy of class counsel's representations was fully adjudicated at the fairness hearing.[178]

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[174] *Id.*

[175] Kamilewicz v. Bank of Boston Corp., 520 U.S. 1204 (1997).

[176] 179 F.3d 641 (9th Cir. 1999).

[177] 77 F. Supp. 2d 114 (D.D.C. 1999).

[178] *Id.* at 121. Judge Sporkin based much of his ruling on what he believed the consequences were of allowing such malpractice actions to go forward. He wrote that the threat of such actions "could discourage future class counsel from attempting to settle and compromise a class action . . . [i]n actions where a class seeks prospective and retroactive injunctive relief, such handcuffing would sound a death knell to class counsel's ability to evaluate its case and negotiate a workable settlement in the best interest of the class as a whole, in a timely manner." *Id.* at 122. In referring to actions by lawyers in the Lincoln Savings and Loan matter that facilitated the commission of fraud, Judge Sporkin asked: "Where were [the lawyers] . . . when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?" Lincoln Sav. & Loan Ass'n. v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990). One answer of course is that more than eighty law firms were busily collecting an estimated $70 million for representing the parent company of Lincoln Savings in its five years of dealing with the Federal Bank Board. RHODE, *supra* note 149, at 109. Applying Judge Sporkin's *cri de coeur* to the class action context leads to a

Two other decisions,[179] however, have allowed plaintiffs to successfully sue their attorneys for breach of fiduciary duty. *Arce v. Burrows*,[180] a Texas state court action, held that attorneys entering into an aggregated settlement on behalf of their clients without obtaining their clients' consent breached their fiduciary duty. As a consequence, the attorneys had to forfeit a portion of their fees. In *Arce*, multiple plaintiffs hired attorneys, the defendants, to represent them individually in a personal injury case stemming from an explosion at a chemical plant.[181] They agreed to payment on a contingency fee basis. After their attorneys entered into an aggregate settlement without obtaining their consent,[182] the plaintiffs initiated a state court action. The court held that a fiduciary relationship imposes a "duty . . . of loyalty and good faith, strict integrity, and fair and honest dealing."[183] Because a fiduciary relationship exists between an attorney and his client as a matter of law, the court held that fee forfeiture is a viable remedy when the attorney breaches his fiduciary duty to his client.[184] The client only needs to prove that a breach occurred, not actual damages in order to be entitled to fee forfeiture.[185]

Although *Arce* was not a class action, it did allow multiple plaintiffs who felt that they had been wronged (by their attorneys not seeking their informed consent to an aggregated settlement) to sue for

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similar question to be posed: Where were the judges?

[179] In a third case, *Zimmer Paper Products, Inc. v. Berger & Montague P.C.*, 758 F.2d 86 (3d Cir. 1985), the court inferred that class members may sue class counsel for breach of fiduciary obligation.

[180] 958 S.W.2d. 239 (Tex. App. 1997). For a discussion of *Arce*, see Errin Martin, Comment, *The Line Has Been Drawn On The Attorney-Client Relationship: The Implications of* Burrow v. Arce *on Texas Practitioners*, 32 TEX. TECH L. REV. 391 (2001).

[181] *See Arce*, 958 S.W.2d. at 243.

[182] This was a violation of the Texas Disciplinary Rules of Professional Conduct 1.08(f). *Id.* at 245 n.4.

[183] *Id.* at 246.

[184] *Id.*

[185] *See id.* at 248. The court held that the amount of the forfeiture should be determined on a case-by-case basis because the attorney may have provided valuable services to the client prior to the breach, for which the attorney should be compensated. *Id.* at 250. The court looked to the Restatement (Third) of the Law Governing Lawyers for factors that would be considered in making the determination of the amount of fee forfeiture. Those factors include: "(1) the extent of the attorneys' misconduct; (2) the willfulness of the attorney's misconduct; (3) any threatened or actual harm to the client; and (4) the adequacy of other available remedies." *Arce*, 958 S.W.2d at 250 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. D (Proposed Final No. 1 1996)).

breach of fiduciary duty even though they had agreed to a settlement.

The Ninth Circuit similarly allowed a cause of action for malpractice by former clients against their attorneys who had settled a shareholder derivative action by court order in the case of *Durkin v. Shea & Gould*.[186] In that case, the plaintiffs argued that their former attorneys had breached their fiduciary duty with regard to the manner in which the settlement of the shareholder derivative suit was structured and had committed malpractice. To prove malpractice, plaintiffs had to prove common law negligence: duty, breach, causation and damage. The defendants asserted that issue preclusion prevented the litigation of malpractice because there had already been a full and fair litigation on the issue, as well as a final judgment on the merits.[187] The court held that plaintiffs had not had a full and fair opportunity to litigate the alleged malpractice because the malpractice action did not accrue until after the settlement became final.[188] The court, therefore, held that the plaintiffs' attorneys should not be immunized from a subsequent malpractice action simply because a court had approved a settlement or entered a judgment. "To hold otherwise would be to rule that where an attorney's negligence has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of all accountability and responsibility for his negligence."[189]

The *Arce* and *Durkin* cases notwithstanding, the mass tort system has stripped the ability of the two core lawyer regulatory systems (disciplinary board enforcement of ethics codes and civil actions for breach of the standards of care and of conduct) to monitor attorneys. Courts have essentially joined together with plaintiff lawyers to overthrow fundamental client protections that have evolved over the past 600 years. Denying clients who have literally had their pockets picked by their lawyers the right, for example, to seek redress by invoking the same tort system that their ostensible lawyers are invoking to generate multi-million dollar fees for themselves may be seen to be a reflection of the immense power that aggregative attorneys have come to wield in our society.[190]

This power is, at base, a consequence of the enormous amounts of

[186] 92 F.3d 1510 (9th Cir. 1996), *cert denied*, 520 U.S. 1197 (1997). Whether *Durkin* is still good law in the Ninth Circuit is an open question in view of *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999).

[187] *Durkin*, 92 F.3d. at 1515.

[188] *See id.* at 1517.

[189] *Id.* at 1518 (quoting Ruffalo v. Patterson, 285 Cal. Rptr. 647, 648 (1991)).

[190] *See supra* note 13.

fee income that aggregative litigation is generating. Stated simply, courts are awarding fees in many of these cases, which routinely and vastly overcompensate lawyers. Judges justify the fees awarded by noting that attorneys must be provided with sufficient compensation to yield the necessary incentives to undertake the litigation to effectuate client rights in an era when legislatures are stymied by special interests and administrative agencies are shackled by budgetary constraints. Even if that proposition were accepted at face value, however, it cannot justify the enormous fees—the tens and hundreds of million of dollars—being awarded.

One of the more pernicious fee setting devices that courts have permitted is the basing of the class action fee as a percentage of an artificial settlement value when the reality is that the actual payments to the class will be a fraction of the announced settlement value. Thus, in the reversionary settlement (as opposed to the pro-rata), where any funds unclaimed by the class revert to the defendant, the lawyers' fee can easily amount to 200% or more of the amount actually paid to class members.[191]

As a reaction against some of the excesses of the class action

[191] *See* Motion For Leave To File Amici Curiae and Brief Amici Curiae in Support of Petition, Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223 (2000) (in support of petition for certiorari, June 5, 2000). This was likely the case in *Waters* where there was a forty million dollar reversionary fund settlement which provided that any amount of the fund not claimed by class members and not paid out as attorney's fees and expenses was to return to defendants. This agreement resulted in awarding class counsel, $13,333,333 (one-third of the reversionary fund), whereas the distribution to the class plaintiffs only amounted to $6,485,362.15. In other words, the fee award allowed by the District Court was more than twice the amount of the class' recovery. *Int'l Precious Metals*, 530 U.S. 1223 (2000). Although the Court dismissed the petition for certiorari seeking to challenge the fee award, Justice Sandra Day O'Connor filed a concurrence explaining her reason for denying the petition for a writ of certiorari. Justice O'Connor agreed that as a result of utilizing the reversionary settlement method, the award of attorney's fees were "extraordinary." *Id.* at 1223. She also recognized that these settlements "potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class [and] . . . encourage the filing of needless lawsuits." *Id.* However, Justice O'Connor asserted that rehearing of this case did not provide a fitting opportunity to redress this injustice because of the existence of a "clear sailing" agreement, which provided that the petitioners would not, "directly or indirectly oppose [respondents'] application for fees." *Id.* Indeed, "as a result of . . . [these 'clear sailing' agreements], courts often lack the information necessary to protect the interests of the class against the conflicts inherent in the settlement process." Brief of Amici Curiae, *id.* at 9-10, *Waters*. Justice O'Connor's shot-across-the bow, however, lands far short of doing damage to abusive reversionary settlements. So long as class counsel insist on "clear sailing" provisions, there may never be an opportunity, per Justice O'Connor's condition, for the court to eliminate this clear abuse.

system, some courts which had shifted fee setting from the lodestar to the percentage method have began to refocus on the lodestar. However, use of the lodestar instead of the percentage method for fee setting does not eliminate overcompensation. Indeed, the unspoken truth about the lodestar is that it is often laden with uncountable numbers of hours, which are counted even though they lack accountability.[192] If law firms were audited to determine how many hours each lawyer in the firm was claiming in *all* of the class action cases they were participating in, I have no doubt that for some and probably for many, their fees would be out of this world—literally. Instead of a day being merely 24 hours long as it is on Earth, for many of these lawyers, the number of hours in a day would more closely correspond with that of some of the outer planets, Saturn for example.[193]

II. CONCLUSION

A principal consequence of overcompensation is the proliferation of much aggregative litigation, and, in particular, class action activity,

[192] *See* Note, *Developments in the Law—The Path of Civil Litigation*, 113 HARV. L. REV. 1827 (2000) (stating "class counsel may inflate their hours, overstate the risks of litigation or otherwise exaggerate the compensation they deserve"). Because a fee dispute arose between the Chicago lawyers and the Alabama lawyers who were the plaintiff lawyers in *Kamilewicz*, that case provides a modest insight into hourly record keeping procedures in class actions. The lawyers had agreed to split their fees 60-40. The Chicago lawyers believed they had been short-changed and sought an accounting from the Alabama lawyers who had actually collected the fee. The latter refused but did send a copy of IRS Form 1099 provided by BancBoston showing a total fee payment of $7.18 million. When the Chicago lawyers went to BancBoston, they learned that the bank had actually paid $8,556,201. Litigation thereafter ensued with regard to the fee split. During the fee fight, both sides testified to the amount of time they had worked on the case. The Alabama lawyers filed a brief citing testimony by one of the Chicago lawyers that he had worked 130 hours on the case and the other Chicago lawyer, less than that. The Alabama firm stated that it worked about 2000 hours on the case and the Chicago lawyers worked, at most, 335 hours. Together these figures totaled 2,335 hours. *See* Curran, *You Win, You Pay*, *supra* note 161. At the hearing several years earlier to determine the fairness of the settlement and approve the fee, the lead Alabama lawyer testified that he and two other members of his firm performed about 60% of the work on the case—between 5,500 and 7,500 hours. He further testified that the Chicago lawyers did the other 40% and that their total hours on the case came to around 10,000—more than four times the number of hours claimed in the testimony presented in the later fee dispute law suit. *Id.*

[193] A Saturn day, for example, is 244.8 Earth hours. *See* CALIF. INST. OF TECH., WELCOME TO THE PLANETS, *available at* http://pds.jpl.nasa.gov/planets/special/saturn.htm (last visited Dec. 1, 2001).

without any redeeming social value. It is simply fee driven.[194] The process may be seen as perverse in that the aggregative strategies that courts have devised to deal with the effects of mass tort claims on courts' dockets facilitate the bringing of more mass tort claims, requiring, in turn, additional aggregative responses.

Perhaps the most important article on the subject of aggregative litigation not yet written—at least in part because of the difficulty involved—is one about the aggregate social effect of aggregative litigation—for example, an analysis of the costs of aggregative litigation including class actions and who pays for them as well as of the benefits, and who receives them. The huge increase we have witnessed in aggregative litigation in the past decades as well as the enormous wealth transfers that have resulted are typically justified by the deterrence effect of such litigation on malevolent corporate behavior. This conclusion, however, is as least as much an article of faith as a matter of empirical reality. Just as it has become increasing clear that, on the whole, punitive damages have little deterrence effect[195] and indeed appear to inhibit improvements in product safety, so too, empirical and analytic attention to aggregative litigation may reveal a similar dysfunctionality.

[194] To be sure, most all class action litigation is fee driven. My focus is on class action litigation where the assertion of wrongful conduct is pretextual or the alleged injury nonexistent and the use of the class action vehicle is simply a means of extracting a wealth transfer in order to generate fees.

[195] *See generally* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations on Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998); W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001). For an argument that personal injury law does not have much deterrence effect, see Stephen D. Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 558, 559-90 (1985); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. REV. 2403, 2431-31 (2000).

APPENDIX

AN HISTORICAL ANALYSIS OF THE 1966 AMENDMENT TO RULE 23 OF THE CIVIL RULES OF FEDERAL PROCEDURE[1]

As class actions have proliferated and the amounts of wealth transferred under the aegis of amended Federal Rule of Civil Procedure 23 have grown exponentially, it is instructive to consider the effect of the 1966 amendments to Rule 23, and whether those effects were intended consequences of the amendments, and, if not, whether changes to Rule 23 are appropriate. The logical beginning point is an examination of the purposes of the 1966 amendments and some of the actual effects of those changes.

The former Rule 23 provided for three categories of class actions defined in terms of "jural relations:" the "true" class action, in which the rights were "joint, or common, or secondary;" the "hybrid" class action, in which rights were "several" and affecting "specific property;" and the "spurious" class action, in which rights to be enforced were "several" with "common questions of law or fact" and "common relief."[2] Judgments in the "true" and "hybrid" class actions extended to the class, while the judgment in a "spurious" class action extended only to the parties that intervened.[3] The Advisory Committee's objectives in amending Rule 23 were:

> (1) to redefine the cases that could proceed under rule 23, by adopting more functional definitions of class actions, (2) to clarify the effect of a class action judgment on members of the class, (3) to codify some of the better class action practices that federal judges had developed, (4) to provide district court judges more guidance regarding their procedural powers and responsibilities, and (5) to deal explicitly with the notice that should be provided to absent class members.[4]

[1] My research assistant, Allan Blutstein, has provided invaluable assistance in the preparation of this Appendix.

[2] Norman C. Sabbey, Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. INDUS. & COM. L. REV. 539 (1969).

[3] *Id.*

[4] Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669 (1979); *see also* Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 98-107 (1966); DAVID LOUISELL & GEOFFREY C. HAZARD, JR., PLEADING AND PROCEDURE 833 (2d ed. 1968):

> The 1966 revision undertook three tasks: First, it sought to eliminate the confusing classification system of original Rule 23. Second, it sought to make absolutely clear the availability of a class suit in cases where joinder of a large number of people was indicated under the necessary principles of Rule 19. Third, it provided encouragement and machinery for new uses of the class suit.

Id. (citations omitted).

In drafting current Rule 23(b)(3), the Advisory Committee changed the "opt-in" procedure of "spurious" class actions to an "opt-out" procedure whereby absentee class members became bound by the judgment unless they "opted out" before trial.[5] This "opt-out" mechanism is described in Rule 23(c)(2). Under Rule 23(c)(2), members of a (b)(3) type class action receive "the best notice practicable under the circumstances," advising each member that the court "will exclude the member from the class if the member so requests."[6] Under Rule 23(c)(3), members of a (b)(3) class action who do not opt out are bound by the judgment "whether or not favorable to the class."[7] The intent of the Committee in making this revision is not clear. Most of the Committee's work product, notes, and correspondences have not been published and are accessible only by visiting the federal archives in Maryland, where the material is stored in boxes.[8] Therefore, "[t]he paucity of source material and research makes any inference about Committee intent somewhat hazardous and necessarily tentative."[9] The Advisory Committee's Notes in subdivision (c)(3) suggest that one possible reason for the change was to eliminate the "so-called 'one-way' intervention in 'spurious' [class] actions."[10]

Intervention by class members in the former spurious class actions was optional. If the class member did not intervene before trial of the liability issue, his claim was not precluded by the plaintiff's loss. Some courts, however, would allow the class member to intervene after the trial on

[5] *See* FED. R. CIV. P. 23(b)(3), (c)(2), (c)(3).

[6] FED. R. CIV. P. 23(c)(2)(A).

[7] FED. R. CIV. P. 23(c)(3).

[8] Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 9 n.17. Resnik suggests that the material in the federal archives "may well be incomplete" since she was unable to locate all off the references contained in the files. *Id.*

[9] Robert Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 292 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)).

[10] *See* FED. R. CIV. P. 23(c)(3), advisory committee's notes, 39 F.R.D. 69, 105 (1966).

the liability issue if the plaintiff won, and to take advantage of the victory—so-called "one-way intervention."[11] The rationale of one-way intervention was to assist small claimants who could not obtain relief because they could not afford to intervene.[12]

As to the propriety of the one-way intervention, the Advisory Committee did not state explicitly in its Notes that it thought this type of intervention was unfair; it merely cited to cases representing conflicting views, and commented that the proposed rule excluded one-way intervention.[13] Benjamin Kaplan, who was the Reporter to the Advisory Committee on the Civil Rules at the time Rule 23 was amended in 1966, was "similarly cryptic" in discussing the Committee's reasoning for rejecting one-way intervention,[14] stating only that critics found the procedure "distasteful," "as lacking 'mutuality,'" and a "perverse anomaly" in that the class action "did not run fully for or against the class."[15] Nevertheless, the very fact that subdivision (c)(2) eliminates one-way intervention, combined with the Committee's lengthy discussion of the issue, indicate a high likelihood that the Committee drafted subdivision (c)(3) with the specific intention of eliminating one-way intervention.[16] There is no discussion, however, of whether the Committee sought to or realized that it could eliminate one-way intervention without making the profound changes that it did make in Rule 23.[17]

[11] The leading case allowing one-way intervention was *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961). For further cases dealing with one-way intervention, see FED. R. CIV. P. 23(c)(3) advisory committee's notes, 39 F.R.D. 69, 105 (1966). It should be noted that only a minority of courts permitted one-way intervention in the 1960s. *See* John E. Kennedy, *Class Actions: The Right To Opt Out*, 25 ARIZ. L. REV. 3, 16 n.78 (1983).

[12] *See* Sabbey, *supra* app. note 2, at 546.

[13] *See* FED. R. CIV. P. 23(c)(3), advisory committee's notes, 39 F.R.D. 69, 105 (1966); *see also Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1395 (1976) (stating "the reasons the rulemakers opposed the one-way intervention are not clear").

[14] *Developments in the Law—Class Actions*, *supra* app. note 13, at 1395.

[15] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 385-86 (1967).

[16] *See* Kennedy, *supra* app. note 11, at 16-17 (stating that "the Rule reformers, paying heed to criticism of *Union Carbide* and 'one-way intervention,'" came up with a "brilliant new solution" to the debate over the binding effect of judgments on class members); *Developments in the Law—Class Actions*, *supra* app. note 13, at 1394 ("One of the central purposes of the draftsmen was the elimination of one-way intervention.").

[17] *See* Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1163-64 n.158 (1965) ("If the advisory committee was most worried about the possibilities of 'one-way intervention' it could have proposed a rule prohibiting such in express terms, rather than including a section specifically stating the effect of the

An additional reason for the change from "opt-in" to "opt-out" may have been to assist small claimants who, in the view of the drafters, would not act in their best interests by opting in prior to trial.[18] Accordingly, the drafters changed the consequences of non-action by small claimants by providing that non-action would automatically include them in the class action. Consider in this context the remarks of Benjamin Kaplan:

> If, now, we consider the class, rather than the party opposed, we see that requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves as something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class.[19]

judgment.").

[18] *See, e.g.*, Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501, 507 (1969) ("[T]he 'smaller guy' normally is not involved with lawyers and legal proceedings. Not many of such persons would take affirmative action to intervene in a spurious action under the former Rule." The article also asserts that subsection (c)(2) "is probably the most dramatic indication that the chief purpose of the amended Rule is to aid the small claimant.").

[19] Kaplan, *supra* app. note 15, at 397-98. Kaplan specifically noted, however, that his views are "entirely personal and have no other status." *Id.* at 356 n.*. Judge Frankel described a phone call he made to Kaplan to ask about the background to Rule 23(c)(2):

> Departing from sound practice, I made an *ex parte* call to Prof. Ben Kaplan of Harvard, who, as you know, was the Reporter of the new Rules, and who in a sense may be the missing Hamlet of this performance to show cause why he did what he did about this notice thing. Ben came graciously off the beach at Martha's Vineyard to take my call, and I should say that I have some doubts about whether a man who is caught in his shorts that way, without his notes, should be held firmly to everything he says. Nevertheless, with this private reservation, I did put him the question about this sub-section. He blushed and stammered a little bit—which is his way, as all of you who know him know—and then recalled that his committee had indeed thought at some length about how this notice should work. The reasoning, as he told it to me, relates to the fundamental conception that I have already touched of classes comprised

It is important to note, however, that the Advisory Committee's Notes to Rule 23(c)(2) and (c)(3) discussed only the elimination of one-way intervention as a possible basis for the opt-out mechanism, and did not mention as a rationale that small claimants were not opting in insufficient numbers to satisfy the drafters' political beliefs regarding the use of litigation to police corporate behavior. Additionally, the Committee did not indicate whether it had contemplated that class actions ought to be brought when all the class members had claims for just a few dollars and where there were thousands or hundreds of thousands of class members, and therefore the "opt-out" mechanism should be instituted to facilitate such actions.[20] Some commentators answered this question in the negative, including one plaintiff antitrust lawyer who stated:

> [I]t is sheer nonsense to say that the purpose of Rule 23 is or should be to secure redress to individuals whose damage is, on an individualized basis, minuscule. I do not believe that the efficient administration of justice is served by clogging the Courts with class action claims for the purpose of insuring that the so-called "Two-Dollar Bettor" gets his money back from a price-fixing conspiracy or a 10(b)(5) violation. That may well be the effect of the Rule's utilization, but I do not see myself on a white horse dressed in armor, lance extended doing battle with the dragons to recover $6.59 for Mrs. Housewife.[21]

> of little people, who normally don't have much dealing with lawyers or with legal formalities. He got to speaking quite professorially—and I wrote down what he said—of the class action's "historic mission of taking care of the smaller guy." As he and the committee saw it, the likelihood is that this guy will routinely ignore, or at least fail to respond to, the notices contemplated under (c)(2). On that premise, the vote went the way we see, to the effect that a non-response means inclusion rather than exclusion.

Marvin Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

[20] Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 847 (1974) (describing the Committee's intent as "shrouded in mystery").

[21] Maxwell M. Bleicher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 369 (1972); *see also* Landers, *supra* note app. 20, at 848 (concluding from the lack of Congressional support in 1970 for legislation authorizing some consumer class actions that "[i]f rule 23 may be interpreted to permit consumer class actions by those whose claims are small and whose numbers are great, this development is nothing short of

The changes in subdivisions (b)(3) and (c)(2) were not expected to have a profound effect on the litigation landscape. Arthur Miller contends that "in the main, the rulemakers apparently believed that they simply were making Rule 23 a more effective procedural tool" and that the "class action onslaught caught everyone, including the draftsmen by surprise."[22] Only some predicted the consequential expansion in class action litigation.[23] The Advisory Committee, however, recognized that the change from "opt-in" to "opt-out" was somewhat innovative. Thus, the Committee added the following special note in its 1964 proposed amendments: "The Advisory Committee recognizes that the proposal embodied in subdivision . . . (c)(2) is novel. Accordingly, the Committee will particularly welcome comments on this proposal."[24] The significance of the proposal did not escape the attention of the legal community,[25] which for the most part reacted favorably at the time.[26]

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startling.") Landers further concludes that "[h]ad the full implications of rule 23 had been realized in 1966, its passage in statutory form must be regarded as doubtful." *Id.*

[22] Miller, *supra* app. note 4, at 670. Miller argued, however, that "most, if not the vast majority, of the class actions instituted since 1966 would have entered the federal courts had rule 23 not been altered." *Id.* at 676. *See also* Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 770 (commenting on the "accidental growth of the class-action lawsuit, through a seemingly minor amendment to Rule 23 of the Federal Rules of Civil Procedure . . ."). *Cf.* John Burritt McArthur, *The Class Action Tool in Oilfield Litigation*, 45 U. KAN. L. REV. 113, 185 n.433 (1996) (The opt-out provision "guaranteed the large increase in class litigation" and that it is "unthinkable . . . that the Advisory Committee could have adopted that section [b(3)] without expecting a major expansion of litigation.").

[23] *See, e.g.*, Thomas J. Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. INDUS. & COM. L REV. 515 (1969).

[24] Amendments to the Rules of Civil Procedure for the U. S. District Courts Proposed by the Advisory Committee on Civil Rules, 34 F.R.D. 371, 395 (1964) (Special Note of Advisory Committee). *See also* Kaplan, *supra* app. note 15, at 391 (describing the "opt out" provision in (b)(3) and (c)(2) as "novel").

[25] *See, e.g.*, Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 642 (1965) ("The most significant change made by the proposed new rule is its provision that the judgment in a class action based only on a common question of law or fact can operate conclusively on all members of the class.").

[26] *See, e.g.*, Comment, *Federal Rules of Civil Procedure: Attacking the Party Problem*, 38 S. CAL. L. REV. 80, 96 (1965) (describing the binding effect of the (b)(3) class action as "[p]erhaps the most beneficial and far reaching change introduced by the proposed Rule 23"). It should be noted that the author of the above article was commenting upon the 1964 Preliminary Draft in which the right to opt out was not unqualified. The Preliminary Draft stated that "[t]he court shall exclude those members who, by a date to be specified, request

Charles Joiner, a member of the Committee, spoke approvingly of Rule 23, especially of subdivisions (b)(3) and (c)(2), stating that "persons are protected to a much greater degree than under the present rule."[27] Benjamin Kaplan, as previously discussed, appeared to contend that the new opt-out procedure was justified by the favorable effect it had on small claimants.[28]

Additionally, Kaplan argued that "as a practical matter the new rule is not a violent change injurious to the defendant," since under the previous regime the courts had often avoided the liability-limiting "opt-in" mechanism by allowing one-way interventions or classifying actions as "true."[29]

In discussing the new opt-out rule, Judge Marvin Frankel remarked:

> To a generation raised on *Pennoyer v. Neff* [citation omitted], it is a rather heady and disturbing idea to be told that people in faraway places who receive a letter or are 'described' in a newspaper 'notice' which does not come to their attention are exposed to a binding judgment unless they take some affirmative action to exclude themselves . . . .
>
> That reaction is entirely understandable, but I suggest, with all deference, that our initial fears will prove in the end to be largely unfounded.[30]

exclusion, unless the court finds that their exclusion is essential to the fair and efficient adjudication of the controversy and states its reason therefor [sic]." Amendments to the Rules of Civil Procedure for the United States District Courts Proposed by the Advisory Committee on Civil Rules, 34 F.R.D. 371, 386 (1964) (Proposed Rule 23(c)(2)). For an argument that the Preliminary Draft of Rule 23(c)(2) was preferable to the Rule as adopted in 1966, see Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment*, 52 MINN. L. REV. 483, 525-26 (1967).

For an opposing pre-enactment view of the opt-out scheme and the binding effect of judgments in the proposed (b)(3) type class actions, see, e.g., Comm. on Fed. Rules of Civil Procedure, Judicial Conference—Ninth Circuit, Supplemental Report, 37 F.R.D. 71, 82-83 (1965).

[27] Charles Joiner, *The New Civil Rules, A Substantial Improvement*, 40 F.R.D. 359, 366-67 (1966).

[28] *See supra* app. note 19 and accompanying text. *See also* Ford, *supra* app. note 18 (expressing the view that the underlying purpose of class actions is to redress small injuries to a large number of persons).

[29] Kaplan, *supra* app. note 15, at 397.

[30] Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45 (1967). Frankel believed that if the "non-exhaustive list" of criteria of subdivision (b)(3) were met, then "the preliminary shock of 'binding' absent people will subside or disappear." *Id.* at 45-46. Additionally, he argued that it was "not really unprecedented" to

The main objection to the new opt-out mechanism was that the (b)(3) type action provided a device for bringing before the court "great numbers of passive litigants who would otherwise have remained silent."[31] The inclusion of these claimants in the judgment, so it was argued, would produce a direct conflict with the professed purpose of subdivision (b)(3), economy of time, expense, and effort.[32] Indeed that has been the case.[33] The opt-out change to Rule 23 has resulted in a vast expansion of the number of class actions brought.[34] The expansion is in large measure a function of the power that

bind absentee members, pointing to the former "true" class action, in rem proceedings, and stare decisis, which binds "countless people in lawsuits in which they did not participate." *Id.* at 46. Frankel also remarked that the opt-out rule was limited, in that absent parties had a right to attack the judgment which purported to bind them, for example, on the ground of inadequacy of representation. *Id.* Moreover, the rule was limited by the fact that the judgment was only conclusive on the issues actually litigated. *Id.* at 47.

[31] *See* Weithers, *supra* app. note 23, at 525; *See also* William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377-78 (1972):

> Failure to opt out cannot be interpreted as interest in the class action. This is shown by the fact that in settled cases, where members of the class get an automatic recovery by responding, most of those who do not opt out do not bother to file claims. The result therefore is not the consolidation of many viable claims in a single simplified lawsuit, but rather the generation of claims for people who have no interest in pursuing them.

Id.

Several objections were made concerning the validity of the enactment of Rule 23. One commentator argued that, by expressly stating the effect of a judgment in a class suit, the Rule violated the Federal Rules Enabling Act, which provides that the Supreme Court may prescribe rules of procedure for federal district courts but "shall not abridge, enlarge or modify any substantive right." *See* Note, *supra* app. note 17, at 1164-65 (citing 28 U.S.C. § 2072 (1958)). Another objection was that the Rule had the effect of extending jurisdiction in contradiction to FED. R. CIV. P. 82, which provides that the rules "shall not be construed to extend the jurisdiction of the United States district courts." *See* Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1219-22 (1966). For a response to the latter objection, see Kaplan, *supra* app. note 15, at 397.

[32] Weithers, *supra* app. note 23, at 518. *See also* Simon *supra* app. note 31, at 377 (arguing that courts which view the Rule as providing a remedy to small claimants "frustrate the original goals of the intended reform" because "[i]nstead of improving efficiency, the amendment has fostered a flood of class litigations").

[33] In fact, by 1972 a prominent group of trial lawyers had concluded that Rule 23 had "failed to achieve its purposes," and proposed six revisions of Rule 23, which included a return to the former opt-in mechanism. *See* AM. COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 2, 6 (1972).

[34] Evidence suggests that expansion of class action filings occurred shortly after the promulgation of the 1966 amendments. Thus, a statistical study of civil dockets of federal

certification of a class gives to lawyers for the class to effectively coerce a settlement. Indeed, there was some sense at the time of the 1966 amendments that this would be the case. Although several undesirable results of the approval of (b)(3) class actions were envisioned, in retrospect perhaps the most accurate concern raised[35] was that the aggregate amount of claims in class actions would be of such magnitude that defendants would be forced to settle the claims, regardless of the merits of the claims.[36]

Other concerns raised about the (b)(3) class action included the unlawful solicitation of clients by plaintiffs' attorneys and the crushing economic and administrative burdens imposed upon the courts.[37] Another concern typically raised involved the mechanical problems of the notice requirement in subdivision (c)(2).[38] For example, neither the Rule nor the Committee's Notes clearly address the issues of who was required to prepare and pay for the notice. If a plaintiff's attorney prepared and sent notice, the ethical prohibition against client solicitation was a concern.[39] Additionally, if the plaintiff was to bear the cost of notice, "a requirement for certified mailing to each member of a very large class may have a chilling, if not prohibitive, effect on his prosecution of the class suit."[40]

The drafters did not think that the opt-in/opt-out revision would have an effect on mass torts. Indeed, they believed that the class action should not apply to mass torts.[41] Thus, the Advisory Committee's Note accompanying

courts in the Southern District of New York indicated that nearly four times as many class actions were commenced in 1971 as were started in 1967, the first full year under the rule. *Id.* at 13. *See also* DEBORAH HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000); 1 CLASS ACTION WATCH, Federalist Society's Litigation Practice Group Class Action Subcommittee at A1 (a survey of class actions pending in Texas state courts).

[35] *See, e.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971) (likening the coercive effect to "legalized blackmail").

[36] Weithers, *supra* app. note 23, at 522. An unsigned memo provided to the Advisory Committee in 1974 criticized amended Rule 23 because (b)(3) class actions "force defendants into settlements regardless of the merits of the claims because the cost of defense or the size of potential recovery is intimidating." *See* Resnik, *supra* app. note 8, at 16 n.45. For a discussion of the coercive effects of the certification of class actions, see Section I.A of main article.

[37] Weithers, *supra* app. note 23, at 521-23.

[38] *See, e.g.*, Rodman Ward, Jr. & Wayne N. Elliot, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. INDUS. & COM. L. REV. 557 (1969).

[39] *Id.* at 561-64.

[40] *Id.* at 564-67.

[41] Kaplan, *supra* app. note 15, at 393; *see also* Resnik, *supra* app. note 8, at 11 (The drafters

Rule 23 (b)(3) stated:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[42]

Some commentators and judges questioned the Advisory Committee's note on mass torts within a few years of the 1966 amendments to Rule 23.[43] In 1972, a committee of the American College of Trial Lawyers recommended a return to the opt-in procedure for (b)(3) classes, stating:

> In the Committee's view, the current method for inclusion and exclusion of class members, "patterned after the highly successful procedures of the Book-of-the-Month Club" has created more serious problems than it purported to resolve. Contrary to the early predictions of the draftsmen that the "opt-out" provision was not a "violent change injurious to the defendant," this section of the amended rule has resulted in the creation of the vast, silent and indefinite classes which are only infrequently recognized as unmanageable and more commonly utilized to compel settlement by defendants as a

of Rule 23 "did not see the class action as responsive to the problems of mass torts."); William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1253 (1996) ("One purpose the drafters did not have, however, was to create a device for the aggregation of multiparty litigation. That type of litigation still lay largely in the future.").

[42] FED. R. CIV. P. 23, advisory committee's note, 39 F.R.D. 69, 98-107 (1966). At least one member of the Committee believed that mass torts should be absolutely excluded from certification as a class action. *See* Resnik, *supra* app. note 8, at 10 (describing a letter from John Frank to Benjamin Kaplan in which he writes, "I am, I believe, unpersuadably opposed to the use of class actions in the mass tort situation").

In considering whether to certify mass torts as class actions some courts have noted that the advisory committee's note does not mention or refer to mass torts, only "mass accidents." *See* Patricia Rimland, *National Asbestos Litigation: Procedural Problems Must Be Solved*, 69 WASH. U. L.Q. 899, 903 n.35 (1991).

[43] *See* Resnik, *supra* app. note 8, at 17 n.53.

form of "ransom to be paid for total peace."[44]

Nonetheless, by the late 1970s, some federal district judges began making a de facto revision to Rule 23(b)(3) by certifying mass torts as class actions.[45] By the early 1980s, one member of the Advisory Committee, Charles Alan Wright, had become "profoundly convinced" that the Committee's position on mass torts had been mistaken.[46] It is clear that a "profound" change has occurred in the use of class actions in mass torts since the 1966 amendments to Rule 23.[47] While historically the certification of class actions in the case of mass torts was disfavored, increasingly courts have approved such certification. *But for* the amendments, moreover, more specifically the adoption of the opt-out mechanism in subdivision (b)(3), the considerable increase in the certification of mass torts could not have occurred as it did.[48] Yet the Advisory Committee, as noted above,

[44] AM. COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 APPROVED BY THE BOARD OF REGENTS 32 (1972) (citations omitted).

[45] *Id.* at 17-19. *See* Bruce H. Neilson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988) (describing several techniques developed by federal district court judges to allow class actions in mass tort cases). Interestingly, Justice Hugo Black dissented from the adoption of the 1966 amendments because, *inter alia*, he thought that judges were given too much discretion in class suits. 39 F.R.D. 272, 274 (1967) (Mr. Justice Black's Statement). Of course, many judges declined to certify mass torts as class actions in accordance with the constraints suggested by the advisory committee's note. For a summary of some of these decisions, see Richard A. Chesley & Kathleen Woods Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 485-90 (1985).

[46] Wright stated:

> I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that this is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong that we see in this case and so many others.

In re A.H. Robbins Co., 880 F.2d. 709, 731 (7th Cir. 1989) (quoting Statement of Charles Alan Wright, *In Re* School Asbestos Litigation, Master File No. 83-0286 (E.D. Pa. July 30, 1984)).

[47] *See* Resnik, *supra* app. note 8, at 21.

[48] While Arthur Miller has argued that Rule 23 cannot be blamed for the explosion of class action litigation in the fields of civil rights, antitrust, consumers' rights, and environmental protection, it is interesting to note that he did not explicitly address mass tort litigation. *See*

discouraged the use of Rule 23(b)(3) for mass torts; it is thus highly likely that the resultant substantial growth of class action litigation in mass torts was simply an unintended, unforeseen consequence of the change to the opt-out mechanism.[49] So too, though perhaps to a lesser extent, is the explosive growth of class actions in the consumer fraud area.

With the recognition that the 1966 amendments to Rule 23 have precipitated unforeseen and unintended changes, renewed efforts to again amend Rule 23 have gained momentum.[50] One of the principal objectives of the proponents of change is to return to a modified form of the opt-in procedure. In this regard, a Judicial Conference committee chair offered the following:

> I believe that Rule 23 was never intended to be a tool to enhance enforcement of substantive claims. Rather, I believe, it was designed as a procedural device to facilitate the aggregation of claims for judicial efficiency. Others, however, believe that while judicial efficiency may have been the original intent of Rule 23, the rule has transformed by use into a mechanism to enhance substantive enforcement with the result that it actually supplements or even displaces government regulation. While there is plenty of evidence to support this observation, if it were to be legitimized as a purpose for Rule 23, such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude that it is too anarchical to authorize private attorneys

text accompanying *supra* app. note 22. Regarding the new opt-out mechanism, Miller stated:

> It is true of course that the shift from an opt-in to an opt-out procedure has heightened the attractiveness of seeking damages under the federal antitrust and securities laws. The effect is to facilitate the aggregation of relatively small claims that are not individually economically viable into a group claim that is sufficiently credible to be taken seriously. It is difficult to believe, however, that an alternative procedure for achieving the same result would not have been developed by plaintiffs had they been left with the pre-1966 text.

Miller, *supra* app. note 4, at 674.

[49] For an argument that the change to opt-out is unconstitutional in at least some applications, see Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263 (1996).

[50] *See generally* Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923 (1998); Leslie W. O'Leary, *Mass Tort Class Actions: Will* Amchem *Spawn Creative Solutions?*, 65 DEF. COUNS. J. 469 (1998); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address The Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996).

to self-appoint themselves as enforcers of laws without adequate accountability to the lawmakers or to the public.[51]

Another set of efforts is directed against abusive practices of plaintiff lawyers bringing class actions in state courts and using subterfuges to prevent removal of the action to federal court.[52]

Whether any of these efforts will succeed in the face of opposition from both the class action bar—amply fueled by the enormous fees generated by such litigation—and consumer groups with which the plaintiffs' bar is typically allied, remains to be seen.

[51] *Statement on Class Actions Before the Courts and Intellectual Property Subcomm. of the H. Comm. on the Judiciary, Mar. 5, 1998*, 105th Cong. (statement of John P. Frank) (quoting Judge Paul Niemeyer, before the Senate Judiciary Comm., Dec. 16, 1997), *available at* http://www.house.gov/judiciary/41158.htm (last visited Dec. 1, 2001). Mr. Frank, a member of the Civil Rules Committee at the time of the 1966 Amendment, sets forth several recommendations in his testimony to deal with the excesses that the amendments have spawned. *Id.*

[52] *See* John H. Beisner, "Congressional Reform Efforts," reference materials for use in a presentation at "Understanding Class Actions," a conference of the Manhattan Institute's Center for Judicial Studies, Washington, D.C., May 20, 1998, (on file with author) for a compendium of materials on H.R. 3789, 105th Cong. (1998). The bill would allow removal of class actions filed in state courts to federal courts in some instances not now permitted to combat such abusive practices of plaintiffs' class action counsel as: adding a defendant to a state court class action proceeding to destroy "complete diversity" and then, after the one year period for removal to federal court, 28 U.S.C. § 1446(b) (2002), has expired, dropping that defendant; limiting the relief demanded in a state court class action to avoid removal to federal court because of the class amount, *see* Zahn v. Int'l Paper, 414 U.S. 291 (1973) (in a putative class action, the jurisdictional amount requirement—now $75,000—applies to the claims of each and every class member, and then after the one year period for removal has expired, amending the complaint to seek relief in excess of the diversity jurisdictional amount threshold; and filing putative class actions in state court in states that have no deadline for providing service and then not serving the defendant until the one year deadline has expired).

24

C

Federal Rules Decisions
October, 1991

*35 THE USE OF COURT EXPERTS IN ASBESTOS LITIGATION [FNa]

Carl B. Rubin [FNaa]
Laura Ringenbach [FNaaa]

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I.

INTRODUCTION

Of growing concern to the progress of litigation has been the proliferation of expert witnesses. Hardly a case is tried that does not have its share of experts on almost any subject imaginable. [FN1] It has been said that the greatest untapped source of wealth in the United States is the money available to anyone who qualifies as an expert. Aside from the added expense that experts cause, their use creates an advantage to the litigant who is well financed and an equivalent disadvantage to the one who is not.

Inevitably, the increased use of experts has created the "Expert-Advocate," who no longer is sought simply because of his technical knowledge, but rather for his courtroom presence and his ability to present a convincing position.

Anyone familiar with current litigation is also familiar with the "Battle of the Experts." Where each side has adequate financial resources, the jury will be treated to a procession of persons with impeccable credentials and persuasive testimony. The real problem confronting a jury is that these experts, all armed with such qualifications, will reach diametrically opposite viewpoints depending upon which side they testify for. All too often it is the charm, wit and appearance of such an expert that decides the outcome of the litigation.

*36 Juries in the Southern District of Ohio will usually be composed of jurors with an average formal education of high school. The ability of an erudite expert with two or three college degrees to confuse such jurors is not even in question. Theoretically he will be counter-balanced by an expert for the other side possessing equivalent credentials. The avoidance of jury confusion is probably the most critical task facing a trial judge. An uncontrolled number of experts inevitably magnifies confusion. Arguably that problem can be minimized by limiting the number of experts permitted for each side. [FN2] Usually this technique meets with some resistance, particularly by the side that is better financed. It is not enough. Even two or three experts per side are capable of confusing any jury.

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This is not to suggest that jurors are incapable of understanding scientific testimony. Studies beginning with the Chicago Jury Project reported in "The American Jury" by H. Kalven and H. Zeisel (1966) indicate quite the contrary. [FN3] The problem instead is how to minimize the inevitable confusion of contradictory partisan testimony.

There is a procedure for control in this area and it is contained in Rule 706 of the Federal Rules of Evidence. [FN4] A court may appoint its own expert. It is a customary technique on cross examination to inquire of an expert witness how frequently he has been retained by one side or another; how much he charges for his appearance and in some instances how much he made in previous years by acting as an expert witness. While this should not detract from the validity of his views it does imply that the expert's view are colored by his employment. The more partisan the retained experts appear to be, the more objective the Court's expert will seem.

***37** There has been a reluctance to use this device because of the substantial impact the Court's expert may have. [FN5] But choosing between alternatives is nothing new. It is the very essence of the art of judging.

It is the basic thesis of this paper that this problem, like most others that occur in the courtroom, are controllable by the presiding Judge by the use of Rule 706. As a subthesis it is suggested that Rule 706 be used sparingly since it has the potential for affecting the litigation involved.

II.

THE ASBESTOS LITIGATION

This paper reports the results of using a court appointed expert in 65 asbestos bodily injury cases filed in the United States District Court for the Southern District of Ohio at Cincinnati. Part III will be concerned with the use of Court experts in 65 cases. Part IV will consider the results of the sixteen cases where the Court's expert testified.

Asbestos litigation in significant numbers began in the United States District Court at Cincinnati in 1986. The majority of suits filed arose from conditions in a plant originally owned by the Philip Carey Company and later sold to Celotex. The plant produced building material containing asbestos. Employees were exposed to asbestos in its unprocessed state. A group of cases concerned the General Electric Corporation Jet Engine facilities at Evandale, Ohio. At that plant the exposure was limited to processed asbestos in the walls and ceilings.

It should also be noted that the illnesses which were the subject of this litigation were the noncancerous variety of asbestosis and pleural plaque. Merely for the purpose of separation, the two conditions are described as follows:

> Asbestosis is a term reserved for the interstitial fibrosis of the pulmonary parenchyma in which asbestos bodies or fibers may be demonstrated. [FN6]

Asbestosis is only caused by the inhalation of asbestos fibers. It is not curable

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and will result in permanent disability.

A second condition is known as "pleural plaque":

Pleural plaques are discrete, elevated, rounded lesions characteristically occurring on the posterolateral aspect of the lower parietal pleural or diaphragm. Plaques are of two types-diffuse and nodular-and can vary in size and shape. [FN7]

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.

***38** In 1986 and in 1987 the early asbestos cases began to come to the Court's attention, usually in settlement conferences. A pattern began to develop almost immediately. It became apparent 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. There should be no question regarding the competence of the experts involved. Without exception, they are all board certified, although one has been unable to obtain certification in the specialty of pulmonology. They are all experienced, knowledgeable and qualified.

Proceeding under Rule 706, the Court first inquired of the American Medical Association, The American Thoracic Society, The American Board of Internal Medicine and other national groups of the availability of specialists in pulmonology who would be willing to participate in this program. To be used as a Court's expert, a doctor was required to meet the following criteria: (1) board certification in the field of pulmonology, (2) no previous participation in an asbestos case by appearance either for a plaintiff or a defendant, and (3) no previous employment or retentions as a consultant for any of the defendant asbestos companies. Without much difficulty a list of experts was developed. While names were solicited from plaintiffs and defendants, it developed, predictably, that each side was submitting names of doctors who had previously testified favorably.

Initially an effort was made to create panels. In Ohio there is an arbitration procedure whereby medical malpractice cases may be submitted to a board, one member of which is named by the plaintiff, one by the defendant, and a chairman by the Court. [FN8]

The Court proposed such a panel to examine each plaintiff. One doctor would be selected by the plaintiff, one by the defendant and one by the Court. [FN9] It continues to be this Court's opinion that a report by such a panel would be useful in any asbestos case. Regrettably, however, counsel declined to participate. In the absence of such a panel the Court then began to name its expert for each case. With the assistance of Special Master Laura Ringenbach, and later Special Master Jill Fuchs, a procedure was developed whereby counsel were advised of the name of the expert proposed by the Court and given an opportunity to object. [FN10] Upon selection, the expert was instructed by the Court. [FN11]

Counsel were to submit to such expert all reports, x-rays, and other pertinent material. The expert rendered a written opinion and was thereupon available for deposition. In the event the case went to trial, the expert would testify at a convenient time. All expenses of the expert, the cost of his initial opinion, his

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time in deposition, if any, his travel expenses and a fee for testifying were paid equally by the plaintiff and the defendant.

*39 III.

THE USE OF COURT EXPERTS WHERE CASES SETTLED

Initially the Court developed a list of ten doctors who served as the Court's experts. [FN12] None were selected from the Cincinnati area. Of the ten, five considered three or fewer cases, one reported on five and four dealt with ten or more. The differences were entirely the result of a doctor's availability.

Appendix IV details the separate conclusions of the experts as to asbestosis and pleural plaque. It is noteworthy that ten independent experts all found that the majority of plaintiffs examined did not have an asbestos related condition.

Appendix IV may have statistical value. It discloses that court appointed experts found that almost two thirds of all plaintiffs did not have an asbestos related condition. Of the 65 plaintiffs, 42 (64.62%) were found to be free of any condition giving rise to a cause of action.

The remaining 23 have been subdivided into a group diagnosed with asbestosis and one diagnosed with pleural plaque only. The distinction may be medically significant, but legally the distinction should be irrelevant on the subject of liability. Either asbestosis or pleural plaque caused by exposure to asbestos fiber should be compensable. The initial question directed to the court expert, however, was "does this plaintiff have Asbestosis?" That question was answered "no" over 80% (84.62%) of the time.

IV.

COURT EXPERT TESTIMONY

The Court's experts testified in sixteen cases tried between September, 1987, and September, 1990. In point of time, one case was tried in 1987, three in 1988, three in 1989, nine in 1990. In all appearances by the Court's expert, the same technique was used. The jury was instructed that the expert had been called by the Court and that his testimony was not to be given any additional credence from that fact alone. A copy of the jury instruction given in these cases is included herein as Appendix V. Ideally, the Court's expert would testify after the plaintiff had rested and before the defendant had begun. This was not possible in all cases. Where it was not practical for the Court's expert to testify in that fashion, his testimony was presented wherever convenient. The Court's expert was introduced, as all experts are introduced, by the Court with a reading of selected qualifications. He was then asked three questions:

1. What have you done to prepare yourself for testimony in this case?

2. Do you have an opinion to a reasonable degree of medical certainty as to

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whether or not Mr. _____ has an asbestos related disease?

3. What is that opinion?

***40** Upon the giving of such opinion, the witness was then interrogated by counsel in such detail as counsel found appropriate and in whatever order counsel agreed.

While it is discretionary under Rule 706 for the Court to advise or not advise the jury that the witness has been selected by the Court, an alternate procedure proved impractical. In a situation where all experts appeared in person, the Court offered to interrogate each in the same fashion with the same three questions asked and without any identification that one was a court appointed expert. Unfortunately, frequently one or more experts would testify by videotape and thereby prevent the uniform introduction by the Court.

In the sixteen cases where court experts testified, they found asbestosis in two. Pleural plaque alone was found by them in five cases. As a result of those trials, juries returned eleven defendant verdicts and five plaintiff verdicts. The damage awards for the plaintiffs ranged from a low of $10,000 to a high of $140,000. In only one instance, where the Court's expert found neither asbestosis nor pleural plaque, was there a plaintiff's award. In that case he was awarded $10,000. In two cases where the Court's expert found no asbestosis, but did find pleural plaque, there were awards of $15,000 and $22,000. In the remaining two cases where the Court's expert found both asbestosis and pleural plaque the damage awards ranged from a low of $30,000 to a high of $140,000. [FN13]

Cases tried involved three Court experts: Dr. Murray Gilman of Atlanta, Georgia; Dr. Eddy Bresnitz of Philadelphia, Pennsylvania; and Dr. Marc Schenker of Los Angeles, California. Dr. Gilman testified in seven cases, Dr. Bresnitz in six, and Dr. Schenker in three. Dr. Gilman found no case where the plaintiff had asbestosis alone, three cases where the plaintiff had pleural plaque alone, two cases where there was both asbestosis and pleural plaque and two cases where there was neither asbestosis nor pleural plaque. Where Dr. Gilman found both asbestosis and pleural plaque, the plaintiff won damage awards. Where he found no asbestosis but pleural plaque, there were two defense verdicts and one plaintiff's verdict in the amount of $15,000. It was Dr. Gilman who testified in the one case where he found neither asbestosis nor pleural plaque that the plaintiff received a $10,000 verdict.

Dr. Schenker testified in three cases and found neither asbestosis nor pleural plaque in any of the plaintiffs. In one instance he did testify that asbestosis was "possible but unlikely" and in none of the cases in which he testified did the plaintiff receive any monetary award.

Dr. Bresnitz testified in six cases, found pleural plaque alone in two and neither asbestosis nor pleural plaque in four. In no instance did the jury disagree with his findings where he found neither asbestosis nor pleural plaque, but in the two cases where he found no asbestosis but pleural plaque, the jury found for the defendant in one and for the plaintiff in the other and awarded $22,000.

It should be pointed out that in all of the cases tried, the only defendant was

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Carey-Canada, Ltd., a subsidiary of the Celotex Company. ***41** Before or during trial all other defendants settled. Carey-Canada alone was responsible for any judgments. In four of the cases where there were judgments of $10,000, $15,000, $22,000, and $30,000, Carey-Canada paid nothing. The amount of settlement by other defendants exceeded the judgment awarded. From that defendant's viewpoint, the trial of sixteen asbestos cases was probably economically sound since only in two cases were they required to pay any damages. The largest verdict was returned in a case where the Court's expert found both asbestosis and pleural plaque and the second largest verdict was returned in the case where no court expert was retained. [FN14]

If sixteen cases is a statistically significant number, it would appear that the juries tended to follow the Court's experts. The Court's experts found no asbestosis in fourteen cases and there were defendant verdicts in eleven. The Court's experts found asbestosis in two cases and there were plaintiff verdicts in each. In three other cases where the Court's expert found no asbestosis there were plaintiff verdicts, but in the fairly nominal range of $10,000- $22,000.

Pleural plaque was found by the Court's expert in seven cases. It was not found in nine. In three cases where the Court's expert found pleural plaque, there was still a verdict for the defendant. Where it was not found, the jury held for the defendant in eight of the nine cases. In the one case there was a plaintiff's verdict for $10,000, although the Court's expert found no asbestosis either. In five cases where the Court's expert found pleural plaque, there were plaintiff verdicts ranging from a high of $140,000 to a low of $15,000.

In summary, the jury decided with the Court's expert in thirteen out of sixteen cases where asbestosis was involved for a percentage of 81.25. In cases where pleural plaque was involved, the juries decided with the Court's expert in twelve out of sixteen cases for a percentage of 75.00. Note that there is an overlap in the foregoing since only sixteen cases in toto are involved but two questions on each.

The conclusion is inescapable: A Court's expert will be a persuasive witness and will have a significant effect upon a jury.

V.

FUTURE USE

For the future, Rule 706 will be used wherever appropriate with the following safeguards:

One: Impartial experts must be selected. In medical matters the American Medical Association or its various specialty Boards are an appropriate starting point. No expert should ever be selected who has any prior connection with either side.

Two: Counsel should be given an opportunity to recommend or at least to comment on the court's proposed selection. All available information concerning the proposed expert should be given to counsel together with ***42** an opportunity to be

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heard either by written objections or by an appropriate court hearing.

Three: It must be emphasized to the expert from the beginning that his only function is to render an objective opinion. He is neither an advocate for, nor partisan of either side.

The use of court experts may also involve a question of judicial philosophy. Justice Oliver Wendell Holmes once described the trial judge's function in these words "In a trial by jury in a federal court, the judge is not a mere moderator but is the governor of the trial for the purpose of securing its proper conduct". [FN15] Rule 706 may become essential to the function of the "governor".

APPENDIX I

In the United States District Court for the Southern District of Ohio Western Division

In Re: ASBESTOS LITIGATION

NOTICE OF PROPOSED ORDER

Essential to any determination of the litigation currently in this Court and referred to as the "Asbestos Cases" is the existence or nonexistence of the medical condition known as Asbestosis. This Notice is limited to those cases where the existence of Asbestosis is contested. It does not deal with any asbestos case asserting the existence of cancer as a result of exposure to asbestos fibers.

This common issue warrants a procedure for prompt disposition. There are currently in excess of 60 asbestos cases pending before the undersigned. They will require approximately one-half of the Court's trial time for 1987. Additional cases may require similar time commitments during 1988.

This problem has been discussed with representative counsel of both Plaintiffs and Defendants. Based upon the views stated by such counsel it is the Court's intention to proceed as follows:

1. All counsel will be solicited to suggest Board Certified Pulmonologists who might assist the Court.

2. The Court will make an independent inquiry of the University of Cincinnati College of Medicine and other appropriate agencies and will from all sources compile and publish a short list of qualified pulmonologists who may serve as Court Experts.

3. In any asbestos cases where the existence of Asbestosis is questioned, the parties will be directed to submit all pertinent information to a panel of three experts, one to be selected by the Plaintiff, one to be selected by the Defendants, and the third by the Court. The Court's choice will serve as Chairman. Such a panel may examine the Plaintiff, ***43** may inquire into his

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medical records and may conduct any other tests that appear to be appropriate.

Upon completion of its inquiry, the panel will advise the Court of its opinion in regard to the existence or nonexistence of Asbestosis. The parties will be encouraged to resolve their differences based upon such report. No party to the litigation will be required to accept such panel opinion as a basis for settlement. The right to a jury trial will not be affected.

4. Pursuant to the Rule 706 of the Federal Rules of Evidence the Court may call any panel member as its witness in the trial of the case. In such event counsel will be so advised at the final pretrial conference and given an opportunity to depose that witness.

This Court proposes to make this order effective February 1, 1987. A hearing will be held on Friday January 16, 1987 at 2:00 p.m., at which time any person wishing to do so may show cause why this Order should not be adopted.

IT IS SO ORDERED.

Carl B. Rubin

[FNa] Chief Judge

United States District Court

[FNa]. Judge Rubin served as Chief Judge in the Southern District of Ohio from Sept. 23, 1979 to March 15, 1990.

APPENDIX II

In the United States District Court for the Southern District of Ohio Western Division

IN RE: ASBESTOS LITIGATION
This Order Applies to Case Nos.

ORDER OF INTENT TO APPOINT COURT EXPERT

Pursuant to Rule 706 of the Federal Rules of Evidence counsel in the above-entitled cases are hereby notified that the Court proposes to appoint as its expert:

Dr. _____

for the above-listed cases.

Counsel are directed to file any objections to such appointment within ten days of the date of this order.

IT IS SO ORDERED.

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Carl B. Rubin

Chief Judge

United States District Court

*44 APPENDIX III

In the United States District Court for the Southern District of Ohio Western Division

IN RE: ASBESTOS LITIGATION

INSTRUCTION TO COURT APPOINTED EXPERT WITNESSES

In accordance with Rule 706(a) of the Federal Rules of Evidence, the following instructions to each court-appointed expert witness serving on the Asbestosis Panel are hereby filed with the Clerk of this Court.

As the Court's appointed expert on the Asbestosis Panel, you will render an objective medical diagnosis of the presence or absence of such diseases as may be requested.

You will be assigned a case or cases that have been assigned a trial date. The plaintiff's and defendants' counsel will be instructed to provide you with all necessary and relevant medical data, including but not limited to records, x-rays, slides, tissue samples, and pulmonary test information for each plaintiff. You may request additional tests of plaintiff if, in your judgment, it is warranted. In addition, if you wish to consult with a pathologist or radiologist, the Special Master will assist with any necessary arrangements.

The plaintiff's and defendants' counsel will each submit, in writing, the name, address and telephone number of the physician selected to act as that party's representative on the Asbestosis Panel. You may communicate with the other physician panelists or call for joint consultation.

A written report for each case summarizing your findings and opinions will be required. That report should be sent to the Special Master for distribution to lead counsel on that case.

Counsel for plaintiff and defendants may wish to depose you after you have submitted your written report. The deposition will take place in the city where you reside (unless you agree to another location) and at a mutually convenient date and time.

If the case you evaluated proceeds to trial, you must be available to testify as the Court's expert witness. All reasonable efforts will be made to minimize any inconvenience the scheduling may cause you and your patients.

Your bill for fees and expenses associated with the case evaluation,

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depositions, and/or trial testimony must be sent to the Special Master. The Court will arrange for prompt payment.

If at any time you have any questions concerning the procedure, please direct them to the Special Master.

IT IS SO ORDERED.

Carl B. Rubin

Chief Judge

United States District Court

***45** APPENDIX IV

			COURT EXPERT FINDINGS	
EXPERT	TOTAL CASES	ASBESTOSIS	PLEURAL PLAQUE ONLY	NO ASBESTOS RELATED CONDITION
Dr Marc Schenker	11	6777, 6779 6833	6778	6773, 6776, 6827 6830, 7962 [FN*], 8279 [FN*] 8240 [FN*]
Dr. Eddy Bresnitz	10		6795, 8013 [FN*], 81061 [FN*]	6784, 8019 [FN*], 6792 6787, 8012 [FN*], 8016 [FN*] 8010 [FN*]
Dr Brian Boehlecke	10	6814	6817, 6836 6841	6804, 6808, 6812 6824, 6839, 6845
Dr Richard Matthay	5			6854, 6856, 7010 61197, 61135

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Dr Hans Weil	3	6232	6226	6229
Dr Robert Jones	3		6238	6235, 6241
Dr Charles Drage	3			6250, 6351, 6356
Dr Irwin Berlin	3	6510	6512	6518
Dr Murray Gilman	15	8027, 8037 8048 [FN*], 8694 [FN*]	8044 [FN*], 7820 [FN*] 8450 [FN*]	6726, 6727 [FN*], 6731 6732, 6743, 6749 8030, 8040 [FN*]
Dr Bernard Gee	2			6352, 6357
TOTAL	65	10 15.38%	13 20.00%	42 64.62%

FN* Tried to a Jury

APPENDIX V

JURY INSTRUCTION-5006.1

EXPERT WITNESS

You have heard testimony from persons who were described as experts.

A person who by knowledge, skill, experience, training or education has become expert in some field, may state an opinion on matters in that field and may also state reasons for that opinion.

Expert testimony should be considered by you like any other testimony. You may accept it or reject it, or give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

***46** In this case you have heard from an expert witness appointed by the Court. You may not attach any significance to that fact in considering his testimony.

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APPENDIX VI

TRIAL RESULTS

CASE NUMBER	TRIAL DATE	DR.	ASBESTOSIS	PLEURAL PLAQUE	DECISION	DAMAGES
6727	9/87	G	No	No	Deft	0
7820	9/88	G	No	Yes	Deft	0
7962	11/88	S	No	No	Deft	0
8010	12/88	B	No	No	Deft	0
8450	6/89	G	No	Yes	Deft	0
8040	11/89	G	No	No	Pltf	$10,000
8044	4/90	G	No	Yes	Pltf	$15,000
8012	4/90	B	No	No	Deft	0
8013	5/90	B	No	Yes	Deft	0
8019	9/90	B	No	No	Deft	0
8016	6/90	B	No	No	Deft	0
81061	6/90	B	No	Yes	Pltf	$22,000
8048	12/89	G	Yes	Yes	Pltf	$140,000
8279	2/90	S	No	No	Deft	0

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8240	2/90	S	No [FN*]	No	Deft	0
8694	3/90	G	Yes	Yes	Pltf	$30,000

G-Dr. Murray Gilman

B-Dr. Eddy Bresnitz

S-Dr. Marc Schenker

FN* 'Possible but unlikely'

APPENDIX VII

The following is a case by case listing of significant portions of the opinions by the court appointed expert. The parties are not identified and the number used is a portion of the filing number in the Southern District of Ohio.

A. Court's Expert Diagnosis of Asbestosis

6232
"Asbestosis of mild extent-evidence of chronic bronchitis, undoubtedly primarily associated with long term cigarette smoking."

***47** 6510
"Squamous cell carcinoma of lungs, asbestosis/fibrosis of the lung."

6777
"My opinion with a reasonable degree of medical certainty is that the findings in this case are consistent with asbestosis."

6779
"My opinion in this case with a reasonable degree of medical certainty is that the findings are sufficient to make a diagnosis of asbestosis."

6814
"Overall it is my opinion that Mr. _____ has asbestos induced pulmonary disease which is of a very mild degree in terms of its physiological impact."

6833
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has probable asbestosis."

8027
"Mr. _____ has a restrictive ventilating defect most likely secondary to a combination of diffuse pleural thickening and interstitial pneumonitis ... it is reasonable to attribute these abnormalities to asbestos related events."

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8037
"Mr. _____ has a probable asbestos-related disease process. The clinical data suggests that early interstitial pneumonitis or asbestosis may be present."

8048
"The clinical and radiologic findings are consistent with asbestos-induced pleuroparenchymal changes. The demonstration of bilateral pleural thickening and calcified plaques is a classical asbestos-related problem."

8694
"In summary, the radiologic findings indicate that Mr. _____ asbestos exposure has produced a mild degree of interstitial fibrosis as well as a calcified pleural plaque."

B. Court's Expert Diagnosis of Pleural Plaque Only

6226
"There is ample evidence of the pleural affects of asbestos exposures, but no evidence of asbestosis."

6238
"Mr. _____ had calcified plaque of the parietal pleura caused probably by inhaled asbestos. There is no radiographic evidence of asbestosis."

6512
"Asbestos induces pleural calcification indicative of exposure but not disease, no evidence of asbestosis."

***48** 6778
"My opinion in this case with a reasonable degree of medical certainty is that Mr. _____ has pleural changes consistent with this asbestos exposure, however, he does not have adequate findings to make a diagnosis of asbestosis."

6795
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has asbestos induced bilateral pleural plaque/thickening. There is no evidence of parenchymal asbestosis or clinically significant pulmonary function impairment."

6817
"It is my opinion that Mr. _____ has no clinically significant interstitial fibrosis (asbestosis) at the present time ... he does have bilateral localized pleural thickening (plaques) which is attributable to his asbestos exposure."

6838
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has pleural plaques due to his prior asbestos exposure. He does not have evidence of interstitial fibrosis or asbestosis."

6841
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has a pleural plaque related to his prior asbestos exposure. He does not have evidence of asbestosis."

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7820
"A diagnosis of asbestosis cannot be supported by the available medical records. The presence of pleural plaque on the postmortem pathology specimens demonstrates that an asbestos related pleural process was present."

8013
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has the following diagnosis: (1) pleural plaque/thickening ... asbestos was a significant contributing cause to the above diagnosis."

8044
"Mr. _____ has asbestos related lung disease in the form of calcified pleural plaque. There is no substantial evidence to indicate that pulmonary asbestosis is present."

8450
"The medical evidence clearly establishes that Mr. _____ has an asbestos-related disorder. The chest x-rays consistently demonstrate bilateral pleural plaque formation. A pulmonary parenchymal disorder such as asbestosis cannot be diagnosed based on the available data.

81061
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has the following diagnosis: (1) bilateral pleural plaques secondary to his past history of asbestos exposure. Although early ***49** asbestosis is a possibility, the lack of bibasilar end-inspiratory rales, the lack of a persistently abnormal diffusing capacity, the lack of interstitial opacities and the changes in PFT's associated with increasing weight, do not support that diagnosis currently."

C. Court's Experts Diagnosis of No Asbestos Related Condition

6229
"No asbestos related disease."

6235
"Mr. _____ did not have an asbestos related condition of lungs or pleura."

6241
"No evidence of asbestos-related health effects."

6250
"The x-ray reviewed revealed no evidence of asbestosis.... no evidence of restricted lung disease which should be characteristic of parenchymal asbestosis."

6351
"Record does not substantiate the diagnosis of either pleural or parenchymal pulmonary asbestosis."

6352
"There is no medical basis for believing there are any asbestosis effects on lung or pleural."

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6356
"[N]o evidence of pleural or parenchymal asbestosis."

6357
"No interstitial lung disease and no pleural pulmonary abnormalities, therefore no asbestos related abnormalities."

8518
"No evidence for asbestosis i.e. no interstitial lung disease."

6726
"Review of the chest x-ray findings did not reveal signs of an increase of interstitial markings which could support a diagnosis of asbestosis even in the presence of normal pulmonary functions studies."

6727
"The accumulative findings do not indicate that asbestosis has occurred in this individual."

6731
"The pulmonary function data do not however provide objective data supportive of an interstitial disease process such as asbestosis.... the chest x-rays [d]emonstrate essentially clear lung fields without evidence of asbestosis or asbestos-related pleural abnormalities."

6732
"The cumulative data does not indicate that the claimant has an interstitial disease process consistent with asbestosis."

***50** 6743
"Chest x-rays ... do not reveal any evidence of an increase in interstitial markings ... in the absence of any increase in interstitial markings on x-rays a normal diffusing capacity and a normal vital capacity, it is highly unlikely that a diagnosis of asbestosis can be supported."

6749
"In the absence of significant pulmonary parenchymal changes on chest x-rays and a normal specific diffusing capacity, a diagnosis of an interstitial disease process is unlikely. As a result a diagnosis of asbestosis is not supported by the cumulative medical information."

6773
"... He does not at this time have sufficient findings for a diagnosis of asbestosis."

6776
"My opinion with a reasonable degree of medical certainty is that there is no evidence of asbestos related abnormalities in this case."

6784
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has no evidence of asbestos related disease and no evidence of respiratory impairment."

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6787
"It is my opinion with a reasonable degree of medical certainty that there is no evidence of asbestos related disease at the present."

6792
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has no evidence of asbestos related pleural or parenchymal pulmonary disease."

6804
"It is my opinion that Mr. _____ does not have clinically significant interstitial fibrosis (asbestosis)."

6808
"It is my opinion that Mr. _____ has no evidence for clinically significant interstitial fibrosis (asbestosis)."

6812
"It is my medical opinion that Mr. _____ does not have significant interstitial fibrosis (asbestosis)."

6824
"It is my medical opinion that Mr. _____ does not have any clinically significant asbestos related lung disease."

6827
"Diagnosis of asbestos related conditions: None. Mr. _____ does not have criteria for a diagnosis of asbestosis ... the pleural changes on his chest x- ray may have been due to asbestos exposure but could also represent a post infectious or post surgical outcome. It's presence on only the left side suggests it may be related to a process other than his asbestosis exposure."

***51** 6830
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ does not have any asbestosis related conditions."

6839
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ does not have asbestosis."

6845
"Mr. _____ does not have evidence of asbestosis or pleural changes due to asbestos exposure."

6854
"There is no evidence that the patient is significantly impaired due to asbestosis at this time."

6856
"I find no evidence for significant impairment due to asbestos."

61135
"Patient has a significant history of asbestos exposure, but no evidence of significant impairment secondary to asbestosis."

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61197 [FN16]

"No clinical evidence at this time that the patient is impaired by asbestos related pulmonary pleural alterations. Note, no opinion was expressed whether lung cancer was due in part to asbestos exposure.-1986 an upper lobectomy for adenocarcinoma of the lung."

7010
"No evidence of parenchymal disease ... no evidence of asbestosis."

7962
"... it is not possible to state with a reasonable degree of medical certainty that asbestosis related lung disease was present ..."

8010
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has no evidence of asbestos related disease." (Testimony at trial December 20, 1988).

8012
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has no evidence of asbestos related disease."

8016
"It is my opinion with a reasonable degree of medical certainty that Mr. _____ has no evidence of asbestos related disease."

8019
"There is no definitive evidence of an asbestos related disease such as asbestosis."

8030
"Mr. _____ does not have sufficient objective evidence to support a diagnosis of an asbestos-related disease process."

***52** 8040
"The cumulative data which I had the opportunity to review was not supportive of an asbestosis related lung disorder ... interstitial ... asbestosis was not considered a likely possibility in the absence of supportive ... data."

8240
"... asbestosis is possible but unlikely in the absence of more definite x- ray changes. Similar cases would find asbestosis on pathologic specimens at the most 25% of the time."

8279
"In summary, there is no evidence to support a diagnosis of asbestosis in this case, but it is not possible to categorically exclude such a diagnosis in view of the basilar fibrosis on the chest x-rays and the possibility that asbestosis could have contributed to their presence."

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Acknowledgement:

Appreciation for the detailed and diligent research of David Burleigh is hereby expressed. Without such assistance this paper would not have been completed.

[FNaa]. Judge, United States District Court, Southern District of Ohio.

[FNaaa]. Esquire, Special Master.

[FN1]. Rule 702 Federal Rules of Evidence. Testimony by Experts

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[FN2]. In Re Bendectin Products Liability Litigation, 624 F.Supp. 1212, aff'd 857 F.2d 290 (6th Cir.1988), cert. denied, 488 U.S. 1006, 109 S.Ct. 788, 102 L.Ed.2d 779 (1989).

[FN3]. This subject is considered in a scholarly and well written article by Edward J. Imwinkelried, "The Standard for Admitting Scientific Evidence: A Critique from the Prospective of Juror Psychology" 28 Villanova Law Rev. 554 (1982-1983).

[FN4]. Rule 706 Federal Rules of Evidence. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

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(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

[FN5]. See Rule 706(c) supra.

[FN6]. Official Statement of the American Thoracic Society published in the American Review of Respiratory Disease, March 1986.

[FN7]. Supra.

[FN8]. Ohio Revised Code § 2711.21.

[FN9]. See Order of January 5, 1987 attached as Appendix I.

[FN10]. See Appendix II-"Order of Intent to Appoint Court Expert".

[FN11]. See Appendix III-"Instruction to Court Appointed Expert Witnesses".

[FN12]. See Appendix IV.

[FN13]. By comparison, in one case where asbestosis was conceded by defendants and no court expert was retained, the plaintiff received a verdict for $80,000.

[FN14]. See Footnote 13.

[FN15]. Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931).

[FN16]. No opinion expressed regarding lung cancer.

END OF DOCUMENT

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

Mr. Steven Kazan
Partner , Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise

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Mr. Chairman and members of the Committee: I am a plaintiffs' trial lawyer. I speak for myself and other members of the asbestos bar who stand up for the interests of asbestos cancer victims. For 25 years I have concentrated on obtaining compensation for people who are dying from asbestos cancers. I appeared before you before you last September to explain why I believe that asbestos litigation has become a tragedy for my clients.

I am grateful for the chance to appear before you again to address a different issue: what should be done?

In my view, the solution is simple. I believe in the civil justice system, and I do not think that we need a big-government solution to asbestos litigation. Nor do we need an elaborate National Trust Fund administered by a private bureaucracy. Asbestos litigation has become a nightmare because the courts have been inundated by the claims of people who may have been exposed to asbestos but who are not sick – who have no lung function deficit. This flood is conjured up through systematic, for-profit screening programs designed to find potential plaintiffs with some x-ray evidence "consistent with" asbestosis. Ironically, and tragically, in many states, that x-ray evidence triggers the statute of limitations, literally forcing the filing of premature claims. These claims are choking the asbestos litigation system and keeping the courts from doing their job: providing compensation for people who are genuinely injured by asbestos diseases.

If the fundamental cause of the asbestos litigation crisis is the flood of "unimpaired" claims, the obvious solution is to defer the claims of the "unimpaired" until they are sick, while preserving their right to sue by tolling the statute of limitations and making that a meaningful right – there would still be asbestos defendants to sue. Such legislation would allow the courts to focus on the 10-15% of claims where the plaintiff is really injured. I have no doubt that our civil justice system would be up to the task of providing fair and even-handed justice in these cases.

1. The Medical Criteria Approach. Over the years, Congress has considered many asbestos bills. Most of them involved creating some kind of government compensation scheme, like Black Lung or the 9/11 program, but the problems involved proved too daunting. That was true even when filing rates were one-tenth what they are today, and when there were only 200-300 potential defendants. Today there are 8,400 defendants representing every major industrial sector in the country, and 60,000 to 100,000 new claims filed every year. Moreover, with an almost infinite supply of exposed people, even this volume of new claims could be dwarfed in coming years.

Perhaps it is time to consider a simpler approach. Rather than supplanting the civil justice system, let's consider creating the conditions necessary to allow it to work. That is the approach that was advocated by the American Bar Association in its historic February 11 vote to support asbestos legislation that would defer the claims of the unimpaired while tolling the statute of limitations. And, that is the approach taken in S. 413, which was introduced by Senator Don Nickles on February 13, 2003. I call this the "medical criteria" approach. It makes a lot of sense.

The purpose of medical criteria is to distinguish between people who are sick as a result of asbestos exposure and those who are not. Thus, the medical criteria proposals leave the cancer victims alone. Cancer victims are clearly impaired, and the courts are perfectly capable of sorting out the questions about causation that are usually the key to cancer cases. Cancer criteria are simply unneeded.

The ABA criteria and those in the Nickles bill are generally similar. Both are based upon medicine, and yet both take into consideration the special problems involved in integrating medical standards into the legal system. While leaving purely medical issues to the doctors, I would like to comment on

some key issues in making medical criteria effective in the courts.

First, "forensic medicine" should observe the same standards as real medicine. In the real world, a person who wants to receive medical advice about a symptom, or even about risks of future illness from some exposure, would go to a doctor, explain his occupational and medical history, undergo tests that comply with generally accepted technical standards, and receive a considered diagnosis. That is the medical model. And that is precisely what does not happen in asbestos litigation.

In asbestos litigation, screening firms recruit asbestos-exposed individuals as clients. Technicians employed by those firms administer tests that rarely comply with applicable technical standards. The test results are provided to doctors who are often not licensed in the relevant state, who do not consider themselves to be in a doctor-patient relationship with the potential claimant, and who often have a financial interest in identifying as many potential plaintiffs as possible. The doctor usually does not render a diagnosis, but merely affirms that the x-rays presented to him are "consistent with" asbestosis. If this were medicine, it would be malpractice. But it is not medicine: It is the medical side of legal entrepreneurship.

The very first thing a medical criteria bill should do is require a genuine diagnosis based upon generally accepted medical procedures. Both the ABA criteria and the Nickles bill do that.

Second, a medical criteria bill should rely on workable, objective tests for determining whether the claimant has a breathing impairment. The Nickles bill uses the American Medical Association's Guides for the Evaluation of Permanent Impairment (5th edition) for this purpose. Although the AMA Guides address respiratory impairments generally, they do not focus on causation and thus do not determine if an impairment is asbestos related. However, they are objective and are widely used in state and Federal workers' compensation programs in evaluating claims of asbestos-related disability. Indeed, the AMA Guides have been incorporated by reference in the Longshore and Harbor Workers' Act for evaluating claims of retirees, including those claiming asbestos-related conditions.

The ABA criteria are based upon the work of a Commission on Asbestos Litigation appointed by President-elect Dennis Archer (on which I had the privilege of serving). Those criteria are specifically aimed at asbestos-related diseases and may be easier to administer than the AMA Guides. At the end of the day, however, they are likely to have a broadly similar effect.

Third, medical criteria should be able to sort out conditions that are and are not caused by asbestos. Accordingly, it is necessary to have x-ray evidence that supports the conclusion that the claimant has an asbestos-related disease. It is also necessary to distinguish people whose breathing problems are caused by "chronic obstructive pulmonary disease" or "COPD" – a disease usually related to smoking -- rather than asbestos exposure. While the ABA resolution and the Nickles bill differ in specifics, both take a reasonable approach to this problem.

Fourth, medical criteria need to be objective and need to be applied at the outset of a case. Doctors treating patients normally start with a careful evaluation but understandably wish to consider developing information and where necessary make last-minute, subjective judgments, based on all relevant circumstances. But, as a lawyer who has tried asbestos cases for 30 years, I know that will not work in asbestos litigation. In practically every other kind of personal injury case, a plaintiff is expected to be able to provide sufficient grounds for filing a lawsuit when the case begins. It is reasonable to require the same in asbestos cases. If medical criteria are not applied then, they will be ineffective. Unfortunately, it is all too easy to find doctors on both sides of any question, and all too often their disagreements will be resolved at trial. In asbestos litigation, that is a recipe for continued screening. Lawyers for both sides know that it is unlikely that there will ever be a trial, or even real investigation or discovery, because the pressures for settlement are too intense, especially in "magnet" jurisdictions where large numbers of cases are consolidated for trial. The only way to break the vicious cycle that has brought untold numbers of asbestos "cases" into the courts is to apply objective medical criteria at the beginning of the case to distinguish between the sick and those who have not yet become sick.

There is nothing radical about this approach. Courts in New York City, Baltimore, Chicago, South

Carolina, and other jurisdictions accomplish the same result through inactive dockets. Both the ABA proposal and the Nickles bill envision early application of objective medical criteria to make sure that people who are sick will have immediate access to the courts while deferring the claims of people who do not have anything wrong with them and protecting their right to bring a lawsuit if they fall ill. The medical criteria approach will also have a tremendous beneficial effect on the currently pending bankruptcies. As a practical matter, it is impossible to reorganize successfully under Chapter 11 of the Bankruptcy Code without a so-called "section 524(g) injunction" which requires future asbestos claims to be presented to the trust that results from the reorganization. To be approved, a plan proposing a section 524(g) injunction must receive the affirmative vote of 75 percent of present claimants (regardless of the amount of their claims). While there is some controversy over whether people who are unimpaired have present claims and are entitled to vote, historically the unimpaired – or, more exactly, the lawyers who represent them – have held the key to approval of any bankruptcy reorganization. For that reason, reorganization plans systematically favor the unimpaired at the expense of people with fatal diseases. Indeed, this has led to instances where debtors or their parent corporations overpay present cases in an attempt to buy approval of unfair reorganization plans that hurt present and future cancer victims.

A medical criteria bill would make clear that people who are exposed to asbestos but who are not sick do not have present claims in bankruptcy. People who are truly injured – the sick and dying – could receive full compensation, because they would not be required to compete for funds with the mass of unimpaired claimants, as they do today. This benefit of a medical criteria bill is especially important when an injured person's only claim is against a bankrupt company.

As I noted above, the medical criteria approach is reflected in the Nickles bill, which I think is a very good start. That bill does, however, affect cancer claims in certain respects. In principle, I would prefer a bill that did not address cancers at all. Cancer claims are not the problem. But, in any event, I think that the provision of S. 413 on venue is wrong. Section 5(b) of the bill generally requires asbestos claims to be brought in a jurisdiction where the plaintiff lives or where his exposure to asbestos took place. Appropriately, there is an exception for cancer cases. That exception only applies, however, when a doctor certifies that the plaintiff can expect to die within 3 years after the date of filing a claim. While this would cover all, or practically all, claims filed by living cancer victims, if the victim has already died when the case is filed, the venue limitations of the bill would fully apply. I believe that this distinction between claims brought by cancer victims themselves and claims brought by their widows and children is unfair and unjustified. It could also create an anomalous situation where the surviving aspect of the victim's personal injury case is in one state and the wrongful death case must be in another.

2. Letting the Civil Justice System Work. I have devoted my life to representing seriously injured people in the civil justice system. I believe in trial by jury. I believe that the courts do a good job in dealing with claims brought by injured people against the people or companies that injured them. If asbestos litigation involved only 7,000-8,000 cancer cases a year and a few thousand more non-cancer claims involving real breathing impairment, no one would be arguing the need for significant reforms. Certainly I would not.

Asbestos is unique, even by mass tort standards. More than 500,000 asbestos cases had been filed by 2001, and the current rate of filing is 60,000-100,000 per year. This flood of cases has forced the courts to adopt a variety of measures, including mass consolidations, designed to force settlements. These measures have in turn stimulated more lawyer-funded screenings, more filings, and even more intense pressure on courts to depart from the traditional legal process in order to deal with the onslaught of claims.

A medical criteria bill would relieve this pressure. It would let the courts go back to doing what they do best – resolving real cases and controversies between genuinely injured people and the defendants that they allege caused their injuries. In my view, this solution is most consistent with traditional American values.

We do not need a new federal entitlement program to compensate asbestos victims. We do not need federal officials to allocate responsibility among the 8,400 companies that have been named in asbestos lawsuits, or to unravel the tangled insurance relationships that have evolved over time. Nor do we need to build a quasi-public National Trust to do so. I strongly believe that substituting an administrative compensation scheme for the civil justice system is inappropriate. The federal government has not been notably successful in past schemes of this kind. It is far wiser to fix the problem – the filing of scores of thousands of claims on behalf of people who are not sick – and then let the courts do the rest.

3. "It's Time for Congress To Act". I am here today because I am very concerned about those who are hurt the most from asbestos, people who are dying of asbestos cancers, and their families. We have been talking about ending the asbestos nightmare for years. The first bills were introduced a generation ago. The Judicial Conference's Ad Hoc Committee on Asbestos Litigation called for asbestos legislation in 1991. The Supreme Court challenged Congress to legislate in this area in its Amchem opinion in 1997 and again, even more forcefully, in its Ortiz opinion in 1999. Meanwhile more than 60 companies have gone bankrupt, the litigation has spread to touch every sector in the American economy, and my clients are increasingly in danger of dying without viable defendants who can compensate their families for this tragic loss.

Mr. Chairman, the title of this hearing says it all: "It Is Time for Congress to Act." Congress needs to act now, to establish medical criteria to ensure that those who are sick today, and the many more who will become sick in the years to come, are protected and that their right to a jury trial will be truly meaningful because the responsible companies will still exist and be able to pay for the harm they have caused.

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In Focus: Products Liability

PLAINTIFFS' BAR NOW OPPOSES UNIMPAIRED ASBESTOS SUITS

AS MORE DEFENDANTS GO BANKRUPT, COUNSEL SEEK TO CURTAIL PAYMENTS TO THE LEAST-INJURED CLAIMANTS.

Mark P. Goodman, Robert D. Goodman and Steve Vaccaro
Special to The National Law Journal

Mark P. Goodman is a partner at New York's Debevoise & Plimpton, concentrating his practice in products liability, white collar crime and commercial litigation. Robert D. Goodman is a counsel in the firm's products liability practice. Steve Vaccaro is an associate in the firm's products liability and bankruptcy practices.

PERHAPS THE MOST controversial development in products liability litigation is the filing of claims by people exposed to, but not injured by, a product. Claims by individuals without significant physical impairment have appeared in most mass product litigations, including Fen/Phen, breast implants and many others. However, these so-called "unimpaired" or "exposure only" claims have had their earliest and greatest impact in the asbestos litigation. Federal and some state courts have created special rules to limit unimpaired claims, but in most states, these claims are tried to juries. As a result, a billion or more dollars have been paid to settle asbestos claims brought by individuals who, by all accounts, suffer no physical impairment.

While unimpaired asbestos claims perhaps do not receive the majority of asbestos settlement dollars, they are an undeniable factor underlying the recent spate of asbestos-related bankruptcies. But as more asbestos defendants have sought bankruptcy protection--where limits on resources are obvious--a surprising new voice has been raised in opposition to unimpaired claims, one which may finally catch the judicial ear: the voice of the asbestos plaintiffs' bar.

At sufficient doses, asbestos exposure increases the risk of developing lung cancer and mesothelioma, a rare cancer of the pleural tissue enveloping the lungs. Asbestos exposure can also cause asbestosis, a scarring of the lung tissue involved in gas exchange and other respiratory processes, as well as pleural thickening, a scarring of the pleural tissue. Although severe asbestosis attendant to heavy asbestos exposure can cause pulmonary disability and even death, the majority of present-day asbestosis claimants show signs of only minimal asbestos exposure, and have completely normal pulmonary function. The vast majority of pleural claimants experience no symptoms or discomfort at all. Neither asbestosis nor pleural conditions causes cancer.

The statute of limitations was an early impetus to unimpaired claims. Individuals diagnosed with asymptomatic asbestos-related conditions, concerned that the limitations period was running on asbestos-related injuries that might develop, filed claims before any injury developed. Defendants responded to these early

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unimpaired claims by offering to toll the limitations period for claims involving death or disability that might occur, in return for the withdrawal of unimpaired claims. However, the plaintiffs' incentive to accept these so-called "green card" agreements disappeared when courts later ruled that each distinct asbestos-related health condition had its own limitations period.

During the early 1990s, some courts instituted inactive dockets, pleural registries or other devices or rules for suspending unimpaired claims. Asbestos claimants in Maryland, for example, must demonstrate cancer or a minimum level of pulmonary impairment before the defendant is required to answer the complaint. Order Establishing An Inactive Docket, In re: Asbestos Personal Injury and Wrongful Death Cases, No. 92344501 (Baltimore City, Md., Cir. Ct. March 15, 1993).

Judge Charles R. Weiner of the Eastern District of Pennsylvania, who presides over the entire federal docket of pretrial asbestos cases pending in Multidistrict Litigation No. 875, has for more than a decade given priority to cancer and other impaired asbestos claimants, effectively limiting liability for unimpaired claims. In a 1997 case involving the claims of unimpaired railroad workers, the U.S. Supreme Court held that pleural and other asymptomatic conditions were not compensable under the Federal Employers Liability Act. Metro-North R.R. v. Buckley, 521 U.S. 424 (1997).

However, the majority trend, particularly in the state courts, has been toward acceptance of unimpaired claims and the development of causes of action for unimpaired claimants, such as claims for emotional distress, fear of cancer and medical monitoring. Defendants fear that as a result, the pool of potential claimants may well expand to include every person who can plausibly allege exposure to asbestos, regardless of presence or severity of injury. Unimpaired claims now represent between 50% and 70% of claims received annually by most asbestos defendants. In just the last year, an additional five companies have entered bankruptcy citing asbestos liabilities, bringing the total to approximately 60. More bankruptcies are likely, due in part to the cost of defending and settling thousands of unimpaired claims each year.

Bankruptcy

Although some believe that the resources available to asbestos claimants in the tort system are virtually infinite, bankruptcy presents a different case. Under § 524(g) of Chapter 11 of the Bankruptcy Code, asbestos defendants can shed their liabilities through reorganization so long as they establish a trust fund to satisfy present and future claims. Sec. 524(g) funds necessarily are limited and therefore dollars paid to the unimpaired come directly at the expense of claimants with serious injuries. The conflict is even more serious with respect to future claimants--primarily individuals who will develop cancer after decades-long latency periods following exposure to asbestos. Some judges and even plaintiffs' attorneys have grown concerned that without limiting payments to unimpaired claimants, funds for future claimants will soon disappear.

Recognizing this danger, the Manville Personal Injury Trust (upon which § 524(g)'s provisions were modeled) has moved to conserve its funds by reducing payments to 5% of each claimant's presumed damages. Even with the reduction, the Manville Trust is still racing toward insolvency due to the large numbers of claims it expects to receive--as many as 2.6 million claims in addition to the 500,000 already resolved. It is likely that half or more of these future claims will allege

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asymptomatic asbestosis or pleural thickening. The § 524(g) asbestos personal injury trusts created through the Celotex and Eagle- Picher bankruptcies have made similar reductions in their payments, and will likely face similar numbers of future claims.

In a letter to Judge Jack B. Weinstein of the Eastern District of New York, the trustees of the Manville Trust concluded that "a disproportionate amount of Trust settlement dollars have gone to the least injured claimants-- many with no discernible asbestos-related physical impairment whatsoever." See Letter from Robert A. Falise to the Honorable Jack B. Weinstein and the Honorable Burton R. Lifland (Dec. 5, 2001), at 2.

In response, Judge Weinstein ordered a hearing to address whether "there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries." See Order, In re Joint E. & S. Dist. Asbestos Litigation, No. 90 CV 3973 (E.D.N.Y. Nov. 7, 2001). This may be a case of past as prologue: A similar hearing was held in 1990 when the then-fledgling Manville Trust faced insolvency under a crush of asbestos claims, leading to a major reorganization of the trust.

At a Dec. 13, 2001, hearing before Weinstein, several members of the asbestos plaintiffs' bar spoke out for the need to limit funds for unimpaired claimants. Steve Kazan, a long-time asbestos plaintiffs' lawyer from Oakland, Calif., called on the Manville Trust to "set an example" and "stop paying significant amounts of cash to people without any evidence of significant impairment." See David Voreacos, "Manville Trust 'Cash Crunch' Weighed by U.S. Judges," Bloomberg News, Dec. 13, 2001.

From Kazan's perspective, the "asbestos companies are really cash cows that we should care for and cultivate so we can milk them for years as we need to. But I have colleagues who'd rather kill them, cut them up and put them on the grill now. We'd all have a great time, but there are people who will be hungry in five years." Lisa Girion, "Firms Hit Hard As Asbestos Claims Rise," Los Angeles Times, Dec. 17, 2001.

The Manville trustees have proposed increasing the current disease-specific schedule of payments so that the ratio of payments to cancer versus nonmalignancy claimants increases from the current 4:1 to as high as 50:1. Letter from Robert A. Falise, supra, at 3.

There is speculation that the trust may also reserve some or all of its funds exclusively for cancer and impaired claimants, to prevent further increases in unimpaired claims from eroding a readjustment in the payment schedule. As of this writing, no changes in the trust have been announced, as the trustees have requested additional time for continued discussion among affected parties.

Plaintiffs' counsel have for nearly a decade shunned federal court (synonymous with Judge Charles A. Weiner's MDL 875 proceeding), because Weiner has given priority to impaired over unimpaired claimants. Weiner has recently ordered all MDL claims resulting from mass screenings dismissed without prejudice.

A large percentage of mass-screened claims historically have been unimpaired. Weiner found "that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs." Administrative Order No. 8, Multidistrict Litigation No. 875 (E.D. Pa.

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Jan. 14, 2002). The effect of Weiner's order is limited because most asbestos claims are pending in state court.

With the recent wave of asbestos bankruptcies, however, the federal courts have regained a central role in the asbestos litigation. Weiner's order, and any decision by Weinstein on the impairment issue, will be carefully considered by participants in the many pending asbestos bankruptcies. In several of those bankruptcies, Kazan and like-minded plaintiffs' counsel have made their appearance as the "Unofficial Committee of Select Asbestos Claimants." The Unofficial Committee advocates solely on behalf of claimants with malignancies and other impairing or terminal conditions, arguing that bankruptcy courts should establish a certain minimum level of impairment before claims can be counted or allocated any funds. The Unofficial Committee proposes deferring compensation to claimants exposed to asbestos unless and until they become impaired.

Another interesting development came on Nov. 27, 2001, when Judge Edward R. Becker, chief judge of the 3d U.S. Circuit Court of Appeals, issued an order sua sponte consolidating the bankruptcies of five major asbestos defendants-- Armstrong World Industries Inc., Federal-Mogul Corp., Fibreboard, Owens Corning and W.R. Grace & Co. Citing the "tremendous opportunity which is provided" by the consolidation of "the lions' share of the asbestos claims all over the country," Becker assigned the cases to Judge Alfred M. Wolin of the District of New Jersey.

After inviting all interested parties in the bankruptcies to submit suggestions on how best to resolve the bankruptcies, Wolin has developed a draft strategic plan to address common issues, including "who is ill and who is not ill." Telephonic conference, In re Owens Corning, No. 00-03837 (JKF) (Bankr. D. Del. Nov. 27, 2001), at 2. Wolin has assembled a team of five special masters and has urged a cooperative and pragmatic approach to resolving the impairment controversy and other issues, with the aim of avoiding "collateral damage" to asbestos claimants and unnecessary delay of the debtors' reorganization.

Wolin's first ruling, issued on Feb. 8, reflects this pragmatic approach. The court refused to hear asbestos cases brought against automobile manufacturers that had been removed from state court as cases "related to" Federal-Mogul's bankruptcy case. Concerned that the addition of the auto defendant cases would distract from the "awesome responsibility" presented by the existing consolidated proceeding, Wolin remanded the cases. These simultaneous proceedings before Wolin, Weinstein and Weiner create an unprecedented situation by bringing the key players in the asbestos litigation together in federal courts, which have traditionally been willing to look critically at the impairment issue. The possibility that resources will be exhausted gives new impetus to Wolin's proposal made in an asbestos case nearly 12 years ago: "The portent of [the] staggering and almost incomprehensible number of [asbestos- related] claims compels the legal and judicial communities to mutually rethink the organic structure of a product liability trial...[and]...invites the employment of extraordinary case management techniques provided they equally serve the litigants, the courts, and the ends of justice." Campolongo v. Celotex Corp., 681 F. Supp. 261 (D.N.J. 1988).

Babcock & Wilcox Co., whose asbestos bankruptcy has not been consolidated before Wolin, hopes to make the most of this new federal forum by obtaining the dismissal of unimpaired claims on the ground that they are not cognizable. Although several courts in the tort context have ruled in favor of that position, it is unclear whether a bankruptcy court, required to give the broadest possible interpretation to a statutory "claim," could so rule. Babcock's position may also undercut its known prebankruptcy willingness to settle unimpaired claims.

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Even if Babcock's approach succeeds, it is difficult to tell what impact, if any, limitations placed on unimpaired claims in the bankruptcy process would have on the state court tort system. State courts would remain a haven where unimpaired claimants can win tens of millions of dollars each. If a paradigm for efficiently and fairly estimating and funding asbestos-related liabilities in the Chapter 11 context emerges from the proceedings before Wolin and Weinstein, asbestos defendants still in the tort system may well conclude that bankruptcy is a more attractive option.

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ASBESTOS

The $200 Billion Miscarriage of Justice

Asbestos lawyers are pitting plaintiffs who aren't sick against companies that never made the stuff--and extracting billions for themselves.

FORTUNE
Monday, March 4, 2002
By Roger Parloff

James Curry, awarded $25 million in damages

"You indicated that you walked three or four miles a day?" a defense lawyer asked plaintiff James Curry this past October in a rural courthouse in Lexington, Miss.

"Correct," answered Curry, a 65-year-old former railroad worker in seemingly good health. Curry and five co-plaintiffs were in court seeking compensation for exceedingly mild cases of asbestosis and other "asbestos-related conditions." Such conditions--scars, marks, opacities, and other imperfections in the lungs that show up in X-rays--are not necessarily accompanied by any impairment or symptom severe enough to spur someone to see a doctor. Nevertheless, most state courts recognize these conditions as "compensable injuries," that is, the proper subject of lawsuits.

Like most asbestos plaintiffs today, Curry and his co-plaintiffs were never asbestos workers per se. They were, rather, laborers, janitors, plant workers, or general maintenance men who, once in a while during their long working lives, allegedly either handled asbestos-containing products or worked in the general vicinity of others who did.

"And you also jog?" the defense lawyer asked Curry.

"No, I don't jog anymore.... I stopped after '96."

"Did you tell them at your deposition [in March 2001] that you jog?"

"Possibility that I did.... Just made a mistake."

This past Oct. 26 the jury returned a verdict for Curry and his five co-plaintiffs against three defendant corporations of $150 million--$25 million per plaintiff--in compensatory (not punitive) damages. Four defense doctors had testified that none of the plaintiffs suffered from any asbestos-related condition whatsoever, but the plaintiffs' doctor, a Jackson pulmonologist, had disagreed. None of the plaintiffs claimed to have incurred any medical expenses or to have ever lost a day of work due to asbestos exposure.

The prospect of winning verdicts like Curry's has turned the original mass tort--

asbestos litigation--into the ultimate mass farce. There are now about 49,000 asbestos plaintiffs awaiting trial in Lexington, Fayette, Port Gibson, Pascagoula, and other propitious plaintiffs' venues in Mississippi, and at least 200,000 more cases nationwide--mainly concentrated in other favorable plaintiffs' locales sprinkled across such states as Texas, Louisiana, West Virginia, New York, and California. The nation's dockets are now so jammed with asbestos suits being brought on behalf of minimally injured people that lawyers who represent the truly ill are teaming up with asbestos defendants to demand reform. They fear that the marginally impaired plaintiffs will drive so many defendants bankrupt that the genuinely sick and dying will have no one left to collect from.

Total corporate asbestos liability to U.S. plaintiffs is now expected to reach $200 billion. Insurers worldwide will soak up $122 billion of that sum, according to actuarial firm Tillinghast-Towers Perrin, while the defendant corporations themselves will disgorge the remaining $78 billion. Though as recently as 15 years ago dispassionate experts predicted that a total of 100,000 people might eventually file asbestos-related claims, the most recent forecasts predict between 1.3 million and 3.1 million claims, of which only about 570,000 have yet been filed.

Until very recently, most Americans regarded asbestos litigation as a problem of the distant past. And with good reason. It has now been more than 35 years since Dr. Irving Selikoff published his medical studies definitively establishing that asbestos dust was causing horrendous diseases among asbestos workers. It has been more than 30 years since the government began imposing strict limits on workplace exposure to asbestos dust. It has likewise been at least 30 years since labor unions came to understand the dangers of asbestos dust and began warning their members to take precautions. It has been 20 to 30 years since most asbestos-containing products were phased out of production completely. As a result, instances of serious asbestosis began declining many years ago. The 1994 edition of the medical text Occupational Lung Disorders describes asbestosis as a "disappearing disease."

But while asbestosis may be disappearing from America's hospitals, it is precipitously on the rise in America's courthouses, with the rate of new filings against some defendants having nearly tripled in the past two years. Filings against one defendant surged from 31,000 in 1999, to 58,000 in 2000, to more than 91,000 last year. Almost all of that surge occurred among claimants alleging nonmalignant asbestos-related conditions like Curry's--the most subjective and least serious diagnoses.

"The Search for the Solvent Bystander"

After the Chapter 11 filing of Johns-Manville, the most culpable asbestos defendant, plaintiffs lawyers searched for deep pockets in ever more peripheral businesses.

The First Group to Fall

Company	Year	Comment
Johns-Manville	**1982** *(year of bankruptcy filing)*	The biggest maker of asbestos products, it shocked the business world by filing for bankruptcy to avoid the tort system.
Unarco	**1982**	This maker of composition board containing asbestos filed for bankruptcy a month before Manville.
Raymark *(Formerly Raybestos Manhattan)*	**1989**	A manufacturer of asbestos brake parts, it entered bankruptcy in 1989, emerged briefly in 1996, but filed again in 1998.
Eagle-Picher	**1991**	An asbestos-based pipe sealant for ships generated $20 million in revenues and $2 billion in asbestos liability.

The Current Crop of Bankrupts

Company	Year	Comment
Babcock & Wilcox	**2000**	Like many defendants, the boilermaker was a purchaser, not a manufacturer, of asbestos products.
Owens Corning	**2000**	The glass fiber company tried--and failed--to weather the storm by setting up an ambitious settlement program.
G-I Holdings ***(Formerly GAF)***	**2001**	The 1967 acquisition of a company that made insulation for WWII ships cost it $1.5 billion in asbestos liability.
W.R. Grace	**2001**	The chemical giant paid nearly $2 billion for using asbestos in its fire-protection products.

Companies in the Cross Hairs

Company	Comment
Georgia-Pacific	The forest-products company faces 62,000 claims related to gypsum products it made before 1977.
3M	It never made or sold asbestos. Allegedly failed to warn that its dust masks wouldn't work if improperly used.
Halliburton	Of its 275,000 active claims, 80% come from its 1998 acquisition of Dresser Industries, an engineering and construction company.
Ford Motor	Plaintiffs seek $1.7 billion in damages for exposure to asbestos used in brakes.

The filings by workers in so-called nontraditional industries--industries in which employees seldom come anywhere near asbestos dust--have skyrocketed. Filings in the textile industry, for instance, jumped more than 721% in the past two years, according to one defendant's records; in the pulp and paper industries, 296%; in the food and beverage industries, 284%. Companies like Chiquita Brands, General Electric, and Sears Roebuck have all been hit with asbestos suits.

The avalanche of new claims being brought by ever less impaired plaintiffs alleging ever more marginal medical conditions caused by ever more fleeting exposures to asbestos dust has triggered a new wave of bankruptcies. Since January 2000, 16 asbestos defendants have entered Chapter 11, including boilermaker Babcock & Wilcox; glassmaker Pittsburgh Corning; insulation maker Owens Corning; floor manufacturer Armstrong World Industries; roofing-materials company G-I Holdings (formerly GAF Corp.); chemical giant W.R. Grace; construction-materials manufacturer USG Corp.; and auto-parts conglomerate Federal-Mogul Corp. Adding them to at least 39 other asbestos defendants that have sought bankruptcy protection since 1979 brings the momentary total to 55.

Each newly bankrupt company will eventually turn over most of its already dissipated shareholder value to a trust that will then divvy it up, mainly among minimally impaired claimants and their lawyers. Like the employees of Enron, employees of these reorganizing companies have seen their retirement savings vanish in a flash. At the time of Federal-Mogul's bankruptcy filing this past October, all-too-loyal employees held 16% of the company's stock, which had lost 99% of its value since January 1999. About 14% of Owens Corning's shares--which lost 97% of their value in the two years before its filing--were owned by

employees. But those employees' losses have thus far gone unbemoaned by Congress.

Each time another company seeks bankruptcy protection, the prospects for all the remaining companies worsen, since the bankrupt company passes most of its liability along to them, under the ancient principle of tort law known as joint and several liability.

"The last man standing gets to pay the entire liability," summarizes Frank Macher, who became Federal-Mogul's CEO in January 2001, nine months before its Chapter 11 filing. What proved fatal to his company, he says, was its 1998 acquisition of T&N plc, a British manufacturer that carried what had seemed at the time a manageable level of U.S. asbestos liability. But as each new domino fell--Babcock & Wilcox, Owens Corning, Grace, USG--plaintiffs lawyers' demands on Federal-Mogul increased correspondingly. "Within four years," says Macher, "settlement costs went from $80 million a year to $350 million [in 2000], to a projected $400 million [in 2001]." Inundated beneath 360,000 active cases, Macher's company entered Chapter 11 in October.

Companies that once barely gave their modest asbestos liability a second thought are now trying to reassure shareholders that they can survive. The stock of oil-field supplier Halliburton Corp. fell 42% on Dec. 7 after the company, now battling 275,000 asbestos cases, sustained the latest in a series of stunning, adverse jury verdicts. In January, Moody's Investors Service began reviewing the debt rating of Georgia-Pacific, the forest-products company, due to its 62,000 cases. Dow Chemical shares fell 7.5% in a day that month, as jittery shareholders absorbed news of an asbestos settlement paid by its recently acquired Union Carbide subsidiary. Ford Motor, General Motors, and DaimlerChrysler are now defending more than 15,000 cases, and that number could rise, since claims alleging injury from asbestos in brakes and clutches increased 1,634% over the past two years.

In fact, more than 1,000 American corporations have now been named as asbestos defendants, according to a report issued last August by the RAND Institute for Civil Justice. Those companies are scattered across 44 of the 82 industrial categories used by the U.S. Department of Commerce, meaning that employers across more than half of the American economy now face asbestos liability.

How did so many American businesses find themselves hurtling toward this $200 billion black hole? Can anything be done to deflect their path?

The course of asbestos litigation over the past 30 years has been shaped less by the law of torts than by the law of unintended consequences. At every turn, well-intentioned court rulings have, in the fullness of time, backfired.

Few people doubt that the unprecedented scale of today's corporate asbestos liability stems ultimately from the unprecedented scale of yesterday's corporate wrongdoing. In the 1920s and '30s, at least some American corporate officials--now long deceased--knowingly concealed evidence that asbestos dust could cause horrendous, fatal diseases. When the first asbestos suits were filed in the 1960s, the plaintiffs were usually asbestos workers suffering from grave and crippling maladies. The most common were mesothelioma, a 100% fatal cancer; lung cancer; and severe asbestosis. Though nonmalignant, severe asbestosis may have been the most torturous of all. Its asphyxiating symptoms could drag on for years, often ending only when the victim finally suffocated to death.

Because workers were usually barred from suing their employers for occupational disease--being restricted by state law to modest workmen's compensation benefits--lawyers framed these cases as product-liability suits against the asbestos manufacturers. Once that legal theory won the imprimatur of a federal appellate court in 1973, filings picked up momentum. In the late 1970s plaintiffs lawyers began unearthing smoking-gun corporate documents showing that corporate officials had concealed asbestos' perils. As a result, by the early 1980s plaintiffs had begun to win punitive-damages verdicts, magnifying the allure of such suits to other contingent-fee plaintiffs lawyers.

As defendants tried to stanch the rising tide of cases by raising statute-of-limitations defenses, plaintiffs lawyers responded by filing cases as soon as their clients manifested the slightest trace of exposure, even if the client had not yet developed a disabling disease. Most judges allowed those suits to go forward, concerned that if the plaintiffs waited till their conditions grew worse, their cases might be dismissed for tardiness. Increasingly mild asbestosis cases were brought, as were suits on behalf of plaintiffs suffering only from pleural plaques--a scarring of the lungs that most doctors regard as harmless.

In 1982, Ronald Motley, a young plaintiffs lawyer from Charleston, S.C., won about $1 million in Pascagoula, Miss., for a shipyard worker suffering from moderate asbestosis. Motley, who would ride the crest of the asbestos wave to become the premier mass tort trial lawyer in the country, had argued that the plaintiff in that case should be compensated for his fear of developing cancer. Though awards for fear of cancer are legally controversial, many judges permit them--either overtly or covertly--out of concern that a plaintiff who later does get cancer might be either legally barred from bringing a second suit or might have no one left to collect from, the defendants having all gone bankrupt by then.

As the number of asymptomatic plaintiffs rose, a handful of jurisdictions started either rejecting them or deferring them until the plaintiffs developed disabling conditions. But liberal venue rules usually permitted plaintiffs lawyers to avoid those jurisdictions by filing their so-called unimpaireds elsewhere.

Since asymptomatic cases had become valuable, plaintiffs lawyers began seeking them out. By the mid-1980s they were organizing mass screenings, often with the cooperation of labor unions. A van equipped with radiographic equipment--an "examobile," as some were called--would roll up to a factory door, and all workers over a certain age would be invited to receive a free chest X-ray. Just before the exam, the worker would typically be asked to sign a retainer agreement, promising to be represented by a certain law firm if the X-ray came back positive for asbestos-related disease. The X-rays would then be collected and sent to a single radiologist--a credentialed specialist, albeit one working for the plaintiffs lawyer--who would sift through them, assembly-line style, looking for arguable cases of asbestosis, pleural plaques, or cancer.

There was nothing illegal or unethical in itself about staging mass screenings, and plaintiffs lawyers straight-facedly claimed that they provided a benefit to society. "I think it's a wonderful thing," says Fred Baron, the past president of the Association of Trial Lawyers of America and the head of Dallas-based Baron & Budd, which now handles about 12,000 asbestos cases. "If I have a disease, I want to know about it, and I want to be able to seek treatment for it."

Nevertheless, the purported medical benefits of screening were always dubious; asbestosis and mesothelioma are untreatable, and National Cancer Institute studies have suggested that X-rays catch lung cancer too late to reduce mortality rates. The opportunities for abuse, on the other hand, were legion. The X-rays of hundreds of screened tire workers who submitted claims in the mid-1980s to one

now-bankrupt asbestos defendant were subsequently reevaluated by independent academic researchers in a paper published in November 1990. The researchers concluded that "possibly 16, but more realistically 11 of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform mineral." A Kansas federal judge, reviewing the evidence involving the tire workers, commented that screening procedures in that case had produced "a mockery of the practices of law and medicine."

As asbestos manufacturers desperately groped for defenses against the then unfamiliar phenomenon of mass tort liability, they adopted a variety of strategies. In retrospect it has become clear that the most culpable defendant, Johns-Manville Corp., chose the shrewdest approach: early departure from the tort system. In 1982 that company, already defending 16,000 suits, shocked the business community by filing for bankruptcy protection. Then ranked 181st on the fortune 500 list, with 1981 revenues of more than $2.2 billion, Johns-Manville was the largest and most vibrant industrial corporation ever to seek Chapter 11 protection. Because it had been the biggest asbestos manufacturer, plaintiffs lawyers had until then regarded it as the primary target, and had looked to it for at least 30% of their recoveries. But with the filing, Johns-Manville's treasury was lost to plaintiffs for most of the next 13 years, while the bankruptcy litigation played out, and it never fully returned.

In what would become the model followed by most asbestos defendants who later filed for reorganization in Chapter 11, Johns-Manville split into two units: the reorganized company, which went forward minus its asbestos operations and liabilities, and a trust. The trust's funds were invested so that the proceeds could be used to pay the company's asbestos victims. Most such trusts, including the Manville Trust, ultimately set up administrative processes whereby claimants, after submitting minimal proofs of exposure and an asbestos-related condition, would be paid set sums for designated medical conditions. Most trusts also paid, however, only at a greatly discounted rate--in Johns-Manville's case, 10 cents on the dollar.

With Johns-Manville effectively out of the picture by 1982, plaintiffs lawyers looked to the remaining manufacturers and distributors to make up the difference. Most of those companies turned to settlements as the most rational way of coping. Like the trusts, they essentially developed grid schedules, whereby they would offer X amount for a mesothelioma case, Y amount for a pleural plaque case, and so on. Looking back ruefully, many defendants now believe that by settling so readily for so many years they unwittingly encouraged the filing of increasingly marginal and dubious claims.

If defendants were making asbestos recoveries tantalizingly easy for plaintiffs, so were the courts. Since it was difficult, for instance, for plaintiffs to recall precisely which products they had worked with 40 years earlier, or to guess which of many asbestos products might have ultimately caused their injuries, courts relaxed the standards of proof required to link any one asbestos defendant to a plaintiff's injury. Even if a plaintiff could not recall using a defendant's product, he could sue that defendant if a co-worker remembered seeing that defendant's products at a work site.

Perhaps the most dramatic slackening of the rules came in the procedural realm, where judges increasingly joined plaintiffs and defendants in large cases and trials to keep up with their exploding asbestos dockets. Though such consolidations created grave doubts about the ability of jurors to keep the unique circumstances of each plaintiff or defendant clear in their minds, trial judges increasingly saw no alternatives. Within just two years after one federal appeals

court in 1985 very cautiously okayed the joinder of four plaintiffs into one case--explaining that all four had served on the same work crew and that two were brothers--a federal trial judge consolidated 3,031 plaintiffs into a single case in Beaumont, Tex. That judge announced his plan to hold trials for representative plaintiffs, and then statistically to extrapolate those verdicts to thousands of co-plaintiffs.

Though a federal appeals court later blocked that plan, the so-called "jumbo consolidation"--in which as many as 11,000 plaintiffs and scores of defendants were joined in a single case--was soon common practice in the state courts of Texas, West Virginia, Maryland, Massachusetts, and Mississippi. Courts in West Virginia, Texas, and Mississippi allowed out-of-state plaintiffs to join those suits, even if they had never lived or worked in the forum state. As a result, by July 1999 some 9,100 asbestos plaintiffs from all over the country were suing in rural Jefferson County, Miss.--about 700 more asbestos plaintiffs than there were county residents.

Though judges turned to jumbo consolidations in an effort to get out from under their groaning caseloads, they may have unwittingly exacerbated the problem. "You think you're clearing your docket," says David Bernick, a litigator at Chicago's Kirkland & Ellis who represents three bankrupt asbestos defendants, "but what you're doing is you're widening the pipeline to the courthouse."

In the jumbo cases, a sampling of illustrative cases would typically go to trial together--in a "bouquet" trial, as it became known--and the judges would then hope that thousands of co-plaintiffs' claims could then be settled based roughly on the verdicts awarded the representative plaintiffs. But, academics have since concluded, the bouquet trials overcompensated the least injured plaintiffs by allowing them to benefit from "sympathy by association" or "the piggyback effect." In addition, jumbo consolidations tended to coerce settlements from asbestos defendants by presenting them with the so-called "Armageddon scenario." Going to trial in a jumbo case was a bet-the-company proposition, one that few defendants were willing to risk.

Wanting to avoid these bouquet trials, defendants were often willing to settle the malignant cases, but plaintiffs lawyers frequently refused unless the defendants would settle the firm's nonmalignant cases as well. Much as a movie studio might refuse to rent out a blockbuster film unless an exhibitor agrees to take five clinkers along with it, the plaintiffs lawyers held their malignant clients hostage to fetch a higher price for their nonmalignants. Though the ratios vary widely by jurisdiction, in some states nonmalignant cases now outnumber cancer cases by margins as wide as 47 to 1.

Through the 1990s, plaintiffs lawyers continued using mass screenings to conscript fresh armies of asbestos plaintiffs. Just eight screening doctors accounted for more than 70% of all the claims filed with the Manville Trust between January 1995 and April 1998. Concerned about the reliability of such diagnoses, the trust had begun auditing claims in 1995, having independent doctors reevaluate claimants' X-rays. Its doctors concluded that 38% of all the asbestosis claimants audited in 1996 suffered from no asbestos-related condition at all, while another 28% had conditions milder than had been asserted. The audits were discontinued after plaintiffs firms sued to stop them. David Austern, president of the trust's claims-paying arm, says that the high audit-failure rates probably do not reflect fraud on anyone's part, but rather the intrinsic subjectivity of X-ray interpretation, especially when the alleged diseases are so mild. "It's more art form than science," Austern says.

Many of the men now being screened held numerous jobs in their lifetimes--sandblasting, welding, painting--each of which carries its own hazards to the

lungs. Consequently, asbestos defendants are very likely now paying compensation for every occupational disease known to man. Incipient or marginal asbestosis, as picked up on an X-ray, bears at least a superficial resemblance to more than 130 other lung inflammations, including scores caused by various airborne particles.

The asbestos mass tort has proven more resistant to comprehensive settlement than any other, because the class of people exposed is so enormous, the injuries so ill-defined, and the pool of potential defendants so bottomless. But the most vexing problem has been that so many asbestos-related injuries will not occur for decades. How do you negotiate a settlement with plaintiffs who don't yet exist?

An intrepid group of lawyers tried to do just that in 1993, when they announced the so-called Georgine settlement. In an agreement between about 20 asbestos defendants and many of the country's leading asbestos-plaintiffs firms--including Ron Motley's Ness Motley Loadholt Richardson & Poole--the companies settled a backlog of 14,000 cases in exchange for the plaintiffs firms' agreement to set up an administrative claims process for adjudicating all future claims. Under the new regime, future unimpaireds would get nothing unless they came down with a real illness, as defined by objective medical criteria.

But the deal, which was framed as a highly unorthodox class action settlement, needed judicial approval. And since the settling lawyers were, in effect, trying to alter the tort laws of all 50 states, the arrangement raised serious constitutional issues.

In June 1997 the U.S. Supreme Court struck down Georgine on procedural grounds, not addressing the constitutional issues. After the Court rejected a second proposed asbestos settlement in 1999, the prospect of ever hammering out a court-sanctioned, negotiated solution was laid to rest.

"We should've filed bankruptcy on the day after the Georgine settlement was overturned by the Supreme Court," says the CEO of one now-bankrupt asbestos defendant. "Every asbestos defendant should've done the same thing."

Since the most obvious asbestos defendants were, by that time, mostly out of the picture, the second- and third-tier defendants began to bear the brunt of the litigation. "The concept is picking low-hanging fruit," explains Steven Kazan, an Oakland, Calif., plaintiffs lawyer who represents almost exclusively mesothelioma victims. "In the early days of the litigation, you had Manville. Manville goes away. Next in line are the regional distributors. If they go away, next in line are the contractors who bought from them. If those guys disappear, there are cases where we very legitimately are suing the neighborhood hardware store, because that's where the guy bought asbestos joint compound, or the lumberyard where he bought asbestos shingles, or the floor company where he bought floor tiles. They say, 'All of a sudden, why me?' One answer is: 'Consider yourself lucky that we left you alone for 20 years.' We're now higher in the tree." Defense lawyers see it differently. "It's the search for the solvent bystander," says John Aldock, chairman of Shea & Gardner.

No matter how many major asbestos defendants succumbed to bankruptcy, plaintiffs always seemed able to identify the products of ever more peripheral defendants as having been present at their work sites. In fact, plaintiffs usually managed to convince juries that these afterthought defendants, who never used to be sued at all, were actually the guiltiest parties. In railroad worker Curry's case, for instance, the jury apportioned 80% of his $25 million award between the two defendants who were left in his case after scores of others had already

settled before trial. (Dozens of other key potential defendants had never even been named in the suit, of course, since they had already gone bankrupt.) Specifically, the jury ordered that 60% of Curry's award be paid by ACandS Inc., a tiny Lancaster, Pa., insulation contractor that never had offices in Mississippi, never performed contracts at any of the sites where the plaintiffs worked, and sold few asbestos-containing products anywhere. For all six plaintiffs in the case, ACandS's liability came to $83.75 million, which was more than ten times the company's net asset or equity value, and more than the firm's total cumulative earnings in its 43 years of existence. (ACandS would like to appeal, according to a spokesman, but is not certain it can afford the bond required by law to do so.)

During the summer of 1997 the mysteries of the so-called product-identification phase of asbestos litigation came under scrutiny when a 20-page memo prepared by a paralegal at Baron & Budd was inadvertently turned over to defense lawyers at a deposition. The memo provided startlingly candid advice to asbestos plaintiffs about how to prepare for their depositions:

You must be able to pronounce the product name correctly and know WHICH products are pipe covering, WHICH are insulating cements, and WHICH are plastic cements.... Have a family member quiz you until you know ALL the product names listed on your Work History Sheets by heart....

Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case.

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered....

When the memo surfaced, Baron said that neither he nor any lawyer at his firm had ever seen it before. A Baron & Budd paralegal eventually signed an affidavit in which she took sole responsibility for writing it. (She is still employed at Baron & Budd.) Nevertheless, Baron also argues in an interview that the memo doesn't actually counsel anything improper, especially when taken in context with other materials the firm provided to plaintiffs, which advised them, for instance, to tell the truth.

Judicial reactions to the memo ranged widely. One state district judge referred the memo to a Dallas County grand jury for criminal investigation, but the inquiry died. Meanwhile, in civil proceedings, a panel of the state's appellate court concluded that the memo, while "heavy-handed," was not fraudulent. In fact, the court found, it was protected by the attorney-client privilege, so the asbestos defendants were barred from making any further inquiries about it.

In May 1998, a watershed trial took place in Fayette, Miss., the county seat of rural Jefferson County. An array of twelve plaintiffs went to trial, having been selected from among the more than 1,700 then joined in a jumbo consolidation known as David Cosey. That June the jury returned a verdict of $48.5 million in compensatory damages for just those 12 individuals--including $2 million for each of at least five seemingly healthy plaintiffs. "He reported no respiratory symptoms," the plaintiffs' expert had testified about one of the men. "He had normal pulmonary function tests in all ways."

The Cosey case, as it then played out, became an unusually vivid illustration of the dreaded "Armageddon scenario." With the same jury deliberating whether to impose punitive damages on top of the $48.5 million already assessed, most defendants settled those 12 individuals' claims, many agreeing to pay every penny of the verdict, according to one lawyer familiar with the case. When a few

defendants balked, however, circuit judge Lamar Pickard telephoned their representatives, according to affidavits later filed in the case. He allegedly advised those defendants that if they did not settle the remaining 1,700 co-plaintiffs' claims within 30 days, he was considering reconvening the same jury that had just ruled and having it set damages for all of their claims as well. He then allegedly implied that the defendants would not be able to appeal the resulting aggregate verdict to the Mississippi Supreme Court, because they would not be able to afford the appeal bond required under Mississippi law, which, at the time, had to cover 125% of the total judgment. The defendants settled the 12 individual claims that afternoon. They still balked, however, at settling the rest of the co-plaintiffs' claims.

Though Judge Pickard did not proceed with a trial of all 1,700 remaining co-plaintiffs, he did schedule a group trial of 63 more plaintiffs' claims for October. Five days before that trial was scheduled to begin, and after the Mississippi Supreme Court denied the defendants' emergency petition seeking, among other things, to disqualify Judge Pickard for bias, the defendants agreed to settle all the remaining 1,700 claims. (Judge Pickard declines to comment, on the grounds that a piece of the Cosey case is still pending. Mississippi relaxed its appellate bonding rules in 2001, but it is unclear whether the changes are sufficient to make much difference in practice.)

Owens Corning's share of the June 1998 Cosey verdict came to about $27 million. That blow struck the company just a few months after a new general counsel, Maura Abeln Smith, had joined it. "We looked at our position," Smith recalls, "and said, We can't be paying $27 million to $30 million for ten to 12 individual plaintiffs--even if they were sick. That would be an incredible amount of money to have to pay out per person for a company that was trying to meet its obligations to hundreds of thousands of people."

As a result, Smith and CEO Glen Hiner launched the company's National Settlement Program, whereby Owens Corning eventually reached agreements with 120 plaintiffs firms, including Ness Motley and Baron & Budd. In a sense, it was Owens Corning's own private Georgine, except that it could not be forced upon anyone. The company agreed to pay all outstanding claims for amounts listed in a grid schedule, and the plaintiffs firms, in turn, promised to recommend that their future unimpaired clients not seek reimbursement until they became sick.

Owens Corning settled about 245,000 cases through the program, over and above the roughly 200,000 it had already resolved previously. "We thought we had gone over the hump," Smith recounts.

But as claims filings rose throughout 1999 and 2000, Owens Corning's program proved unable to save the company. Periodic windfall verdicts like the one in Cosey ensured that there would always be new plaintiffs attorneys--typically the younger lawyers who had not yet made their fortunes--who insisted on taking cases to trial.

"It was the spinoffs we were having difficulty with," says CEO Hiner, referring to startup firms formed by lawyers who left more established firms, and were not bound by those firms' agreements to participate in Owens Corning's settlement program.

The situation worsened in February 2000, when Babcock & Wilcox entered bankruptcy, the first of a new line of dominoes. As each fell, plaintiffs firms ratcheted up their settlement demands on all the defendants left in the tort

system. After two more defendants entered Chapter 11--and with an ominous trial date looming in Beaumont, Tex.--Owens Corning sought bankruptcy protection in October 2000.

Though Hiner and Smith had guessed wrong about their settlement program, they had guessed right about ducking the Beaumont case. In February 2001 that jury returned a $35.2 million verdict for 22 modestly injured workers--$1.6 million each--which the jury predictably apportioned primarily between the two defendants still left in the case: USG and Federal-Mogul. When USG went bankrupt in June, Federal-Mogul was left on the hook for the entire sum under the principle of joint and several liability. Federal-Mogul filed in October.

Gazing across this desolate landscape, two colonies of unbowed reformers are now plotting parallel avenues of attack upon the indomitable asbestos dragon. Though the leaders of each band profess optimism about their own prospects, they are disconcertingly skeptical about the prospects of the other camp.

One group is led by litigator Bernick, who hopes to entice federal judges presiding over bankruptcies to lead the way out of the quagmire. Now representing Babcock & Wilcox and Grace, among others, Bernick wants federal judges to appoint panels of medical experts to evaluate what he believes to be dubious scientific theories underpinning many asbestos claims today--a tactic that bore fruit for Bernick a few years ago when he was national defense counsel for Dow Corning during its breast implant litigation. Bernick believes, for instance, that independent experts will agree that the fleeting occupational exposures that form the basis of most claims today cannot really cause asbestosis. In Bernick's grand vision, the conclusions of these panels would then have a far-reaching, persuasive impact on judges throughout the country.

But while other asbestos defense lawyers would be delighted to see Bernick succeed, many consider his strategy quixotic. If nothing else, Bernick's goal of using federal bankruptcy courts to dismiss thousands of tort claims that would be permitted in the state courts where they were brought raises at least as many legal and constitutional red flags as did the Georgine settlement, which the Supreme Court felt constrained to strike down.

Accordingly, other defense lawyers place their hopes in a legislative solution. But while some still reflexively call for sweeping tort reform, most now forswear that rallying cry. "We need to save ourselves from the people who would like to do tort reform again," says Aldock, "because you never get it." Surveying 30 years of failed asbestos reform bills, Aldock and others believe that the only hope for legislative success lies in seeking very narrow fixes. Prototype legislation embodying this strategy is now being proposed by the Asbestos Alliance, a group led by the National Association of Manufacturers, but also supported by a group of plaintiffs firms that specialize in representing mesothelioma and other cancer victims.

Because of the dwindling number of plausible, solvent asbestos defendants, tension has built between the firms that represent only very sick plaintiffs, like Steve Kazan's, and larger firms that represent all plaintiffs, including the unimpaireds. "I happen to believe," says Kazan, "that the interests of the unimpaired clients in fact are better served by giving them nothing or very little now, but making sure that if they were to get sick later on there will be money for them."

In February 2000, when the most recent wave of bankruptcies began, Kazan and others with practices like his decided that their clients' interests could no longer be adequately protected by plaintiffs creditors' committees composed predominantly of lawyers like Baron. They formed a committee of their own to

make sure that their point of view would be heard. That group now also supports the Asbestos Alliance's legislative approach.

The alliance proposes leaving asbestos litigation in the courts rather than trying to replace it with an administrative claims process, and it would not attempt to bar punitive damages or cap attorneys' fees--as failed initiatives of the recent past have tried to do. Instead, the alliance proposes legislation that would establish minimum objective medical criteria of actual injury that a plaintiff would have to prove before he could file suit anywhere in the country. In addition, its bill would ban jumbo consolidations and bar plaintiffs from suing outside the states where they live or were exposed.

Though most defense lawyers would favor such a bill, many are highly skeptical that it will ever pass--as anyone has to be, given the wretched history of such initiatives. Furthermore, many note, any asbestos reform supported by the Bush Administration will almost inevitably be derided as a bailout for Halliburton--Vice President Dick Cheney's old firm.

Unless the Alliance can enlist mainstream plaintiffs firms like Ness Motley into their cause--bringing with them support from labor unions and victims groups--its efforts certainly seem doomed. Still, such recruitments may not be impossible. Those firms consented once to the idea of establishing minimal medical criteria--in the context of the Georgine settlement in 1993--and, conceivably, they could be coaxed back into the reform camp again.

The other thing legislation may have going for it today is the unusual zeitgeist--the bipartisanship of the post-Sept. 11 Congress combined with the palpable sense that the wheels are simply coming off the asbestos wagon.

In November, for instance, the federal judge overseeing the Manville Trust demanded that the trust's leadership advise him on whether he should order fundamental changes in its rules. He was responding to the fact that in light of ever-multiplying claims, the trust had been forced to halve its payments on claims from 10 cents on the dollar to just 5 cents last June, and was in danger of having to shave them further, possibly to as little as 2 cents on the dollar.

Then, in January 2002, another federal judge, presiding over the consolidated pretrial proceedings of all federal asbestos cases nationwide, ordered that all nonmalignant cases initiated through mass screenings would henceforth be subject to dismissal unless the plaintiff could show independent evidence of asbestos exposure and disease.

A legible message is coming into focus. Judges, legislators, and even plaintiffs lawyers may finally be converging on an overdue consensus. After 30 years of watching lawyers game the system until they have turned it inside out, it's time to try some narrow, targeted, legislative reform.

Enough is enough.

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Enough to Make You Sick

In the struggle for a shrinking pot of money from asbestos litigation, the sickest victims are getting nickels and dimes while lawyers get their millions

BY THOMAS KOROSEC

Little did Ronald Bailey know that his handiness and inquisitive mind would one day kill him.

The Fort Worth native had a knack for understanding mechanical things. So as an engineering student at the University of Oklahoma in the early 1960s, he took what he thought was a great work-study job repairing the school's boilers, cooling systems, pumps and pipes, which ran under the Norman, Oklahoma, campus in miles of tunnels. It was a hands-on education, and just as important for the penniless student, it paid overtime. "When we'd tear down one of those boilers, it was Annie bar the door. That was money-making time," Bailey recalled years later.

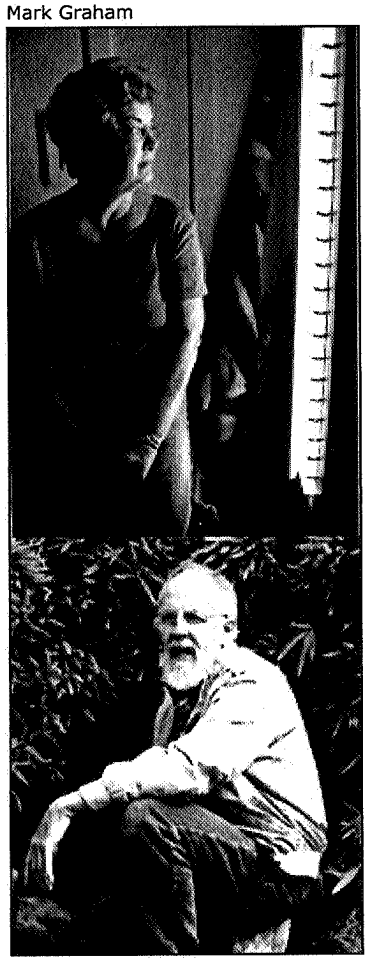
Bailey had little reason in the four decades since to think about his school-days job, but in the summer of 1999, after a lifetime of work as a mechanical engineer and landscape contractor, it came charging back. "He woke up one morning and he couldn't breathe," recalls his wife, Lynne Bailey. "They took an X-ray, and half his lung was covered with a malignancy."

Bailey had contracted mesothelioma, a rare and incurable form of cancer tied with scientific certainty to breathing asbestos fibers. At his college job, Bailey spent hours installing or tearing out heat-resistant asbestos pipe insulation and gaskets, or mixing floury, dusty asbestos-laden refractory cement--all in close spaces underground.

The fit, trim 59-year-old confronted his illness with stubborn optimism, refusing to accept an oncologist's estimate that he had less than six months to live. "He was sure they didn't know what they were talking about," says his wife, describing how he enrolled in an experimental cancer treatment trial in San Antonio and exhausted their savings on drugs and unconventional treatments.

But the hopeless prognosis proved spot-on. Ronald Bailey died in June 2000, becoming one of 2,500 Americans struck down that year from this particularly virulent occupational disease. "It engulfs the lungs and strangles them, like a belt being cinched up around the chest," says Mark Iola, a Dallas lawyer who specializes in representing people with malignant asbestos-related illnesses. "I

Mark Graham



Lynne Bailey of Fort Worth lost her husband, Ronald, to mesothelioma, a rare and incurable form of cancer caused by asbestos exposure. Since his death in 2000, she has witnessed firsthand the results of a national battle over asbestos

can't think of a more painful way to die."

Since the 1980s, families of men such as Ronald Bailey have been able to sue and stand a good chance of collecting court-imposed judgments or settlements from companies that made asbestos products. (Asbestos was phased out of the workplace in the early 1970s.) After 30 years of intense litigation, there is a well-established body of evidence that the major asbestos product makers knew about hazards to workers by the 1940s but concealed that information and issued no warnings. All that was left to prove when Bailey and his wife brought their liability lawsuit was which companies' products he had used and who would be made to pay.

In a deposition taken at his house three months before he died, Bailey answered those questions in easy detail. Dressed in a plaid shirt and cardigan sweater, his nose fixed with an oxygen tube, he described how he installed various pipe coverings, valve packings, cements and gaskets on his university job. A smorgasbord of materials was on hand because distributors would sometimes donate surplus supplies to the university, he said.

"He was a great witness," Iola says. "The defendants weren't going to let a jury hear from him."

In August 2000, just as Bailey's case was set to go to trial in Cameron, Texas, the last of 14 defendants settled with his widow. Iola will only say the total amounted to "more than several millions of dollars. There were about $200,000 of medical bills and $500,000 of lost wages. But most of it was for his pain and suffering and the loss of consortium, of him being who he was to his family."

Over the next year, however, Lynne Bailey would witness firsthand what a lawsuit crisis looks like. Before they paid her anything, six corporate defendants that owed about half her total settlement filed for bankruptcy, saying they were being drowned by a flood of asbestos claims. The six--roofing-materials company GAF, refractories-maker A.P. Green, boilermaker Babcock and Wilcox, insulation materials company Owens Corning Fiberglass, chemical conglomerate W.R. Grace and building-products manufacturer U.S. Gypsum--were soon joined by one more, Houston-based Kaiser Aluminum, which filed for bankruptcy after it had paid Bailey.

The vast majority of the lawsuits burdening these and other companies are being filed on behalf of workers who, unlike Ronald Bailey, are not sick and will probably never get sick from their asbestos exposure.

The explosion of so-called "unimpaired" cases, filed en masse by some of the wealthiest and most enterprising law firms in the country, has troubled corporate defendants since the early 1990s. (See "Toxic Justice," an August 13, 1998, *Dallas Observer* special report.) But over the past two years, with nearly every former producer of asbestos products filing for bankruptcy, the corporations have been joined by new allies: asbestos' true victims

lawsuits.

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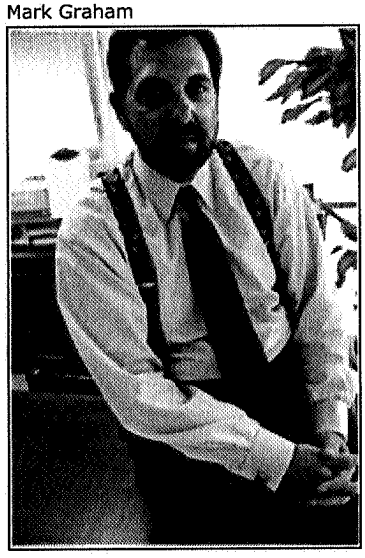

Dallas attorney Mark Iola, who handled Ronald Bailey's case, believes that only people with serious health problems should be able to sue asbestos defendants.

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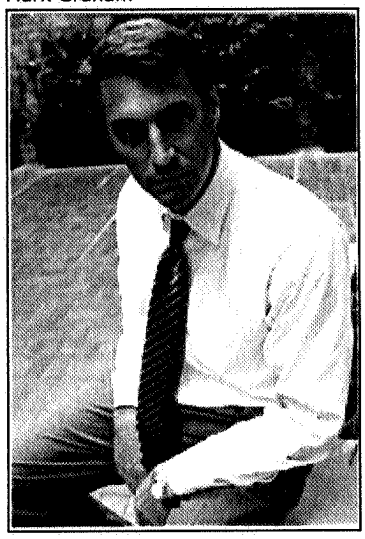


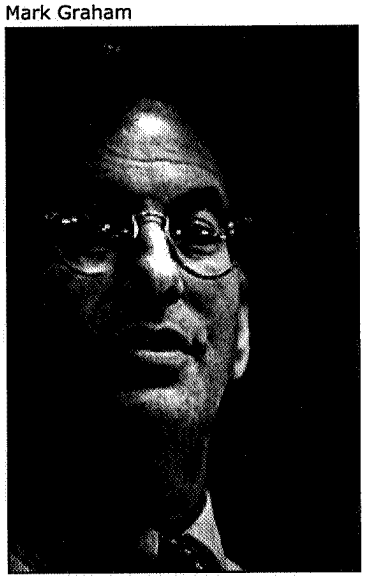
Peter Kraus says his former colleagues at Baron & Budd have reached so far into the pool of potential asbestos clients that they are now rounding up people who

and their lawyers, who say the crisis is harming them the most.

have no cause to be compensated.

"The seriously ill now have no place to go for compensation," Iola says. "The companies that are responsible for their injuries are in bankruptcy, because they've had to pay billions of dollars to people who don't manifest any impairment or disability. Lawyers are the ones doing this, and they're doing it for money. They are stealing money from the very sick."

Mark Graham



Fred Baron, a partner in Dallas' largest plaintiffs' firm, Baron & Budd, is pushing tens of thousands of "unimpaired" asbestos claims--meaning the plaintiffs aren't sick from asbestos exposure and probably never will be.

Earlier this year, 22 plaintiffs' law firms, most of them in Dallas or on the West Coast, threw in with their historic adversaries in the manufacturing and insurance industries to push Congress for reform. Their stand is causing an unprecedented rift among trial lawyers nationwide.

While the issue is obviously national in scope, Dallas is home to several of the most important legal players, including Iola and lawyer Peter Kraus, who advocate allowing only people with serious health problems to sue asbestos defendants.

Meanwhile, Fred Baron, a partner in Dallas' largest plaintiffs' firm and a force in the influential Association of Trial Lawyers of America, has taken up as a defender of the status quo. The ever-expanding, 80-lawyer, 500-employee Baron & Budd has a backlog of cases estimated to number between 10,000 and 20,000. The firm owns or has a major financial stake in a similar firm, Silber Pearlman, which has as many as 10,000 asbestos cases of its own. Together, the two control a double-digit percentage of the roughly 250,000 asbestos claims pending nationwide.

"Kraus and Iola would prefer only their cases get compensated to the exclusion of all others," Baron says. "That doesn't seem to be a very fair way to go."

For Baron, who has a national reputation as a brilliant legal strategist, these kinds of battles are getting to be old hat. Over the past decade he has twice challenged attempts to limit asbestos claims, appealed the issue to the U.S. Supreme Court and won both times. He expects to prevail again. "When you hear both sides of it, you see the system is working pretty well," he says.

Although the issue is rife with debate about fairness and legal rights, at its core it is about money: the solvency of a swath of American industry on one hand, and on the other the huge sums the big plaintiffs' firms collect via their customary 40 percent fees. The 25-lawyer Silber Pearlman firm, with its inventory of unimpaired asbestos claims, took in $100 million in revenue in 2000, according to Reagan Silber, who sold the firm that year. Baron & Budd, by extrapolation, undoubtedly made much more.

California attorney Steve Kazan, who has been representing asbestos cancer victims for nearly 30 years, says he expects reform of the type he is advocating to cost Baron and his partners several hundred million dollars. "And, you know, that's a lot of money," Kazan says. "I'd expect him to spend as much as he can spend to fight this. Fred is a smart businessman."

Kazan, whose Oakland firm stopped taking unimpaired cases more than two decades ago, equates the lawyers pushing the gush of lawsuits from unimpaired workers to rude dinner guests. "If you're

first in the buffet line, you don't eat all the shrimp," he says. "You're supposed to take a few, but don't take them all."

If every person with minor workplace exposure to asbestos demands damages--a population that could number as many as 30 million--nobody will receive meaningful compensation, Kazan and other reform advocates say. Because no viable companies will be left to pay future claims, the approximately 7,000 people who each year come down with asbestos-related cancers will be shorted worst of all.

Few people know all the lumps and curves in the asbestos street better than Peter Kraus.

For most of the 1990s, the lanky 42-year-old was a partner and a top courtroom lawyer at Baron & Budd. In 1998, he started his own firm with Andy Waters, another Baron & Budd alumnus, and the two now specialize in representing those afflicted with mesothelioma and asbestos-related lung cancers.

There are multimillion-dollar fees in that work, too, and Kraus' firm now houses 24 lawyers at its offices on McKinney Avenue. A blend of high-dollar slick and laid-back casual, it's a place where the stone table in the waiting room is piled up with *Mother Jones* magazines and more than a few lawyers seem to prefer not wearing socks.

In Kraus' view, his former colleagues at Baron & Budd have reached so far into the pool of possible clients that they now are rounding up people who have no cause to be compensated.

"I had no problem feeling good about representing people with pleural plaques, with breathing problems, all the classic signs of asbestos exposure," Kraus says. "But then you got to where you had people with mild, nonspecific changes in their lungs that could be caused by any number of things. They have no breathing problems. Their exposure history to asbestos is questionable. That is when I wanted to find something else to do.

"As the '90s went on, you got more and more people with marginal exposure to the stuff. You went from insulators and pipe fitters to having the maintenance guys in a paper mill. Yes, there was asbestos in that mill equipment, but they didn't work with it, and the medical evidence you get reflects that."

As a Baron & Budd partner, he says, "I was pushing for more of a focus on the cancer cases when I left. I started a malignancy-based practice, and they went the other way. They bought Silber Pearlman. Once they did that, their economic incentives were set. They couldn't change now if they wanted to. They would have to let go hundreds of employees and scores of lawyers and radically restructure. Nobody wants to bite that bullet."

Kraus says his criticism isn't personal. Baron is the best lawyer he's ever met, he says. "He's a real street fighter when he's in a battle. I saw that. And he will make it personal. I hope this doesn't get personal, because I have great respect for him. But he's already tried to isolate those among us who have taken this stand from the larger body of lawyers around the country. I'm sure it has started to affect our referrals, but we can take that. We all compete for cases anyway."

Kraus says it is wrong to think corporate America has simply taken an unfair beating at the hands of some sharp lawyers, as *Fortune* suggested recently in an article labeling asbestos lawsuits a "$200 billion miscarriage of justice."

That gargantuan number is the latest estimate of total corporate asbestos liability projected by the

actuarial firm Tillinghast-Towers Perin if the current trends remain. Stephen Carroll, senior economist at the Rand Institute for Civil Justice, says a quarter of that total has been paid out so far by the companies and their insurers in 600,000 settled claims. The circle of defendants, which now stretches out to everyone from toaster-makers and wineries to Sears, Roebuck, numbers about 5,000 in virtually every part of the U.S. economy.

Kraus says it is a mistake to oversimplify the multistage battle that has become the longest-running product liability fight in history. Corporate defendants will tell the public they are all for compensating the sick, he says, "But they fight like hell to pay as little as they can.

"I have pieces of paper come across my desk every day that are shameless. They will do anything to continue [or delay] a cancer case, because everyone knows the claim is less valuable after the plaintiff is dead. Some of these companies want to pay a mesothelioma claimant with substantial exposure [to their products] $25,000. That isn't what I call compensation. That's what they think it's worth if you're a blue-collar guy who has died catastrophically 20 years before the end of your natural life."

A few blocks away, in an office tower at the edge of Highland Park, Mark Iola expressed many of the same views about his new allies in industry and new adversaries in the plaintiffs' bar. "It used to be, back when my grandfather practiced law in Oklahoma, a lot of guys got into law because that's what they really wanted to do. Now the profession has attracted a lot of people who want to run a business."

Iola says he gets many of his asbestos cases from lawyers who were clever enough to establish elaborate Web sites on asbestos. Ronald Bailey came to him that way. When he was diagnosed, his daughter typed the word "mesothelioma" into a search engine, hoping to learn more about the disease. Out came a lawyer-sponsored Web site giving an encyclopedia of information, plus the lawyer's phone number. The advertising-savvy lawyer in turn brokered the case to a trial lawyer, Iola, who did all the traditional legal work.

That same entrepreneurial zeal is behind the tens of thousands of claims from workers who are unimpaired but who claim to have mild asbestosis, small irregular scarring between the air sacs of the lungs caused by inhaling tiny shards of the asbestos mineral.

"You could see as early as a decade ago this unnatural proliferation of nonmalignant cases being filed around the country," says Iola, who began working on asbestos cases in 1982. "I say unnatural because malignant disease from asbestos is predictable. We can scientifically predict through epidemiological studies how many people will come down with mesothelioma in a given year. It's coded on death certificates, and the number has been constant--around 2,800 deaths each year for the past 25 years. Same with asbestos-related lung cancers. There's about 4,500 cases filed a year.

"What has proliferated have been these nonimpaired cases. Medical science would say there should be a decreasing trend, because controls in the workplace began in 1969 and became effective under federal law in 1972. We have decreased dramatically the amount of exposure, and asbestosis is a dose-response disease. So we should have fewer and fewer cases. But we have more and more because lawyers are very, very creative.

"That's why we have 10 times more nonmalignant cases being filed today than in 1990. A nonmalignant asbestos disease is whatever a willing physician says it is, so a lawyer and physician can go out and create however many cases they want."

Lawyers for a list of corporations that are being hit with new claims in an ever-widening search for solvent defendants--including General Electric, Exxon Mobil and Union Pacific Railroad--have been probing the medical side of that phenomenon.

Their target has been the medical screening companies that lawyers hire to find clients. As Paul Scrudato, a defense lawyer in New York, wrote in a brief earlier this month, "Hundreds, sometimes thousand of asbestos plaintiffs do not just happen to file lawsuits or bankruptcy claims on the same day, in the same place, represented by the same lawyers."

Most of the new filings are generated through free, lawyer-sponsored mass-screenings, often advertised with promises such as "A Picture Of Your Lungs Could Be Worth Millions," he says.

At the screenings, which are conducted in mobile trailers parked at motels or union halls, chest X-rays are taken by technicians, then a doctor spends a few minutes with the individuals.

In March, Dr. Gregory Nayden, an osteopath working for one such company in Florida, Georgia and Mississippi, testified in a deposition that he had evaluated approximately 14,000 people as part of these litigation screenings, for which he was paid more than $1 million. He concluded that every single one had asbestosis.

Nayden, the testimony showed, was not an expert in asbestosis, was unfamiliar with much of the medical criteria, was unlicensed in the states in which he was working, and he didn't even write up his own reports.

The medical evidence accepted in state courts where most of the suits are filed is hazy and imprecise, say Scrudato and breakaway plaintiffs' lawyers such as Kazan and Iola. X-ray findings that plaintiff-hired doctors will testify are "consistent with" asbestosis are consistent with a lot of other things. "'Consistent with' doesn't mean caused by," Kazan says. "When a doctor sees you for a broken arm, he can't diagnose from looking at it whether you fell off a skateboard or fell down the stairs. The X-rays in these cases show minimal changes consistent with a hundred other explanations, including smoking and air pollution, living in an urban setting, life on our planet."

Fred Baron says he doesn't shed any tears for the companies he's been putting under siege for the past three decades and sending to the bankruptcy courts. To him, asbestos litigation is going just fine, and he expects it to "rock on" into the future.

"These aren't bankruptcies where they lock the doors and sell it all off; these are reorganizations," he says. Johns Manville, the biggest asbestos producer in history, employs more people now than it did in 1982, when it filed for bankruptcy and began setting up a trust to pay past and future claims, he says. The reorganized company is still in the building-products business as a division of Berkshire Hathaway.

Claimants to the trust get a nickel or a dime on the dollar, "but that's how it works," Baron says. "The bottom line is everybody stands in line and gets the same percentage."

Even after the 20 bankruptcies filed in the past two years, he says, money continues to flow. Last year, 60,000 claims were settled. Workers with no breathing impairment now collect an average of $60,000 total against multiple defendants, as opposed to the $80,000 to $100,000 two or three years ago, Baron says. "Mesothelioma cases that were getting 4 or 5 million are now getting 2. It's false to say there are people getting nothing."

Baron contends workers were victimized by asbestos even if they have not developed breathing

problems, and they deserve their day in court. "The American system isn't set up so that if you don't have a $5 million claim, you don't get to sue," he says. To that end he is gearing up a constitutional argument against reform based on the principal that asbestos claims are brought in state courts, and the federal government has no power to tell the states who can sue.

Iola and his colleagues say Baron's legal argument sounds high-minded and principled, but it does not square with other moves he has taken lately, such as negotiating "prepackaged bankruptcies" with some of the still-solvent defendants. "We're the ones fighting that. We want access to the courts," says Iola, who says he is tired of Baron's tactics. "Fred likes the bankruptcies, because he can settle a bunch of his cases and pocket the fees. I used to admire him, but Fred's about the money and his huge homes and planes, the power and friends he has, the access. He's forgotten about the victims."

Despite what Baron says, there are a growing number of sick asbestos victims who will get next to nothing. The defendants with stark liability--companies with documented histories of callous behavior--are out of the game, Kraus and Iola say. Today, the Manville trust--which is named as a defendant in nearly every suit--settles mesothelioma claims for $200,000, pays $10,000 of that in cash and promises to pay the rest if and when it can.

In early September, Iola says, he turned away the case of a 46-year-old Tyler woman with the disease whose only exposure to asbestos was from dust her father brought home on his clothes from a Pittsburgh-Corning insulation mill. The company filed for bankruptcy last year under a crush of unimpaired claims, so all the mother of three will be able to collect is about $50,000 from a bankruptcy trust, Iola says. "There is nobody to sue."

Interestingly, as a junior lawyer at a Dallas firm in the early 1970s, Baron started into asbestos litigation on behalf of workers at the same mill. As recently as June, he retold the story at a legal conference in Washington, recounting the blows he struck for justice and workplace safety back when he was young.

On and off since 1982, the manufacturing and insurance industries have pushed Congress to relieve them of their asbestos woes. The most recent, a proposal in 1998 to take the issue out of the courts and settle claims administratively, gathered support from Republicans and tort reformers but died because of equally strong opposition from labor, Democrats and trial lawyers.

This time around, reform proponents have dropped any hint of widespread legal reform and fashioned a narrow solution they think might pick up votes from moderate lawmakers, particularly Democrats who hold the swing votes.

Their proposal, which is yet to take the form of a bill, is to establish medical criteria defining who is sick from asbestos and guarantee people the right to sue if or when they become sick. The proposal would define anyone who has cancer or asbestos-related breathing impairment as defined under existing American Medical Association standards as eligible to file suit for compensation.

"No company has gone bankrupt paying people who are sick," says Mike Baroody, executive vice president of the National Association of Manufacturers, which is leading the reform push. "The awards that have been going to people who are not sick have turned into a scandal."

Multimillion-dollar verdicts in plaintiff-friendly venues such as Mississippi, Louisiana, West Virginia and South Texas, where jurors seem to relish clobbering Northern corporations, and accusations of fraud and cheating by plaintiffs' lawyers have made the topic popular in the general press.

Since 1998, when an internal memo got loose from the firm, Baron & Budd has been battling accusations that its staffers coach workers to lie about their claims and say they worked with products they never saw. In a civil case pending in New York, the former GAF, now G-1 Holdings, says it has evidence that Baron & Budd paralegals skipped the aggressive coaching altogether and simply "filled in the blanks" on workers' affidavits in about 200 cases. The suit alleges the clerks then forged the workers' signatures on the paperwork.

Baron says the accusations are baseless and, like others against the firm in the past, will be tossed out of court. A lawyer for G-1 did not return calls.

Whether or not false product identifications are to blame, claims from unimpaired workers tend to flood into solvent companies once others declare bankruptcy, toppling asbestos-troubled companies like dominoes. There is another perverse effect as well. Once a bankrupt company sets up a claims trust and streamlines its payments, as with Manville, it becomes a magnet for more and more claims.

Baroody concedes that the history of corporate behavior "does not endear us" on this issue. But the list of people affected by asbestos lawsuits extends beyond company executives and Wall Street investors to current and future victims, and union members whose retirement savings have been devastated when their companies have gone under. That's why he says he is optimistic his bill has a chance of passage, if not this election year, then the next.

"The plaintiffs' bar is not of one mind on this anymore, and that's significant," Baroody says.

Because problems confronting sick plaintiffs are novel and compelling, they have become the centerpiece for lobbying by the Asbestos Alliance, a group including the manufacturers, the American Insurance Association and the defecting trial lawyers. In July, they launched their campaign with a newspaper ad in Capitol Hill's *Roll Call* that centered on the human toll rather than the companies' economic woes. Meanwhile, some of the lawyers who signed the advertisement fanned out for meetings with lawmakers.

"I'm up there walking the halls of Congress and lobbying for a piece of legislation that in a vacuum is completely reasonable," Kraus says. "But it's a real eye-opener to see what power looks like. Democratic legislators are scared to death of getting crosswise with ATLA [the trial lawyer's lobby], and Fred Baron dictates to ATLA what their position will be on asbestos legislation."

Only a small percentage of trial lawyers has anything to do with asbestos, Kraus says. "It's only a tiny percentage of lawyers who thinks this legislation is a bad idea, but those people are Fred Baron, and Peter Angelos in Baltimore, and Perry Weitz in New York, and Joe Rice and Ron Motley in South Carolina. These are very wealthy, very powerful Democrats who can bring a lot of cash to bear for Tom Daschle and Dick Gephardt and rank-and-file Democrats. Nobody wants to get crosswise with those guys, so it's a tough fight politically."

According to the Center for Responsive Politics, a nonpartisan research group, Angelos, who got wealthy enough on asbestos to buy the Baltimore Orioles, contributed $2.3 million in soft money to the Democrats in the past two years; Baron & Budd, $1 million; Weitz & Luxenberg, $710,000; and Ness, Motley, $1.2 million.

Those totals don't include the $25,000 Baron & Budd and Silber Pearlman chipped in last year for the legal defense fund of New Jersey Senator Robert Torricelli, who sits on the key Senate Judiciary Committee. Or the $105,000 Baron gave a political action committee formed by North Carolina Senator John Edwards, who is considering a presidential bid in 2004.

On a recent afternoon, Baron said in the most muted terms that he plans to work against the

reform proposal. He was more animated in a story that appeared the same day in the *Financial Times* of London. "There will be a jihad," he told the paper. "We will fight them with everything we've got."

Baron appears so confident he has Senate Democrats in his camp for the battle, he half-joked about the matter at a bankruptcy conference in June. Using a slide projector to highlight a line from a *Wall Street Journal* story, Baron read a sentence aloud: "It says, 'The plaintiffs' bar is all but running the Senate.'

"I really strongly disagree with that," Baron said, smiling. "Particularly the words 'all but.'"

Fort Worth's Lynne Bailey says she has met other women over the past several years with ill husbands who have far less economic security than she has been able to attain.

"I know a 70-year-old lady who might get nothing," says the 62-year-old widow. "I also have an acquaintance who is in an asbestos suit, and he doesn't have anything wrong with him. He worked at a certain place where a bunch of people were suing and he put in. There's a lot of frivolous lawsuits, I think."

Bailey, who worked as an optician when her husband became ill, says he was on more than two dozen medications as his disease progressed, some costing as much as $1,000 a shot.

"Money was a big issue for us," she says. "It's horrible enough to face it, but it's even worse when you're struggling with the money situation. When they get sick, that's when they need the money."

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Financial

For Asbestos Victims, Compensation Remains Elusive

Albert B. Crenshaw
Washington Post Staff Writer

Last September, Dale Dahlke, a 53-year-old electrician and cost estimator at the Puget Sound Naval Shipyard, began to feel short of breath playing in his usual recreation-league basketball games. Always athletic and rarely sick, he thought he might have a cold.

Eight months later he was dead. The "cold" turned out to be an array of asbestos-related ailments, including mesothelioma -- a form of cancer that emerges long after its victim has been exposed to asbestos but kills with gruesome speed.

In building Navy ships, Dahlke spent hours in cramped spaces where asbestos had been used to make the ships fireproof. Before he died, he sued 11 companies that he thought were responsible for his asbestos exposure.

Now it appears that his widow will receive relatively little in compensation. For nearly 15 years after the courts, industry and victims' attorneys reached an agreement on how to compensate the tens of thousands of people exposed to asbestos through their jobs, the compensation problem seems to be getting worse, not better.

In recent years, dozens of companies, including all 11 that Dahlke sued, have filed for bankruptcy protection in the face of a flood of new asbestos cases -- though almost all of them are still operating. Hundreds of other corporations are defendants, too, as tens of thousands of new claimants, many of whom show no symptoms of illness, sue because they fear they may get sick.

The result is the product-liability case that will not end. And with so many cases and so many bankruptcies, victims are having trouble collecting for their injuries. The bankruptcy filing provides some protection from existing lawsuit judgments, and many companies are turning to trusts to settle claims.

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Thus, lawyers say, Dahlke's widow, Charisse, can expect only about 15 percent of the $1 million or so that her husband could have received had he filed suit before the bankruptcies.

As the number of cases has grown and major defendants have filed for bankruptcy, aggressive trial lawyers have sued companies far removed from manufacturing asbestos. The potential liability for U.S. business is estimated at more than $200 billion. That's comparable to what the savings and loan debacle of the 1980s cost the government. And insurers, who may pay one-third of the total, say it will be more costly than all their 9/11 terrorism claims.

The nation's court system is clogged as a consequence. A giant consolidated case involving about two dozen defendant companies and 5,000 claimants went to trial yesterday in West Virginia, after some 200 companies reached settlements following a failed attempt last week to get the U.S. Supreme Court to intervene. Another case involving 40 defendant companies and 1,300 claimants is scheduled for trial next month in Virginia after the state Supreme Court refused to block it.

Congress long rejected calls for a legislative solution. But the Senate Judiciary Committee has scheduled a hearing today that some hope will call attention to the dimensions of the problem.

"The last best hope here is the U.S. Congress," said Steven Kazan, an Oakland, Calif.-based lawyer who represents clients with mesothelioma, a cancer found mostly in people exposed to asbestos. Kazan and some other trial lawyers have split with their colleagues in the plaintiffs bar and sided with business groups out of fear the pot of available money will be too small to help their clients.

Michael Baroody, executive vice president of the National Association of Manufacturers, said that it needed to be understood that victims include not only those injured by asbestos but also "workers who find their jobs lost" as their employers fail and people investing for retirement who see "the value of those investments diluted if not evaporated by asbestos liability."

The pending claims are "an anchor" weighing down the manufacturing sector of the economy and slowing the overall recovery, Baroody said.

Proponents of change would like to see some provision made for claimants who have evidence of asbestos exposure, but little apparent injury. One proposal is for courts to create registries or "inactive dockets" through which claims could be preserved but not addressed until

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the people actually become sick.

But Fred Baron, of the Dallas law firm of Baron & Budd, who has been filing asbestos cases since 1973 and who opposes congressional action, noted that repeated efforts in Congress to limit or federalize asbestos claims have failed.

Baron said the corporations are "allied with a few lawyers who represent a few cases."

"Their complaint is not with the tort system, their complaint is with the bankruptcy situation," he said. "When a company goes into Chapter 11 for reorganization, the amount of money to pay claims gets consumed in large part by low-end claims.

"The bottom line is, asbestos companies don't want to pay claims. Lawyers for mesothelioma victims want them to get more of the pot. Those two groups have kind of banded together."

The explosion of asbestos claims in the past few years is a shock to many experts, who had calculated that most victims of the 40-year-old occupational disease would be dead or compensated by now.

By some estimates, 30 million tons of asbestos -- silicate minerals resistant to heat and fire -- were used in industrial sites, homes, schools, shipyards and commercial buildings in the United States during the past century. Because of its heat-resistant qualities, asbestos was used in thousands of consumer, industrial, maritime, automotive, scientific and building products.

Though it remains legal, the use of asbestos has fallen drastically.

The first company to file for bankruptcy protection from asbestos claims was Johns-Manville in 1982. The total is now more than 60, many in the past few years. Among them are such well-known names as Owens Corning and W.R. Grace.

There are currently more than 200,000 asbestos-injury cases pending in state and federal courts. Some 60,000 of these were filed in 2000 alone, up from an average of 20,000 new claims annually in the early 1990s.

The Manville Trust, a mechanism set up in the 1980s to pay claims

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against Johns-Manville, has seen the number of claims against the company almost double in 2000 compared with 1999, then almost double again last year, according to David Austern, president of the Claims Resolution Management Corp., which administers payments from the trust.

The trust has recorded 600,000 claims so far, and the total could eventually hit as many as 2.7 million, he said.

Johns-Manville's dominance in the asbestos industry was so complete that almost everyone with an asbestos injury has a claim against it. So its numbers are regarded as representative of the claims universe.

At the same time, the mix of claims has been shifting. The number of mesothelioma cancer cases has remained steady at about 2,000 cases a year, with cases of asbestosis and other non-malignant lung ailments taking a greater share. The ratio of non-malignant to malignant injury claims has risen from 88 to 12 in 1999 to 95 to 5 this year, Austern said.

"The entire increase in total claims filing is attributable to non-malignant claims," he said.

Just the specter of asbestos is enough to send a company's stock tumbling. Last month, the shares of papermaker MeadWestvaco Corp. plunged in one day after the firm announced it faced some 500 asbestos injury lawsuits involving about 6,000 plaintiffs.

Halliburton Co., which was run by Vice President Cheney, saw its stock price drop dramatically last December when it announced it faced asbestos liabilities.

While the search for a solution continues, so does the parade of big court cases.

Corporations complain that they do not get fair treatment in giant cases such as the one starting in West Virginia because jurors cannot possibly sort out who is to blame for what. Such cases allow those who are not sick to "leverage" the claims of the truly sick to inflate their own claims, the companies argue.

They also complain about "forum shopping" by trial lawyers seeking friendly juries. Juries in Mississippi, for example, have returned 20 verdicts of $9 million or more since 1995, and at least seven were for

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more than $100 million. Of 403 plaintiffs involved in litigation against GAF Corp., more than half were from Texas. Jefferson County, Miss., is sometimes called a "magic jurisdiction" for plaintiffs. Its population is about 9,700, but 21,000 plaintiffs filed asbestos claims there between 1995 and 2000.

Claimants and their attorneys reply that consolidated trials are the most efficient way to deal with what one court called the "elephantine mass of asbestos litigation." And they say that dividing the cases up is a tactic designed to make lawsuits more expensive and harder for plaintiffs to pursue.

Outside the courtroom, the Manville trust is paying about 5 cents on the dollar for claims filed against it, and Austern said no other trust set up by a bankrupt company has paid more than 20 percent. He noted that injured individuals often file claims against more than one trust.

The Manville trust earlier this month reached agreement with its plaintiffs on a new formula that "raises significantly the amount of money that will be paid the mesothelioma victims, and commensurately reduces the amount paid" to those with non-malignant ailments. It also raises the amount paid to lung cancer victims and requires that "greater and more extensive medical documentation must be filed with each claim."

Many of the lowest-level claims will be barred entirely, he said.

"This distribution process is probably going to be a template for many other future bankruptcies," Austern said. "We have always been the coal mine canary for the way these things work."

---- INDEX REFERENCES ----

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REVIEW & OUTLOOK

Lawyers for Asbestos Reform

Democracy's great virtue is that it doesn't drive off a cliff. But new court cases and a report from the Rand Institute of Civil Justice show how we're flirting with the ledge on asbestos litigation.

The new study finds 85% of U.S. industry now in the sights of the asbestos plaintiffs' bar. All things considered, the indirect cost has been $10 billion in investment that hasn't taken place, 138,000 jobs that haven't been created. Let's not talk about the direct cost to employees and shareholders and insurers. Just in the past two years 20 companies have been driven into bankruptcy. Even the organs of the national media are finally noticing that 90% of the plaintiffs aren't medically impaired, yet soak up money that might go to the truly ill.

The claims have cost the economy more than 9/11, Enron and WorldCom put together.

Now to the good news: The U.S. Supreme Court has agreed to review a West Virginia verdict awarding $5.8 million to six plaintiffs who claimed emotional suffering from the fear they *might* get asbestos-related cancer in the future. One of the winners testified he had worked around asbestos for three months in the 1950s. Such verdicts explain why analysts put U.S. companies' total potential liability at upward of $200 billion.

Which brings us to another case, proceeding under West Virginia's so-called mass litigation panel, in which 250 corporate defendants are being tried simultaneously on the overlapping claims of 8,000 plaintiffs, exhibiting every degree of illness or good health. In an unusual move, the defendants—including Exxon Mobil and Honeywell—have applied to the Supreme Court for an emergency stay to stop the trial, scheduled to begin in a week. They say it would be impossible for them to weed out good claims from bad, forcing them into a package settlement to avoid chances of an instantly bankrupting jury verdict.

Everyone understands the temptation of states to dispose of thousands of claims at once, but lawyers for the plaintiffs get most of their contingency winnings by propelling companies to settle cases of dubious merit. This process has already driven most of the primary asbestos makers into bankruptcy. Half or more of all claims are now leveled at companies with only a remote connection to the original problem. The entire auto industry has become a bull's-eye because of asbestos in brake linings, not to mention such notably non-heavy industry defendants as Gerber, Sears and Dow Jones (publisher of this newspaper).

In Pennsylvania, the state Supreme Court will soon consider the constitutionality of a state law that limits one type of such "successor" liability. Crown, Cork & Seal bought a bottle-cap maker in the 1960s for $7 million and three months later sold off a small insulation business. Yet that insulation business has already cost Crown Cork $350 million in asbestos claims.

That the legal system has been forced to take another run at trying to rationalize the asbestos disaster is a measure of Congress's dereliction. Twice the U.S. Supreme Court has pronounced the asbestos morass unresolvable without help from the legislature, but Democrats have stonewalled to protect their major donor group, the trial lawyers.

Even that may be about to change (OK, we're stretching optimism to the breaking point here). Later this month the Senate Judiciary Committee, under lawsuit-loving Pat Leahy of Vermont, has agreed to hold an "informational" hearing on the crisis. Democrats Carl Levin (from auto-making Michigan) and Tom Carper (Delaware) are said to be ready to introduce legislation to impose medical criteria on plaintiffs.

A key reason for this modicum of progress is a new division in the ranks of the plaintiffs' bar. Steve Kazan, who handles only mesothelioma cases (a horrible, asbestos-related cancer), has become a voice for curbing his fellow attorneys. He recently told the Los Angeles Times: "There is a great capacity for venality and greed in the profession. Unless something is done, we are going to see 60,000-100,000 more claims a year almost indefinitely."

On the other side is plaintiff plutocrat Fred Baron, of Houston's Baron & Budd, who was recently quoted vowing "jihad" (nice choice of word) against any legislation that might reduce payouts to plaintiffs unless and until they are sick.

Mr. Baron, former head of the Association of Trial Lawyers of America, is a big Democratic fund raiser, but at last some Democrats of a more dignified stripe are ranging themselves on the side of justice and honesty. Walter Dellinger III, former Clinton solicitor general, filed the emergency plea with the Supreme Court to intervene in the 250-defendant West Virginia travesty.

The asbestos mess has already cost the economy more than 9/11, Enron and WorldCom put together. U.S. companies have been loath to estimate their total potential liability for balance-sheet purposes—not least because, in a bet on democracy, they believe our politics won't let this outrage continue forever.

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Business Insurance
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News

Asbestos liability reform efforts continue : Push to prioritize claimants draws support from some plaintiffs' attorneys

DAVE LENCKUS

WASHINGTON-As most defendants in a unique and massive asbestos liability lawsuit in West Virginia settled out of the case last week on the eve of their trial, a U.S. Senate committee began considering tort reforms that could prevent similar litigation.

To maximize recoveries for claimants who are seriously ill, tort reform proponents want to limit recoveries to only claimants who meet certain medical criteria.

Other federal asbestos liability tort reform efforts have failed to build much steam in Congress, but business and insurer representatives say a new ally will make their run at reforms much stronger this time. Now supporting some reforms are members of the plaintiffs' bar, who are concerned that failing to prioritize claimants not only will lead to smaller awards per individual but also will dry up funds for future claimants.

Other trial lawyers, however, argue that the main goal of reform efforts is to minimize the liabilities of the various types of asbestos liability defendants, which are: asbestos producers, manufacturers of products that contained the material, and employers and property owners that exposed workers and others to asbestos used as a building material at their facilities.

In the West Virginia case, all of those types of companies were named as defendants by around 8,000 plaintiffs, some of whom are seriously ill and others whose exposure to asbestos has not impaired their health.

The litigation was so unwieldy that the West Virginia judiciary set up a system for classifying the original 125 defendants as either asbestos manufacturers or installers and then assigning them to one of two judges. The judges were scheduled to conduct two separate but

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simultaneous trials in the litigation in Kanawha County Circuit Court.

Two of the defendants-Mobil Corp., now part of Exxon Mobil, and Honeywell International Inc.-asked the U.S. Supreme Court to delay the trial until the high court decided whether to hear the defendants' motion that the structure of the trial violated the defendants' due-process rights.

The defendants argued that the consolidation of so many defendants with such a wide range of potential liability to so many plaintiffs whose health varied greatly would make jurors' task of parceling out liability and determining damages impossible. Most defendants would not risk going to trial under those conditions and would be forced to settle, even if they thought they had strong cases, Mobil and Honeywell argued.

The Supreme Court earlier this month refused to delay the trial before it considers whether to hear the defendants' case (BI, Sept. 23).

As Mobil and Honeywell predicted, the defendants-including Honeywell-began settling en masse last week. Only five companies-including Mobil and Union Carbide Corp., a subsidiary of Dow Chemical Co.-remain as defendants in the case, which now has been consolidated into a single trial in one courtroom before two judges, said Bruce E. Mattock, a partner with Goldberg, Persky, Jennings & White P.C. of Pittsburgh. Mr. Mattock represents several hundred plaintiffs.

Mr. Mattock would not comment on the confidential settlements, but one attorney not involved in the litigation said the settlements minimally total hundreds of millions of dollars.

Meanwhile, on Capitol Hill, the U.S. Senate Judiciary Committee last week conducted a hearing on whether asbestos liability reform is necessary.

The committee heard testimony from reform proponents who both bemoaned the growth in asbestos liability claims by people who are not physically impaired and expressed concern that those claimants are diluting the funding available for seriously ill individuals. Witnesses cited studies by actuarial firms Tillinghast-Towers Perrin and Milliman USA estimating that ultimate asbestos liabilities will range from $250 billion to $275 billion and that insurance will cover $100 billion to $150 billion of those claims.

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Asbestos liabilities have cost business more than $50 billion to date, have driven more than 50 companies into bankruptcy, and now are hitting thousands more, according to various estimates.

The day of the hearing, the nonprofit think tank Rand Corp. released a study reporting that much of the asbestos liability awards over the past decade were paid to claimants who were not physically impaired. That trend and the rapidly growing pace of new claims raises doubts about whether there will be enough funds to cover all new claims, according to the study's authors.

A failed federal reform effort a couple of years ago would have established a compensation process under which claimants would receive a scheduled award based on their medical conditions.

Now, the insurer-backed Coalition for Asbestos Justice, the National Assn. of Manufacturers and the Asbestos Alliance-a broader industry group headed by the NAM-are seeking reforms that they say only prioritize claimants without limiting their potential recoveries.

The Washington-based NAM and the Asbestos Alliance want to limit court access to only claimants who meet certain medical criteria under a standard developed by the American Medical Assn., said Jan Amundson, senior vp and general counsel for the NAM and chair of the Asbestos Alliance.

The standard already is used in the Social Security system; to assess longshoreman claimants seeking federal compensation; and by some state workers compensation systems, noted plaintiffs' attorney Steven Kazan of Oakland, Calif.-based Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise P.L.C.

Under the proposal, claimants who develop illnesses later would be able to file claims when their illnesses manifest.

The NAM and the Asbestos Alliance also want to either bar consolidated cases or allow only plaintiffs with similar illnesses to ban together. Additionally, the organizations want to limit court venues to either where a claimant was exposed or currently lives.

The Coalition supports a federal reform that some state judiciaries already have implemented, said Mark Behrens, co-counsel for the group and a partner with Shook, Hardy & Bacon L.L.P in the Kansas City, Mo.-based law firm's Washington office.

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State courts hearing asbestos liability cases in Baltimore, Boston and Chicago have streamlined the litigation by moving physically unimpaired claimants to inactive dockets, where those claims will remain dormant until the claimants develop physical problems allegedly triggered asbestos exposure, Mr. Behrens explained.

Unlike in the past, the plaintiffs' bar is split on the reform issue.

Indeed, Mr. Kazen, who represents seriously ill asbestos claimants, first suggested the AMA guideline approach. Mr. Kazen also implored the Senate committee last week to enact reforms that guarantee the greatest recoveries for sickest claimants.

In a separate interview, Mr. Kazen said that no reform measure would win the support of the majority of plaintiffs' attorneys. But, a "significant" portion of the bar agrees the current system "is real crazy," he said. "We have to do something."

"This is a major change and, I hope, something that will produce a real impact," Mr. Kazen said.

The Coalition's Mr. Behrens said that the reform effort's chances of success have been boosted by support from a portion of the plaintiffs' bar, the spread of litigation from a concentrated group of asbestos producers that are now bankrupt to a large portion of the U.S. business sector, and support for reforms that prioritize claimants rather than restricting their recoveries in advance.

But a spokesman for the Assn. of Trial Lawyers of America in Washington said the reforms would hurt ill claimants. "No one is being compensated who cannot prove both exposure and injury," the spokesman said.

Claimants with medical conditions created by their exposure to asbestos but who still can function are nonetheless ill, the spokesman said. Categorizing those claimants as healthy "is like saying someone with HIV but who hasn't developed full-blown AIDS is not sick. That's foolish and untrue."

---- INDEX REFERENCES ----

COMPANY (TICKER): Exxon Mobil Corp.; Dow Chemical Co. (XOM DOW)

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Editorial

CHANGE RULES ON ASBESTOS LAWSUITS

MATHEW BERGMAN AND JACKSON SCHMIDT

Matthew Bergman is a Seattle lawyer representing asbestos victims in Washington and Oregon. Jackson Schmidt; also of Seattle; has represented asbestos product manufacturers since 1989 and now represents Owens-Illinois; a manufacturer of glass and container products.

Asbestos litigation has grown from a cottage industry in the early1980s into the largest body of litigation in the history of the United States. It's an enormous mass of hundreds of thousands of lawsuits in which billions of dollars change hands annually between defendant corporations and plaintiffs.

As most of the traditional insulation company defendants from the early days of the litigation have disappeared into bankruptcy, plaintiffs' lawyers have proceeded to identify and target new defendant companies, many of which have, in turn, also sought the protection of the bankruptcy courts.

This large and growing series of bankruptcies has brought into clear relief a fundamental fact about the asbestos litigation: The amount of money available to compensate injured workers is limited, and each year less money is going to those people who are actually sick and dying from asbestos exposure.

An estimated 200,000 asbestos claims are pending in state and federal courts across the country. Almost 150,000 new claims were filed nationally in the past two years. Almost 300 new claims were filed in King County last year, and at least twice that many are actively pending on the court's docket.

The problem is that a significant percentage of the asbestos claims filed annually are not filed by workers who are actually injured or sick due to exposure to asbestos fibers, but by plaintiffs who have never been diagnosed as having a disease by a treating physician.

They claim instead that they might become sick in the future from

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asbestos exposure. As a result, the claims continue to grow by the thousands each year. The alarming reality is that the vast majority of these claims are "unimpaired claims" filed by people who are not sick, who may never get sick or may not be sick for decades.

In the current system, there is no distinction drawn between the sick and the non-sick. People who are sick or dying from asbestos are lumped into mammoth inventory claims, which combine a handful of sick claimants with hundreds of non-sick claimants. By allowing these inventory claims, courts effectively force many defendants to pay settlement money on the unimpaired claims in order to avoid going to trial on the impaired claims.

The courts permit this arrangement because it serves to remove the unimpaired claims, which defendants would not otherwise have an incentive to settle and plaintiffs would not have an incentive to try, from their dockets.

This flood of claims from non-impaired plaintiffs has driven 16 asbestos defendant companies into bankruptcy since January 2000. More than 1,000 companies in the United States have been named as defendants in asbestos claims. None of the now-bankrupt companies attributes its demise to the cost of paying claimants who are really sick.

Total corporate asbestos liability to U.S. plaintiffs is now projected by some to reach $200 billion. Workers and businesses in Washington have not escaped the flood. Kaiser Aluminum, an employer of more than 660 workers in Washington, filed for Chapter 11 bankruptcy recently citing asbestos litigation costs. The aluminum manufacturer had at one time been the largest employer in Eastern Washington, employing more than 2,500 workers. The company estimates that it faces $100 million in annual costs for asbestos litigation and has already closed some plants in Washington.

Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. As a result of these bankruptcies, the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.

Almost everyone agrees we have a crisis. The Supreme Court has called the asbestos litigation an "elephantine mass" and has asked Congress to provide a legislative solution.

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We are attorneys on opposing sides of the litigation. Bergman represents truly sick and dying plaintiffs. Schmidt represents a company that manufactured an asbestos-containing product for a limited period that ended more than 50 years ago. We are both deeply disturbed that the unimpaired claimants are diverting the limited compensation funds away from the sick and injured.

The solution is simple: defer the non-sick claims unless and until the claimants actually suffer an asbestos-related disease. Only through making the truly sick and dying our first priority can we begin to direct money to the people who dearly need it. The courts first need to establish objective medical criteria for asbestos-related impairment, setting the minimum requirements for an "injury" in asbestos lawsuits. The sick could pursue their claims promptly. Those who are not sick would be able to bring their claims when and if they become sick.

Despite the Supreme Court's plea, Congress has failed to pass legislation to reform the broken asbestos litigation system. Our courts, businesses and the people sick and dying from asbestos cannot afford to wait any longer.

---- INDEX REFERENCES ----

KEY WORDS: HAZARDOUS; HEALTH; LAWSUIT

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Tuesday, November 5, 2002

National

Asbestos litigation overwhelms courts

Stephen Hudak and John F. Hagan; Plain Dealer Reporters

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LONNIE TIMMONS III THE PLAIN DEALER Rita Krammes believes she is dying because she was a helpful spouse. Although she taught full time, Krammes, 52, saw to it that her handyman husband's work shirts were clean and pressed. Not until she was diagnosed with mesothelioma did she learn the dust she shook from his clothes was asbestos. Her case is on Cuyahoga County's fast-track cancer docket. CHUCK CROW THE PLAIN DEALER Asbestos Judges Leo Spellacy, left, and Harry Hanna rarely seat a jury, despite a docket of 34,000 cases and a full trial schedule. Most cases settle. "Usually, the only question is who's going to pay," Hanna said. Above, the judges meet with lawyers during a pretrial conference last month. LONNIE TIMMONS III THE PLAIN DEALER George Quick's first brush with asbestos was during a tour in Vietnam. He changed the asbestos-lined brake pads on hundreds of Army Jeeps and trucks. His last brush may have been as custodian of Hudson schools. He said he occasionally found it in ceiling tiles and pipe wrap. The schools removed it. Quick needs an oxygen tank to breathe. JOSHUA GUNTER THE PLAIN DEALER Documents and exhibits for asbestos cases crowd storage rooms in the basement of the Cuyahoga County Courthouse. JOSHUA GUNTER THE PLAIN DEALER Michael V. Kelley

Michael Kelley has a mansion in Hunting Valley, a million-dollar beach condo, a private jet, a Jaguar and no apologies.

The Cleveland lawyer, who grew rich representing workers with lungs scarred from asbestos, doesn't see a problem with the longest-running and most-expensive legal saga in U.S. history.

But others do.

"Asbestos litigation has become a national nightmare as well as a national disgrace," said Steven Kazan, a lawyer representing victims of mesothelioma, a painful cancer caused by asbestos. "This has nothing to do with health anymore and everything to do with lawyers taking advantage of economic opportunity."

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Not enough of the money is getting into the hands of people who have suffered, said Mickey Kilbane, a Cleveland asbestos worker critical of corporate bankruptcies and fat lawyer fees.

"How much is enough for these guys?" he asked.

About $54 billion has been spent by companies and insurers to settle and fight claims, according to the RAND Institute for Civil Justice, which has studied asbestos cases for over 20 years.

It estimates the final bill will exceed $200 billion. RAND's latest report, released in September, also found:

Nearly 60 cents of every dollar spent on asbestos litigation goes to pay fees and expenses of lawyers for both sides. Plaintiffs' lawyers typically charge a contingency fee of 40 percent.

Even though the industry abandoned asbestos more than 30 years ago and asbestos-related deaths are dropping, new claims are actually increasing.

More than 200,000 claims for asbestos injuries jam dockets in U.S. courts, including more than 34,000 in Cuyahoga County, one of the nation's five busiest for asbestos cases.

According to some estimates, as many as 90 percent of those who are filing claims are not sick but acted now for fear the once-deep money trough will be empty if they wait until they are.

Kazan said every claim paid to someone who isn't sick cheats someone who is.

Last month, Cuyahoga County Judges Harry Hanna and Leo Spellacy created a fast-track "meso docket," which puts the cases of asbestos-cancer victims at the front of the line.

A typical asbestos lawsuit filed in Cleveland today names 100 or more defendants, a shotgun approach used by lawyers uncertain whose product to blame and who can most afford to pay.

It's a search for the deepest pockets, said Matthew O'Connell, a

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founding partner in the Cleveland firm of Sutter, O'Connell, Mannion & Farchione, who are specialists in asbestos defense.

Half the Fortune 500 have been accused, including companies like drug giant Pfizer and CBS' parent Viacom, which never used asbestos but acquired companies that once did.

Most consider themselves "peripheral" defendants, caught in plaintiff dragnets after more culpable companies like Johns-Manville and Ohio-based Owens Corning filed for bankruptcy.

"In this day and age, the burden of asbestos litigation has nothing to do with culpability," O'Connell said. "You've got people who are not sick suing people who never made the stuff."

It happens partly because of a controversial legal doctrine known as "joint liability," which holds a company that is only partly to blame 100 percent responsible if co-defendants can't pay.

Some plaintiffs are recruited by lawyers with Web sites and brash ads, including one suggesting: "A PICTURE OF YOUR LUNGS COULD BE WORTH MILLION$"

"It's not principle motivating them," O'Connell said. "There's money out there."

Kelley, whose firm has filed more than 1,400 asbestos claims in Cuyahoga County this year - three times as many as the next-busiest firm - said plaintiff's lawyers are an easy target.

"They bitch about people like me," he said. "But who's protected workers over the years? The government? The EPA and [Occupational Safety & Health Administration] didn't. Industry certainly didn't. Who? Trial lawyers, like me."

Deborah Hensler, co-author of the RAND study, said most of the newest asbestos claims are based on chest X-rays showing a shadow on the pleural membrane surrounding the lungs.

The shadow - usually caused by a thickened or scarred membrane - could indicate asbestos exposure but also may suggest 100 other diseases that aren't the fibers' fault.

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These pleural plaques usually do not impair breathing or develop into more serious diseases. But under Ohio law, they can be considered injuries for which a worker may sue.

Big national firms like Kelley's, which boasts 25,000 clients, sponsor X-ray screenings at union halls, providing doctors and a portable unit to examine large groups of workers.

"People on the other side hate screenings, of course, because it creates cases that wouldn't otherwise be filed," Kelley said.

But some on his side hate them, too.

"These are not patients; they are plaintiffs recruited for profit," Kazan said.

David Egilman, an expert medical witness who testifies primarily for asbestos plaintiffs, also criticized mass screenings this year in the American Journal of Industrial Medicine.

"I was amazed to discover that, in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one," he said.

"Some workers end up being unnecessarily and incorrectly advised that they have a potentially or invariably fatal disease. A number, no doubt, suffer anxiety and stress as a result. Others may change their life plans for no valid reason."

Nonetheless, Texas lawyer Fred Baron, a pioneer in asbestos litigation who has a Cleveland-area office, defended free screenings as a service to workers uncertain of their exposure.

"If a big trailer pulls up in front of [your office] and offers women free mammograms, would you be screaming and yelling that's outrageous? Of course not," he said. "Having a physician examine somebody and take an X-ray to determine whether they have lung cancer or asbestosis, to me, is not a bad thing."

But Judge Charles Weiner of Philadelphia, presiding over all asbestos claims in federal court, will no longer hear a case that

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was spawned from a mass screening unless shown additional evidence of disease.

Former federal Judge Thomas Lambros took a similar approach here in Cleveland in 1988, dismissing the cases of 1,500 sailors who couldn't back up their claims. Most never refiled.

While asbestos lawyers have portrayed themselves as tenacious fighters for working people battling corporate conspirators, others view them as unscrupulous money-grubbers.

In January, asbestos defendant G.I. Holdings sued several prominent law firms, accusing them of filing thousands of bogus claims to overwhelm courts and reap fees. The company claimed lawyers threatened them with a "nuclear response" if it continued to push for legislation that would change asbestos litigation and cap punitive damages.

In Texas and Ohio, Baron's firm was accused of improperly coaching witnesses after a 20-page memo called "Preparing for Your Deposition" was discovered by defense lawyers. The memo instructed clients how to answer crucial questions: "It is important to mention that you NEVER saw any labels on asbestos products that said WARNING or DANGER."

But lawyers aren't solely to blame for the new flood of claims. RAND's Hensler said defendant companies and judges shoulder some blame.

Many companies unwittingly encourage new filings by agreeing to settlements that pay even the weakest claims, believing it is less risky than losing a trial and paying punitive damages.

Some just opt for bankruptcy.

Rather than go belly-up, a company facing heavy asbestos claims can reorganize in Chapter 11 and set up a trust to pay damages. It can emerge later without asbestos liability and flourish.

"The bankruptcies are the tip of the iceberg," said Stephen Carroll, co-author of the RAND study. "Under the surface there are a lot of corporations being hit hard by asbestos liabilities and they put their money into compensation payments instead of investment."

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Meanwhile, existing trusts like Johns-Manville's, besieged by claims, pay just 5 cents on the dollar.

As money is used to pay those who are not sick, dying claimants or their widows and children get a fraction of their due. Lynne Marion of Bay Village, for instance, will see no more than $150,000 of a $4.4 million award for the death of her 51-year-old husband, Dennis, a mechanic.

The company, which ran brake and alignment centers, can't pay more.

"The legal part was long and depressing," Marion said. "We had to relive everything. And when you have to go to court, that's another slap in the face. Then they give you a judgment against people that don't have anything."

Meanwhile, judges, concerned about dockets suddenly clogged with thousands of similar asbestos cases, have relaxed pretrial rules, lowered legal barriers and consolidated complaints to speed them along.

"Eternity would not have been long enough to try all these cases," explained retired Judge James McMonagle, who formerly presided over the asbestos docket in Cuyahoga County.

The idea was to resolve cases quicker and pay the sickest victims faster.

But "if you build a superhighway, there will be a traffic jam," said Francis McGovern, a national expert on mass litigation whose career began in Cuyahoga County resolving asbestos claims.

The system has to change, said Sen. Mike DeWine, an Ohio Republican and a member of the Senate Judiciary Committee, which held hearings in September to consider a legislative solution.

"As things stand now, victims face a growing risk of never being compensated for asbestos-related illness, and many businesses face a growing risk of liquidation," DeWine said.

Twice, the U.S. Supreme Court has called on Congress to deal with

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the "elephantine mass of asbestos cases," saying a judicial remedy to the never-ending crisis is improbable if not impossible.

Yet the partisan fight seems unlikely to be resolved anytime soon. Democrats support trial lawyers who don't want changes; Republicans back corporate interests who do.

Supreme Court justices will hear arguments tomorrow in an asbestos case from West Virginia that the insurance industry and other critics see as symbolic of the legal crisis.

The courts will review a jury verdict awarding $5.8 million to six retired railroad workers who said they feared their exposure to asbestos may cause them to develop cancer.

None of the retirees has cancer.

For more information: Visit www.epa.gov/asbestos/

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News researchers Patti Graziano and Cheryl Diamond contributed to this story.

Note: Graphics by Ken Marshall / The Plain Dealer - Sources: The RAND institute for Civil Justice, Lehman Brothers -- ASBESTOS: THE LETHAL LEGACY (see microfilm)

Note: Chart by The Plain Dealer - Source: Cuyahoga Common Pleas Court -- A burgeoning docket (see microfilm)

---- INDEX REFERENCES ----

NAMED PERSON: KRAMMES, RITA; SPELLACY, LEO; QUICK, GEORGE; KELLEY, MICHAEL V; O CONNELL, MATTHEW

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THE WALL STREET JOURNAL. ONLINE

April 25, 2002

PAGE ONE

As Asbestos Mess Spreads, Sickest See Payouts Shrink

By SUSAN WARREN
Staff Reporter of THE WALL STREET JOURNAL

Soon after Jimmie Harrison died in early 2000 of asbestos-related cancer, his wife fulfilled one of his last wishes: She sued a raft of asbestos-product makers.

As recompense for the death of her husband, a retired 76-year-old pipe fitter, Ruth Harrison was awarded an impressive-sounding $4 million in settlements. But she has seen little of that so far, and now her chances of seeing much more are shrinking. She has sold her car and home in Tulsa, Okla., to help pay a stack of bills.

Since Mrs. Harrison filed suit in an Illinois state court, 14 of the 27 defendants she named have sought bankruptcy-court protection -- two on the same day this February. "I lost a million dollars that day," she says.

The asbestos battleground has shifted. In the past two years, desperately ill plaintiffs have been eclipsed by a huge and growing number of relatively healthy people seeking awards for possible future illnesses. Since January 2000, the wave of less-severe claims has pushed at least 20 companies that sold or used asbestos products into bankruptcy protection. That's on top of 40 other asbestos-related corporate bankruptcies since the mid-seventies.

Jimmie Harrison

The upshot: There are fewer unencumbered companies to pay claims. The sickest asbestos victims are now collecting far less than comparable victims did in the 1990s. And the whole asbestos mess, which was supposed to be largely resolved by now, instead is spreading and could drag on for decades.

The morass has increasingly pitted the interests of mortally ill plaintiffs against those who are much healthier. Dallas lawyer Peter Kraus, who files asbestos suits only for cancer victims,

ASBESTOS BATTLEGROUND

- Insurers Could See Payout Timeline for Asbestos-Related Claims Shrink[2] 04/23/02
- The Manville Trust to Begin Selling Asbestos Claims-Resolution Services[3] 03/25/02
- Halliburton, Honeywell See Filings as a Way to Manage Asbestos Suits[4] 02/19/02

COMPANIES

Dow Jones, Reuters

McDermott International Inc. (MDR)	
PRICE	16.10
CHANGE	-0.24
U.S. dollars	10:20 a.m.

Goodrich Corp. (GR)	
PRICE	32.01
CHANGE	-0.71
U.S. dollars	10:20 a.m.

* At Market Close

condemns rivals who represent those who aren't sick. "They're sucking the money away from the truly injured," he says.

"You can't help but feel a little bit angry," says the widow Mrs. Harrison of suits on behalf of those who aren't suffering.

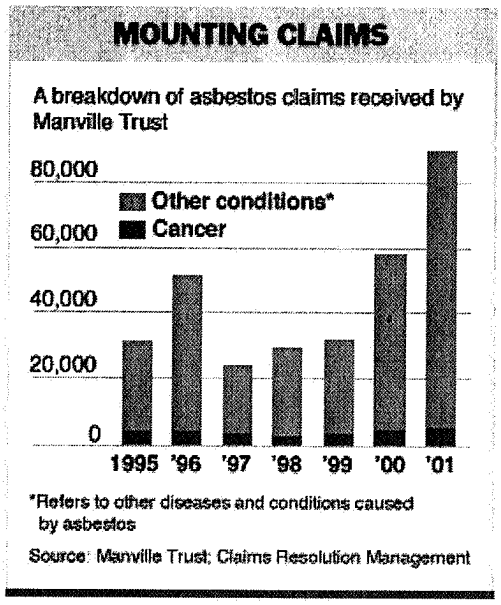
Last year alone, 89,438 new claims were filed against the Manville Personal Injury Trust, which is a good proxy for the entire asbestos scene because almost all claimants seek payment from the trust. The trust, which pays liabilities on behalf of Johns Manville Corp., a maker of construction products, saw new claims double in 2000, and rise by 54% last year. Over the trust's 14-year life, 11% of claims have involved cancer. Last year, only 6.6% did.

Claimants obtain money from the trust through an administrative process in which injuries are assigned dollar values. Because of the mounting number of claims on behalf of people who aren't sick, the trust in June cut its payment rate in half across the board, to five cents on the dollar, for an overall average payout of $2,000 a claim.

Some companies that had only attenuated dealings with asbestos now find themselves swamped by lawsuits because other potential targets are shielded by Chapter 11. While complaining that plaintiffs' lawyers are abusing the legal system with legions of dubious claims, some companies continue to fight even the most seriously harmed plaintiffs -- a response that adds further delay and expense. Meanwhile, perennial discussion of congressional intervention to limit asbestos litigation appears to be bogged down in a broader logjam over proposals to curb civil lawsuits.

Insidious Diseases

The recent exacerbation of the asbestos problem stems partly from the insidious nature of the diseases involved. Commonly used as a fire retardant and insulator from the 1900s through the 1970s, asbestos is a mineral made of fibers that can lodge in the lungs and cause mesothelioma, an especially deadly cancer. Severe lung scarring from inhaled asbestos fibers can progress until it slowly suffocates its victim.



But symptoms may take decades to show up, and not everyone who has scarring becomes truly sick. In the vast majority of cases, exposure to asbestos has milder effects, ranging from benign tissue changes outside the lung to scarring inside that can cause shortness of breath. Often, symptoms appear late in life, when it can be difficult to separate the effects of asbestos from those of other ailments or smoking. "Many victims are quite active and live pretty much a normal life," says Dr. William Beckett, a lung-disease expert at the University of Rochester.

William "Bud" Bishop of Fort Worth, Texas, has been diagnosed with mild asbestosis, a scarring of the lungs. Slender and athletic-looking at 55, he takes long walks to stay fit and works at his job as a city building-code inspector. This year, he enjoyed a rare Texas snowball fight with his grandchildren. But he doesn't ride his bicycle anymore because of shortness of breath, and he can't do heavy labor without stopping to

rest frequently. He fears he will die early from an asbestos-related disease. He says he was exposed to the mineral almost every day in his early career as a welder, when he wrapped himself in asbestos blankets to make repairs beneath industrial boilers.

In November, Mr. Bishop received tens of thousands of dollars in settlements from a slate of more than 20 companies he had sued. "It may seem to corporate America that we're just a bunch of money-grubbers," he says, "but when I was crawling underneath those giant boilers and the bigwigs drove up in their limousines, I know damn well they knew about asbestos."

State laws generally allow anyone with evidence of an injury to file suit against defendants whose products plausibly can be linked to the harm. Because asbestos was ubiquitous at many work sites, and plaintiffs typically can't name all of the products they were exposed to, the law allows them to sue multiple defendants -- often dozens. If some defendants are defunct or in Chapter 11, the others can be held liable for the entire amount of an award.

A suit can be based on evidence as scant as a shadow on an X-ray, seen by a single doctor hired by a plaintiff's attorney. "To an ordinary person, the idea that we're spending all this money on people who don't seem to have an impairment seems egregious," says Deborah R. Hensler, a Stanford Law School professor who has studied asbestos litigation for Rand Corp., a research group based in Santa Monica, Calif. "But in fact, we have a legal system that says these people have claims."

These claims aren't necessarily winners in court, but many companies prefer to limit legal fees and jury risks by settling. Settlement of marginal cases seemed less controversial years ago, when there were more defendants with more money to go around. The resolution of such claims has taken center stage since 2000, as thousands of relatively healthy people have lined up at the courthouse. Many realized they might have claims following mass X-ray screenings of factory workers sponsored by plaintiffs' lawyers and unions.

Babcock & Wilcox, a unit of **McDermott International** Inc., which filed for protection under Chapter 11 in 2000, complained in a filing last October with the U.S. bankruptcy court in New Orleans that only 9% of the 221,375 claims it faces involve cancer. Nearly 60% involve no impairment at all, the company said. Babcock, which used asbestos in the construction of power plants, had paid $1.6 billion to claimants from 1982 to 2000.

The Manville settlement trust says that two-thirds of the $320 million it disbursed last year went to people with mild symptoms or none at all. The trust says it typically pays cancer victims $2,000 to $10,000 apiece, or an average of 6.5 times as much as it pays people with less severe claims. The trust has paid a total of about $2.8 billion to 465,000 claimants so far. It has $2 billion in reserve and anticipates 1.5 million additional claims in coming years.

The Manville trust grew out of the since-concluded bankruptcy proceedings of Manville. As the onslaught of suits accelerates, more and more companies are similarly seeking the shelter of Chapter 11. While reorganizing under court protection from creditors, companies can freeze legal claims and arrange to resolve them at steep discounts.

In Beaumont, Texas, last year, 22 men diagnosed with asbestos-related lung scarring sued a similar number of companies that had made insulation and other products used at the refinery where the plaintiffs once worked. The plaintiffs collected an average of $66,000 each in settlements with 20 defendants. Two companies, **USG** Corp. and a unit of **Federal-Mogul**

Global Inc., chose to go to trial, where they argued their products weren't to blame.

A jury ruled for the plaintiffs, awarding the men a total of $35.2 million, or about $1.6 million each. Following the verdict, both USG and Federal Mogul sought bankruptcy protection.

The case had an unanticipated side effect: The Mesothelioma Applied Research Foundation lost $900,000 in research donations USG had pledged before going into bankruptcy, says Christopher Hahn, executive director. His Santa Barbara, Calif., group avoids taking sides in the litigation wars, he says, but fears mesothelioma claims are being overshadowed "by the general discussion of unimpaired claims."

Fred Baron, a Dallas plaintiffs' attorney who represents a mix of clients, including those without serious symptoms, says he prefers not to debate the relative moral arguments for different categories of plaintiffs. "What I fall back on and ask is, 'What are their legal rights?' " says Mr. Baron, who helped pioneer asbestos litigation in the 1970s. His firm, Baron & Budd, now represents Mr. Bishop, the former welder with mild symptoms, among thousands of others.

In a Philadelphia federal court, Baron & Budd recently butted heads with lawyers representing only cancer victims. The issue: the legitimacy of cases generated by mass X-ray screenings. The screenings-based cases, advocated by Baron & Budd and most other plaintiffs' attorneys, are flooding the courts and "imperiling the availability of compensation to those who have been seriously injured by asbestos exposure," argued attorney Steven Kazan, who represents only cancer victims. U.S. District Judge Charles Weiner, who is presiding over thousands of consolidated federal cases, agreed, ruling that cases would be subject to dismissal if not supported by convincing evidence.

Mesothelioma, whose only known cause is asbestos, takes a brutal physical, financial and emotional toll on its victims. Yearly medical costs can easily exceed $200,000. Insurance companies typically don't pay for some treatments because they are still considered experimental.

James Crawford of Wood River, Ill., who was 57 when he was diagnosed with mesothelioma in February 2001, had surgery last year that his insurance carrier wouldn't pay for. Doctors scraped tumors from his heart and abdomen. Taking out a mortgage on his paid-off home to cover the $70,000 surgery bill "broke his heart," says Terry Crawford, his wife of 34 years. Exposed to asbestos as a factory worker years ago, he died in January, 30 days after securing a $16 million award from an Illinois state-court jury.

Her husband "wanted the companies to be responsible for what they'd done to people's lives," Ms. Crawford says. With 12 of the 32 companies that were supposed to pay now in bankruptcy court, she expects to see less than half of the award and feels that what James went through "was all for nothing."

In recent months, companies that are being sued have taken the side of the sickest victims. In comments to Wall Street analysts in late January, **Dow Chemical** Co.'s chief executive, Michael Parker, condemned what he said were the frivolous suits that make up the vast majority of claims against its Union Carbide unit. He also lamented delayed settlements for the truly sick. "We have the utmost of care and concern for those people," he said.

Echoing a common industry view, he said he backs a legislative solution. Most legislative

proposals entail paying the sickest plaintiffs first and making others wait until they actually fall ill before they get compensation. That approach would diminish Union Carbide's payouts overall. The company reported pending asbestos liabilities of $233 million as of Dec. 31, most of it covered by insurance.

As the identity of those responsible for asbestos products is increasingly obscured by a spider-web of corporate spin-offs, mergers and acquisitions, companies defend themselves by arguing that plaintiffs have sued the wrong target. Companies often contend that plaintiffs weren't exposed to their products, or that their products didn't cause the illness in question. These defenses often entail grueling depositions, protracted exchanges of paperwork and, occasionally, taxing trials.

In February 2000, about 20 lawyers crowded into Henry Plummer's small Grand Prairie, Texas, living room for the first deposition in his suit, filed about a month earlier in Texas state court in Dallas. In a videotape of the event, the 67-year-old sat in his rocking recliner, wearing a striped Polo shirt and aviator-style glasses. White stubble covered his head, betraying recent chemotherapy.

Painstaking Recital

For seven-and-a-half hours, a series of lawyers took Mr. Plummer through a painstaking recital of his three-decade Navy career. His duties as a machinist on warships continually exposed him to asbestos in insulation, gaskets and pipe coverings.

Three months earlier, a biopsy had confirmed that fluid gathering around his lungs was caused by mesothelioma -- a word he had never heard. He called Mr. Kraus, the Dallas attorney who represents only the seriously ill. Mr. Plummer saw a suit as one last thing he could do for his family, says his wife, Eula Plummer.

In April 2000, Mr. Plummer traveled to Boston to have his left lung removed, which doctors said might grant him a few more years of life. But the surgeons found the cancer had spread to his diaphragm. Just as his strength returned after surgery, a blood clot set him back. "It was one thing after another," recalls Mrs. Plummer. "But he was a fighter."

Mr. Kraus named more than 20 makers of asbestos products in the suit. Some were dismissed because he failed to find proof that Mr. Plummer had been exposed to their products. Settlement negotiations began with the rest, and an August 2001 trial date was set.

Early last year, Mr. Plummer's doctor told him the cancer was back -- on his other lung. "We just sat in the office and cried and cried," says Mrs. Plummer, "and then he really gave up." He arranged for his funeral and reviewed with his wife the things she would need to know after his death. But he held on until his trial.

Mr. Kraus negotiated several settlements. But some of the companies waited to settle until shortly before the trial in August. Three of them -- **Halliburton** Inc.'s Dresser Industries Inc. unit, **Goodrich** Corp.'s Garlock sealants business, and IREX Corp.'s AC&S Inc. -- decided to take their chances before a jury.

The companies, or their units, all once made products that incorporated asbestos. Halliburton, based in Dallas, is grappling with about 275,000 asbestos-related claims. Charlotte-based

Goodrich and its units face more than 95,000 claims.

At the trial in August, a huge poster of a black-and-white photo of a smiling Mr. Plummer in his young Navy days was set before the jury. He was standing arm in arm with a buddy in the bowels of a ship, asbestos-insulated pipes running overhead. Mr. Plummer had recently discovered that his friend had died of mesothelioma some years before.

In the end, Garlock won its case by arguing that its gaskets couldn't have released enough asbestos to cause Mr. Plummer's cancer. The judge dismissed Dresser after the company argued that Mr. Plummer hadn't proved a connection between the company and the asbestos-containing pumps he worked with.

But the jury found AC&S Inc.'s pipe insulation had contributed to the plaintiff's injury and awarded him $3.1 million. After the trial, Mr. Plummer's health deteriorated quickly. Attached to an oxygen tank, he died at home in October.

In December, the judge made routine deductions reflecting the settlements Mr. Kraus had negotiated, arriving at a final judgment against AC&S of $1.7 million. But the money kept shrinking.

Several of the settling defendants, including G-I Holdings Inc., **Owens-Corning** and Fiberboard Inc., had begun Chapter 11 proceedings. That is expected to reduce the total settlement amount by almost $1 million, to about $500,000.

Now, AC&S says it is likely to file for bankruptcy protection this year, too. That prompted Mrs. Plummer to settle confidentially with the Lancaster, Pa., company for much less than the court award.

After paying her lawyer 33% of her total recovery, on top of other court costs and medical bills, the 63-year-old widow will have hundreds of thousands of dollars left over to live on. Still, she adds, "I would have rather had him and no money."

Write to Susan Warren at susan.warren@wsj.com[1]

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Friday, December 14, 2001

Law

Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims

By Queena Sook Kim
Staff Reporter of The Wall Street Journal

The Manville Trust, set up to compensate people injured by asbestos, says it is becoming the latest victim of the rising tide of claims filed by people who trustees say aren't medically impaired.

The most pressing issue facing the trust is the possible "misallocation of available funds," said U.S. District Judge Jack B. Weinstein, who called yesterday's hearing to discuss the issue in New York's borough of Brooklyn.

According to a letter Manville trustees sent to Judge Weinstein on Dec. 5, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants -- many with no discernible asbestos-related physical impairment whatsoever." As a result, claimants who are sick, often with cancer, are receiving reduced payments.

Critics say chest X-rays, required to be consistent with asbestos exposure, are often questionable and that the trust created a payment system that made it too easy for people to claim injuries and receive money.

The hearing has grabbed the attention of people involved in asbestos litigation, because the Manville Trust has long been a bellwether for other trusts. While some asbestos attorneys question Judge Weinstein's power to change the payment methods of the trust, most agree that his recommendations, while perhaps not binding, will be influential. Judge Weinstein has overseen litigation concerning the trust since 1990 and is considered an icon in asbestos litigation.

"This court has taken a lead on this issue," said Mark H. Iola, an attorney speaking for the Select Asbestos Claimants, a group that represents claimants who are seriously ill, mostly with cancer. "Others will look to this court."

The hearing was a who's who of asbestos litigation. Attorneys representing many parties involved in asbestos cases spoke at the hearing or submitted letters recommending remedies such as the dismissal of hundreds of thousands of

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claims filed by people who aren't medically impaired.

The concept of a settlement trust was pioneered in the 1980s by Denver-based Johns Manville Corp., a building-products maker that filed for protection under Chapter 11 of the U.S. Bankruptcy Code due to asbestos liability in 1982, and set up the Manville Trust.

Born out of reorganization, trusts must come away with at least 51% of the company's worth, though historically it has been closer to 80% to 90%. Using the money, the trust must deliver "fair, adequate and equitable compensation" to people without making them go through the court system, according to the Manville Trust's literature. To do this, trusts set up a payment schedule for injuries and require evidence, usually chest X-rays, that show the injury is consistent with asbestos exposure.

In 2000, the Manville trust received a total of 58,059 claims, about twice as many as in the year-earlier period, said David Austern, the trust's general counsel. In the first 11 months of 2001, the trust has received 69,784 claims. Since the trust was started in 1988, it has paid out $2.7 billion in claims. To deal with the rise in claims, the trust lowered payments to five cents on the dollar from 10 cents in July. As of Nov. 30, 2001, the trust had about $2 billion in remaining assets.

Fred Baron, a plaintiffs' attorney who sits on the Manville Trust's Selected Counsel for Beneficiaries, believes that claims are rising because more people are aware of their rights to receive compensation for injuries. The Selected Counsel for Beneficiaries is, in part, responsible for readjusting payment plans. "The Manville Trust shouldn't be shrouded in a veil," Mr. Baron said at the hearing. "They should be proud that they're well known and people are filing claims."

---- INDEX REFERENCES ----

NEWS SUBJECT: Justice Department; Charities, Community & Civic Groups; Health; Health; Lawsuits; Legal/Judicial; Wall Street Journal; English language content; Executive Government; Government Bodies; Domestic Politics; Political/General News; Corporate/Industrial News; Law Enforcement (GVJUS CMY HLT GHEA LWS C12 WSJ ENGL GVEXE GVBOD GPOL GCAT CCAT GHOME)

MARKET SECTOR: Newswire End Code (NND)

GOVERNMENT: Justice Department; U.S. Government Agencies (JUS USG)

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EASTERN DISTRICT OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

----------X

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION

NYAL
Index No. 4000

----------X

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In re JOHNS-MANVILLE CORPORATION, et al.,

Debtors.

In Proceedings for
A Reorganization Under
Chapter 11.
Case Nos. 82 B 11656 (BRL)
through 82 B 11676 (BRL),
Inclusive

----------X

EASTERN DISTRICT OF NEW YORK

----------X

BERNADINE K. FINDLEY, et al., on behalf of themselves, and all others similarly situated as beneficiaries of the Manville Personal Injury Settlement Trust,

Plaintiffs,

v.

TRUSTEES OF THE MANVILLE PERSONAL INJURY SETTLEMENT TRUST, not individually but solely in their capacities as Trustees,

Defendants.

E.D.N.Y.
90 CV 3973 (JBW)

ORDER

----------X

The courts have received and reviewed the Financial Statements and Report of the

Manville Personal Injury Settlement Trust for the period ending September 30, 2001. The courts note that there is a continuing rise in the number of claims and that the amount payed pro rata on claims has been reduced from 10 percent to 5 percent of the original value. The courts take judicial notice of the continuing media and other campaigns encouraging a flood of new claims.

This combination of events, together with the increasing number of bankruptcy filings by asbestos related entities, suggests that there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries.

Interested attorneys, parties, and others shall appear in Courtroom 10 of the Brooklyn courthouse of the Eastern District of New York on December 13, 2001, at 10:00 A.M. to consider whether the equities involved and changed circumstances warrant or permit modifications of any relevant prior judgements.

SO ORDERED

Jack B. Weinstein
Senior District Judge, E.D.N.Y.

Burton R. Lifland
Bankruptcy Judge, S.D.N.Y.

Dated: November 7, 2001
Brooklyn, N.Y.
New York, N.Y.

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12 JBKRLP 51
(Cite as: 12 J. Bankr. L. & Prac. 51)

Journal of Bankruptcy Law and Practice
2003

*51 THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS [FNa1]

Joseph E. Stiglitz, Jonathan M. Orszag, Peter R. Orszag [FNaa1]

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Executive Summary

Asbestos claims have skyrocketed over the past decade. These claims are pushing many companies into bankruptcy or at least to the brink of filing for bankruptcy protection.

*52 The pain and suffering of impaired asbestos claimants are palpable and undeniable. It is important to realize, however, that the current system of paying asbestos claims imposes significant costs not just on businesses, but on their individual employees. Wages, future employment prospects, and the ability to save for retirement are all affected. The purpose of this paper is not to suggest in any way that impaired claimants are unworthy of assistance, but rather to highlight the fact that payments to any claimants are not free and to illuminate some of the costs imposed on workers as a result.

We estimate that 61 companies have filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code as a result of asbestos liabilities. These companies are spread across the nation, with 47 states having at least one asbestos-related bankruptcy. Many of the workers at these companies -- which employed 204,868 people the year before they filed for bankruptcy -- are members of unions, and they are often shareholders in the companies as well as employees.

The bankruptcies associated with asbestos liabilities have had a marked deleterious effect on workers in those firms. For example, we found:
• Bankruptcies led to a loss of an estimated 52,000 to 60,000 jobs;
• Each displaced worker at the bankrupt firms will lose, on average, an estimated $25,000 to $50,000 in wages over his or her career because of periods of unemployment and the likelihood of having to take a new job paying a lower salary; and
• The average worker at an asbestos-related bankrupt firm with a 401(k) plan suffered roughly $8,300 in pension losses, which represented, on average, a roughly 25-percent reduction in the value of the 401(k) account.

The bankruptcy event itself is costly, since the legal, accounting, and other transaction costs associated with a bankruptcy can be significant. Based on the published literature on the topic, the direct costs of bankruptcy amount to between three and six percent of the firm's market capitalization. This range suggests that the direct costs associated with asbestos-related bankrupt companies total between $325 million and $650 million.

The pace at which these bankruptcies have been filed has accelerated in recent years: Since 1998, 35 companies have filed for bankruptcy protection because of asbestos-related claims, compared to 26 in the previous two decades. In the first ten months of 2002, 15 *53 companies facing significant asbestos liabilities filed for bankruptcy -- that represents more asbestos- related bankruptcies than in any five-year period before 1999.

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This paper has focused primarily on the costs associated with firms declaring bankruptcy because of asbestos liabilities. While it is important to remember that such bankruptcies are unlikely to have substantial macroeconomic effects, it is also important to remember that the bankruptcies do not capture the full effect of asbestos liabilities on defendants. In particular, many other firms experience financial shocks as a result of asbestos liabilities even if they do not declare bankruptcy as a result. Furthermore, perhaps only a quarter of the estimated eventual costs associated with asbestos claims have been paid to date, raising the specter of many more companies facing severe financial effects and additional asbestos-related bankruptcies in the future. Any such additional bankruptcies are not reflected in our analysis.

Our conclusion is that the current system for handling asbestos claims imposes significant costs on the workers (and shareholders) of the defendant firms. Since many of these firms were not asbestos manufacturers, the costs imposed on workers may seem unfair and inefficient from an economic perspective.

I. Introduction

Prior to the 1970s, asbestos was an important and cost-effective input in a wide variety of manufactured products, from wire insulation to building materials. Asbestos had unique and attractive features: It was cheap, strong, flexible, and resistant to heat and decay.Reflecting these advantages, it was promulgated as a "strategic material" during World War II. [FN1] Throughout much of the 20th century, asbestos was widely used and an estimated 100 million Americans were occupationally exposed to it. [FN2]

In the early 1970s, the United States government -- through the Occupational Safety and Health Administration (OSHA) within the Department of Labor -- began regulating workplace exposure to asbestos. Over time, the regulations became increasingly stringent. Asbestos use remains technically legal in the United States today, but ***54** OSHA and Environmental Protection Agency (EPA) regulations have effectively phased out most uses of asbestos.

A number of diseases have been linked to asbestos exposure. The most severe is mesothelioma, a cancer that is fatal within one to two years of diagnosis. The inhalation of asbestos also can cause lung and other cancers. A third disease arising from exposure to asbestos dust is asbestosis, which is a fibrous scarring of the lung that may or may not impair an individual. A fourth condition associated with asbestos exposure is pleural plaques, which are generally non-impairing symptomatic changes in the pleural membrane covering the lung.

Prior to the 1970s, workers with an asbestos-related disease generally filed for relief through state worker's compensation systems. In 1973, the U.S. Court of Appeals for the Fifth Circuit ruled in Borel v. Fibreboard that manufacturers were liable if they failed to warn consumers about the risks associated with asbestos exposure. [FN3]

Given the long latency period of asbestos-related diseases (up to 40 years), many experts had expected the filing of claims to peak in the 1980s or early 1990s. [FN4] Asbestos claims, however, continued to skyrocket in the 1990s. [FN5] A RAND Institute for Civil Justice (RAND) analysis of five major asbestos defendants suggests, for example, that each company was receiving roughly 15,000 to 20,000 claims per year in the early 1990s. By 2000, that number had increased to roughly 50,000 claims per year. [FN6] Similarly, the Manville Trust -- which pays asbestos claims for former asbestos producer Johns-Manville -- has experienced substantial increases in claims in the past few years. In 1999, the Manville Trust had 32,500 new claims filed against it. New claims rose to approximately 59,200 in 2000 and 91,000 in 2001. [FN7] ***55** (See Chart 1.)

Chart 1: Claims Filed Per Year Against the Manville Personal Injury Trust,
1999-2001
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The claims are also increasingly being extended to a wider array of firms. In 1983, RAND found 300 firms had

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been listed as defendants in asbestos cases. [FN8] By 2002, RAND estimates that more than 6,000 independent entities have been named as asbestos-liability defendants. [FN9] The dramatic recent expansion in defendants raises an important public policy issue. One of the objectives of product liability law is to provide financial incentives for manufacturers to ensure the safety of their products. When joint and several liability is extended well beyond the original manufacturer to include an extremely broad class of firms, however, it could impose an inefficient burden. [FN10] As explained below, joint and several liability means that any firm in the production chain could potentially be held accountable for the entire cost of the damage associated with an input. To reduce the expected costs of such ***56** liabilities, the downstream firms may have to undertake excessive safety checks on all the inputs used in their production processes. The information costs associated with this activity may well outweigh the benefits associated with improved incentives for safety.

The incentive effects discussed above relate primarily to the expected cost of the liability facing specific firms. A distinct issue involves the distribution of any liability payments actually made to claimants. According to the RAND, at least 600,000 individuals filed asbestos-related claims between 1973 and the end of 2000, many against multiple companies. [FN11] This figure may be an underestimate of the total number of individuals filing claims since RAND's database is incomplete: it only has data on claims filed against certain companies, not every company with an asbestos claim against it. In addition, RAND notes that it only obtained data on claims submitted through the end of 2000; as shown above, however, a significant number of individuals filed claims in 2001. Nonetheless, other organizations have produced estimates that are similar to RAND's calculations. [FN12]

The dramatic acceleration in claims does not appear to be associated with an acceleration in the number of severely affected people. Indeed, the American Academy of Actuaries has concluded that about 2,000 new mesothelioma cases are filed each year, a flow which is largely unchanged over the past decade, and that the annual number of other cancer cases at least partly related to asbestos exposure amounts to between 2,000 and 3,000. [FN13] Such cases cannot come close to explaining the increase in asbestos claims being filed, which increased by almost 60,000 between 1999 and 2001. [FN14] RAND concluded that "it is clear that the growth in the annual number of claims observed ... is entirely due to increases in the numbers of nonmalignant claims entering the system." [FN15]

The upshot is that the share of total new claimants who are unimpaired has increased sharply. In 1984, RAND estimated that fewer ***57** than four percent of claimants had no asbestos-related impairment. [FN16] A 1992 paper asserted that non-mesothelioma (and other cancer) claims "account[ed] for sixty to seventy percent of new asbestos claims filed." [FN17] In a 1993 paper, Professors Christopher Edley and Paul Weiler of Harvard Law School estimated that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment." [FN18]

More recent studies of have concluded that even a larger share of claimants is unimpaired. NERA, an economics consulting firm, found that roughly 75 percent of the claims brought against one defendant in 1999 and 2000 had no evidence of impairment. [FN19] Similarly, a preliminary analysis of claims filed against Babcock and Wilcox in 2001 concluded that "two-thirds of the claims ... seek to recover for benign and harmless conditions such as pleural plaques, pleural thickening with no evidence of impaired lung function, or asbestosis with no evidence of impairment." [FN20] Data from claims against W.R. Grace produce similar results. [FN21]

The rapid increase in claims has, not surprisingly, been associated with an increase in total outlays. To date, RAND estimates that aggregate outlays for asbestos claims total $54 billion, with U.S. insurance companies covering an estimated $21.6 billion, [FN22] non-U.S. insurance companies covering $8 billion to $12 billion, and the defendant ***58** companies paying $20 billion to $24 billion, including at least five companies which have each spent more than $1 billion. [FN23]

Looking to the future, most analysts believe that the number of claimants and total outlays for claims will continue to rise. Tillinghast-Towers Perrin, an actuarial consulting firm, projects that 1.1 million claims will eventually be filed, with the total cost to defendants and insurers amounting to $200 billion. [FN24] Milliman USA, another actuarial consulting firm, also forecasts 1.1 million total cumulative claims, but it projects higher total costs ($275

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billion). [FN25] These projections imply that only roughly half of the claims and one-fifth to one-quarter of the eventual costs have been paid to date.

The staggering costs of asbestos liabilities have pushed many defendant companies into bankruptcy or to the brink thereof. We estimate that 61 companies have faced significant asbestos liabilities and have filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code as a result. [FN26] (Our selection methodology is described in more detail in the next section.)

The pace at which these bankruptcies have been filed has accelerated in recent years: Since 1998, more companies have filed for bankruptcy protection (35 companies) than in the previous 20 years combined (26 companies). (See Chart 2.) In the first ten months of 2002, 15 companies facing significant asbestos liabilities filed for bankruptcy -- that represents more asbestos- related bankruptcies in 10 months than in any five-year period before 1999.

Bankruptcy offers firms facing substantial asbestos liabilities a number of benefits. [FN27] First, bankruptcy includes an "automatic stay" on litigation in which the firm is the defendant. Second, the firm can often obtain an injunction, which temporarily protects the parent (as well as subsidiary firms that have not filed for bankruptcy) from asbestos liabilities. Since bankruptcy reorganization can often take ***59** more than five years, bankrupt firms often receive a relatively lengthy reprieve from paying asbestos liabilities. Moreover, as part of the reorganization plan, the bankrupt firm usually wins the right to pay claimants on much less favorable terms.

Another effect of a firm's declaring bankruptcy is that it may cause a "domino effect" on other asbestos-related defendants. The domino effect arises from three simple facts: (1) many states have joint and several liability for damage; (2) most people sue multiple defendants; [FN28] and (3) most claimants "forum shop." [FN29]

Chart 2: Asbestos-Related Bankruptcies By Year, 1978-2002
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***60** An example may help to explain how this effect works. [FN30] Suppose that an individual (John Doe) sues two companies (Company A and Company B) because he has developed asbestosis and is physically impaired. Further suppose that John Doe proves to a jury that both Company A and Company B are jointly liable for his impaired condition and they owe him a total of $500,000. If Company A goes bankrupt before it pays John Doe its share of the $500,000 (say, $250,000), Company B may be liable for Company A's share of the damages. Thus, if Company A files for bankruptcy, the asbestos-related costs for Company B increase. Such a structure creates a number of perverse effects, including the incentive for firms to declare bankruptcy in order to shift liabilities to other firms (which in turn raises the probability that the other firms will be forced into bankruptcy) and the incentive for claimants to sue as many defendants as possible.

Although bankruptcy may provide benefits to firms facing significant asbestos liabilities, it also imposes economic costs. In particular, empirical studies have shown that bankruptcy is associated with significant transaction costs (for the lawyers, accountants, and others involved in the proceedings). The events leading to the bankruptcy, along with the bankruptcy event itself, also tend to be associated with a loss in human capital (for the workers displaced from their jobs) and organizational capital (if the firm is scaled back or no longer exists). As we discuss below, a significant share of these costs is borne by the firm's workers. In most cases, the workers would not have been in a position -- nor perhaps even employed by the firm at the time -- to alter the choice of input used in the production process. Having such workers bear a substantial share of the costs attenuates any positive incentive effects from the underlying product liability approach. In the absence of any significant incentive effects, the attractiveness of the product liability approach relative to alternatives for compensating victims is therefore weaker, since the product liability approach may involve higher transaction costs and be less fair than alternatives.

The purpose of this paper is to analyze the impact of asbestos-related bankruptcies on the workers of asbestos-related companies. The paper is divided into three sections. The first section explores the characteristics

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(such as size, location, and industry distribution) of the companies that have filed for bankruptcy due to asbestos-related claims. The ***61** second section focuses on the effects of asbestos liabilities on workers in the bankrupted firms, including the impact on employment levels and the effects on workers in their role as partial owners of the firm (especially through their pension plans). The final section draws conclusions from the previous sections.

II. Asbestos-Related Bankruptcies

This section provides a brief history of asbestos-related bankruptcies and examines the characteristics of the 61 bankrupt companies. [FN31] We compiled our list of bankrupt companies from five different sources: (1) a paper by Mark Plevin and Paul Kalish (Where Are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims), (2) the June 2002 Mealey's Asbestos Bankruptcy Report, (3) a March 2002 Lehman Brothers analysis (Thinking About Asbestos), (4) a December 2001 report of the American Academy of Actuaries (Overview of Asbestos Issues and Trends), and (5) a list of companies that have sought bankruptcy protection that was provided to us by the American Insurance Association. The entire universe of companies cited by these sources exceeded 70.

After compiling this list, three filters limited our sample to U.S. firms for which asbestos liabilities played a substantial role in causing the bankruptcy. First, we sought confirmation from a variety of contemporaneous sources (e.g., press releases, bankruptcy filings, newspaper stories, other regulatory filings, etc.) that asbestos liabilities played a significant role in the bankruptcy. To be sure, other factors may have contributed to the company filing for bankruptcy (e.g., foreign competition, financial mismanagement, etc.), but for the companies we designate as "asbestos-related bankruptcies," asbestos was identified as a significant contributing factor to the decision to enter into bankruptcy. Second, we excluded any non-U.S. corporations because of data limitations. Finally, to avoid double counting, we treated separate bankruptcies by subsidiaries of the same parent firm as one bankruptcy event. (For example, when UNR Industries filed for bankruptcy in 1982, ten related companies filed at the same time.)

***62** A Brief History of Asbestos-Related Bankruptcies

Asbestos-related bankruptcies can be grouped into four waves. The "first wave" occurred between 1978 and 1985 when seven companies with significant asbestos liabilities filed for bankruptcy protection. For example, UNR Industries faced an estimated 17,000 asbestos claims and projected that it was going to face another 120,000 claims when it filed for bankruptcy in July 1982. Johns-Manville, still the largest employer to have declared bankruptcy because of asbestos claims, filed for bankruptcy the next month. The companies that comprised this "first wave" of bankruptcies were primarily large asbestos manufacturers.

The "second wave" of asbestos-related bankruptcies occurred between 1986 and 1993. During that time period, 18 companies entered into bankruptcy due to significant asbestos liabilities. Some of these companies were quite large: Todd Shipyards employed 4,400 workers in 1986, the year before it went bankrupt; and Hillsborough Holdings employed 8,935 workers in 1988, the year before it went bankrupt. None of these companies, however, approached the size of Johns-Manville, which employed 27,000 people in 1981.

From 1994 to 1997 ("the third wave"), there was a sharp downturn in asbestos- related bankruptcies. Only one company (Rock Wool Manufacturing) filed for Chapter 11 protection, although it was not a prominent asbestos-liability defendant. [FN32]

The "fourth wave" of asbestos-related bankruptcies started after the U.S. Supreme Court struck down Georgine v. Amchem Products, a landmark asbestos settlement, in June 1997. It accelerated after the U.S. Supreme Court overturned a 1993 global class action settlement, Ortiz v. Fibreboard, in June 1999. That settlement involved approximately 186,000 asbestos personal injury claims against the Fibreboard Corp., a maker of vinyl siding that is

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now a subsidiary of Owens Corning. As one Chief Executive Officer confided to Fortune in March 2002, "We should've filed bankruptcy on the day after the Georgine settlement was overturned by the Supreme Court ... Every asbestos defendant should've done the same thing." [FN33] In 1998, there were four asbestos-related bankruptcies. By 2001, there were eight, and in the first ten months of 2002, there were 15 asbestos-***63** related bankruptcies. These companies employed more than 135,000 workers: for example, Owens Corning employed 20,000 and Babcox and Wilcox employed 12,264 people in 1999, the year before both firms declared bankruptcy.

Size of Asbestos-Related Bankrupt Firms

Using data from Compustat, Dun & Bradstreet's Million Dollar Directory, Ward's Business Directory, Moody's, company web sites, and individual firms' Securities and Exchange Commission (SEC) filings, we constructed an employment database for the asbestos-related bankrupt companies. Employment data were available for only 40 of the companies. The other 18 companies were small and presumably excluded from the above-mentioned data sources; as noted above, three companies were excluded because they filed for bankruptcy after our analysis was completed. For some companies -- roughly 10 -- we built a time series of employment data between 1960 and 2001. For the other 30 companies, employment data were available on an infrequent basis or for shorter time periods (e.g., for Kaiser Aluminum, data were available for 1986 to 2001). [FN34]

Table 2 presents data on the size of the firms that have filed for bankruptcy in each of the four waves described above. Since 1978, 26 companies facing asbestos liabilities filed for bankruptcy when they had more than 1,000 employees, with seven companies having more than 10,000 workers when they filed for bankruptcy protection. The companies that have filed bankruptcy most recently appear to be the largest firms, with six out of the seven largest filing for bankruptcy ***64** since 1998. [FNaaa1] Two-thirds (66.7 percent) of these employees worked at firms that went bankrupt in the past four years. That is, the companies that went bankrupt between 1998 and 2002 employed a total of 136,831 people in the year before each company filed for Chapter 11 ***65** protection.

Table 3: Number of Asbestos-Related Bankruptcies and the Number of Workers Employed By the Firms, By Time Period

Time Period	Bankrupt Companies For Which We Have Employment Data	Number of Workers Employed By Bankrupt Firms Year Before Bankruptcy Filing
"First Wave": 1978-1985	2	30,600
"Second Wave": 1986-1993	13	37,365
"Third Wave": 1994-1997	1	72
"Fourth Wave": 1998-2002	24	136,831

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Total	40	204,868

Another measure of the size of the bankrupt companies is their market capitalization one year prior to filing bankruptcy. From the Center for Research in Security Prices (CRSP) market database and individual companies' Securities and Exchange Commission (SEC) filings, we obtained market capitalization data for 17 companies. (Many of the bankrupt companies were either privately held or were subsidiaries of larger firms. For such companies, market capitalization data are not publicly available.) Since companies filed for bankruptcy in different years, we converted each firm's market capitalization level into July 2002 dollars using the Consumer Price Index (CPI-U). As Table 4 shows, four of the 17 firms had market capitalizations of more than $1 billion the year before they filed for bankruptcy, two firms had market capitalizations of between $500 million and $1 billion, six firms had market capitalizations of between $100 million and $500 million, and five firms had market capitalizations of less than $100 million. All four firms with market capitalizations over $1 billion filed for bankruptcy after 1998.

Table 4: Market Capitalization of Bankrupt Firms One Year Prior to Filing for Bankruptcy, in July 2002 Dollars

Market Capitalization (in July 2002 Dollars)	Number of Firms
More than $1 billion	4
$500 million to $1 billion	2
$100 million to $500 million	6
Less than $100 million	5
Total	17

Industry Distribution of Asbestos-Related Bankrupt Firms

A number of analysts have noted that the companies facing asbestos liabilities are not concentrated in a particular industry. For example, ***66** RAND has found that "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 82 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." [FN36]

Companies outside asbestos manufacturing appear to be paying a larger share of the asbestos liabilities today.

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Specifically, according to a confidential study of asbestos costs cited by RAND, nontraditional defendants accounted for about 60 percent of asbestos expenditures by the late 1990s. By comparison, in the early 1980s, the report cites evidence that nontraditional defendants accounted for only about one-quarter of asbestos-liability costs. [FN37] A different analysis by Prudential Financial draws a similar conclusion. Prudential Financial notes that as traditional defendants -- those involved in the mining, manufacturing, and distribution of products that included large amounts of asbestos -- declared bankruptcy, claimants cited other organizations as responsible parties. The study notes, "Defendants are increasingly 'peripheral.' This generally means that: They did not manufacture, sell, or install asbestos-containing insulation or materials; [a]sbestos was more or less 'incidental' in their products or facilities; [i]f it was in their products, it was enclosed [and] therefore, only a minimal number of fibers were released into the air; and [t]heir current outstanding claims count is in the hundreds or low thousands ... opposed to the more than one hundred thousand recorded by the traditional defendants." [FN38]

The Prudential Financial report provides a list of nearly 1,000 organizations that are current defendants in asbestos litigation, along with an industry classification for each defendant. As noted above, RAND estimates that there are more than 6,000 defendants. The Prudential Financial list is thus a subset of all defendants and only 39 bankrupt companies are included. We have divided this incomplete list into bankrupt and non-bankrupt companies. (See Table 5.) The table shows clearly that defendants -- and, to a lesser degree, bankrupt ***67** companies -- are spread across different industry groups.

Table 5: Distribution of Defendants and Bankrupt Companies, By Industry Group, As Presented in Prudential Financial's Asbestos Litigation--A Problem Without A Solution

Industry	Defendants	Bankrupt Companies
Aluminum & Metal Plants [FNa1]	30	1
Asbestos Industry [FNd1]	128	16
Automotive	5	
Brake Product Manufacturers	11	
Cement Manufacturer [FNr1]	23	1
Chemical Plant	28	
Commercial Industry Jobsites	19	4

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Commercial Industry West Coast	8	1
Construction	3	
Contractor	16	
Distributor	14	
Diversified	1	
Financial Services	3	
Fireproofing Manufacturers	6	2
Floor Tile Manufacturers	1	1
Food	1	
Gasket & Packing Manufacturers	1	
Hotels	2	
Imaging	1	
Industrial Boiler Companies	2	1
Lumber Industry Mills	3	
Lumber, Plywood, Veneer/Particleboard	24	
Manufacturing	47	2
Marine	3	
Media	1	

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Mills - Plants	3	
Miscellaneous	1	
Oil Refinery	91	
Paper/Pulp Mills	27	
Pharmaceuticals	3	
Power Plants [FNh1]	230	
Real Estate	1	
Refineries/Chemical Plants	35	
Shipyards [FNaa1]	116	2
Steel Mill	58	1
Supplier	2	
Technology	1	
Telecommunications	3	
Thermal Insulation Manufacturers	7	3
Transite Pipe Manufacturers	4	1
Transportation	9	1
Turbine Companies	1	
Utility	2	

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Wallboard, Plaster & Joint Compound Manufacturers	17	2
Total	992	39

FNa1. Includes defendants categorized as "Aluminum Plant."
FNd1. Includes defendants categorized as "Sold, Made, Designed Asbestos Products."

FNr1. Includes "Insulating Cement Manufacturer" and "Refractory Cement Manufacturer."

FNh1. Includes defendants categorized as "Industrial Sites - Power Plants," "West Coast Power Plant," "Power Plant," and "State & Electric Power Plants."

FNaa1. Includes defendants categorized as "Shipyard."

Location of Asbestos-Related Bankrupt Firms

Using the same sources described above to build our employment ***68** database, we also constructed a database on the locations within the United States of the companies that have sought bankruptcy protection due to asbestos liabilities. For 50 of the companies that have filed for bankruptcy before September 2002, we have data on the location of their headquarters. These companies are currently headquartered in 19 different states; Pennsylvania -- which contains heavy concentrations of manufacturing firms -- accounts for almost a quarter of the bankrupted firms. See Table 6.

Table 6: Distribution by State of Current Headquarters of Companies That Have Sought Bankruptcy Protection

State	No. of Companies Currently Headquartered in State
Pennsylvania	12
Illinois	5
New Jersey	5
California	4

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Maryland	3
New York	3
Alabama	2
Colorado	2
Florida	2
Michigan	2
Washington	2
Connecticut	1
Delaware	1
Idaho	1
Missouri	1
North Carolina	1
Ohio	1
Texas	1
Vermont	1

Our database also includes information on the location of company facilities. Many firms do not report the locations of all of their facilities, so this information is incomplete. In addition, our database does not include any information on the number of workers at a given facility. Despite these shortcomings, it is interesting that these 50 companies have facilities in 47 states. (See Chart 3.) The only states without a facility appear to be Hawaii, North Dakota, and Rhode ***69** Island.

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Chart 3: States with and without Facilities of Asbestos-Related Bankrupt
Companies
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Unionization of Asbestos-Related Bankrupt Firms

Although the bankrupt firms span a wide variety of industries, they are concentrated in manufacturing, which has a relatively high unionization rate. Many of the firms declaring bankruptcy report particularly high unionization rates in their SEC filings. For example, Johns-Manville reported that 42 percent of its workers were unionized in 1981, the year before it declared bankruptcy. [FN39] Other bankrupt firms report similarly high unionization rates for the year before they filed for bankruptcy: Eagle-Picher reported a unionization rate of 33 percent; ***70**[FN40] Federal Mogul reported 33 percent; [FN41] Armstrong reported 57 percent; [FN42] and Todd Shipyards reported 75 percent. [FN43]

III. Economic Implications of Asbestos Liabilities and Bankruptcy

The previous section described the characteristics of the bankrupt companies that filed for bankruptcy prior to September 2002. This section explores the effect of asbestos-related liabilities and bankruptcies on employment, retirement security, government finances, and other economic factors. There is a large theoretical literature in economics, and a somewhat smaller empirical literature, on the effects of bankruptcies on firm financial policies and behavior. [FN44] Our focus here is more applied, and focuses specifically on asbestos-related bankruptcies.

Bankruptcies and the events that lead to them impose various forms of (potentially related) economic costs. First, the events leading to bankruptcy cause job displacement, which reduces the human capital of workers at the firm. These costs are borne primarily by the workers themselves (with some of the costs subsidized through the unemployment insurance system) but largely represent a loss to society as a whole. Second, bankruptcies can destroy the organizational capital associated with the firm; these costs are borne by both the workers and owners of the firm and also largely represent a loss to society as a whole. Third, the liability payments that caused the bankruptcy represent transfers from stockowners of the firm to victims; these transfers ***71** impose costs on the owners of the firm but produce benefits for the recipients. Only the net cost of the transfer -- that is, any inefficiency associated with the transfer from one party to the other -- represents a loss to society as a whole. Finally, the bankruptcy event itself involves direct transaction costs: the legal, accounting, and other costs associated with a bankruptcy can be significant. Our focus is primarily on the costs borne by workers at the bankrupt firms, through the loss of their human capital and the potential reduction in their retirement wealth (if they own shares of the firm through their retirement accounts), although we also discuss briefly the overall economic issues.

It is important to emphasize that some decline in the size, stock value, and employment of asbestos manufacturing firms is appropriate, given the discovery of the health risks associated with asbestos and the importance of the incentives provided by the liability system for improved safety. The purpose of this paper is not to separate the "appropriate" from the "inappropriate" costs associated with asbestos liabilities. Nonetheless, the mechanism used to transfer funds to victims is worthy of further examination. As discussed elsewhere in the paper, the increasingly extensive number of tangentially related defendants raises questions about the economic costs and benefits of the liability approach in this context.

Impact of Asbestos-Related Bankruptcy on Workers

As asbestos-related claims increase, firms may find it difficult to obtain new financing and retain clients. They may therefore seek to reduce costs, including labor costs, well before they actually declare bankruptcy. [FN45] In particular, as a firm approaches bankruptcy, it faces the challenge of maintaining its customer base and continuing production, which may make it difficult to maintain previous employment levels even before the bankruptcy

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occurs. Indeed, a common finding ***72** in the bankruptcy literature is that the threat of bankruptcy has real effects several years ahead of the bankruptcy event. [FN46]

The media have reported a large number of layoffs by firms declaring bankruptcy due to asbestos liabilities. For example, Federal-Mogul announced in January 2001 that it would close up to 50 of its 150 production units. [FN47] The following month (February 2001) it announced it was firing 1,100 workers. [FN48] This layoff followed an April 1998 announcement by Federal- Mogul of 4,200 job cuts. [FN49] In 1998 and 1999, the years before it filed for bankruptcy, Owens Corning reported 1,500 layoffs. [FN50] And U.S. Gypsum announced in January 2001 that it would eliminate 500 salaried jobs as part of a restructuring plan. [FN51]

We conducted a more systematic and rigorous analysis of employment among asbestos-related bankrupt companies. We have time-series employment data for 31 of the companies that filed for bankruptcy prior to September 2002. The 31 firms for which we have time-series employment data represent the vast majority, and likely roughly 90 percent, of total employment for the bankrupt firms as a whole. [FN52] For these firms, we compared the change in employment of each firm in the five years prior to bankruptcy to the change in employment for other firms in the same four-digit Standard Industrial Classification ***73** (SIC) code. [FN53] The five-year period was chosen as a rough proxy for the time between the first material revelation of asbestos liabilities and the bankruptcy event. A longer-time period, such as ten years, produces an even larger employment effect than the estimate presented below.

Data for each four-digit SIC code were obtained from the Bureau of Labor Statistics; for each four-digit SIC code, we obtained an estimate for employment at the non-bankrupt firms by subtracting the employment at companies that declared bankruptcy due to asbestos liabilities from the overall SIC employment level. [FN54] The results of this analysis are summarized in Table 7.

After adjusting for the changes in industry employment, the 31 firms lost 51,970 jobs in the five years prior to bankruptcy. (The raw change in employment -- that is, the change without adjusting for employment changes at the industry level -- was a loss of 60,636 jobs.) Nine firms showed gains in employment in the five years prior to bankruptcy, while 22 firms experienced declines in employment. The change in employment represents an average 22- percent decline -- relative to changes in industry employment -- for the 31 bankrupt companies. And, as the table shows, roughly half (53 percent) of the change in employment has occurred in firms that have filed for bankruptcy since January 1998.

The 31 firms for which we have data likely represented 87 percent of total employment at the bankrupted firms as a whole. Assuming that employment losses at the firms for which we lack data were proportionate to those for which we have data, the implied total employment loss for the bankrupted firms as a whole would be roughly ***74** 60,000.

Table 7: Change in Employment in Five Years Prior To Bankruptcy After Controlling for Changes in Industry Employment

	Number of Lost Jobs
Firms Filing for Bankruptcy Before January 1998	24,551
Firms Filing for Bankruptcy After January 1998	27,419

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Total for Firms With Data	51,970
Estimated Scaled Total for All Bankruptcy Firms	~60,000

This methodology effectively assumes that, in the absence of the bankruptcy, the bankrupted firm would have maintained a constant share of the industry's employment. An alternative methodology, which has been applied to revenue calculations in other bankruptcy studies, most notably Altman (1984), uses regression analysis to examine the relationship between the firm's employment and industry employment for some period before the bankruptcy. It then applies that relationship to industry employment immediately surrounding the firm's bankruptcy to obtain a predicted level of employment. The difference between the predicted level of employment for the firm and the actual level is then attributed to bankruptcy-related events. We also conducted this type of analysis. The overall results were not qualitatively different from those summarized above when the requisite data were available, although the results for individual firms did vary in some cases. Because of data limitations, we prefer the principal approach adopted above rather than this regression-based approach.

RAND has also estimated job losses associated with asbestos-related bankruptcies or liabilities. Specifically, it bases its calculations for changes in employment levels on the amount defendant firms have paid out ($23 billion). RAND estimates that a reduction of $23 billion in retained earnings would result in a reduction in investment levels by the defendant firms of up to $10 billion. RAND then estimates the employment effect of this reduced investment. The study concludes that, "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 ***75** the year 2000 would be approximately 128,000." [FN55] RAND notes that these figures represent upper-bound estimates, since non-defendant firms will likely "make up" for the reduction in investment by defendant firms. Note that we focus only on bankrupt companies; RAND examined all defendant firms regardless of whether they declared bankruptcy.

Regardless of the precise estimate attached to employment losses associated with asbestos, it is important to emphasize that the aggregate level of employment in the nation as a whole will be primarily determined by factors other than asbestos liabilities and the bankruptcies that have resulted. That is, while the firms that have declared bankruptcy due to asbestos liabilities have reduced employment by between 52,000 and 60,000, the effects on total employment are likely to be smaller.

The workers displaced from the bankrupted firms may ultimately find employment elsewhere, but the transition could be costly and lengthy. For example, regional imbalances in employment may make it difficult for workers to find a new job that matches their existing skills within driving distance of their existing home. And it is costly for workers to move or learn new skills. Research by Henry Farber, an economist at Princeton University, has shown that "the costs of job loss are substantial. Employment probabilities are reduced substantially. There is an increased probability of working part-time, yielding lower earnings both through shorter hours and lower wage rates. These costs are larger for those workers with less education. And even those re-employed full- time suffer substantial earnings losses on average, regardless of education level." [FN56]

The economic costs resulting from the dislocation involve two components:
• First, the structural and frictional unemployment associated with the bankruptcies represents a lost opportunity. That is, to the extent that the movement of the displaced workers to new jobs produces a temporary increase in the unemployment rate that would not have otherwise occurred, the production of goods and services lost during the transition represents a true economic cost. Data from the Bureau of Labor Statistics suggest that the median ***76** displaced worker who had been previously employed for at least three years and who finds a new job went approximately six weeks between jobs. [FN57] Furthermore, only about four-fifths of displaced workers were re-employed within a few years of being displaced. [FN58] To give a conservative estimate of the magnitude of

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costs involved, we can adopt a variety of simplifying, but nonetheless reasonable, assumptions. If we assume an average displacement lasts for one month, that the displaced workers had earned an average of $40,000 per year (which we also assume to be equal to the value of goods and services they produced), and that a total of 52,000 to 60,000 workers were displaced due to the asbestos-related bankruptcies, the unemployment spells associated with the displacements would represent an economic cost of about $175 million to $200 million.

• Second, displaced workers tend to earn lower wages at their new jobs, reflecting the loss of human capital associated with the displacement. Farber (2001) estimates that the loss in earnings from displacement amounts to between 5 and 10 percent of previous wages. Under the same assumptions as above, and assuming that the average displaced worker is 45, and has 20 years to retirement, the present value of the losses in wage income would amount to between $1.2 billion and $2.8 billion at a five percent real discount rate.

The total economic costs associated with the displacements under these assumptions would then amount to between $1.4 billion and $3.0 billion.

In addition to these earnings-related costs imposed on workers, bankruptcy also imposes costs on workers as shareholders. Many workers hold shares of the firm in their pension plans, so that workers suffer two forms of losses: a loss in their human capital (from their displaced employment) and a loss in their financial capital (from the decline in their retirement assets). In the next sub-section, we turn to estimates of the retirement asset losses experienced by workers in the bankrupt firms.

*77 Impact of Asbestos-Related Bankruptcy on Retirement Security

Layoffs may not be the only costs to workers from asbestos-related bankruptcies. Indeed, current (and former) workers may experience significant deteriorations in retirement savings if their pension account is invested in company stock. As Michael Kavanagh, the president of a local union that represents 400 W.R. Grace employees in Baltimore, recently told the Baltimore Sun, he is "worried about retirees and those about to retire who were counting on the Grace stock they'd built up over the years to help supplement their post-paycheck years." [FN59]

This concern arises because as asbestos liabilities increase, the market value of the firm usually declines. Such stock market declines manifest themselves in decreased values of employee defined contribution (DC) pension plans, such as 401(k)s. In 1998, 40 percent of families had a 401(k) or other similar DC pension plan through their employer. [FN60] And as various policy-makers have emphasized in recent months, a significant portion of these DC pension plans are invested in the company's stock: According to the Employee Benefit Research Institute, roughly one-fifth (19 percent) of 401(k) assets are in company stock. [FN61] In total, the National Center for Employee Ownership estimates that approximately 25 to 30 million U.S. employees own stock in their companies through employee stock ownership plans (ESOPs), broad- based stock option plans, and DC plans. [FN62]

To estimate the impact of asbestos-related bankruptcies on employee retirement assets, we undertook two different approaches.

Changes in Stock Prices

The first method uses an estimate of the change in the stock price due to asbestos liabilities to calculate the change in retirement assets for each worker.

Of the companies that went bankrupt due to asbestos liabilities prior to September 2002, we have consistent time-series stock market data ***78** for 13 of them. As with the analyses of changes in employment, we compare stock market performance to a control group. In particular, we track the stock market price of each company for the five years before and, if possible, five years after bankruptcy to the performance of a control group of companies, weighted by market capitalization, that produce similar products and face similar economic and market circumstances. (Control group companies are those in the same three- digit SIC code as the bankrupt company, but

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have not filed for Chapter 11 protection for asbestos-related reasons.) Data on stock prices were obtained from the CRSP database; stock price data were adjusted to take into account dividend payments.

We limit the analysis to a ten-year period that begins five years prior to Chapter 11 filing and extends up to five years after the filing; the comparison stops before five years if the company liquidated, was acquired, or if the bankruptcy took place within the last five years. As before, we compare a market capitalization index for each bankrupt firm to a value-weighted market capitalization index for a control group of companies drawn from the same SIC. The index is normalized to 100 in January 1995 -- the first period of comparison.

The results of this exercise for firms declaring bankruptcy after 1997 are shown in Chart 4. To simplify the presentation, aggregate indexes of the bankrupt firms and non-bankrupt firms within the same industries were constructed. As the graph shows, the bankrupt firms experienced significant stock market declines relative to their industry groups: while the industry control group increased 87 percent between 1995 and 2002, the bankrupt firm index fell 92 percent.

Chart 4: Portfolio of Companies That Filed for Bankruptcy After 1998 v.
Industry Control Group and Aggregate Market Indices
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***79** An analysis of the firm-by-firm results for all 13 companies for which we have full data shows that all these bankrupt firms underperform relative to their industry control group. This type of stock market underperformance is perhaps not surprising and has been found in other broader studies of bankruptcies. [FN63] The next step involves converting these results into an estimate of the impact on pension assets. Of the 13 companies analyzed, six report information on what share of employee pension assets are invested in common stock. We used information from the firm's SEC filings to estimate the per plan participant assets held in company stock. [FN64] Among the six firms, the average plan participant had 401(k) assets of $35,891, with $9,098 invested in company stock five years before the company filed for bankruptcy. [FN65] Common stock thus represented 25 percent of the pension assets five years before the firms filed for bankruptcy; by comparison -- as noted above -- the national average is 19 percent.

If the investment in company stock had followed the industry control group index for these firms, the employee's pension assets would have dropped from $9,098 to $8,662. Instead, they declined by 96 percent. That is, on average, instead of the value of company stock falling to $8,662, it fell to $401 -- a loss of $8,261 in pension wealth per affected worker relative to the level that would have obtained if the stock performed in line with the rest of the relevant industry control group. The total defined contribution pension losses amounted to more than $350 million.

***80 Changes in Per Plan Participant Assets**

The second methodology utilizes information supplied to the SEC by the companies in annual filings. Specifically, in 11-K filings, publicly traded companies report the share of the firm's pension fund assets that are held in company stock. We can thus calculate the assets that each plan participant holds in company stock by dividing that amount by the total number of plan participants.

We examine the per plan participant assets invested in company stock for five years before (or the closest time period to five years before) the company filed for bankruptcy and for the year the company filed for bankruptcy. [FN66]

This approach does not directly rely on an estimated change in the stock price, as the first approach does. But like the first approach, it implicitly assumes that the decline in plan assets is due to the bankruptcy itself rather than other factors. In addition, this approach has three shortcomings not relevant to the first approach. First, it likely

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obscures the underlying trend in per plan participant assets, since participants continue to contribute to the pension plan in the intervening period. Second, it does not control for changes at the industry level. In other words, it does not make even a crude adjustment for the change in per plan participant assets that would have occurred in the absence of the asbestos liabilities (e.g., the industry may have suffered a severe downturn that would have affected the per plan participant assets regardless of the asbestos liabilities). Finally, the per plan participant metric can be affected by hiring decisions and pension participation rates, since the addition of new plan participants with below-average balances would cause a decline in the per plan participant measure.

As noted above, we have data on pension fund investments in company stock for six firms. As Table 8 indicates, the weighted average per plan participant assets in the six companies for which we have data fell by $8,307 from the five years prior to bankruptcy to the year ***81** of bankruptcy.

Table 8: Change in Average Per Plan Participant Assets in Company Stock for Six Asbestos-Related Bankrupt Firms

	Average Per Plan Participant Assets
Five Years Before Bankruptcy	$9,098
Year of Bankruptcy	$791
Change	$8,307

As one example, Chart 5 shows the change in the per plan participant assets invested in company stock for USG employees. Between December 1996 and December 2001, per plan participant assets fell by $1,670, from $1,976 in December 1996 to $305 in December 2001. In December 1996, the pension fund held nearly $20 million in company stock; by December 2001, it held just $3.7 million. After accounting for inflows of pension savings, the USG pension fund lost more than $40 million between December 1998 and December 2001 due to the drop in USG's stock.

Chart 5: Per Plan Participant Assets Invested in Company Stock by USG
Employees, 1992-2001
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Changes in Retirement Security

We can apply the results from the two methodologies above to ***82** estimate the impact on workers (and their families) from the loss of pension wealth. Such a reduction in pension wealth imposes a cost that could manifest itself in one of three ways: a reduction in consumption during retirement; an increase in savings (and thus a decrease in consumption) before retirement; or a delay in retirement. [FN67] To provide insight into the potential magnitude of these adjustments, we built a model of retirement saving.

The model takes a given level of current pension wealth, projects it forward to an assumed retirement age, and

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then annuitizes it (that is, converts the accumulated pension account into a monthly payment that is paid as long as the annuitant or his or her spouse is alive). The model takes into account the current age of the worker, the marital status of the worker, the worker's marginal tax rate in retirement (to examine after-tax retirement income), the worker's current 401(k) balance; the worker's current earnings; the worker's anticipated retirement age; an assumed real return on the 401(k) assets; an assumed rate of aggregate real wage growth, combined with the age-wage profile constructed by the Office of the Chief Actuary at the Social Security Administration; and marital-specific annuitization rates. By comparing the results before and after the decline in pension wealth, the model can then be used to examine the effects of the decline on after-tax retirement income if no changes are made to saving or the worker's retirement age; required saving prior to retirement to maintain the previous level of after-tax retirement income; and the delay in the retirement age necessary to maintain a given level of after-tax retirement income without an increase in saving.

The projections shown in the table below assume actuarially fair annuities; a 5 percent real pre-tax return on assets; 1.5 percent aggregate real wage growth; a 25 percent marginal tax rate in retirement; that the worker is currently earning an age-adjusted lifetime equivalent of $45,000 per year; that the worker is married; and the worker intends to retire at age 65. We examine three workers: a 35-year-old, 45-year-old, and 55-year-old. Unfortunately, we do not have data on plan assets by age of worker. Therefore, for each worker, we assume 401(k) balances were initially equal to mean per plan assets for the affected companies ($35,891) multiplied by an age-related scaling factor. The age-related scaling factor was derived by comparing median financial ***83** assets by age groups from the Federal Reserve's Survey of Consumer Finances, and assuming that the median worker was 45 years old. The result was an assumed initial 401(k) balance of $14,795 for the 35-year-old worker; $35,891 for the 45-year-old worker; and $43,898 for the 55-year-old worker. In each case, we assumed a decline due to the bankruptcy of 25 percent, which is roughly consistent with the observed declines in plan assets (as discussed above).

As Table 9 shows, the losses imposed by bankruptcy cause substantial, albeit perhaps not devastating, costs on workers. For example, if a 45-year-old worker lost 25 percent of his assumed 401(k) balance, he could either allow his retirement income to fall by $1,250 per year or he could raise his annual 401(k) saving before retirement by $720 per year. For older workers, several offsetting forces affect the results. The first factor is that the accumulated 401(k) balances prior to the decline are assumed to be larger for the 55-year- old than for the 45-year-old, meaning that a given percentage decline represents a larger absolute loss at the time for the older worker. On the other hand, the power of compound interest means that a loss of $1 to a 45- year-old corresponds to a larger loss in retirement income than the loss of $1 to a 55-year-old. For example, $1 today would accumulate to $2.65 over the twenty years that a 45-year-old has until retirement; $1 today would accumulate only to $1.63 over the ten years that a 55-year-old has until retirement. Therefore, although the 55-year-old may lose more dollars today, the 45-year- old suffers more from the lost power of compound interest. Finally, the 55- year-old has fewer working years over which to make up the loss through additional contributions to the 401(k) plan.

Table 9: Impact of Loss of Pension Wealth on Measures of Retirement Security

	35-year old worker	45-year old worker	55-year old worker
Assuming 25 percent decline in 401(k)			

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Increase in required 401(k) saving per year to maintain pre-reduction retirement income ($2002)	$241	$720	$1,421
Reduction in retirement assets ($2002)	$15,986	$23,807	$17,876
Reduction in annual after-tax retirement income ($2002)	$839	$1,250	$939
Delay in retirement age to maintain pre-reduction retirement income per year (years)	0.48	0.83	0.72

Note: See text for assumptions.

***84 Other Pension Losses Due to Asbestos-Related Bankruptcies**

Bankruptcies can also impose large costs on defined benefit (DB) pension plans in addition to defined contribution plans. The Federal Government plays a significant role in protecting employees and retirees who participate in traditional (defined benefit) pension plans. A key element of that protection is the benefit guarantee for under-funded, terminating defined benefit plans that is administered by the Pension Benefit Guaranty Corporation (PBGC), a government corporation established within the Department of Labor. [FN68] (Since the PBGC is required to be self-financing, it does not impose any direct cost on the Federal Government or on the taxpayers when it assumes trustee-ship of a particular plan and thereby takes on additional liabilities to pay claims.) One example of a defined benefit plan that the government "took over" was the Atlas Corporation's 1978 Retirement Plan, which covered 148 workers. Atlas filed for bankruptcy in September 1998. On October 27, 1999, Atlas' DB plan was terminated and the PBBC became the trustee on November 18, 1999. [FN69] PBGC also took action against Raymark Industries. (Raymark created Raytech Corporation, which filed for bankruptcy in 1989.) In 1999, PBGC won a decision against Raymark. In the case, PBGC sought to ensure that Raymark covered the $19 million in pension liabilities owed to 1,500 former workers based in Connecticut, Pennsylvania, Indiana, South Carolina, and North Carolina. [FN70]

Losses associated with the declines in firm values (embodied in both stock value drops and corporate debt restructurings) are not, of course, concentrated solely among the employees and pension plans of the bankrupted firm. Instead, all shareholders and creditors bear some of the burden. For example, soon after USG Corporation entered into bankruptcy, the New York State Teachers Retirement Board ranked as the twelfth largest institutional investor in USG Corporation with nearly 400,000 shares. [FN71] The California Public Employees Retirement System (CALPERS) is currently the eighth largest institutional ***85** investor in W.R. Grace, which filed for bankruptcy in April of 2001. [FN72] And CALPERS and TIAA-CREF are two of the top ten institutional investors in Kaiser Aluminum. [FN73]

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The sharp declines in the stock market value of asbestos-related bankrupt companies would thus likely have broader effects. One example of such a loss is the New York State Teachers Retirement Board's experience with Owens Corning. On March 31, 1999, the Board owned 449,200 shares of Owens Corning. While these shares represented a very small share -- roughly 0.03 percent -- of the entire pension fund, the value of the stock declined by roughly one third between March 31, 1999 and September 30, 1999. Owens Corning stock price continued to slide as it approached bankruptcy: It fell from 21.69 on September 30, 1999 to 1.19 on October 20, 2000 -- a 95 percent decline in 13 months. If the New York Teachers Retirement Board had not sold any shares before Owens Corning filed for bankruptcy in October 2000, the pension fund would have lost nearly $14 million.

It is possible that the stock prices for other, non-defendant firms are indirectly bolstered by the asbestos liabilities -- for example, successful claimants likely spend at least part of their awards on something, and the firms selling those goods and services could experience increases in their stock prices. But any such effects are almost impossible to quantify precisely -- and given the transaction costs associated with the process, the overall effect on share values is very likely to be negative.

The Direct Costs of Asbestos-Related Bankruptcies

The estimates above are proxies for what are called the "indirect costs" of bankruptcy (Altman 1984). But the bankruptcy event itself involves direct transaction costs: the legal, accounting, and other costs associated with a bankruptcy can be significant.

Altman (1984) finds that the direct bankruptcy costs amount to 6.2 percent of a firm's value during the year of bankruptcy. RAND cites evidence that the cost of bankruptcy reorganization is equal to about three percent of a firm's value, based on Franks and Touros (1989); Weiss (1990); and White (1996). The RAND figure, however, values ***86** the firm's debt at book value rather than market value; Altman, where possible, uses market value instead.

To date, no one has studied the direct costs of asbestos bankruptcy reorganization. The bankruptcies that have been studied in the literature involved large publicly traded corporations comparable in size to large asbestos defendant corporations. But reorganization costs for asbestos defendants may be higher than figures reported in these earlier studies because none of the studied bankruptcies included massive numbers of tort creditors.

Based on the earlier literature, a conservative estimate is that the direct costs of bankruptcy amount to between 3 and 6 percent of the firm's market capitalization. Since the aggregate market capitalization one year prior to bankruptcy (in July 2002 dollars) for the 12 companies for which we have data was $7.2 billion, the direct costs associated with these asbestos-related bankrupt companies will total between $225 million and $425 million. These 12 firms represented about two-thirds of employment at the bankrupted firms as a whole; if the ratio of market capitalization to employment were the same for the other bankrupted firms as for these 12 firms, the total direct costs would amount to between $325 million and $650 million.

The previous studies had included some measure of corporate debt in computing the relative direct costs of bankruptcy; by excluding the debt altogether while nonetheless adopting the range of relative cost estimates from the previous studies, we obtain a conservative estimate for the dollar value of the direct costs. If we include the book value of the debt (nearly $12 billion) for the 12 companies for which we have data, the direct costs would range from $575 million to $1.1 billion. If we assume that the debt-worker ratio were the same at the firms for which we lack financial data, the total direct costs would amount to between $850 million and $1.7 billion.

Impact of Asbestos-Related Bankruptcy on Government Finances

The layoffs and stock market price declines associated with asbestos liabilities may have a variety of effects on government finances. For example, workers laid off from the firms facing asbestos claims may qualify for

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unemployment insurance and retraining programs. They may also become eligible for other means-tested benefits (including Food Stamps and Medicaid), depending on their family status, assets, ***87** and income while unemployed. In addition, the loss in wage income among the laid-off workers reduces both payroll taxes and income taxes, and the decline in stock prices for the bankrupted firms reduces capital gains if the stocks are held in taxable accounts (and ultimately reduces income taxes if the stocks are held in traditional retirement accounts). The loss in corporate profits at the firms involved reduces corporate profits tax revenue. But just as the employment losses at the affected firms will eventually be balanced by employment gains elsewhere in the economy as employment shifts to new jobs, the aggregate effect on government expenditures and revenue is less deleterious than this partial equilibrium picture may suggest.

Costs Imposed on Firms That Do Not Declare Bankruptcy

This section has focused primarily on the costs associated with firms declaring bankruptcy because of asbestos liabilities. While it is important to remember that such bankruptcies are unlikely to have substantial macroeconomic effects, it is also important to remember that the bankruptcies do not capture the full effect of asbestos liabilities on defendants to date, nor do they reflect the future costs imposed from ongoing litigation. As noted above, roughly a quarter of estimated total costs to defendants and insurers have been paid to date.

The companies facing significant asbestos liabilities and that have not declared bankruptcy are spread throughout the economy, representing nearly every industry group. [FN74] Among the companies facing such claims are a major paper and forest products company, a major media conglomerate, and leading transportation firms. For example, the major media conglomerate reported 118,000 asbestos claims outstanding against it as of June 30, 2002 -- and during the second quarter of 2002 alone, it received 9,700 new claims. One major industrial firm, which never produced or sold asbestos, faces as many as 74,700 claims because its "dust masks" did not adequately protect against asbestos.

As Fortune magazine recently noted, "The filings by workers in so-called nontraditional industries -- industries in which employees seldom come anywhere near asbestos dust -- have skyrocketed. Filings in the textile industry, for instance, jumped more than 721 percent ***88** in the past two years, according to one defendant's records; in the pulp and paper industries, 296 percent; in the food and beverage industries, 284 percent. Companies like Chiquita Brands, General Electric, and Sears Roebuck have all been hit with asbestos suits." [FN75]

The uncertainty surrounding such claims raises borrowing costs and reduces equity values for the firms, thereby impeding their activities. It may also discourage firms from merging, even when such mergers would make economic sense. We have not attempted to quantify the economic effects of asbestos claims against firms that have not (or not yet) declared bankruptcy.

V. Conclusions

A large component of the payments made to asbestos claimants involves transfers from workers at the defendant firms. The pain and suffering of the impaired claimants is palpable; the costs imposed on the workers in the defendant firms is often less clear. The purpose of this paper is not to suggest that impaired claimants are unworthy of assistance, but rather to highlight the fact that payments to any claimants are not free. They impose significant costs on the workers and shareholders of the defendant firms. Since many of these firms were not asbestos manufacturers, the costs imposed on workers may seem unfair and inefficient from an economic perspective.

As we describe above, bankruptcies associated with asbestos liabilities have had a marked deleterious effect on workers in those firms. Employment declines at these firms have amounted to between 52,000 and 60,000 jobs. The displaced workers typically suffer periods of unemployment before finding a new job, and then often must accept a reduction in wages in order to become re-employed. The costs imposed on these displaced workers amount to between $1.4 billion and $3.0 billion in present value, or roughly $25,000 to $50,000 per displaced

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worker.

These costs are not the only ones imposed on workers at the bankrupted firms. For example, workers at many firms are also shareholders in the firm, since they hold company stock in their defined contribution pensions. The average worker at a bankrupted firm with a 401(k) plan suffered roughly $8,300 in losses. For a 45-year-old worker with an average 401(k) balance, such a loss would mean his ***89** retirement income would fall by $1,250 per year. To prevent such a decline, he would have to raise his annual 401(k) saving before retirement by $720 per year.

In light of these costs, re-examining the system used to compensate those with illnesses associated with asbestos exposure seems worthwhile. In the context of asbestos, the beneficial incentive effects often associated with a product liability system are attenuated because claims are increasingly being extended to a wider array of firms. The liability approach also involves significant transaction costs. Finally, the liability approach raises basic questions of fairness. Citizens who have suffered from asbestos-related illnesses deserve appropriate compensation. The crucial issue, however, is how we as a society decide to meet those costs. [FN76] The current system does not appear to an optimal mechanism for doing so.

***90 References**

Altman, Edward. 1984. "A Further Empirical Investigation of the Bankruptcy Cost Question," Journal of Finance, Volume 39, Issue 4 (September), pages 1067- 1089.

A.M. Best. 2001. Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers, May 7.

American Academy of Actuaries. 2001. Overview of Asbestos Issues and Trends, December.

Brickman, Lester. 1992. "The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?" Cardozo Law Review, Volume 13.

Brown, Stephen, and Jerold Warner. 1985. "Using Daily Stock Returns: The Case of Event Studies," Journal of Financial Economics 14 (Summer), pages 3-31.

Bureau of Labor Statistics. 2001. Monthly Labor Review: The Editor's Desk, "Finding a New Job After Displacement," July 18.

Card, David, and Alan Krueger. 1995. Myth and Measurement: The New Economics of the Minimum Wage, Princeton, NJ: Princeton University Press.

Carroll, Stephen et al. 2002. "Asbestos Litigation Costs and Compensation: An Interim Report," RAND Institute for Civil Justice.

Castleman, Barry. 1996. Asbestos: Medical and Legal Aspects, Englewood Cliffs, NJ: Aspen Law & Business.

Edley, Christopher, and Paul Weiler. 1993. Asbestos: A Multi-Billion Dollar Crisis, Harvard Journal on Legislation, Volume 30.

Farber, Henry. 2001. "Job Loss in the United States, 1981-1999," Princeton University Industrial Relations Section Working Paper #453, June.

Franks, J. and W. Touros. 1989. "An Empirical Investigation of U.S. Firms in Reorganization," Journal of Finance,. Volume 44, pages 747-770.

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

Helwig, Ryan T. 2001. "Worker Displacement in a Strong Labor Market," Monthly Labor Review, June, Vol. 124, No. 6.

Kakalik, James et al. 1984. Variation in Asbestos Litigation Compensation and Expenses, RAND Institute for Civil Justice, R-3132-ICJ.

Lehman Brothers. 2002. Thinking About Asbestos, March 20.

***91** Lyon, Andrew. 1989. "The Effect of the Investment Tax Credit on the Value of the Firm." Journal of Public Economics, Volume 38, pages 227-247.

Mullin, George, Joseph Mullin, and Wallace Mullin. 1995. "The Competitive Effects of Mergers: Stock Market Evidence from the U.S. Steel Dissolution Suit." RAND Journal of Economics 26 (Summer), pages 314-330.

Munnell, Alicia, and Annika Sunden. 2002. "401(k)s and Company Stock: How Can We Encourage Diversification?" Center for Retirement Research, Boston College, July.

Nicholson, William et al. 1982. "Occupational Exposure to Asbestos: Population at Risk and Projected Mortality: 1980-2030," American Journal of Industrial Medicine, Volume 3, pages 259-311.

Parloff, Roger. 2002. "The $200 Billion Miscarriage of Justice," Fortune, March 4.

Plevin, Mark, and Paul Kalish. 2001. "What's Behind the Recent Wave of Asbestos Bankruptcies?" Mealey's Litigation Reports: Asbestos, April, available at http://www.crowell.com/pdf/Behind.pdf

Prudential Financial. 2002. Asbestos Litigation -- A Problem Without a Solution", May 6.

Schipper, Katherine, Rex Thompson, and Roman Weil. 1987. "Disentangling Interrelated Effects of Regulatory Changes on Shareholders Wealth: The Case of Motor Carrier Deregulation," Journal of Law and Economics 30 (April), pages 67-100.

Stiglitz, Joseph. 1972. "Some Aspects Of The Pure Theory Of Corporate Finance: Bankruptcies And Take-Overs," Bell Journal of Economics and Management Science, Volume 3, Issue 2 (Autumn), pages 458-482.

Sunden, Annika, and Brian Surette. 2000. "Household Borrowing from 401(k) Plans," Center for Retirement Research, Boston College, June.

Weiss, Lawrence. 1990. "Bankruptcy Resolution: Direct Costs and Violation of Priority Claims." Journal of Financial Economics, Volume 27, pages 285-314.

White, Michelle. 2002. "Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle," Presented at the University of Cincinnati College of Law Conference on "Bankruptcy and Corporate Reorganization in the New Millennium," March 1.

***92** White, Michelle. 1996. "The Costs of Corporate Bankruptcy: A U.S.- European Comparison," in Corporate Bankruptcy: Economic and Legal Perspectives, J. Bhandari and L. Weiss, eds. Cambridge: Cambridge University Press.

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[FN1]. See American Academy of Actuaries (2001), page 1.

[FN2]. Ibid.

[FN3]. See Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 4 Envtl. L. Rep. 20133 (5th Cir. 1973). For a more detailed discussion of the history of asbestos litigation, see Castleman (1996).

[FN4]. Castleman, page 784.

[FN5]. There are myriad reasons why the number of claims has increased so sharply. See White (2002), Plevin and Kalish (2001), and Prudential (2002) for a discussion of the reasons.

[FN6]. Stephen Carroll et al. (2002), page 42.

[FN7]. See http://www.mantrust.org

[FN8]. Stephen Carroll et al. (2002), page 49.

[FN9]. Ibid.

[FN10]. The long latency period involved in cases such as asbestos raises another potential impediment to the

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effectiveness of the liability system in providing incentives for the safety of products. If a firm's managers and owners will have departed by the time any safety problems or illnesses manifest themselves, the incentives provided for corrective action may be weakened.

[FN11]. Stephen Carroll et al. (2002), page 40.

[FN12]. For example, a 1999 National Judicial Conference report estimated that there were between 300,000 and 700,000 asbestos claimants.

[FN13]. American Academy of Actuaries (2001), page 3.

[FN14]. See www.mantrust.org

[FN15]. Stephen Carroll et al. (2002), page 44.

[FN16]. Kakalik et al. (1984), page 30.

[FN17]. Brickman (1992).

[FN18]. Edley and Weiler (1993).

[FN19]. See National Economic Research Associates, Unimpaired Claims Analysis (February 26, 2001). Of all claims received by the Manville Trust in 1999 and 2000, 11 percent were malignant claims (4 percent mesothelioma, 6 percent lung cancer, and 1 percent other cancers), and 89 percent were non- malignant claims.

[FN20]. See Babcox and Wilcox's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claim Filed Here, at 32-37, and Road Map to Babcox and Wilcox's Defenses to Asbestos Personal Injury Claims, VII- 1&2; In re Babcock and Wilcox Co., 2002 WL 1874836 (E.D. La. 2002).

[FN21]. See Debtors' Consolidated Reply in Support of Their Motion For Entry of Case Management Order, etc.; In re W.R. Grace & Co., 285 B.R. 148 (Bankr. D. Del. 2002).

[FN22]. See A.M Best (2001).

[FN23]. Stephen Carroll et al. (2002), pages 53-55.

[FN24]. Lehman (2002), page 5.

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[FN25]. Ibid, page 22.

[FN26]. For comparison, RAND estimates in their September 2002 study that 60 companies have been pushed into bankruptcy due to asbestos liabilities. See Stephen Carroll et al. (2002), page 75.

[FN27]. The Economist recently noted that, "Bankruptcy may not sound like an attractive option, but it is often the best alternative for firms in the throes of asbestos litigation." The Economist, September 19, 2002.

[FN28]. According to RAND, "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." Stephen Carroll et al. (2002), page 41.

[FN29]. A number of analysts have noted that a disproportionate percentage of the claims are filed in state courts that are considered to be "pro- plaintiff." For example, Mississippi has only one percent of the U.S. population, but accounts for roughly 20 percent of the pending claims. See American Academy of Actuaries (2001), page 3. Fortune magazine notes that in July 1999, "some 9,100 asbestos plaintiffs from all over the country were suing in rural Jefferson County, Miss. -- about 700 more asbestos plaintiffs than there were county residents." See Parloff (2002). RAND has similarly found that five states account for two-thirds of recent cases filed, and 84 percent of all the claims were filed in just 10 states. See Stephen Carroll et al. (2002), pages 32 and 34.

[FN30]. This example simplifies the joint and several liability rules, which vary across states.

[FN31]. Three companies in the sample filed for bankruptcy after September 2002. Since our analytical work had been completed by then, we included these companies in the overall count, but did not include them in our various analyses.

[FN32]. See Plevin and Kalish (2001).

[FN33]. See Parloff (2002).

[FN34]. Since employment data were often unavailable from the same data source for the whole time period, we often had to cross data series. Such a mixing of data series may introduce some biases in the employment numbers. If the data did not appear to match -- that is, switching from one data source to another was associated with a significant increase or decrease in employment -- we filtered the data from the database.

[FNaaa1]. The tables, which are reproduced in this article, were misnumbered in the original article. Thus, the first table in the original article is numbered Table 2.

Table 2: Size of Asbestos-Related Bankrupt Companies, By Employment Level in

Year Before Firm Entered into Bankruptcy, By Time Period

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	"First Wave": 1978-1985	"Second Wave": 1986-1993	"Third Wave": 1994-1997	"Fourth Wave": 1998-2002	Total
More than 10,000 Employees	1	0	0	6	7
Between 1,000 and 10,000 Employees	1	8	0	10	19
Fewer than 1,000 Employees	0	5	1	8	14
Data Not Available	5	5	0	8	18
Total	7	18	1	32 [FNa1]	58 [FNa1]

FNa1. Three companies were excluded because they filed for bankruptcy after September 2002, when our analysis was completed.

Table 3 offers another perspective on the size of the bankrupted firms in the past four years. In total, the 40 companies in our database employed 204,868 workers the year before they filed for bankruptcy. [FN35]

End of Footnote(s).

[FN36]. See Stephen Carroll et al. (2002), page 50.

[FN37]. Ibid.

[FN38]. Prudential Financial (2002), page 3.

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[FN39]. See Manville Corporation Annual Report (10-K) for the fiscal year ended December 31, 1981, page 11.

[FN40]. According to Eagle-Picher, as of November 30, 1990, "approximately 33 percent of the Company's hourly employees were represented by eight labor organizations under 13 separate contracts." See Eagle-Picher Industries, Inc. Annual Report (10-K) for the fiscal year ended November 30, 1990, page 3.

[FN41]. According to Federal Mogul, as of December 31, 2000, "Various unions represent[ed] approximately 33 percent of the Company's United States hourly employees." See Federal-Mogul Corporation Annual Report (10-K) for the fiscal year ended December 31, 2000, page 3.

[FN42]. According to Armstrong, "About 57 percent of our approximately 12,400 hourly or salaried production and maintenance employees in the United States are represented by labor unions." See Armstrong World Industries Annual Report (10-K) for the fiscal year ended December 31, 1999, page 7.

[FN43]. Todd Shipyards Annual Report (10-K) for the fiscal year ended March 30, 1986, page 9.

[FN44]. See, for example, Stiglitz (1972).

[FN45]. The forgone profits and investment opportunities associated with this reduction in firm-level activity before and during the bankruptcy form the primary component of the indirect costs associated with bankruptcy. As discussed in the text below, these indirect costs are in addition to the direct costs -- for lawyers, accountants, and others -- required in the bankruptcy event itself.

[FN46]. See, for example, Altman (1984).

[FN47]. Jamie Butters, "Credit Gives Big Supplier A Life: Federal-Mogul Says Added $550 Million Assures Its Survival," Detroit Free Press, January 4, 2001.

[FN48]. See Federal-Mogul Press Release, "Federal-Mogul Adjusts Salaried Workforce Levels to Reflect Business Conditions," February 26, 2001.

[FN49]. See Federal-Mogul Press Release, "Federal-Mogul Announces First Quarter Results and Special Charges Related to Acquisitions and Restructuring," April 23, 1998.

[FN50]. See Owens Corning 2000 SEC 10-K filing.

[FN51]. James Miller, "USG's Asbestos Woes Bring $904 Million Charge," Chicago Tribune, January 12, 2001.

[FN52]. We have some employment data for 40 firms and a fuller set of time- series data for 31 firms. The sample of 31 firms represents roughly 91 percent of employment at the 40 firms as a whole one year prior to bankruptcy.

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The 18 firms for which we have no employment data are extremely small, and are extremely likely to have had less than a total of 10,000 employees. The 31 firms in our sample would then represent 87 percent of total employment for the bankrupt firms as a whole.

[FN53]. For 11 of the 31 companies, we did not have employment data for the precise year the firm declared bankruptcy or five years prior to the bankruptcy filing. For example, eight of these 11 companies filed for bankruptcy in 2001 or 2002, but employment data were available only through 2000 or 2001. For such companies, we analyzed the 1995-2000 or 1996-2001 time periods. The SIC system has recently been replaced by the North American Industry Classification System (NAICS).

[FN54]. If employment data were unavailable for the four-digit SIC code, we used the three-digit SIC code. If data for the three-digit SIC code were unavailable, we used data for the two-digit SIC code. In cases in which the firm's employment level represented a significant portion (more than one-third) of the total employment in the industry code, we also used more disaggregated data.

[FN55]. Stephen Carroll et al. (2002), page 74.

[FN56]. Farber (2001), page 31.

[FN57]. BLS (2001).

[FN58]. Helwig (2001).

[FN59]. Kristine Henry, "Old W.R. Grace v. New," The Baltimore Sun, July 1, 2001.

[FN60]. Sunden and Surette (2000), Table 1, Page 2.

[FN61]. Dallas Salisbury, Testimony Before the Senate Committee on Health, Education, Labor, and Pensions, February 7, 2002. Also see Munnell and Sunden (2002).

[FN62]. See www.nceo.org

[FN63]. See, for example, Altman (1984).

[FN64]. We obtained SEC filings for 16 of the bankrupt companies. We first excluded three companies with ownership changes. Of the remaining 13 companies, eight reported defined contribution plans. Two of these companies were excluded because data were not available for the period within two years of bankruptcy. Of the remaining six companies, we computed the net common stock fund value per plan participant. In cases in which the companies offered multiple plans to various classes of employees, we consolidated the funds and participant figures. For one company (Federal Mogul), data on the number of plan participants were unavailable; we assumed that two-thirds of the employees were participants in the DC plan. Where a common stock fund's asset and liability

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breakdowns were not given, we used the fair market value of the common stocks held by the plan. For two companies, we were unable to obtain data for five years prior to bankruptcy. For both companies (Federal Mogul and Eagle Picher), we used data from three years prior to bankruptcy.

[FN65]. These figures represent the average of the six firms, weighted by the number of plan participants.

[FN66]. For two of the six companies, data were only available for three years before bankruptcy.

[FN67]. It could also manifest itself as a reduction in the worker's bequests to his or her children. For simplicity, we ignore this possibility.

[FN68]. See, for example, Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 USC section 1301 et seq.

[FN69]. See http://www.pbgc.gov/plans/Planlookup.cfm?plan=2814

[FN70]. See http://www.pbgc.gov/news/press___releases/1999/pr00010.htm

[FN71]. In December 2001, the New York State Teachers Retirement Board owned 0.91 percent of USG Corporation. See http://www.marketguide.com

[FN72]. See http://biz.yahoo.com/hd/g/gra.html

[FN73]. See http://biz.yahoo.com/hd/k/klucq.ob.html

[FN74]. See Stephen Carroll et al. (2002).

[FN75]. See Parloff (2002).

[FN76]. Supreme Court Justice David Souter wrote that "The elephantine mass of asbestos cases ... defies customary judicial administration and calls for national legislation." See Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715, 43 Fed. R. Serv. 3d 691 (1999). Similarly, Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee, recently stated that "Congress can provide a secure, fair, and efficient means of compensating victims." See Senator Patrick Leahy, Statement before the Senate Judiciary Committee, September 25, 2002.

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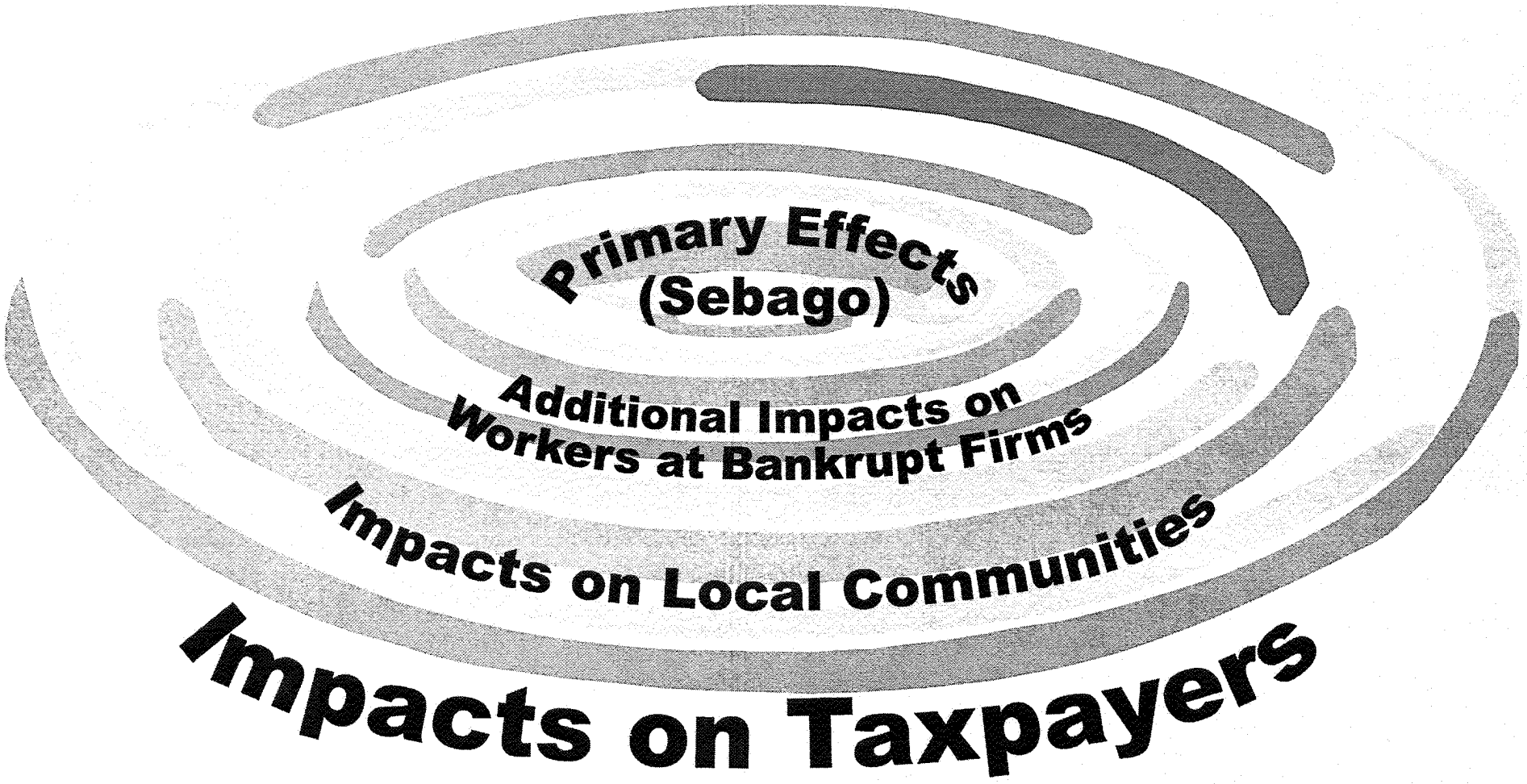
The Secondary Impacts of Asbestos Liabilities

Jesse David, Ph.D.
Senior Consultant

U.S. Chamber of Commerce
January 23, 2003

MMC Marsh & McLennan Companies

The Economic Impacts of Asbestos Liabilities: The Ripple Effect



Characteristics of A Displaced Worker From Firms Facing Asbestos Liabilities

- Between 52,000 and 60,000 jobs have been lost due to asbestos-related bankruptcies *to date* (Sebago, 2002)
- About 90% of the bankrupt firms are in Non-durables Manufacturing
- A large portion of these firms had facilities in small communities
  - Average population: 138,000
  - Median population: less than 25,000

Characteristics of A Displaced Worker From Firms Facing Asbestos Liabilities

Continued…

- The typical displaced worker is:
  - Blue collar trade
  - High school graduate
  - 6 to 7 years of tenure at lost job
  - Earnings of about $506 per week in lost job
- Employment status after 2 to 3 years:
  - 11% remain unemployed
  - 14% have dropped out of the labor force
  - Those re-employed:
    - Are unemployed for about 10 weeks
    - However, 22 to 25% are unemployed for more than 6 months
    - Earned 3 to 17% less in new job even after 2 to 3 years

Additional Costs Borne by Displaced Workers: Retraining

- 42% of displaced manufacturing workers participate in training programs
- Retraining programs cost about $2,000 to $3,000 per worker
- Total cost to date: $44-76 million
- Costs are shared by:
  - Workers
  - Companies
  - Federal/state governments

Additional Costs Borne by Displaced Workers: Loss of Group Healthcare

- Cost of health care for family of four:
  - Monthly cost under group plan: $162 per month
  - Monthly cost under individual plan: $464 per month

Individual plans cost $302 *more* per month

- Individual health plan costs more than 50% of unemployment benefits
- Total *monetary* costs to date:
  - about $30 million
- What about families without insurance?

Impact of Unemployment Insurance

- Average national UI benefit: $200 per worker per week
  - Average duration of UI benefit: 14.6 weeks
  - But only 49% of displaced workers from manufacturing industries receive unemployment insurance.
- Only a partial offset to lost wages
  - Less than 50% of weekly earnings in lost job

Total cost to taxpayers of UI benefits to displaced workers from asbestos-related bankruptcies: approximately $80 million

Costs Borne by Local Communities: Reduced Income for Local Businesses

- Local business lose through indirect impacts of plant closures and the "multiplier effect"
- Regional impact models provide estimates:
  - REMI: a "state of the art" model that predicts local impacts over time
  - Estimates the local economic impacts from each job lost due to asbestos liabilities
  - The magnitude of the effect will depend on the characteristics of the local community
- Average effect: Eventually about 8 *additional* jobs lost locally for every 10 initial jobs lost

Costs Borne by Local Communities: Reduced Income for Local Businesses

Continued…

Example: In 2000, Owens-Corning laid off 275 workers from its Granville plant in Licking County, Ohio

- REMI model predicts:
  - Indirect/induced impacts
    - 77 jobs lost in local Services
    - 60 jobs lost in local Retail Trade
    - 48 jobs lost in local Construction
  - Total lost employment in the county: approximately 500 jobs
  - Total output reduced by over $60 million annually
  - Approximately 1 out of every 2 displaced workers will relocate out of the county
  - Total reduction in regional income: about $15-20 million annually

Costs Borne by Local Communities: Reduced Income for Local Businesses

Continued…

- In summary, the effect of local reductions in income are magnified by the "multiplier effect"
- Total effect nationwide: to date, $0.6-2.1 billion in local costs *additional* to those reported by Sebago due to indirect and "multiplier" impacts
- These represent only the *net* costs—impacts on the affected communities will be much higher

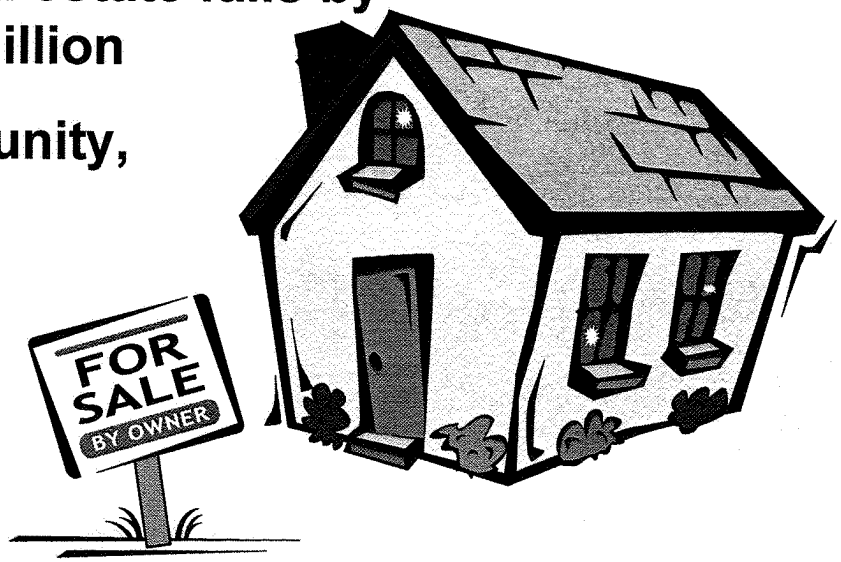
Costs Borne by Local Communities: Falling Real Estate Values

- Plant closures or mass layoffs will affect all owners of local real estate
- Research has shown that property values are dependent on local incomes and population
  - Income effect: ~ 0.2
  - Population effect: ~ 1.1

Costs Borne by Local Communities: Falling Real Estate Values

Continued…

- Example: Licking County, Ohio—500 lost jobs
  - Population/per-capita income each decline by 0.1%
  - Total value of local real estate falls by approximately $5-10 million
  - The smaller the community, the larger the effect



Costs Borne by Local Communities: Local Sales and Property Taxes

- Depends on local tax structure
  - Property tax collections affected by falling real estate values
  - Some offset due to reduced local expenditures
  - Sales tax receipts affected by declining local output
- Federal and state taxes also impacted by temporary decline in income

Conclusions

- Asbestos liabilities impose costs not just on shareholders
- Workers of the affected firms
  - Retraining
  - Health care availability and expense
- Local communities also can be hit hard
  - Other local business are hurt as people and jobs move out
  - Local property values will fall
  - Local governments face declines in revenues likely to be much greater than cost declines

Conclusions

Continued…

- Many other costs are passed on to taxpayers across the country
- These costs are expanding from year to year
  - 50,000 to 60,000 direct workers so far…
  - How many communities will be affected?

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Testimony

of Michael E. Baroody
Executive Vice President
National Association of Manufacturers

before the Committee on Budget
United States Senate

***on* The State of the Economy**

January 29, 2003

Testimony of

Michael E. Baroody
Executive Vice President
National Association of Manufacturers

and
Chairman
Asbestos Alliance

Before the
Committee on Budget
United States Senate

On
The State of the Economy

January 29, 2003

Thank you Mr. Chairman and Members of the Committee. I am executive vice president of the National Association of Manufacturers and chairman of The Asbestos Alliance. In the first part of my testimony, I speak on behalf of the Alliance, a coalition led by the NAM that includes asbestos defendant companies, insurers, trade associations, and others seeking congressional legislation to help solve America's asbestos litigation crisis. While this hearing is not about asbestos litigation per se, I believe its far-reaching impact is one of a number of factors hurting the U.S. economy. In fact, I would characterize out-of-control asbestos litigation as an anchor weighing down the business community, particularly the manufacturing sector, and slowing down our overall economic recovery. Let me explain why.

For the last 18 months, newspapers and magazines have been filled with stories of skyrocketing claims, massive jury awards and bankruptcies. Asbestos litigation has already forced more than 60 companies into bankruptcy. More than one-third of those bankruptcies have

occurred in the last three years. An estimated 200,000 claims are now pending. More than 90,000 were filed just in 2001, the last year for which complete data are available. Moreover, we are not by any means near the end of this story. According to some estimates, after more than 25 years, we have not yet passed the halfway mark. Ultimately, if nothing is done, we may see more than two million asbestos cases, and the ultimate cost to American business could reach $275 billion.

It would be a different matter altogether if this huge sum was the amount needed to compensate people with deadly cancers and other serious diseases caused by exposure to asbestos. But in fact, exactly the reverse is true. The heart of the problem is that asbestos claimants who are not sick today and who probably will never become sick are filing claims and winning millions of dollars. According to a report released last year by RAND, between two-thirds and 90% of all claimants are "functionally unimpaired, meaning that their asbestos exposure has not so far affected their ability to perform activities of daily life."

Let me give you an example of why this is a problem. In October 2001, a Mississippi jury awarded $150 million to six plaintiffs in an asbestos case. Each was awarded $25 million. Not one of these six men displayed any symptoms at all. In fact, the lawyer who brought the case boasted to reporters, "Most of these guys have not missed a day of work in their lives." One plaintiff even boasted in his deposition that he was a jogger.

Questionable claims like the ones in this case and the resulting settlements and verdicts are forcing companies into dire financial straits and sparking the bankruptcy filings. One of the

defendants in the case I just mentioned is now bankrupt, and another saw 42% of its market value, $3.8 billion, disappear in a single day because of the financial markets' concern with asbestos liabilities. At the same time, many of those who are seriously ill from exposure to asbestos are seeing their compensation delayed and reduced. If the present course continues, there may not be any money left to pay the sick.

There are many victims of this asbestos litigation scandal, but first among them are the truly sick and their families, who may have to wait for years for inadequate compensation. For that reason, prominent plaintiffs' lawyers who represent cancer victims actively support the Alliance's proposed reforms. But there are other victims as well.

According to RAND, in 1970, there were 300 companies in asbestos litigation. Today, that number is 8,400 companies, representing virtually all U.S. industries and companies of all sizes. Many of the defendants never even made or used asbestos in their products. These range from well-known Fortune 500 multinationals to tiny firms, like a five-person company that distributes air compressors to gas stations. That small business is still trying to determine why it has been named in asbestos lawsuits!

The defendant companies are spending untold millions of dollars and resources. A total of $54 billion has been spent on asbestos litigation and, as I mentioned above, estimates of total cost range as high as $275 billion. The workers in the many impacted companies, retirees and shareholders are also paying a heavy price. Late last year, Nobel Prize-winning economist

Joseph Stiglitz did an excellent study on the impact of asbestos bankruptcies on workers. I would like to share some of his findings.

Dr. Stiglitz found that asbestos bankruptcies have put 60,000 employees out of work. Those workers and their families have lost $200 million in wages alone. Employee retirement assets have declined roughly 25%. And the direct costs of bankruptcies on the bankrupt firms have been between $325 million and $625 million. These companies, their employees, and the communities that depend on them are also victims of asbestos litigation.

While the report did not focus on the non-bankrupt firms, the authors noted that uncertainty surrounding asbestos claims raises borrowing costs and reduces equity values of solvent firms, which has a significant impact. The mere fact that a company is the target of asbestos claims—as so many are—can throw its stock into free fall. For example, when a large company announced last year that it had about 3,000 claims, its shareholders lost about 25 percent of the value of their holdings almost overnight. Only a portion of that value was regained in subsequent months.

Just last week, we received even more disturbing news about the economic impact of asbestos litigation. A U.S. Chamber of Commerce-sponsored study by National Economic Research Associates Consulting found that nationwide, there will be as much as $2 billion in additional costs borne by workers, communities and taxpayers due to indirect and induced impacts of company closings related to asbestos. The shuttering of plants and job cuts will decrease per capita income, lead to declining real estate values and dwindling federal, state and

local tax receipts. Additional costs brought upon workers and communities include up to $76 million in worker retraining, $30 million in increased healthcare costs and $80 million in payment of unemployment benefits. In addition, for every 10 jobs lost directly, the community may lose 8 additional jobs.

The evidence is simply overwhelming—we are all paying the price of the asbestos litigation crisis and something must be done. Last year, your colleagues in the Senate Judiciary Committee held an asbestos hearing and both then-Chairman Leahy and new Chairman Hatch agreed that congressional legislation is essential to resolve these problems. Steve Kazan, a prominent plaintiffs' attorney was among the witnesses and he concluded his testimony by saying, "I urge you to act quickly to fix this broken and abused part of our justice system before the real victims of asbestos lose everything. Only Congress has the power to end this national nightmare." The members of The Asbestos Alliance could not agree more. We are working diligently with the Senate and House to try to get legislation passed this year. It is essential not only to ensure that the sick and dying obtain the compensation they deserve, but also to protect the other victims of asbestos litigation – shareholders, employees, and communities that are injured when companies are made the targets of thousands of frivolous lawsuits.

Lifting this burden from the neck of American business would contribute enormously to economic recovery. Without the asbestos albatross, the thousands of affected firms would be more likely to increase profits, expand their business, make capital investments and create jobs. Reform is also likely to stop the flood of asbestos bankruptcies. These impacts would almost

certainly increase federal tax revenues, reduce unemployment claims and help resolve the country's budget problems.

Let me turn now more broadly to the state of the economy, and more specifically, to the state of the manufacturing economy. On these issues, I speak not for the Alliance, but on behalf of the National Association of Manufacturers. NAM is the nation's largest industrial trade association and represents 14,000 members, including 10,000 small- and mid-sized companies.

The recent economic downturn hit manufactures much harder than the rest of the economy both in terms of depth and duration. Manufacturers began slipping into recession in the third quarter of 2000 – well ahead of the rest of the economy. And by the time that manufacturing output began to turn up in the beginning of 2002, industrial output had fallen by 8 percent over the previous 18 months. This is much worse than the rest of the economy. Overall, GDP slipped less than half a percent during the first three quarters of 2001 – the second-mildest recession in 50 years.

And while the overall economy grew a modest 3 percent last year, manufacturing output edged up only 1.7 percent[1]. This manufacturing "recovery" is slower than the first year of any recovery over the past 40 years and less than one-fifth the average 10 percent growth during the initial 12 months of the past six expansions.

[1] NAM GDP estimate based on published data through the third quarter and a fourth quarter projection.

Since July 2000, manufacturing employment has fallen by 2 million over the course of 29 consecutive monthly declines. By contrast, the employment in the rest of the economy has grown by 954,000, with a brief, but sharp drop in employment immediately following September 11th sandwiched between months of modest employment growth.

During the manufacturing downturn that began in June 2000 and ended 18 months later in December 2001, 1.4 million manufacturing jobs were lost. This 8 percent decline in manufacturing employment rolls matches the average decline during the past six recessions. However, for 2002 overall, another 592,000 manufacturing jobs were lost. This stands in stark contrast to the average 352,000 increase in manufacturing employment that typically has taken place during the first year of previous expansions and clearly shows that the recovery has largely bypassed the manufacturing sector, which was hit hardest in 2001.

To date, the largest employment declines by far have taken place in the electronics and industrial equipment industries. Each has lost more than 350,000 jobs and together account for more than a third of the manufacturing job losses since mid-2000.

The reason why manufacturing was hit much harder than the rest of the economy in the recession and why the recovery has evaded manufacturers is that the recession was mainly caused by a collapse of business investment and exports, which declined by 9 percent and 11 percent respectively in 2001[2]. By contrast consumer spending held up reasonably well, growing by 2.8 percent in 2001.

[2] Q4/Q4 percent change.

More recently, the 2002 recovery was largely driven by consumer spending, which accelerated modestly to 3 percent growth last year.[1] At the same time, business investment spending continued to decline by 3 percent, while goods exports edged up just 2 percent (remaining 8 percent below their level two years ago). This stands in stark contrast to 10 percent growth in exports during the first year of recovery following the 1990-91 recession.

Weak business investment demand and export growth have constrained the recovery for manufacturers, the producers of capital goods used by American industry and the source of two-thirds of overall exports. In short, the expansion to-date has been narrow, unbalanced and historically sluggish.

Despite historically low interest rates, and a bonus depreciation stimulus package passed last year, significant inhibitors to economic growth remain. Some of the challenges facing manufacturers are long-term problems that need to be addressed to create a better environment for manufacturing in America.

- Manufacturers are competing in a deflationary environment, with pricing power *falling* at an average annual rate of 0.9 percent since 1995. By contrast, the inflation rate for the economy overall has averaged 2 percent since the mid 1990s.

- At the same time, heavy regulatory and legal costs are undercutting business competitiveness. Combined, a heavy regulatory and legal burden cost U.S. firms $697

billion, or 6.7 percent of GDP, in 2002.[3] Manufacturers are especially hard hit. The cost of regulatory compliance alone adds up to $8,000 per manufacturing employee. This is 67 percent higher than the average cost to business overall.

- Manufacturers' healthcare costs rose at an average rate of 13 percent over the past year.

- 80 percent of NAM's membership found a moderate to serious shortage of qualified applicants in 2001. This signals that a persistent skills gap remains a problem for manufacturers.

- U.S. share of world manufactured exports has fallen from 13 to 11 percent since 1997 due to the rise in the value of the dollar. And while the dollar has fallen since its peak last February, it still remains 15 percent above its historic level.

Businesses have also become increasingly uncertain about the short term outlook, evidenced by the fact that the ISM business activity index dropped 9 percent from May to December 2002. This lack of confidence has curtailed investment spending, which is the main reason why the current recovery has underperformed past recoveries.

Businesses confidence has been undercut since the final quarter of the 2001 recession for a number of reasons.

[3] NAM estimate based on reports by the Council of Economic Advisors and the Small Business Administration

- First, the attacks of September 11 and the entry of our nation into a war on terrorism have created an elevated degree of uncertainty in the nation overall.

- Second, the emergence of several major financial scandals in 2002 undercut consumer confidence and sent the Dow Jones Industrial Average plummeting 32 percent between March and October 2002. As a result, consumer confidence fell to a 9-year low by October 2002. So, despite healthy growth in real incomes throughout 2002, consumer uneasiness deepened. This dichotomy has caused businesses to put on hold their spending plans for the fear that expected demand may not materialize.

- Third, the probability of a war in the Middle East, and its possible effects on world oil supplies and prices, has further elevated both business and consumer uncertainty.

At the same time, some important fundamentals of the economy have improved and have primed the economy for faster growth once uncertainty dissipates.

- First, there has been a steady and strong acceleration in productivity and associated gains in real incomes in 2002. By the third quarter of 2002, business productivity growth was 5.6 percent higher than a year earlier – the fastest quarterly growth rate in 36 years. This increase in productivity has, in turn, increased real wages. During the first three quarters of 2002, real disposable income grew 3.9 percent over the previous year. This is more than double the modest 1.8 percent growth in 2001 and is a solid foundation for consumer spending going forward once confidence improves.

- Second, this rise in productivity has rapidly pushed down unit labor costs, which has, in turn, led to a recovery in profits. In fact, for the first time since 1949, the labor cost per unit of output has declined four quarters in a row beginning in the 4th quarter of 2001.

  As a result, corporate profits have begun to make a recovery. Manufacturing profits declined by $75 billion from the third quarter of 2000 to the first quarter of 2001. By the third quarter of 2002, nearly two-thirds of this decline was recovered. Similarly, after dropping $138 billion between the fourth quarter of 1999 and the third quarter of 2001, overall corporate profits have rebounded 60 percent.

  This recovery in business profits should prop up business investment spending and counter some of the general uncertainty that continues to exist in corporate America.

- Third, though it still remains 14 percent above its 1997 value, the dollar has depreciated 9 percent since February 2002. This, combined with slightly faster expected economic growth abroad in 2003, should prop up an export recovery which, to date, has been very modest. However, further depreciation is needed for manufacturers to regain their international competitiveness.

- Fourth, after inventory levels reached a five-year high in mid-2001, manufacturers aggressively worked off excess stocks over the past year. Manufacturers' inventory-to-

sales ratios are now near a decade low. This means that firms will respond to stronger demand with increased production since inventory stocks are lean.

Increased uncertainty and an improvement in the fundamentals will work at cross purposes in 2003. While real income growth should keep consumer spending on track, this could be derailed by further shocks to confidence. As a result, businesses will continue to hold back spending plans. Therefore, an acceleration in the economic recovery will not likely take place this year without significant fiscal stimulus to counter the threat of uncertainty. This has important ramifications to the manufacturing sector. Without a meaningful pickup in business investment spending, an upturn in the manufacturing recovery will continue on hold.

NAM strongly supports President Bush's economic growth plan because it offers a creative mix of incentives that will encourage aggressive investment in the stock market and new capital investment by business, which will create more jobs. Specifically, the proposal to eliminate double-taxation of dividends will boost business and consumer confidence, reduce the cost of investment capital and encourage business to invest more in new plants and equipment.

Small business will especially benefit by the proposal to increase the allowance for expensing capital investments from $25,000 to $75,000, indexed to inflation. This will provide a powerful incentive for small manufacturers to increase investment and create jobs.

NAM also endorses the President's support of regulatory and legal reforms as a critical key to stimulating the economy and creating jobs. Removing unnecessary impediments to growth is as important as providing economic incentives.

Thank you, Mr. Chairman. I will be glad to answer any questions you might have.

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Testimony
United States Senate Committee on the Judiciary
Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003
June 4, 2003

Dr. Fredrick C. Dunbar
Senior Vice President , National Economic Research Associates

STATEMENT OF DR. FREDERICK C. DUNBAR BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY HEARING ON SOLVING THE ASBESTOS LITIGATION CRISIS: S.1125 ¡V THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003, ON WEDNESDAY JUNE 4, 2003

SECONDARY IMPACTS OF ASBESTOS LIABILITIES
ON WORKERS, TAXPAYERS AND LOCAL COMMUNITIES*f*x
EXECUTIVE SUMMARY

Asbestos-related bankruptcies and the associated layoffs will have ripple effects that harm many groups beyond company stockholders. Workers will suffer in many ways, including temporary or long-term unemployment, lower long-term earnings, and inadequate and/or more expensive interim health coverage. Taxpayers will bear the financial burden of publicly funded retraining programs and increased unemployment insurance payments. Residents and local businesses in affected communities will suffer as a result of reduced economic activity, lower property values, and reduced local tax revenues.

Workers laid-off have difficulty finding new jobs, and new jobs tend to be lower-paying. After two to three years, 11% remain unemployed and 14% drop out of the labor force. Wages for re-employed workers are between 3-17% lower at new jobs even two to three years after plant closure or layoff. Unemployment insurance typically accounts for less than 50% of the average wages for a displaced worker.

In addition to lost wages, laid-off workers face additional costs. Studies suggest about 40% of displaced workers undertake retraining, with costs ranging from $2,000-$3,000 per worker. A previous study by Sebago Associates estimates that asbestos liabilities have resulted in 52,000-60,000 displaced workers; these figures translate into $44-$76 million in retraining costs to date, borne either by the workers or public agencies. Laid-off workers face higher health insurance costs, averaging about $300 per month. For the 72% of the estimated 52,000-60,000 laid-off workers who participate in employer-sponsored health insurance, this translates into an overall loss of $26-$30 million to date over the transition period of unemployment. Some workers will forego health insurance, incurring costs in the form of reduced health and reduced preventive care.

Taxpayers will suffer in several ways. They will cover increased costs required for uninsured health care and will pay for additional unemployment insurance. Based upon the estimate of 52,000-60,000

displaced workers and an average duration of 14.6 weeks, the additional cost to taxpayers would be about $80 million to date.
Residents of communities where asbestos-related layoffs occur will also be affected:
1. Closure of local plants has the indirect effect of reducing plant expenditures in the region.
2. Reductions in local payrolls further reduce regional spending, creating a ¡§multiplier¡¨ effect on the economy of the community.
On average, about five to eight additional jobs are lost through the ¡§indirect¡¨ and ¡§multiplier¡¨ effects for every ten jobs lost directly by the plant closure. When these multiplier effects are scaled to a nationwide impact, the result is that, to date, we estimate $0.6 to $2.1 billion in costs in the adversely affected communities, in addition to those reported by Sebago Associates.
In addition to losses in employment, asbestos-related layoffs cause the local economy to suffer reductions in regional output of goods and services, reductions in personal income, and reductions in population. Reductions in local economic activity will also lower all local residents¡¦ property values. Property tax revenues will decline more than population, putting greater stress on the cost of local public services such as education and public safety.

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I. INTRODUCTION AND OBJECTIVES

Numerous studies have looked at the direct (or first-order) costs of asbestos litigation. A previous study by the RAND Institute (Carroll et al. 2002) found:
1. Over 600,000 people had filed asbestos claims by the end of 2000.
2. Asbestos claims have risen sharply in recent years.
3. $54 billion has been spent on asbestos litigation to date.
4. Transaction costs make up more than half of this spending.
This study aims to:
1. Assess the impacts of asbestos-related bankruptcies and the associated layoffs on workers and taxpayers
2. Investigate the additional economic impacts of plant closings on regional economies, local property owners, and local taxpayers

II. CHARACTERISTICS OF FIRMS FACING ASBESTOS LIABILITIES

A recent Sebago Associates study (Stiglitz, Orzsag, & Orzsag, 2002, hereafter ¡§Sebago Study¡¨) finds that between 52,000 and 60,000 jobs have been lost due to asbestos related bankruptcies to date. Sixty-one companies with significant asbestos liabilities have filed for bankruptcy. The pace of bankruptcy filings has accelerated dramatically since 1998. Bankruptcy filings may have a ¡§domino effect¡¨ on other defendants, increasing the asbestos-related costs for the remaining firms facing liabilities.

Our examination of 992 asbestos defendants and bankrupt companies as presented in a Prudential financial report (2002) reveals that, while asbestos liabilities affect all industries, the non-durables manufacturing sector has been hit the hardest so far:

1. Over 46% of defendants are in the non-durables manufacturing industry, including producers of insulation and construction products.
2. Almost all bankruptcies (90%) occurred at firms in the non-durables manufacturing sector.

Affected firms are located all across America. The Sebago study reports that 50 bankrupt companies have facilities in 47 states. A sample of plant closures and mass layoffs at firms facing major asbestos liabilities reveals:1

1. At least 22 states had a plant that closed;
2. Plant closures tended to be concentrated in small communities;
3. The average population of a community facing a plant closure was 138,000;
4. The median population of these towns was approximately 20,000.

So far, small communities have experienced most of the mass layoffs. Re-employment opportunities may be limited in these smaller communities, and thus the effects of the layoffs on workers and the local economy may be magnified.

An Institute for International Economics study (Hufbauer & Goodrich, 2001) describes the characteristics of a typical worker who lost a job due to a plant closing or mass layoff in the manufacturing industry between 1979 and 1999.

An average laid-off worker:

1. was in a blue-collar occupation;
2. had job tenure of six to seven years;
3. is a high-school graduate;
4. is 39 years old.

Displaced workers are not a completely homogenous population:

1. 37% of displaced workers are female;
2. 10% are ages 55-64; 14% are under 25;
3. 18% are minorities.

Between 1990 and 1997, the mean weekly wage of a displaced worker in the non-durables manufacturing industry was $506 prior to the layoff (see BLS Monthly Labor Review, 1993, 1995, 1999, 2001).2

III. CHARACTERISTICS OF WORKERS AT FIRMS AFFECTED BY ASBESTOS LIABILITIES

Many workers have difficulty finding new jobs after a plant closure or mass layoff. After two to three years (see BLS Monthly Labor Review, 1993, 1999, 2001):3

1. 11% of workers remain unemployed;
2. 14% have dropped out of the labor force entirely;
3. 75% are re-employed.

Even those workers who find new jobs face difficulties. The average duration of unemployment for displaced workers in the non-durables manufacturing sector is ten weeks.3 However, between 22-26% of these workers are unemployed for more than six months 3. Wages for re-employed workers are between 3-17% lower at their new jobs, even two to three years after the plant closure or mass layoff. Workers in the non-durables manufacturing industry ¡V the group most affected by asbestos liabilities ¡V tend to be unemployed longer and have lower replacement wages than the national average. While, in the long term, worker salaries may return to their pre-lay-off levels, there are clearly

substantial wage costs to individual workers in the short- and medium-run.

IV. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: RETRAINING

In addition to lost wages, workers face many other costs when they are laid-off. Many workers will require additional training as they seek re-employment. Approximately 60% of re-employed workers displaced from non-durables manufacturing jobs move to a different industry (see BLS Monthly Labor Review, 1999 and 2001). These workers may be particularly likely to require additional training. A study of manufacturing workers in New England found that 42% of displaced workers undertook some kind of retraining (Kodrzycki, 1997).

Estimates of the average cost to retrain workers range between about $2,000 and $3,000. It cost the Commonwealth of Massachusetts $2,925 to retrain a displaced worker in 2001. The State of North Dakota spent $2,039 retraining a dislocated worker in 2000-2001.

If 42% of the 52,000-60,000 workers estimated in the Sebago Study to have lost jobs due to asbestos-related bankruptcies undertake training, the total cost will range from $44-$76 million. Costs of this training are borne by both workers and employers; through government-sponsored training programs, taxpayers also bear some of the burden.

V. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: HEALTH INSURANCE

Displaced workers may also face additional costs as they lose subsidized health insurance benefits. Nationally, on average, over 72% of workers participate in employer-sponsored group health insurance programs (see BLS Monthly Labor Review, 1993, 1999, 2001).3 For the average displaced worker, employer-sponsored health insurance is substantially less expensive than individual coverage. The monthly cost to insure a family of four under an individual health plan is $464 (the average National Blue Cross Blue Shield rate, over the period 1990-2002).4 The monthly cost for a family under an employer-sponsored plan is $162 (35% of the individual plan cost, National Compensation Survey, 2000). For workers losing group health care, individual plans cost $302 more each month. Again using the Sebago Study estimates of 52,000-60,000 jobs lost to date, we estimate the collective monetary cost to workers from the loss in health insurance benefits sums to be between $26 and $30 million. We calculate these estimates by multiplying the number of lost jobs by the employer-sponsored health insurance participation rate (72%), excess individual monthly plan costs ($302) and the average duration of unemployment (2.34 months).

This $26-$30 million only measures the cost during the transition period of unemployment ¡V approximately 13.6% of re-employed workers do not receive health insurance benefits at their new jobs (see BLS Monthly Labor Review, 1993, 1999, 2001); for these workers, the costs will be even higher.3 While some displaced workers continue to purchase health care, other workers will choose not to continue their health insurance coverage. Under COBRA, employers are required to offer displaced employees the opportunity to continue to purchase health insurance coverage, with employees paying up to 102% of the group total premium (Duchon, Schoen, Doty, Davis, Strumpf, & Bruegman, 2001). Despite these regulations, less than 20% of laid-off workers choose to participate in COBRA (Neuschler & Taylor, 2002).

While some individuals may choose to purchase private health insurance outside of COBRA plans, these numbers suggest that a substantial fraction of displaced workers remain uninsured while unemployed. Costs of going without insurance are numerous, though difficult to quantify. There are costs to the health of workers and their families: approximately 1/3 of the uninsured report not filling prescriptions, not obtaining medical tests, and not going to the doctor when sick (The Commonwealth Fund, 2001). The uninsured are two to four times more likely to use expensive emergency care rather than preventive care, using the resources and increasing waiting times in emergency room facilities (ACP-ASIM, 1999). Many of the uninsured are not able to pay medical bills ¡V this drives up hospital and insurance costs for the rest of society. When displaced workers lose insurance coverage, their families, communities, and the rest of society all bear some of the costs.

VI. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT:

UNEMPLOYMENT INSURANCE

Displaced workers can offset some of the costs of lost wages with unemployment insurance. Only 49% of displaced workers from the manufacturing industry take up unemployment insurance (Employee Benefit Research Institute, 2002). Of the manufacturing workers who received benefits, over 41% exhausted their available benefits before finding re-employment. The average national duration of unemployment insurance is 14.6 weeks (DOLETA, 1990 ¡V 2000).5

The total cost to taxpayers of unemployment insurance benefits for workers displaced due to asbestos liabilities to date is approximately $80 million. While unemployment insurance helps to ease the burden of unemployment for displaced workers, it is only a partial offset of their lost income. Average benefit is less than 50% of the average weekly wages of a displaced worker (DOLETA, 1990 ¡V 2000).5

Monthly private health insurance premiums for a family of four are over 50% of an average worker¡¦s unemployment benefit.

VII. COSTS BORNE BY LOCAL COMMUNITIES

Local communities bear additional costs due to plant closings and asbestos-related layoffs. In addition to direct effects from plant closings, other local firms lose business through the indirect and induced impacts of plant closures (the ¡§multiplier effect¡¨): Indirect effects are the impacts of reduced plant spending in the community, and induced effects are the impacts of reduced worker spending in the community. These impacts affect the local community in several ways through reductions in regional income and employment, falling property values, and effects on local sales and property tax revenues and local government expenditures.

VIII. COSTS BORNE BY LOCAL COMMUNITIES: REDUCED REGIONAL INCOME AND EMPLOYMENT

As local plants close and lay off workers, they cut back purchases from other local businesses. Laid-off workers also cut back spending. These indirect and induced impacts can be estimated using a regional economic model.

The estimates are based on a ¡§state-of-the-art¡¨ regional impact model developed by Regional Economic Models, Inc. (¡§REMI¡¨). REMI can be used to estimate all of these effects. We used REMI to estimate the local economic impacts in an average case, due to asbestos liabilities. Our example focuses on Licking County, Ohio.

Although the magnitude of effects depends on the characteristics of the local community, the Licking County region had a typical multiplier value in a sample of communities with asbestos-related layoffs. Thus, results can be extrapolated to all affected communities. For example, in 2000, Owens-Corning laid off 275 workers from its Granville plant in Licking County, Ohio.

Licking County, Ohio (U.S. Census Bureau 2002) has:

1. Population of 145,491 in 2000;
2. 58,760 households in 2000;
3. Per capita income of $20,581 in 1999.

In comparison to the direct impacts, REMI model predicts about 225 additional jobs lost due to indirect and induced effects.

Indirect/induced impacts occur in many sectors, for example, we estimated:

1. 77 jobs lost in local services;
2. 60 jobs lost in local retail trade;
3. 48 jobs lost in local construction;

In total, we estimated 500 lost jobs in Licking County, Ohio due to layoff in 2000.

IX. COSTS BORNE BY LOCAL COMMUNITIES: REDUCED REGIONAL INCOME AND EMPLOYMENT

REMI model also predicts impacts on regional output of goods and services, regional income, and population. We estimated that total regional output would be reduced by over $30 million annually. More specifically:

1. $21 million due directly to laid-off workers;
2. $4.5 million in goods and services supplied to the plant;
3. $4.5 million in general goods and services to the population.

This corresponds to a total reduction in regional income of about $15-$20 million annually.

For every ten workers laid off directly, our model predicts that approximately five people relocate out of the county, due mostly to reduced wage levels in the county. These impacts occur in local communities across the country. Since the ¡§multipliers¡¨ vary by community, the impacts will be different for the various communities facing layoffs due to asbestos-induced bankruptcies.

X. COSTS BORNE BY LOCAL COMMUNITIES: FALLING REAL ESTATE VALUES

Plant closures and asbestos-related layoffs will also affect owners of real estate in local communities. Jud and Winkler (2002) show that property values are dependent on local incomes and population. A 10% reduction in local per capita income results in a 2% decline in local real estate prices (other factors held constant), and a 10% reduction in local population results in an 11% decline in local real estate prices (other factors held constant). In our example of Licking County, Ohio, we estimate 500 jobs were lost after Owens-Corning¡¦s 275-worker layoff in 2000.

In response, we estimate that both population and per capita income each fell by approximately 0.1%.. The median home value in Licking County, Ohio in 2000 was $110,700, and there were 58,760 housing units in Licking County in 2000.

Applying multipliers from Jed and Winkler indicates total local real estate values would have fallen by $5-$10 million.

XI. COSTS BORNE BY LOCAL COMMUNITIES: LOCAL SALES AND PROPERTY TAXES

Plant closings also will lead to reductions in local tax receipts. The precise effects on local taxes depends on the community¡¦s tax structure, including the tax rates and the definitions of the tax base. Several factors cause the decline in local tax receipts:

1. Lower real estate values;
2. Reduced population;
3. Reduced spending from remaining residents due to falling incomes.

These declines in tax revenues are likely to outweigh the declines in local government spending due to reduced population. These effects shift some of the cost burdens onto local governments.

XII. CONCLUSIONS

Asbestos liabilities impose costs not just on shareholders, but on many other groups, including workers, taxpayers, and local communities affected by asbestos-related plant closings. Workers in bankrupt firms are hurt through numerous direct and indirect channels. These costs include unemployment, lost wages, lost health care, and reduced wages due to bearing the burden of retraining costs. Not only did laid-off workers suffer the impact, but the costs were also passed onto taxpayers across the country.

Local communities can also be hard hit. Other local businesses are hurt as industry spending falls, local per capita income falls, population declines, and local property values fall.

Finally, local governments face a decline in revenues, which is likely to be much greater than a decline in costs. These costs and impacts will continue to expand as the volume of asbestos litigation grows.

NOTES

1. List of asbestos-related bankruptcies obtained from Committee on the Judiciary United States Senate, Hearing on Asbestos Litigation (2002), Statement of Jennifer L. Biggs, FCAS, MAAA Chairperson, Mass Torts Subcommittee American Academy of Actuaries, September 25. A sample of approximately 90 plant closing/mass layoffs was created based on WARN reports from various state labor departments. Population estimates based on the 2000 U.S. Census. A detailed list of plant closings and mass layoff events used in this analysis is available upon request.

2. In 2002 dollars; dollars have been inflated and discounted using average annual inflation rates and T-bill rates, respectively. The reported wage is an un-weighted average of the mean earnings of a displaced worker in the non-durables manufacturing industry from specified years.
3. Calculated using data from BLS Monthly Labor Review 1993, 1995, and 2001. The reported values are un-weighted averages across these years.
4. In 2002 dollars; average monthly premium quotes obtained from Blue Cross Blue Shield websites assuming non-corporate coverage and age of 40 years for subscriber and spouse. Family rates assume one spouse and two dependent children of age 10. For detailed notes, see NERA table: ¡§Blue Cross, Blue Shield Monthly Premiums by State,¡¨ available upon request.
5. Un-weighted average of duration and value of unemployment insurance for all states from 1990 to 2000.

SOURCES

American College of Physicians ¡V American Society of Internal Medicine. (1999). No Health Insurance? It¡¦s Enough to Make You Sick ¡V Scientific Research Linking the Lack of Health Coverage to Poor Health, November 30.
Blue Cross Blue Shield websites for various states. See NERA table: ¡§Blue Cross Blue Shield Monthly Premiums by State¡¨ for detailed sources.
Bureau of Labor Statistics Displaced Workers Surveys (1984 ¡V 2000).
Carroll, S. J., D. Hensler, A. Abrahamse, J. Gross, M. White, S. Ashwood, et al. (2002). Asbestos Litigation Costs and Compensation, An Interim Report, Rand Institute for Civil Justice.
Committee on the Judiciary United States Senate, Hearing on ¡§Asbestos Litigation,¡¨ Statement of Jennifer L. Biggs, FCAS, MAAA Chairperson, Mass Torts Subcommittee American Academy of Actuaries, September 25, 2002, B62.
Commonwealth of Massachusetts FY01 (PY00) Annual Report ¡V Adult, Dislocated Worker and Youth Activities Workforce Investment Act of 1998, Title I-B. (2001).
Duchon, L., C. Schoen, M. M. Doty, K. David, E. Strumpf, & S. Bruegman. (2001). Security Matters: How Instability in Health Insurance Puts U.S. Workers at Risk, The Common Wealth Fund, December.
Gardner, J. M. (1993). Recession Swells Count of Displaced Workers, Bureau of Labor Statistics Monthly Labor Review, June.
_____. (1995). Worker Displacement: A Decade of Change. Bureau of Labor Statistics Monthly Labor Review, April.
Helwig, R. (2001). Worker Displacement in A Strong Labor Market, Bureau of Labor Statistics Monthly Labor Review, June.
Hipple, S. (1999). Worker Displacement in the Mid-1990s, Bureau of Labor Statistics Monthly Labor Review, July.
Hufbauer, G. C. & Goodrich, B. (2001). Steel: Big Problems, Better Solutions, International Economic Policy Briefs, July.
Jud, G. Donald and Daniel T. Winkler (2002). ¡§The Dynamics of Metropolitan Housing Prices.¡¨ Journal of Real Estate Research, Volume 23 (Nos. 1-2), January-April, p. 29-45.
Kodrzycki, Y.K. (1997). Training Programs for Displaced Workers: What Do Accomplish?, New England Economic Review, May/June.
National Compensation Survey (2000).
Neuschle, E. & Taylor, L. (2002). Covering Displaced Workers and Their Children: Issues and Alternatives, Based on an Institute for Health Policy Solutions Round-Table held November 1, 2001, January.
North Dakota Workforce Investment Act Annual Report ¡V Revised Edition, July 2000 ¡V June 2001. (2001).
Prudential Financial. (2002). Asbestos Litigation ¡V A Problem Without A Solution, May 6.

Stiglitz, J. E., Orszag, J. M., Orszag, P. R. (2002). The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, Sebago Associates, December.
U.S. Census Bureau. 2002. State and County QuickFacts: Licking County, Ohio. Retrieved February 11, 2003 from http://quickfacts.census.gov/qfd/states/39/39089.html.
U.S. Department of Labor Employment & Training Administration (DOLETA) Claims Summary for State Programs. Retrieved December 15, 2002 from http://workforcesecurity.doleta.gov/unemploy/claimssum.asp.
Worker Adjustment and Retraining Notification (WARN) listing from various state labor departments (AL, CA, CT, FL, GA, IL, IA, KS, KT, MS, MD, MN, SC, TX, VA, WI).

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TESTIMONY OF
Scott B. Kapnick

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

Chairman Hatch, Senator Leahy, and the Members of the Committee:

I appreciate this opportunity to address the Committee on the important economic issue of asbestos liabilities.

Background

My name is Scott Kapnick. I am a managing director at Goldman, Sachs & Co. (Goldman Sachs), and I co-head the Investment Banking Division. During my tenure at Goldman Sachs since 1985, I have worked on a broad range of financial transactions for public and private corporations, including mergers and acquisitions, spin-offs, restructurings, recapitalizations and the raising of debt and equity capital, both in the United States and abroad.

Goldman Sachs, founded in 1869, is a global investment banking firm that provides corporate advisory and financing services to all sectors of the US economy, including those with asbestos exposure. We are continually engaged in the valuation of businesses and their securities in connection with mergers and acquisitions, negotiated underwritings, competitive biddings, secondary distributions of listed and unlisted securities, private placements, and valuations for estate, corporate and other purposes.

Summary

The past several decades of asbestos litigation have imposed large costs upon the U.S. economy. In addition to the costs of settlements, judgments and litigation, there has been a negative impact upon certain sectors and specific companies within the markets from their past and prospective asbestos liabilities. The heart of the problem is the uncertainty that these large and unpredictable liabilities have created. As a financial advisor, we have seen that this uncertainty has tended to impose higher costs of capital on certain companies, thereby curtailing their investment and growth. In the most affected industrial sectors, there has been an increase in the rate of asbestos-related bankruptcies and related unemployment. We have also seen that the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole. We believe that the market and the economy could only react positively to any thoughtful reform that protects the interest of victims, but also has two critical elements: (1) creating greater certainty and predictability around the ultimate total cost of the asbestos problem for the U.S. economy as a whole and for specific industry sectors and individual companies, and (2) reducing the inefficiencies and transaction costs associated with compensating victims under the present system.

Credentials and Disclosure

Our knowledge and experience on the asbestos issue results from encountering it in a variety of situations and providing guidance to both our industrial and insurance company clients. This experience is both historical and current. For example, we served as strategic and financial advisor to the Manville Personal Injury Trust from 1992 until the eventual sale of Johns Manville Corporation in 2000. We served as financial advisor to Eagle-Picher and the asbestos trust in the sale of Eagle-Picher to Granaria Investments in the mid 1990s. More recently, we

have been a key financial advisor in the negotiation of an announced asbestos 524(g) global settlement of several billion dollars for a large corporation. We have provided restructuring advice to a large corporation with businesses involving asbestos liability in order to improve its overall valuation. In another example, we were a financial advisor in structuring a large finite reinsurance program to help mitigate the asbestos liability uncertainty in the context of an insurance company merger transaction. We have completed a $1.5 billion high-yield debt offering for a large corporation facing asbestos liabilities and a $1 billion high-yield debt offering for a subsidiary of another corporation facing asbestos liabilities. We are involved in several other projects on an ongoing basis where asbestos liabilities are an issue. More generally, we are continually in dialogue with a number of our clients regarding either their own asbestos liabilities or the impact of asbestos liabilities of others upon their businesses.

In addition to advising companies on asbestos matters, we have also been advisors in the creation of solutions for other large liability problems. These include formation of industry insurance vehicles such as the California Earthquake Authority, the proposed World Trade Center debris removal insurance captive for the City of New York, and a European terrorism insurance company.

In advance of this hearing, we have solicited input on the asbestos issue from several internal areas of Goldman Sachs. We have had discussions with, among others, our Chief U.S. Economist (Bill Dudley), Chair of Investment Policy Committee (Abby Joseph Cohen), and our sector investment research analysts (Industrials: Jack Kelly; Chemical: Avi Nash; Insurance: Tom Cholnoky). We have had discussions with our debt and credit derivative traders, as well as investment bankers. We also relied on information available from industry publications and expert consultants.

In the normal course of our business, we receive fees from companies who may have an interest in seeking a solution to the asbestos issue. We also regularly trade in debt and equity on behalf of our clients and for our own account including distressed debt and equity of many companies affected by asbestos-related issues. Our Global Equity Research has written research related to the asbestos issue and specific companies affected by asbestos liabilities. We are currently in dialogue with numerous companies or their representatives that may support one or another of the reform initiatives that have been proposed or are in development. We are providing this testimony in order to address the economic impact of the asbestos liability issue as part of the overall reform discussion.

Market Environment

We address the asbestos issue today in a post-bubble market environment. The U.S. equity market, as measured by the Wilshire 5000 index, has lost nearly $7 trillion in value from its peak in year 2000. There is currently sluggish economic activity, low consumer confidence, rising unemployment, reduced profitability and generally high anxiety in the marketplace because of geopolitical and economic uncertainty. Large and unpredictable asbestos liabilities is one of several important factors influencing certain sectors and specific companies by further contributing to the uncertainty that exists in the market.

Scope of Asbestos Issue

The impact of asbestos on the U.S. economy is meaningful. In 1982, the Institute for Civil Justice (ICJ) estimated that the direct costs of asbestos up to that point in time had been $1 billion and projected that total direct costs would ultimately reach $38 billion. Rand Institute for Civil Justice (Rand) now estimates that the direct costs through 2000 in asbestos payments have been $54 billion with more than half going towards transaction costs and further that more than 6,000 companies, covering over 75 different types of industries in the U.S., have been

named as defendants. Milliman USA (Milliman) projects that the total direct costs of asbestos personal injury claims will ultimately reach $275 billion. A. M. Best's estimates of asbestos liability for U.S. insurers have grown 63% from $40 billion in 1997 to $65 billion in 2002. From everything we have learned in our work as a financial advisor to companies in this area, we see no reason to believe that these projections are unrealistic in the absence of any reform. However, there is significant uncertainty around the projections, and it is possible that the ultimate losses under the current system could be higher than the projected $275 billion level.

Approximately 66 companies have filed for asbestos-related bankruptcy so far. The rate of these filings is accelerating as a third of these companies have filed petitions in or after year 2000. Parent or subsidiary bankruptcy has become a strategy of choice for a number of companies who are trying to manage their asbestos liabilities. These bankruptcies have additional costs for the economy beyond claims and litigation expenses. These costs include legal, accounting and other restructuring charges, lost wages and productivity, and losses in individual workers' pension accounts. None of these costs result in any payments to the injured parties. In the absence of any reform, the number of asbestos-related bankruptcies is expected to grow, leading to an increase in additional-bankruptcy related costs.

Comparative Analysis

In order to put the scope of the asbestos issue in perspective, it is interesting to compare the estimated total asbestos costs of $275 billion to other meaningful shocks to the U.S. capital markets. All of these large financial events are noteworthy because of their scale and because they prompted a legislative or regulatory response to address uncertainty and a loss of market confidence. The projected scope and associated uncertainty of the asbestos issue is clearly significant in comparison to these other market dislocations, although we recognize that these

situations are different for a number of reasons and in certain respects are not directly comparable.

Between 1986 and 1995, the Savings and Loan sector went through a major crisis. The industry realized unprecedented losses on loans and investments resulting in failure of hundreds of thrift institutions and the insolvency in 1986 of the Federal Savings and Loan Insurance Company (FSLIC), the federal deposit insurer for the thrift industry. There was substantial uncertainty as to the ultimate scale of the problem and the market was beginning to lose confidence in the banking sector. In response, Congress created the Financing Corporation (FICO) and the Resolution Trust Corporation (RTC). According to a study in the FDIC Banking Review, FSLIC and RTC together closed a total of 1,043 failed institutions. The study estimated that the total direct and indirect costs of the crisis were $153 billion of which $124 billion was borne by the public sector.

In 2000 and 2001, an energy crisis followed the deregulation of the power sector in the State of California. The price of electric power for California increased from $7 billion in 1999 to $27 billion in 2000 and was projected to reach $70 billion in 2001. This implied a $20 to $60 billion shock to the California economy in direct costs besides the indirect costs of blackouts, layoffs and lost productivity. In response, the Federal Energy Regulatory Commission (FERC) took action in 2001 to stabilize the power market.

In 2001 and 2002, Enron and WorldCom filed for bankruptcy, contributing to a crisis of corporate governance. The Brookings Institution estimated the total loss to the U.S. gross domestic product from these two bankruptcies to be between $37 and $42 billion. In response, Congress passed the Sarbanes-Oxley Act which led the SEC and FASB to change corporate governance, disclosure and accounting rules.

The insurance industry has also faced large financial shocks in the past some of which have caused significant market dislocations and insolvencies. In comparison to asbestos, the insured losses from these events, although large, were relatively easy to calculate and had less uncertainty associated with them. Ernst & Young (E&Y) estimates that the total insurance industry losses from the September 11, 2001 attacks were in the $35 to $50 billion range. Property Claims Services (PCS) estimated that the total property losses to the insurance industry from hurricane Andrew in 1992 were $15.5 billion and from the Northridge earthquake in 1994 were $12.5 billion. Uncertainty around the insurance industry's ability to handle such large events in catastrophe-prone areas led to the creation of a number of state-sponsored insurance vehicles, such as the California Earthquake Authority (CEA) and the Florida Windstorm Underwriting Association (FWUA).

Investor Perspective

Investors assess relative value of a company by evaluating its expected future prospects for earnings and growth. In this assessment, investors take into account the inherent risks. The issue of asbestos is a complex risk for investors to value. The uncertainty associated with asbestos liabilities affects valuations because it makes investors' financial analysis more speculative and problematic. This contributes to volatility in the valuation of certain sectors and specific companies. The complexity of the asbestos issue arises for several reasons.

First, asbestos liabilities for a company are not easily quantifiable even with full relevant disclosure. Actuarial estimates in the past have not proven to be completely reliable because asbestos diseases have long latency periods which makes future projections difficult and because the incidence rates for asbestos-related diseases have continued to change over time. A good example of this is the Manville Trust which has already received almost six times the maximum number of claims the Bankruptcy Court experts predicted it would receive.

Second, most investors do not have the resources to monitor all the asbestos claims filed against a company in potentially hundreds of courts all over the country. Keeping abreast of claims development and the tactics of the plaintiffs' bar is a potentially important valuation tool for investors. This capability, however, would require investors to have access to dedicated legal experts and incur the corresponding legal expenses. Without such resources, investors tend to use jury verdicts or settlements as a proxy for asbestos liability information. As a result, small jury awards can cause large market reactions, both to the defendant's stock price and to other companies not even parties to the judgment. The process by which legal cases are resolved in the current system adds to volatility in the valuation of certain sectors and specific companies.

Third, a typical asbestos claimant files suits against multiple defendants. If a case actually goes to trial, the courts have generally imposed joint and several liability, even against defendants with an insignificant market share of the relevant asbestos-containing product and even if the particular plaintiff's exposure to the defendant's product was a small part of that plaintiff's total asbestos exposure. This makes it difficult for the investors to assess the share of liability for a specific company or to properly extrapolate the consequences when one of the defendant companies files for bankruptcy. In the absence of any other information, investors tend to assume that most industrial companies have potential asbestos exposure.

Fourth, investors generally have not been able to predict any pattern in which companies have been named defendants in asbestos lawsuits, and it is not always clear which companies will be next in the asbestos litigation lifecycle. Asbestos liabilities increasingly show up in industry sectors that investors previously may have assumed to be peripheral or remote from the issue. For example, investors would not have thought some years ago that major automobile manufacturers could become primary asbestos targets. This has also increased investors' sense of uncertainty.

Fifth, the effect upon corporate parents and current or prior affiliates of companies with asbestos liabilities has been unpredictable. For example, some companies have suffered large asbestos liabilities and associated market value loss based upon conduct by a subsidiary that occurred long before the subsidiary was acquired. Others have suffered these liabilities and losses based upon conduct by entities that had at some point been subsidiaries but had been sold years before.

Sixth, it is difficult for investors to assess the possibility of legislative reform on the asbestos issue. Investors tend to adjust their valuations as the prospects for reform brighten or become more remote.

Finally, uncertainty around asbestos liabilities of a company makes it difficult for the investors to assess its financial strength and risk of insolvency. This can result in limiting the access of a company to the capital markets and substantially increasing its overall cost of financing. Investors take this increased cost into account and penalize the valuation of the company. In some extreme cases, investors factor in the risk of insolvency as a worst case scenario which contributes further to stock price volatility.

The insurance industry faces additional considerations. There is uncertainty around whether insurance companies can be required to pay under 'premises liability' or be held directly liable by asbestos plaintiffs for their own past conduct. This makes it difficult for the investors to assess the proportion of asbestos claims paid to victims that will be reimbursable by insurers and, therefore, the impact of these claims on the financial strength and credit ratings which are critical for the insurance companies to run their businesses competitively. Capital consumed by asbestos liabilities also cannot be deployed towards insuring other risks in the markets including natural catastrophes and terrorism.

Investor Reaction

In view of all these complex considerations around uncertain asbestos liabilities, investors' assessment of the financial strength and valuations of individual companies or whole sectors becomes somewhat more volatile. To illustrate this point, an S&P 500 company announced in January 2002 that it had settled a small number of the asbestos cases that it had been defending. Its estimated liability at that time was $200 million, which was fully covered by insurance. However, the company lost $6.5 billion in market capitalization in the days following the announcement. Other companies known to have asbestos exposure were also affected by this announcement. Five companies, none of them direct competitors but each faced with asbestos exposure, lost an additional $17.5 billion in market capitalization within a week of this announcement. Thus, a single announcement led to a total market value loss for six companies of $24 billion.

There is similar equity market volatility on the upside when the asbestos uncertainty is addressed. For example, in November 1996, T&N, a British mining and manufacturing company, announced a deal to cap its asbestos liability through the placement of the largest ever asbestos liability policy for an industrial company. The news led to a 42% increase in its market capitalization (however, after a merger with another company with asbestos exposure, the former T&N later filed for bankruptcy because of resurgent asbestos liabilities). More recently, Sealed Air announced an asbestos settlement at the end of November 2002 and its market value increased in a single day by $1.2 billion or 56%.

Merger Market Perspective

Uncertainty regarding asbestos liabilities has a similar dampening effect on mergers and acquisitions. In certain cases, asbestos liability has been transferred from companies that originally had the liability to acquiring companies. Legal theories of 'alter ego liability' or

'successor liability' or 'fraudulent conveyance' have been interpreted by courts in different ways leading to uncertainty. A buyer who acquires a company that might have asbestos exposure risks not only its investment in that company, but also its pre-merger assets. For example, Crown Cork and Seal (Crown Cork) acquired Mundek Cork Company (Mundek) in 1963 for less than $50 million and sold its asbestos-related insulation business three months later. Crown Cork has paid out over $300 million over the past 10 years in asbestos liabilities arising from Mundek, significantly more than its initial investment. The uncertainty associated with asbestos liabilities thus makes strategic decisions around mergers, acquisitions and dispositions very challenging. It diminishes the willingness of companies to engage in mergers and asset acquisitions, even in circumstances where such transactions would be in the best interest of the companies, their customers, employees and investors and would promote efficiencies for the economy as a whole. Anecdotally, as leading M&A advisors, we have observed that a number of such transactions are not proceeding because of the uncertainty associated with asbestos liabilities. In the long run, the result can be companies that are not strategically positioned to meet the continually evolving demands of their industries, the economy, and the capital markets.

Impact of Asbestos Reform

We believe that thoughtful asbestos reform could only be positive for the U.S. economy and the capital markets. The capital markets will assess the value of any legislative reform on the basis of two key elements. The first element is to reduce or eliminate uncertainty with respect to asbestos liability in terms of frequency and severity of claims for the economy as a whole and specifically for industry sectors and individual companies. This will allow investors to more accurately assess and project the liability and thereby value and finance these companies with a greater degree of confidence. In other words, the more certainty a legislative reform provides, the greater the positive influence on the markets. The second element is to increase efficiency of the system resulting from reduction of transaction and bankruptcy costs which

together have tended to be a significant proportion of the total asbestos costs. This can be achieved by minimizing areas of dispute between plaintiffs and defendants, defendants and insurers, and among insurers. In assessing the value of any reform proposal, the more it increases system efficiency, the greater the benefit to the market and the economy.

Conclusion

Asbestos liabilities impose meaningful costs on the U.S. economy in terms of direct claims, litigation costs and bankruptcies. The complexity around the asbestos issue leads to uncertainty for the investors and results in volatility in the valuation of certain sectors and specific companies. This volatility has a negative impact on economic activity and growth. Any reform that addresses the uncertainty and inefficiencies of the current system while being fair and equitable to the victims could only have a positive market impact.

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Financial Desk

THE NATION Firms Hit Hard as Asbestos Claims Rise Courts: Recent jury awards underscore commercial disaster's continuing toll.

LISA GIRION
TIMES STAFF WRITER

A series of multimillion-dollar jury awards to victims of asbestos exposure in recent months is sending shock waves through corporate America, contributing to several major bankruptcy filings and warnings of massive future damages.

The wave of new litigation and a surge in the number of people reporting exposure are a blunt reminder that the asbestos problem, a largely forgotten product liability mess of the 1980s, has not gone away.

More than 75,000 new claims for compensation have been brought so far this year, the most since 1989, from people reporting effects ranging from shortness of breath to mesothelioma, an asbestos-related cancer that typically suffocates the afflicted within 18 months.

The number of people expected to file injury claims could eventually reach 2.5 million, from the current 575,000. 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.

The widespread use of the naturally occurring mineral fiber as an insulator and fire retardant in thousands of products from construction materials to yarn through the mid-'70s continues to spin a commercial disaster that is expected to take its toll for at least 40 more years.

The surge in claims coincides with a new understanding of the scope of exposure. Until recently, it was believed that the number of American workers who have or will sustain significant asbestos exposure would reach 24 million to 28 million, an estimate developed by researchers in the early 1980s. This year, that number was revised significantly upward, to more than 100 million potential exposures when a group of researchers added industries and jobs from which claims recently have been made, said David Austern, general counsel for the Manville Trust, a fund set up to compensate people injured by asbestos.

"We're still operating with relatively little experience" because the onset of mesothelioma can occur decades after initial exposure, said Steve Carroll, a senior economist at the Rand Institute for Civil Justice, a Santa Monica-based think tank. "We don't know how many people there are out there who

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aren't going to manifest a disease for 40 years or 50 years or 70 years."

The new surge in asbestos claims is surrounded by controversy. Many critics say a great number of the claims are suspect, drummed up by aggressive plaintiffs' lawyers, bringing a new sense of urgency to concerns that funds are being drained away from thousands of seriously ill and dying victims.

Three funds established in the 1980s to compensate sick asbestos workers reduced payments this year. The Manville Trust, the first major compensation fund that followed the bankruptcy of Johns-Manville Corp., has paid out more than $2 billion but is now paying victims 5 cents on the dollar to assure there will be money left for other claimants. The trust has slashed payments to victims dying of cancer to $10,000 or less--down from hundreds of thousands per claimant in the late 1980s.

That turn of events prompted U.S. District Judge Jack B. Weinstein at a hearing in Brooklyn on Thursday to instruct the parties to the trust to try to forge a new agreement that would substantially raise compensation to the seriously ill.

Estimates of asbestos' ultimate costs hovered around $40 billion in the 1990s. But a recent analysis of new claims trends by Tillinghast-Towers Perrin, a management consulting and actuarial firm,raised the stakes fivefold. U.S. insurers are expected to cover $60 billion, for which the industry may face a shortfall of as much as $33 billion.

More than 42 companies, including at least 10 in the last two years, have blamed asbestos liability for their decisions to seek bankruptcy protection, and the Rand Institute for Civil Justice recently predicted several more companies would resort to court-supervised reorganization within the next two years. W.R. Grace, U.S. Gypsum, United States Mineral Products and Federal-Mogul Corp. have filed for bankruptcy protection this year, citing asbestos claims.

With the nation's major asbestos producers in some stage of bankruptcy, lawyers for victims are turning to companies that were once peripheral parties to pick up the tab for asbestos-related claims. Asbestos injury suits that once targeted about 300 mining and production companies have drawn in several thousand firms that cut across more than half of all industrial categories.

Railroads, textile and other manufacturers, food producers and oil refineries are among the most frequently named targets of the newest wave of suits. Companies as diverse as Sears Roebuck & Co., Ford Motor Co. and Viacom Inc. that never produced the mineral fiber are facing injury suits because they sold asbestos-containing products, incorporated them into cars or acquired asbestos- related businesses.

Companies that choose to fight asbestos suits risk getting hit with jury

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verdicts that are spiraling higher.

In late August, a Texas jury awarded $55.5 million to a 47-year-old father of four who blames his mesothelioma on the asbestos in a Kelly-Moore Paint Co. joint compound he was exposed to while building homes in California in the 1970s.

Less than two weeks later, another Texas jury awarded $130 million to five former laborers and millwrights whose cancers and lung diseases were linked to asbestos exposures on job sites in the 1960s and 1970s. Two of the men died before trial.

And in late October, a Mississippi jury awarded $150 million to six former laborers, who said they had been exposed to asbestos on jobs in the 1950s and 1960s but were not sick.

Halliburton Co.'s Dresser Industries subsidiary was a defendant in the latter two cases. But Wall Street didn't pay much attention until this month when the Dallas-based oil-field services company was hit with a $30-million verdict. As asbestos jitters reverberated on Wall Street, Halliburton's stock plunged before company executives assured investors it planned to appeal and had adequate insurance to cover the verdicts if they hold up.

Increases in both cancer and noncancerous-disease claims are contributing to the surge. But nonmalignant claims, including people who are not sick, are rising much faster. The ratio of nonmalignant to cancer claims has risen from 6-to-1 in 1994 to 16-to-1 this year.

That trend is inciting what may be the most intense round of courtroom brawls since the inception of the asbestos tort juggernaut. An Oakland-based attorney who has represented asbestos victims for 27 years is leading a renegade faction of the plaintiffs' bar that has joined with many of the corporations they sue in calling for limits on claims from people without serious illnesses.

"It's too far gone to do anything else," Steve Kazan said. "The asbestos companies are really cash cows that we should care for and cultivate so we can milk them for years as we need to. But I have colleagues who'd rather kill them, cut them up and put them on the grill now. We'd all have a great time, but there are people who will be hungry in five years."

Many companies have chosen to settle asbestos claims to avoid the costs of litigation and the risks of big jury awards.

"In a sense, the plaintiffs' attorneys have the asbestos defendants held hostage," said Jennifer L. Biggs, a consulting actuary with Tillinghast-Towers Perrin.

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"The defendants are willing to pay for the most serious, or mesothelioma cases, but many plaintiffs' attorneys won't let them settle those claims alone," she said. "They will require the defendants to settle a bundle of perhaps 2,000 claims, where over 90% may be for nonmalignant injuries. [Defendants] are often forced to settle, because they don't want to risk taking the mesothelioma cases to trial, where the plaintiffs may win substantial awards."

But Ohio-based boilermaker Babcock & Wilcox filed for bankruptcy protection last year after a 15-year settlement strategy turned the company into what spokesman Don Washington called a "field of dreams" for junk claims. The company spent $1.6 billion on 317,000 claims that took paralegals five to 10 minutes each to prepare.

"People have always underestimated how many claims are out there, how many people are going to get sick and how many companies have liability," said Peter R. Kelso, editor of Mealey's asbestos litigation and asbestos bankruptcy legal reports.

The nation's Big Three auto makers, which face suits involving more than 20,000 claimants across the country, are trying another strategy, said David M. Bernick, a trial litigator who is representing the auto makers and other asbestos defendants.

Ford, General Motors and DaimlerChrysler want to refute claims that mechanics are getting sick and dying from inhaled brake dust with epidemiological studies that show they have no higher than average risk for mesothelioma, he said. But, instead of trying each case separately, they are asking to make those arguments categorically in the course of the bankruptcy hearings for Federal-Mogul, an auto parts company facing similar allegations.

Juries haven't always agreed with the auto makers' position that their brakes are safe. An appellate court in 1998 upheld an $8-million verdict against Ford for the widow of an auto mechanic who died of mesothelioma after a 35-year career changing brakes and clutches that were made with asbestos.

The flood of claims also owes something to an increased propensity to sue, a trend stoked by an increase in law firms handling such cases from 10 or 15 in the early days to more than 700 today, many of which are filing on behalf of people who are marginally sick at best, Austern of Manville Trust said.

"The decision to file claims today--other than the cancer claims--are not based on medicine," he said. "It is not somebody getting sick and going to a doctor and then going to a lawyer. The great bulk of asbestos claims now are being filed by people who are not impaired and who are asymptomatic. It doesn't mean they won't get sicker. But it does mean they are not sick right now."

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Some law firms solicit asbestos victims through television and newspaper advertisements. Others have flocked to the Internet, where one firm boasts a goal of bringing in more than $100 million for victims on a Web site called "Million Dollar Lungs."

Some lawyers don't wait for victims to come to them. Across the country, hundreds of thousands of people have stepped into mobile vans to undergo lung X-rays in mass screenings conducted by companies paid by lawyers, according to motions recently filed in federal court in Philadelphia. Before X-rays are conducted, workers must sign contracts that allow the lawyer who hired the van to represent them, according to the motion filed by several corporate defendants asking that such suits be put on hold.

Such tactics have re-energized efforts to lobby for legislation that would put a hold on claims from people who are not sick. October's $150-million award to the six retirees who were not sick quickly became Exhibit A in the campaign by the Asbestos Alliance, a newly formed Washington-based coalition of corporate defendants. "It's enough to trigger the Congressional gag reflex. It's just atrocious," said Mike Baroody executive vice president of the National Assn. of Manufacturers and a member of the Asbestos Alliance.

The controversial award was veteran Mississippi product liability lawyer Isaac Byrd's first asbestos case--and one that he is quick to defend. The jury acted properly, he said, in finding that the six men, whose lungs showed signs of asbestos exposure, should be compensated for their increased risk of developing an illness or cancer later.

"You have only one day in court, and the wrongdoer is supposed to be accountable for all of his wrongs," Byrd said. "There is no second bite at the apple. That's why you rely on medical testimony to substantiate the likelihood of something happening in the future."

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About Asbestos

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The Job-Eating Asbestos Blob

Seeing legislators pull their hair over Enron is a pleasant diversion, but if Washington is really interested in the jobs and livelihood of American citizens it might be better off paying attention to the runaway blob known as asbestos litigation.

Don't stop reading now because your company never manufactured asbestos products. The blob is metastasizing way beyond the parts of the economy that spawned it. Last week 3M, maker of Scotch tape, was clobbered when a Wall Street analyst sent up a red flag about its asbestos exposure. The company had recently been hit with a $90 million jury verdict on behalf of four plaintiffs who complained a 3M respirator (labeled for nontoxic use) did not fully protect them against asbestos-related illness.

You only have to go back a couple weeks more to find Halliburton, the oilfield specialist that formerly boasted Dick Cheney as CEO, taking a big markdown on its shares after a jury awarded $150 million to four plaintiffs in an asbestos lawsuit. Halliburton has 250,000 more claimants waiting in the wings. Halliburton chief Dave Lesar says more than half the Dow 30 industrial companies have asbestos exposure, though some are reluctant to disclose it. Dow Chemical was hit with 900 lawsuits in December alone. If something isn't done soon, Reuters quoted a fund manager saying recently, "half the industrial companies in America could face bankruptcy."

Even media giant Viacom is on the rack over its connection (through CBS) to Westinghouse. Jack Welch at GE, when asked about his company's liability, was known to dismiss it with a wisecrack. His successor, Jeffrey Immelt, who expects to be around for a decade or two, can't afford such a relaxed attitude. Already accounting mavens are sniping at GE for not quantifying its asbestos exposure.

What's going on? In 1999, the blob broke free of the legal system's attempts to confine it. The Supreme Court reluctantly shot down a global settlement involving dozens of asbestos companies and hundreds of trial lawyers. Justice Souter pleaded with Congress to shed its lethargy and resolve an "elephantine mass" of claims that "defies customary judicial administration."

Congress didn't, and the legal army that's been living off asbestos litigation for 30 years has gone into overdrive to wring the last dollars from the original asbestos industry. Nine companies have been driven into bankruptcy in the past 12 months, including U.S. Gypsum, Owens-Corning and the former GAF. Now the legal piranha are moving in on downstream targets, such as asbestos customers and makers of protective gear. Not even the election of a noted tort reformer to the White House has restrained the frenzy.

You have to step back and appreciate how heavily invested a big chunk of the legal profession is in asbestos litigation. The blob has created hundreds of millionaires like Peter Angelos, owner of the Baltimore Orioles. It provided seed money for the tobacco wars. It keeps the Democrats, especially those in the Senate, surfeited in campaign contributions.

By now, some of the richest law firms in the country have been built on asbestos and have trained a second and even a third generation of asbestos lawyers, who in turn have started their own firms to mine this vein. Attorneys spend millions on TV advertising, mailings and union-hall campaigns to prospect for potential clients, meaning anyone with a plausible claim to have spent time at a site where asbestos was present.

Virtually any industrial company old enough to have been in business when asbestos was ubiquitous, has something to worry about. Defendants find themselves dragged into court in obscure corners of Mississippi or Texas, where juries are used to "teaching a lesson" to out-of-state companies.

A few years ago, most first-time defendants got the lesson quickly and signed mass settlements in return for lawyers agreeing not to pile on the claims. That used to sound almost good—until defendants who thought they had "contained" the problem found themselves deluged with a bankrupting wave of new claims anyway. In fact, one reason 3M bore the brunt of the recent $90 million verdict was because the other defendants were already in Chapter 11.

Two years ago a bill was bruited in Congress that would have brought some order to the process. It would have created a company-funded, government-run procedure to compensate anyone who's sick or becomes sick from asbestos exposure. The lawyers nuked it, however, because they increasingly depend on collecting money for clients who claim exposure but aren't sick.

The lawyers won partly because most of corporate America stayed on the sidelines. This was shortsighted, to say the least. Now that the blob is headed in their direction maybe the rest of American business, and especially the Bush Administration, will notice and start to contain the economic damage.

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Industry Focus

Firms Hit by Asbestos Litigation Take Bankruptcy Route

Costs of Settlement Funds Are Steep, Taking Away Majority of Businesses' Worth

By Queena Sook Kim
Staff Reporter of The Wall Street Journal

Companies that face the drain of asbestos lawsuits, but are otherwise financially fit, have escalated a tactic that they view as the only remaining way out of the endless litigation -- Chapter 11 bankruptcy proceedings.

Already, 25 of the more than 140 businesses that either made asbestos or sold products containing the substance have adopted the strategy. During the past year alone, four otherwise solvent companies saddled with asbestos litigation -- Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning and Armstrong World Industries Inc. -- have filed for bankruptcy-law protection in an attempt to gain indemnity from all future asbestos suits and renegotiate the money to be repaid to creditors, who include plaintiffs.

On the books, power-plant builder Babcock & Wilcox, a subsidiary of New Orleans energy-services concern McDermott International Inc., was a sound business. At the time of its February filing, the company had total assets of $2 billion and liabilities of $1.84 billion. But after settling 349,000 claims to the tune of about $1.6 billion during the course of two decades, the company saw no end in sight. It figured its asbestos liability would be about $1.3 billion through 2012.

"The Chapter 11 filing was not driven because the company was in poor financial shape and not because we don't have insurance," said McDermott's general counsel, John Nesser. "We wanted to find a way to get an end to our asbestos exposure."

All told, 25 companies have taken the step of filing for Chapter 11 because of asbestos liabilities since the 1980s. In 1994, Congress added provision 524(g) to the U.S. Federal Bankruptcy Code, effectively blessing the strategy that already had been in use for a number of years. The provision allows the Federal Bankruptcy Court to issue an injunction that bars all future plaintiffs from filing asbestos claims against the reorganized company. Future liabilities could be as high as $50 billion, according to a study by Credit Suisse First Boston titled, "Asbestos: The Dust Assassin Cries Out for Tort Reform."

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But the cost of the bankruptcy tactic is steep. The 524(g) provision mandates that the bankruptcy plans create a "qualified settlement fund," or trust, for present and future asbestos claimants, which is usually controlled by financial managers. As a general rule, the trust must come away with at least 51% of the company's worth -- which can take the form of cash, stocks or bonds -- but the percentage has historically been closer to 80% to 90%. The trust in essence assumes all future liabilities for the company and sets a cap on each settlement after both the company and plaintiffs lawyers consult experts to estimate the number of future incidents of illnesses associated with asbestos exposure.

Building-products maker Johns Manville Corp. pioneered the concept when it filed one of the first strategic bankruptcies because of asbestos liability in 1982. Other companies that manufactured products containing asbestos have used the bankruptcy courts to gain indemnity from future lawsuits. But legal experts say businesses such as Babcock & Wilcox and Armstrong, a unit of Armstrong Holdings Inc., are adding a new twist to the strategy by also asking bankruptcy courts to exclude certain liabilities.

Previously, Babcock & Wilcox and Armstrong had tried to overcome liability and preserve equity for shareholders by going through the tort system. But two U.S. Supreme Court decisions, Georgine vs. Amchem (1997) and Fiberboard vs. Ortiz (1999), which stated that defendants couldn't settle class-action suits that would bind future plaintiffs, effectively ended the hope of finding relief in the courts.

An innovative National Settlement Plan by Owens Corning, Toledo, Ohio, to settle past and future asbestos obligations failed to bring permanent relief. In 1998, the company known for its pink fiberglass insulation set up the plan with more than 120 plaintiffs law firms across nearly all the jurisdictions at which claims were pending, aiming to reduce the number of future claims by stipulating that future claimants must exhibit symptoms of illness.

Because it was a private-settlement plan, the company couldn't get an injunction shielding it from future asbestos liability. Plaintiffs attorneys who didn't enter into the national settlement continued to bring suits and demand larger payments. After settling about 240,000 claims for about $1.7 billion, Owens Corning, seeing no relief coming, filed for bankruptcy protection.

For companies facing insolvency, filing sooner rather than later enables them to use a smaller settlement figure when calculating the cost of future liabilities. But calculating the incidents of illness -- as opposed to the number of claims -- can be tricky, because more than 50% of the claims are brought by people who were exposed to asbestos but aren't impaired, according

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to asbestos defendants.

Once the two sides have agreed on a total settlement sum, the company and its creditors -- including plaintiffs, vendors and lenders -- negotiate the percentage of each dollar that will be paid.

Predictably, the largest piece of the pie goes to plaintiffs. In the case of Johns Manville, the trust came away with 80% of the stock, valued at $700 million, and about $700 million in cash. But in the end, the real losers are the shareholders. In the best cases, they have emerged with 10% of the company, but more often the holders lose all.

Ducking for Cover

In the past two decades, 25 companies have filed for Chapter 11 bankruptcy protection because of asbestos litigation. They are:

1982
-- July: UNR Industries
-- August: Johns Manville
-- November: Amatex
1985
-- April: Forty-Eight Insulations
1986
-- July: Pacor
1987
-- Nicolet
1989
-- February: Raymark Industries
-- July: Unarco
-- December: Hillsborough Holdings
1990
-- January: Standard Asbestos Manufacturing & Insulation
-- October: Celotex
-- October: National Gypsum
1991
-- January: Eagle-Pitcher Industries
-- February: H.K. Porter
1992
-- December: Kentile Floors
1993
-- November: American Shipbuilding
-- December: Keene
1995
-- December: Lykes Brothers Steamship
1996
-- November: Rock Wool Manufacturing
1999
-- September: Rutland Fire Clay

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2000 WL-WSJ 26620724

2000
-- February: Babcock & Wilcox
-- April: Pittsburgh Corning
-- October: Owens Corning
-- December: Armstrong World Industries
Date Not Available
-- Brunswick Fabrications

(See related letter: "Letters to the Editor: Asbestos Litigation: Reform Is Imperative" -- WSJ Dec. 28, 2000)

---- INDEX REFERENCES ----

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What's Behind The Recent Wave Of Asbestos Bankruptcies?

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Commentary

What's Behind The Recent Wave Of Asbestos Bankruptcies?

By
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When W.R. Grace & Co. earlier this month became the sixth major asbestos defendant to file for bankruptcy since January, 2000, its chairman said that "the state court system for dealing with asbestos claims is broken" because "Grace cannot effectively defend itself against unmeritorious claims."[1] He said Grace made the bankruptcy filing because "[t]he best forum for available to Grace to achieve predictability and fairness in the claims settlement process is through a federal court-supervised Chapter 11 filing."[2]

Why have companies such as Grace, Babcock & Wilcox, Armstrong World Industries, GAF, Owens-Corning, and Pittsburgh Corning concluded that Chapter 11 of the Bankruptcy Code is "the best forum available" to resolve their asbestos problems? The reason is that bankruptcy uniquely permits an asbestos defendant to put a permanent end to asbestos litigation against it and resolve liability issues in a coordinated and integrated fashion. Also, more recent asbestos debtors are using their bankruptcy filings in an increasingly aggressive fashion. Whereas many prior asbestos bankruptcies appeared to be little more than an exercise in how to distribute the debtor's assets among competing claimants, some of the asbestos defendants who have most recently sought Chapter 11 relief are trying to use bankruptcy to reduce their overall asbestos liability, in an effort to preserve the ownership interests of their existing shareholders.

The Automatic Stay

The first thing that happens when an asbestos defendant files for Chapter 11 is that all litigation against it immediately stops. Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides an "automatic stay" that enjoins virtually all litigation against the debtor immediately upon the filing of a bankruptcy case.[3] By terminating its involvement in thousands of suits in one fell swoop, the debtor eliminates the staggering cost of defending these suits. The stay also prohibits — at least until a plan of reorganization is confirmed — any payments to asbestos claimants. This puts an end to the outflow of

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settlement funds that cripples the debtor's cash flow. In short, the cessation of litigation activity and settlement payments gives the debtor breathing room to begin solving the problems presented by the asbestos litigation.

The automatic stay does not halt litigation against co-defendants, parent companies, subsidiaries, or other entities that have not themselves filed for bankruptcy relief. However, a common tactic is for debtors to attempt to use their bankruptcy filing to obtain an injunction, under 11 U.S.C. § 105, prohibiting suits against parent or subsidiary companies that have not themselves submitted to the jurisdiction of the bankruptcy court. For instance, in the *Babcock & Wilcox* case the debtor obtained an injunction barring suits against its parent company, McDermott International.[4] Similarly, in the bankruptcy case of GAF, the debtor obtained an injunction prohibiting suits against its principal non-debtor subsidiary, BMCA.[5] In *Pittsburgh Corning* as well, the debtor obtained an injunction barring prosecution of suits against PPG Industries or Corning Incorporated.[6] These injunctions barred the continuation of existing suits as well as the filing of new suits. By obtaining these injunctions, the debtors protected the assets of these companies from attack.[7]

The stay also does not stop any litigation filed *by* the debtor. However, the debtor may wish to have at least some of its pre-bankruptcy lawsuits centralized and coordinated in the bankruptcy court. Suits in other federal courts can be transferred by motion under the general federal transfer statute, 28 U.S.C. § 1404, or its bankruptcy-specific analog, 28 U.S.C. § 1411. Suits pending in state court can be removed to federal court, even if there is no diversity and no federal question and even though the regular time for removal has passed: various provisions in the federal judicial code (i) extend federal jurisdiction to non-diversity, non-federal question matters relating to the bankruptcy case and (ii) authorize removal within 90 days of the bankruptcy filing.[8] These provisions make it possible in many cases for the debtor to centralize all litigation involving it in a single court (either the bankruptcy court where the case is filed or the district court in that district) that can issue consistent, coordinated rulings.

The Claims Process

Notwithstanding the intervention of the automatic stay, the debtor's asbestos-related liabilities must still be addressed. As the debtor noted in W.R. Grace, "[w]hile the automatic stay will stop this uncontrolled flow of claims, the central goal of the case must be to define a universe of valid claims and provide for the payment of such claims through a post-confirmation trust."[9]

Generally speaking, there are two types of claims. The first type is "present claims" by persons who assert that, as of the date of the bankruptcy filing, they have already manifested asbestos-related injuries or diseases. The second type is so-called "future claims" that will, at some indeterminate future time, be asserted by persons who were exposed to asbestos in the past but have not yet developed any illnesses or injuries. Discussion of "future claims" will be deferred to the next section of this article.

The debtor will ask the court to establish a "bar date," which is a deadline by which "present claims" must be filed against the debtor. All such claims that are not filed with the bankruptcy court before the bar date deadline are forever barred. Thus, once the bar date passes, the debtor knows with certainty the universe of persons who assert that they have already suffered asbestos-related injuries or diseases.[10]

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Recent battles in some of the asbestos bankruptcy cases have concerned the amount of detail that a claimant must submit as part of his or her proof of claim. In most bankruptcies, proofs of claim are submitted on summary forms that provide an extremely limited amount of information about the claim — far less information, in most cases, than even the most generally-pleaded notice pleading complaint.[11] However, in the *Babcock & Wilcox* bankruptcy case, for example, the debtor obtained an order, over the objections of the official committee of asbestos claimants, requiring asbestos personal injury claimants to submit a customized proof of claim that provided the following detailed information in addition to that required by the official proof of claim form: (i) the year in which the claimant was diagnosed with a particular asbestos-related injury; (ii) whether the claimant was exposed to asbestos from B&W equipment; (iii) the total number of years of exposure, and the first and last years of exposure; and (iv) the name and location of the facility(ies) where the claimant was exposed to asbestos from B&W equipment.[12]

Once the universe of potential "present claims" is identified with certainty, the next step is to determine the validity and value of the claims. Outside bankruptcy, of course, this determination can only be made in a binding way by full-blown trials, in courts scattered throughout the country, of literally tens of thousands of individual asbestos lawsuits. It is the prohibitive cost of such litigation that has made it impossible, as a practical matter, for asbestos defendants to weed out the meritorious claims from those that lack merit.

Bankruptcy, however, provides a tool that can accomplish the seemingly impossible. The procedure, called "estimation" of claims, is authorized by Section 502(c) of the Bankruptcy Code, 11 U.S.C. § 502(c). No set procedure exists governing how claims should be estimated; the only requirement is that the estimation procedure chosen by the court satisfy due process requirements. For example, in one of the earliest cases to use estimation under the Bankruptcy Code, the court estimated the value of a $700 million securities fraud claim against the debtor following a one-day trial in which there were no witnesses and the "evidence" consisted of documents and attorney summaries of how various witnesses would testify if called.[13]

Thus, debtors can be expected to advocate an estimation process that is quick, efficient, and likely to lead to a low valuation. Among other things, the debtor will likely seek to have the bankruptcy court identify common issues presented in a large number of claims and then determine those issues — by either trial or summary judgment-type procedures — across a large number of claims, all at once.[14] Claimants also have an interest in speed and efficiency, but likely will resist any methodology that they feel tramples their due process rights or is skewed to a low valuation.

Not surprisingly, how estimation should proceed, when it should take place, and for what purpose, has led to pitched battles in the most recent wave of asbestos bankruptcies. In the *Babcock & Wilcox* case, for example, the official Asbestos Claimants' Committee argued that estimation of the debtor's liability for asbestos claims could be determined by the bankruptcy court, prior to the bar date, based largely on analysis by experts and the debtor's prepetition history of paying claims. The Committee alleged that "estimation in the bankruptcy court is not intended to fix the amount of specific claims for purposes of distribution," but instead, "[i]n the present case, the purpose of the estimation process is to establish the outer limit of the aggregate value of the asbestos-

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related claims, both present and future," to assist in negotiations over a plan of reorganization.[15] The debtor responded that claims estimation should take place in the district court after the bar date and, rather than determining "a hypothetical 'outer-limit'" of its asbestos liability, should instead determine the debtor's actual liability for specific claims, after taking into account the district court's rulings on certain "threshold issues of liability" having widespread application to large numbers of claims.[16] The debtor also argued that its past claim settlement history is irrelevant to any calculation or estimation of their overall asbestos liability.[17]

The Plan Of Reorganization

The ultimate goal of the Chapter 11 process is to confirm a plan of reorganization that makes provision for all claims against the debtor, thus enabling the debtor to enjoy the "fresh start" envisioned by Congress as one of the major purposes of the Bankruptcy Code. In most bankruptcies, this "fresh start" is obtained by making provision just for prepetition claims against the debtor. Asbestos cases are different, however, because of the number of "future claims" — that is, claims by persons exposed to asbestos prepetition who have not, as of the time of the filing of the petition, suffered any diagnosable injuries or illnesses. The Bankruptcy Code definition of "claim," although broad, has been construed to not include "claims" by uninjured persons.[18] Thus, it would seem, an asbestos debtor could be bereft of any chance to obtain a fresh start, because it might be inundated by a crippling wave of "future claims" after emerging from Chapter 11.

Following the lead of the court in the Johns-Manville bankruptcy case,[19] Congress in 1994 enacted special legislation governing reorganization plans of asbestos debtors that, among other things, makes provision for payment of "future claims." This section, 11 U.S.C. § 524(g), authorizes reorganization plans that "channel" all claims — including all "future claims" — to a court-approved trust provided that the court previously appointed a "futures representative" to negotiate on behalf of the "future claimants." Because all asbestos claims (including all "future claims") are "channeled" to the trust (through the mechanism of an injunction that prohibits any claims other than those asserted directly against the trust), the debtor can emerge from bankruptcy with assurance that its asbestos liabilities are behind it.

This peace of mind comes at a heavy cost, however. To meet the requirements of Section 524(g), a plan of reorganization must, among other things, dedicate at least a majority share of the company's stock to compensation of asbestos claims. In many cases, the claimants' share has been closer to 80-90%.

There are many variables that must be negotiated, among several constituencies, before a consensual plan of reorganization can be achieved. The principal variables are:

1. What consideration is being paid into the asbestos trust for ultimate distribution to asbestos claimants (*i.e.*, cash, stock, insurance proceeds, etc.)?

2. How will the consideration be divided among the "present claims" and the "future claims"?

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3. What criteria will be used to determine if a particular claimant is entitled to compensation?

4. Will any entities other than the debtor (*e.g.*, non-debtor affiliates, insurers, etc.) be entitled to protection from claims via the "channeling injunction"? If so, who are they and what, if anything, are they each contributing in exchange for enjoying the protection provided by the injunction?[20]

In the most recent wave of asbestos bankruptcies, only Babcock & Wilcox has so far filed a plan of reorganization. That plan may or may not be a harbinger for how asbestos reorganization plans will look in the future, since it was filed prior to the conclusion of negotiations with the official committee of asbestos claimants, in order to preserve the debtor's "exclusive period" for filing a plan.[21] In any event, the key elements of the Babcock & Wilcox plan are as follows:

- The plan establishes an asbestos trust under Section 524(g) of the Bankruptcy Code, funded by: (i) certain insurance rights of the debtor having an estimated value of more than $1.15 billion; (ii) a promissory note from B&W in the amount of $100 million, payable out of available net cash flow over ten years; and (iii) $50 million in cash from B&W. If B&W is unable to make payments under the $100 million promissory note, a majority of B&W voting stock would be transferred to the trust.[22]

- All asbestos claims against B&W, its affiliates, and certain others would be "channeled" to the asbestos trust. B&W and the others would be protected from all present and future putative asbestos claims by a permanent injunction against the assertion of such claims.
- The plan divides asbestos claims into several different classes claims: asbestos personal injury claims (Class 4); settled asbestos claims (Class 5);[23] asbestos property damage claims (Class 6); and "derivative" asbestos claims (*e.g.*, contribution claims) (Class 7). Classes 4, 5, and 6 would be paid under the terms of the asbestos trust and a claims distribution procedure specified in the plan; Class 7 claims would be discharged without payment.

- The plan imposes stringent, objective qualifying criteria for persons filing claims against the bankruptcy trust based on an alleged asbestos-related nonmalignancy. B&W divides asbestos personal injury claims into four categories: malignant mesothelioma; lung cancer; other cancer; and "severely disabling asbestosis." In particular, B&W proposes to compensate only those nonmalignancies that qualify under the category of "Severely Disabling Asbestosis." To qualify, a claimant must establish (i) evidence of an ILO reading of 2/1 or greater; (ii) evidence of lung capacity of 70% or less based on acceptable PFT measurements (FVC, TLC or DLCO); and (iii) certification by an examining physician that the claimant is totally disabled as a result of an asbestos-related disease.[24]

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Conclusion

Absent legislative relief or more rigorous case handling by the courts, bankruptcy will remain an attractive option for besieged asbestos defendants because it provides a palette of tools not available in any other forum. Only bankruptcy provides a debtor with the possibility of resolving claims in an efficient and comprehensive way and the ability to put asbestos liabilities completely in the past. As a consequence, we can expect more asbestos bankruptcies during the next few years.

ENDNOTES

1. April 2, 2001 press release titled "W.R. Grace & Co. Files Voluntary Chapter 11 Petition To Resolve Asbestos Claims" (the "Grace Press Release"), available on Grace's web site (www.wrgrace.com).

2. *Id.* For general background on the the failure of the civil litigation system adequately to address asbestos issues, *see* Plevin, Schwartz & Kalish, "Don't Bankrupt Asbestos," Legal Times (March 19, 2001) at 68.

3. The stay is subject to a number of exceptions specified in the statute itself, such as regulatory actions by the government. *See* 11 U.S.C. § 362(b). The bankruptcy court can also terminate the stay, or modify its coverage, upon motion of a party in interest in the bankruptcy case. *See* 11 U.S.C. § 362(d).

4. *See* Order Granting Temporary Restraining Order And Setting Hearing on Preliminary Injunction, The Babcock & Wilcox Co. v. Bearce (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-1029 (Bankr. E.D. La. Feb. 23, 2000); Order Extending Preliminary Injunction, The Babcock & Wilcox Co. v. Bearce (In re The Babcock & Wilcox Co.), Adversary Proc. No. 00-1029 (Bankr. E.D. La. Jan. 18, 2001) (extending preliminary injunction through April 17, 2001).

5. *See* Order Granting Temporary Restraining Order, G-I Holdings, Inc. v. Those Parties Listed On Exhibit A to Complaint (In re G-I Holdings, Inc.), Adversary Proc. No. 01-3013 (Bankr. D.N.J. Jan. 19, 2001).

6. *See* Order Granting Temporary Restraining Order And Setting Hearing on Preliminary Injunction, Pittsburgh Corning Corp. v. Those Parties Listed On Exhibit A to Complaint (In re Pittsburgh Corning Corp.), Adversary Proc. No. 00-2161 JKF (Bankr. W.D. Pa. April 16, 2000).

7. Most recently, on the first day of its bankruptcy case the debtor in W.R. Grace sought to enjoin all lawsuits against another company, Sealed Air Corporation, that was sometimes named as a co-defendant with Grace in asbestos cases. Grace argued that continuation of such suits against Sealed Air would adversely affect Grace's bankruptcy estate because Grace had previously agreed, in connection with its sale of certain non-asbestos businesses to Sealed Air, to indemnify Sealed Air against any asbestos-related claims. *See* Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction Staying All Asbestos-Related and Fraudulent Transfer Claims Against Affiliated Entities, W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co., Adversary Proc. No. 01-00771 (Bankr. D. Del., filed April 2, 2001).

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Injunctions have also been sought to stop litigation against unaffiliated entities with an actual or potential right to the same insurance policies as the debtor, since allowing those entities to deplete the debtor's insurance assets could have an adverse impact on the debtor and its constituents. For example, Babcock & Wilcox filed an adversary proceeding complaint seeking to extend the automatic stay to Atlantic Richfield Co. ("ARCO"), its co-defendant in a pre-petition non-asbestos toxic tort suit in federal court in Pittsburgh. B&W argued (i) it shared insurance assets with ARCO that would be depleted, to B&W's detriment, if the toxic tort suit were permitted to go forward against ARCO, and (ii) unless the automatic stay was extended, the federal court in Pittsburgh might make factual determinations made that could thereafter be used against B&W pursuant to the doctrine of collateral estoppel. This particular attempt to extend the stay was unsuccessful; the bankruptcy court denied B&W's request for preliminary injunctive relief and granted the underlying plaintiffs' motion to dismiss the adversary proceeding itself. Minute Entry, The Babcock & Wilcox Co. v. Hall (In re The Babcock & Wilcox Co.), Adv. Proc. No. 00-1051 (Bankr. E.D. La. Oct. 10, 2000). Both B&W and ARCO appealed to the district court.

See generally Celotex Corp. v. Edwards, 514 U.S. 300, 307-12 (1995); In re Eagle-Picher Indus., 963 F.2d 855, 860 (6th Cir. 1992); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1002 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

8. The provision that extends federal jurisdiction to non-diversity, non-federal question matters "related to" the bankruptcy case is 28 U.S.C. § 1334. The courts generally give the term "related to" a broad interpretation. *See, e.g.*, Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987).

28 U.S.C. § 1452 permits removal of any action that is within federal jurisdiction under 28 U.S.C. § 1334. Bankruptcy Rule 9027(a)(2) generally permits petitions to remove already-pending actions to be filed within 90 days of the filing of the bankruptcy petition. Fed. R. Bankr. P. 9027(a)(2)(A). *But see* Fed. R. Bankr. P. 9027(a)(2)(B) and (C) (setting other time periods in certain instances). On motion, these time periods can be extended. Fed. R. Bankr. P. 9006(b)(1); Jandous Elec. Constr. Corp. v. City of New York (In re Jandous Elec. Constr. Corp.), 106 B.R. 48 (Bankr. S.D.N.Y. 1989); In re St. Joseph's Hospital, 103 B.R. 643 (Bankr. E.D. Pa. 1989).

It is possible that the bankruptcy court will abstain under 28 U.S.C. § 1334(c) after a state court action is removed to federal court. In all cases, a bankruptcy court may choose to abstain. *See* 28 U.S.C. § 1334(c)(1) (a bankruptcy court may voluntarily abstain "in the interest of justice"). In some circumstances, a bankruptcy court *must* abstain, and remand the matter to state court, if certain requirements are met. *See* 28 U.S.C. § 1334(c)(2), 28 U.S.C. § 157(b)(4). Where an action has been removed from state court, the federal court may remand "on any equitable ground." 28 U.S.C. § 1452(b). *See generally* In re United States Brass Corp., 110 F.3d 1261, 1264-66 (7th Cir. 1997).

9. Informational Brief at 53, In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del., filed April 2, 2001).

10. In most bankruptcies, the court sets a single bar date for all prepetition claims. For ease of administration, however, asbestos debtors and other mass tort debtors have occasionally requested a separate bar date for personal injury claims. *See, e.g.*, In re The Babcock & Wilcox Co., 2000 WL 1511175 at *1 (E.D. La. Oct. 6, 2000) (bar date established for asbestos bodily injury claims); In re Dow Corning Corp., 142 F.3d 433 (table),1998 WL 180594 (6th Cir. 1998) (bar date for established for injuries allegedly caused by breast implants); In re Eagle-Picher Indus. Inc., 137 B.R. 679, 682 (Bankr. S.D. Ohio 1992) (discussing bar date for asbestos bodily injury claims).

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11. *See* Official Form No. 10, Federal Rules of Bankruptcy Procedure.

12. *See, e.g.*, Order and Reasons, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Aug. 25, 2000), at 15-27; Order and Reasons, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Oct. 6, 2000); Order Regarding Debtor's Motion For Entry Of An Order Establishing A Bar Date, Approving The Proof Of Claim Forms, And Approving The Form And Manner Of Notice, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Oct. 30, 2000). The debtor had actually requested even more detailed information, but the court found the debtor's proposed form to be "unnecessarily detailed" and unduly burdensome on claimants, and so determined that the debtor's proposed form had to be "substantially modified." Order and Reasons, In re The Babcock & Wilcox Co., No. 00-0558, Bankruptcy Case No. 00-10992 (E.D. La. Aug. 25, 2000), at 21, 22.

13. *See* Matter of Baldwin-United Corp., 55 B.R. 885 (Bankr S.D. Ohio 1985).

14. Because determination of certain issues must take place in the district court, rather than the bankruptcy court (*see* 28 U.S.C. § 157(b)(5)), asbestos debtors have regularly asked the district court to assume jurisdiction of certain claim-related issues. *See, e.g.*, In re The Babcock & Wilcox Co., 2000 WL 422372 (E.D. La. April 17, 2000); Informational Brief at 54-56, In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del., filed April 2, 2001).

15. Memorandum In Support Of Motion By Asbestos Claimants' Committee To Initiate Claims Estimation Procedure, In re The Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La., filed Dec. 27, 2000), at 3, 4.

16. Debtor's Response to the Asbestos Claimants' Committee's ('ACC') Motion To Initiate Claims Estimation Procedure, In re The Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La., filed Feb. 6, 2001) ("Debtor's Response"), at 1. The district court had previously ruled that it, rather than the bankruptcy court, would decide the following "threshold liability issues": "the appropriate standard of liability, the availability of punitive damages, the validity of claims by unimpaired individuals, the validity of claims based on unreliable scientific evidence of disease and/or causation, the appropriate statute of limitations, and the applicability of the sophisticated purchaser and government contractor defense." In re The Babcock & Wilcox Co., 2000 WL 422372 (E.D. La. April 17, 2000), at *5, *4. B&W argued that permitting the bankruptcy court to conduct a claims estimation would "subvert" this ruling by the district court. Debtor's Response at 1.

    Similarly, in a brief filed on the first day of its case, W.R. Grace advised the court that it too would seek to litigate a series of "threshold issues," including the following: "(1) the validity of claims by those who remain unimpaired; (2) the reliability of scientific evidence concerning whether Grace's vermiculite products can cause disease at all; (3) the absence of sufficient proof concerning exposure to Grace products; and (4) whether exposure is sufficient to constitute a substantial contributing factor to a claimant's alleged disease." Informational Brief, In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del., filed April 2, 2001), at 63-64 (footnotes omitted).

17. Debtor's Response at 2, 5-7.

18. *See, e.g.*, In re Piper Aircraft Corp., 162 B.R. 619 (Bankr S.D. Fla.), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd sub nom.* Epstein v. Official Committee of Unsecured Creditors (In re Piper Aircraft Corp.), 158 F.3d 1573 (11th Cir. 1995); In re Correct Mfg. Corp., 167 B.R. 458, 459 (Bankr. S.D. Ohio 1994). The asbestos trust provision of the Bankruptcy Code refers to future "demands," rather than future "claims," and defines "demand" as "a demand for

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payment, present or future, that . . . was not a claim during the proceedings leading to the confirmation of a plan of reorganization." *See* 11 U.S.C. § 524(g)(5)(A).

19. In re Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom.* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

20. There are, of course, a potentially infinite number of variables to be negotiated, depending on the particular circumstances. For example, provision must also be made in the plan for claims other than asbestos claims — if such claims are significant in amount relative to the debtor's ability to pay, then there may be a need to determine, through negotiation, what sort of payment is made to holders of such non-asbestos claims.

    The importance of the channeling injunction is illustrated by the Manville trust's recent announcement of a general 60-day moratorium in payment of claims. The Claims Resolution Management Corporation, wholly owned by the Manville trust, announced last month that it had received "almost twice as many claims during 2000 as it received during 1999." March 26, 2001 Memorandum from David Austern, President, Claims Resolution Management Corporation, to "Attorneys Who File Manville Trust Claims," at 1. *See* "Manville Claims Management Corp. Issues 60-Day Moratorium; Pro Rata Share To Be Examined," Mealey's Litigation Report: Asbestos, Vol. 16, No. 5 (April 6, 2001), at 5-6. "The nearly 60,000 claims filed during 2000 was the greatest number of claims the Trust has received in one year with the sole exception of 1989, the first full year of Trust operations." *Id.* Moreover, during the first ten weeks of 2001, the Trust received more than twice the number of claims it received during the same period in 2000. *Id.* If these claims could have been asserted against reorganized Manville, rather than being channeled to the trust, the new Manville would obviously be staggering under the weight of this increased claim volume.

21. Under 11 U.S.C. § 1121, at the outset of a Chapter 11 case the debtor has the exclusive right to propose a plan of reorganization. That exclusive period can be extended by order of the bankruptcy court. The Babcock & Wilcox plan was filed at the end of an extension of the exclusive period, the debtor apparently having concluded either that the time was ripe to propose a plan or that the court was unlikely to further extend the exclusive period. If the debtor proposes a plan during the exclusive period, it also has a period of time during which it has the exclusive right to solicit plan acceptances from parties in interest.

    The Babcock & Wilcox plan is reproduced in Mealey's Litigation Reports: Asbestos, Vol. 16, No. 5 (April 6, 2001), § B.

22. Underlying the Babcock & Wilcox plan is the following premise: if the amount of allowed asbestos claims is actually less than the company's net worth, then it is not insolvent and the equity interest of its parent company, McDermott International, should be protected rather than eliminated under a plan. *See* Debtor's Response at 3. That is why the Babcock & Wilcox plan proposes to transfer company stock only in the event of an inability to make payments under the promissory note. *See* 11 U.S.C. § 524(g)(2)(B)(i)(III) (a channeling injunction may be issued only if the asbestos trust established by the plan "is to own, *or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares . . .*") (emphasis supplied). It may fairly be anticipated that the debtor in the GAF case may try to take a similar approach, given the value of its non-debtor subsidiary BMCA, which apparently has no direct asbestos exposure.

23. This class of claims consists of claims arising out of asbestos exposure where, although the claimant and B&W entered into a settlement agreement prior to B&W's bankruptcy filing, no settlement payment has been made.

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24. In contrast, the requirements established under the Manville trust were: (i) a baseline ILO reading of 1/0; and (ii) lung capacity of 80% or less. The Manville trust had no requirement for certification by a physician that the claimant was disabled. ■

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Where Are They Now? A History Of The Companies That Have Sought Bankruptcy Protection Due To Asbestos Claims

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Commentary

Where Are They Now? A History Of The Companies That Have Sought Bankruptcy Protection Due To Asbestos Claims

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Since the early 1980s, dozens of companies facing asbestos claims have filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code. As the number of asbestos claims have continued to mount over time, and with plaintiffs' demands to the remaining asbestos defendants increasing dramatically, a number of additional companies — GAF, Babcock & Wilcox, Pittsburgh Corning, Owens Corning, W.R. Grace, Armstrong World Industries, and, just last month, USG Corp. — have also recently filed for bankruptcy protection.

Many articles discussing those recent bankruptcy filings have referred in passing to the "more than twenty" or "more than thirty" companies that have, over time, filed for bankruptcy because of asbestos-related lawsuits. But exactly who has filed for bankruptcy protection and what has happened to those companies since their bankruptcy filings? This article will provide a (hopefully) comprehensive chronology of the asbestos-related bankruptcies and a brief summary of the status of the more prominent filings.[1]

1. The First To Go

Facing an estimated 17,000 asbestos claims, and anticipating up to 120,000 more,[2] UNR Industries, Inc., was the first asbestos defendant to file for bankruptcy protection under Chapter 11.[3] More specifically, UNR and ten related companies, including UNARCO Industries, Inc., filed in the U.S. Bankruptcy Court for the Northern District of Illinois in July, 1982.[4] The UNR Industries trust was confirmed in 1989, and the trust was initially funded with 64% of the company's shareholder equity.[5] As of December 31, 2000, the trust had received more than 360,000 claims.[6]

Despite being in place for more than a decade, issues concerning the UNR trust continue to arise. In March, 2001, two claimants filed an adversary complaint in the bankruptcy court, challenging a $100 per claim filing fee. The trust had imposed the fee because unnamed law firms supposedly had "become careless in their filing practices."[7]

Perhaps the most well-known asbestos-related bankruptcy filing was made by Johns-Manville when it sought Chapter 11 relief in August, 1982 in the United States Bankruptcy Court for the Southern

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District of New York.[8] Johns-Manville's reorganization plan, confirmed by the bankruptcy court in 1988, created the Manville trust with 80% of shareholder equity.[9] At that time, the Manville Trust was expected to receive between 83,000-100,000 asbestos claims over the expected 49-year life of the trust.[10] However, since its first full year of operation in 1989, the Manville Trust has paid out over $2.5 billion to nearly 360,000 beneficiaries.[11]

The Manville Trust also continues to receive record numbers of claims. Nearly 60,000 claims were filed with the trust during 2000, the most claims filed in one year since the trust's first full year of operations, and during the first ten weeks of 2001 the trust had received twice as many claims as it had during the same period in 2000.[12] Moreover, in the first quarter of 2001 alone, over 25,000 claims were paid out, totaling $107 million.[13] As a result, the trust is now considering whether to lower payments to as low as 5-6.5¢ on the dollar.[14]

The issue of how to deal with so-called "future claimants" (*i.e.* those who were exposed to asbestos pre-petition but who have not manifested any injuries) surfaced as a result of the UNR and Johns-Manville bankruptcies. Congress responded in 1994 with specific amendments to the Bankruptcy Code, now codified at 11 U.S.C. § 524(g). As a result of those amendments, companies that have filed for bankruptcy since 1994 have been able to "channel" all claims — including all future claims — to a trust which can appoint a "futures representative" to act on behalf of such claimants.[15]

In addition to UNR Industries and Johns-Manville, three other companies sought bankruptcy protection because of asbestos claims in the early 1980s. Amatex Corp. filed in November, 1982 in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania, at which point the company was already facing over 9,000 asbestos claims.[16] Its reorganization plan was approved in 1990,[17] and over time, the Amatex trust has paid out over $11 million.[18] Waterman Steamship Corp. filed for Chapter 11 bankruptcy protection in December, 1983 and its reorganization plan was confirmed in 1986.[19] Finally, Wallace & Gale Company filed for Chapter 11 in 1984.[20]

2. *The Next Wave*

The bankruptcy filings of Johns-Manville, UNR and others in the early 1980s set the stage for a rush of new bankruptcies in the ensuing decade. Between 1985 and 1994, nearly twenty companies filed for Chapter 11 bankruptcy protection as a result of asbestos litigation.

In 1985, Forty-Eight Insulations, Inc., a manufacturer of asbestos-containing products, filed for bankruptcy, facing more than 26,000 claims that had been brought against the company.[21] The Modified Fourth Amended Plan of Liquidation was confirmed by the U.S. Bankruptcy Court for the Northern District of Illinois in 1995 and included an injunction protecting Forty-Eight's parent company, Foster Wheeler Corp.[22] The trust was funded with 100% of shareholder equity.[23]

In July, 1986, Philadelphia-based Pacor (Philadelphia Asbestos Corporation), Inc. and Pacor Material Supply Co., small local distributors, filed for Chapter 11.[24] Their reorganization plan was confirmed in November, 1989.

Standard Insulations, Inc. filed for Chapter 11 in August, 1986 in the U.S. Bankruptcy Court for the Western District of Missouri. By the bar date in 1991, the company had received more than 23,000 claims.[25]

In November, 1986 Prudential Lines, Inc. consented to bankruptcy proceedings against it and the Second Amended Joint Plan of Reorganization was confirmed in 1990.[26] That same month, McLean Industries, First Colony Farms, and their subsidiaries, U.S. Lines and United States Lines (S.A.), containerized cargo shipping companies, filed for Chapter 11.[27] The resulting trust has received nearly 15,000 claims.[28]

Indiana-based Gatke Corp. filed for Chapter 11 protection in March, 1987, and by 1989 estimated that it would receive 800–1,000 claims.[29] The proceedings were converted to Chapter 7 in July,

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1992. In July, 1997, Nicolet, Inc., a former manufacturer of asbestos-containing products, also filed under Chapter 11 after receiving over 50,000 asbestos claims.[30] Later that year, Todd Shipyards filed for Chapter 11 protection, and the company's reorganization plan was confirmed in 1990.[31]

Perhaps the longest asbestos-related bankruptcy proceedings began in 1989 with the Chapter 11 filing of Raytech Corporation. Raytech was formed in order to insulate the assets of Raymark Industries, a vehicle parts manufacturer, from asbestos-related litigation.[32] After extensive litigation, Raytech was ultimately held responsible as a successor to Raymark. In the spring of 1998, both Raymark Industries and Raymark Corp. filed Chapter 11 petitions and those bankruptcy proceedings were combined with the earlier Raytech proceeding.[33] In April, 2001, the Connecticut bankruptcy court approved a settlement that resolved the last hurdles to the approval of Raytech's Second Amended Plan of Reorganization.[34]

Delaware Insulations, a distributor of asbestos products, principally in Delaware, filed for Chapter 11 in May, 1989 and a trust was created in 1994.[35]

In October, 1990, Celotex Corp. and Carey Canada Inc., filed for Chapter 11 protection in the U.S. Bankruptcy Court for the Middle District of Florida.[36] As of the filing date, Celotex and Carey Canada had received 99,178 and 39,803 asbestos claims respectively.[37] The 1996 confirmed reorganization plan was funded with 100% of the reorganized Celotex's stock.[38] To date, Celotex has received 410,000 claims.[39]

In a related matter, Hillsborough Holdings Corp. filed for bankruptcy in December, 1989 after being named a defendant in a rising number of asbestos suits.[40] Hillsborough had become the parent of Jim Walter Industries and 30 subsidiaries owned by Jim Walter Industries.[41] Among the corporate predecessors for which Hillsborough allegedly was responsible was Celotex.[42] Hillsborough was sued by plaintiffs seeking to pierce the veil with regard to claims involving exposure to Celotex or Jim Walter products.[43] The Hillsborough reorganization plan, which settled the veil piercing claims for approximately $375 million, was confirmed in 1995.[44]

Two weeks after Celotex's filing, Ancor Holdings, Inc. and its wholly-owned subsidiary, National Gypsum Company, followed suit.[45] Under the reorganization plan, approved in 1993, a "new" National Gypsum Co. was established.[46] The National Gypsum Settlement Trust was created with 100% of shareholder equity.[47]

Facing lawsuits pending in 48 states, Eagle-Picher Industries and six related companies filed for bankruptcy in January 1991 in the U.S. Bankruptcy Court for the Southern District of Ohio.[48] Prior to filing, Eagle-Picher had already had been named in 141,000 claims or suits.[49] The reorganization plan was confirmed in 1996, funded with 100% of shareholder equity.[50]

In February, 1991, H.K. Porter Co. filed as well,[51] with approximately 73,000 unresolved claims pending at the time.[52] Affidavits submitted in connection with the bankruptcy proceeding estimated that the company would face nearly 560,000 total claims with a present value of more than $2 billion.[53] In June, 1999 H.K. Porter's reorganization plan was confirmed, which called for a stay in litigation against certain related entities.[54]

Several other defendants also filed in this period. Canadian-based Cassiar Mines, which had mined, milled and sold raw asbestos fiber, filed for bankruptcy in 1992; it was later liquidated.[55] Kentile Floors filed for Chapter 11 bankruptcy protection in 1992,[56] and American Shipbuilding, Inc. filed in November 1993.[57]

Facing over 100,000 lawsuits, Keene Corp. filed for Chapter 11 in December, 1993.[58] Keene acquired its asbestos liability primarily from its 1968 purchase of Baldwin Ehret-Hill, a small manufacturer of acoustical ceilings, ventilation systems and thermal insulation products.[59] In 1996, Keene's Amended Plan was confirmed,[60] funded by 100% of shareholder equity.[61]

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3. *The Mid-To-Late 1990s*[62]

The mid-to-late 1990s saw a slowdown in the number of asbestos bankruptcies with none of the more prominent defendants filing for bankruptcy protection. But some smaller companies did seek Chapter 11 relief during this period.

Lykes Brothers Steamship filed in 1995.[63] In 1996, Rock Wool Manufacturing filed for bankruptcy.[64] At the time it filed, the company had already resolved over 52,000 claims, but 94,000 claims remained unsettled and Rock Wool had estimated it would still face 325,000 future claims.[65] M.H. Detrick,[66] Brunswick Fabricators[67] and Fuller-Austin[68] filed for Chapter 11 protection in 1998, and Harnischfeger Corp. filed in June 1999.[69] Finally, Vermont-based manufacturer Rutland Fire Clay, facing 37,000 pending claims, filed in October 1999.[70]

4. *The Recent Burst Of Filings*

In the past eighteen months, seven prominent asbestos defendants, as well as a number of smaller companies, have filed for bankruptcy protection as a result of asbestos claims.

First among these was Babcock and Wilcox Co., which filed for Chapter 11 in February, 2000.[71] The bankruptcy filing also included B&W subsidiaries Americon, Inc., B&W Construction Co., and Diamond Power International, Inc.[72] As of the filing, the company had received over 385,000 asbestos claims and had paid more than $1.6 billion.[73] Of the recent burst of bankruptcy filings, Babcock & Wilcox is the only company to have a pending reorganization plan at this time. That proposed reorganization plan sets forth specific medical criteria aimed at limiting payments received by unimpaired claimants. A key issue to be resolved in this contentious bankruptcy concerns the equity interest of B&W's parent company. The "future claimants" have argued that absent an agreed upon reorganization plan, B&W's parent cannot preserve that equity interest.

Shortly after B&W's filing, in April, 2000, Pittsburgh Corning also entered bankruptcy.[74] At the time of that filing, Pittsburgh Corning had already spent $1.2 billion and had received and settled at least 435,000 asbestos claims.[75]

In October, 2000, Owens Corning Corp. also sought Chapter 11 bankruptcy protection.[76] The filing included 17 of the company's domestic subsidiaries, including Fibreboard Corp., Owens Corning Fiberglas Technology, Inc., and CDC Corp. As of the date of the filing, Owens Corning had received at least 460,000 asbestos claims and paid $5 billion.[77] The period in which Owens Corning has the exclusive right to file a reorganization plan has been extended to August 2, 2001.

In the final month of 2000, Armstrong World Industries Inc., a Pennsylvania-based maker of ceiling and floor products, and its subsidiaries, Nitram Liquidators Inc. and Desseaux Corp., filed for bankruptcy in the face of more than 175,000 pending asbestos claims.[78] Armstrong's exclusive period for filing a plan has been extended until October 5, 2001.

Just days into 2001, G-I Holdings, Inc., the successor to GAF Corporation, filed for Chapter 11.[79] Since 1970, the company and its predecessors had paid more than $1.5 billion as a result of asbestos claims and had received at least 500,000 claims.[80] The bankruptcy court refused to grant a request that G-I be ordered to place its principal operating subsidiary, BMCA, into Chapter 11.[81]

In April, 2001, W.R. Grace and 61 of its domestic affiliates filed for Chapter 11 relief in bankruptcy court in Delaware.[82] As of the filing, W.R. Grace had already paid $1.9 billion in asbestos-related costs and had received 325,000 claims.[83] In the fourth quarter of 2000, the company cited an 81% rise in the number of claims, with 48,000 new claims being filed in 2000 alone.[84]

Three smaller asbestos defendants have also recently filed for bankruptcy: Burns and Roe, Inc., an engineering and construction firm, which had settled over 2,000 cases, but over the past year

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alone had seen a dramatic increase in the number of new claims;[85] E.J. Bartells; and Skinner Engine Company, an Erie, Pennsylvania rubber and plastics equipment maker, which filed for bankruptcy in April 2001.[86]

In June, 2001, USG Corp. and its major domestic subsidiaries United States Gypsum, Co., USG Interiors, and L & W Supply Corp., all filed under Chapter 11, citing projected asbestos costs for this year of over $275 million on top of $260 million in 1999 and 2000 combined.[87] The number of claims against USG's subsidiary U.S. Gypsum had grown to 48,000 in 1999 and 52,000 in 2000, with claims in the first quarter of 2001 coming in at the same pace. USG had been lobbying Congress for a legislative solution but said that slow progress combined with the shift in control in the U.S. Senate had made Chapter 11 the only viable alternative.[88]

5. Who's Next?

USG almost certainly will not be the last asbestos-related bankruptcy. Although most of the manufacturers of asbestos and asbestos products have already sought Chapter 11 relief, the number of claims continue to rise as do plaintiffs' demands on the remaining solvent, formerly peripheral, defendants. Indeed, on July 23, 2001, United States Mineral Products Co. filed for Chapter 11 protection. (As of the date of that filing, U.S. Minerals had received more than 223,000 asbestos claims of which more than 165,000 were pending.[89]) Absent some type of federal legislation, the Bankruptcy Code is the only mechanism that currently exists for addressing a problem that the tort system has been unable to handle.

ENDNOTES

1. Though not the subject of this article, it is important to note that related entities, such as insurers of asbestos defendants, may have gone into receivership because of asbestos claims. Also not the subject of this article are the bankruptcies of entities that had been named as defendants in asbestos lawsuits but which sought bankruptcy protection for other reasons. The authors would be interested in obtaining information about additional companies that have sought bankruptcy protection as a result of asbestos claims. Mr. Plevin can be reached by e-mail at mplevin@crowell.com. Mr. Kalish can be reached by e-mail at pkalish@crowell.com.

2. *See In re UNR Industries, Inc.*, 725 F.2d 1111, 1113 (7th Cir. 1984).

3. North American Asbestos Corporation actually filed for dissolution in 1978. *See North American Asbestos Corp. v. Superior Court*, 128 Cal. App. 3d 138, 179 Cal. Rptr. 889, 890 (1982).

4. *See, e.g., In re UNR Industries*, Inc., 29 B.R. 741 (Bankr. N.D. Ill. 1983).

5. *See UNR Indus., Inc. v. Continental Cas. Co.*, 942 F.2d 1101, 1108 (7th Cir. 1991), *cert. denied*, 503 U.S. 971 (1992); Presentation Materials of Prof. Francis McGovern at Mealey's Asbestos Bankruptcy Conference (June 19, 2001) (on file with authors).

6. *See UNR Asbestosis Victims Sue Trust In Bankruptcy Court, Allege It Breached Duty*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 16, No. 10 (June 15, 2001).

7. Complaint of John Bechtel and Clinton Bennett at ¶ 14, *In re UNR Industries, Inc.* (Bankr. N.D. Ill. 2001) (No. 82B9841-51).

8. *See, e.g., In re Johns-Manville Corp.*, 36 B.R. 727 (Bankr. S.D.N.Y. 1984).

9. *See* McGovern Presentation Materials, *supra* note 5.

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10. *See* David T. Austern, The Manville Trust Experience, Paper Presented at Mealey's Asbestos Bankruptcy Conference (June 18, 2001) (on file with authors).

11. *See* Memorandum from David T. Austern, President, Claims Resolution Management Corp., to Attorneys Who file Manville Trust Claims 1 (March 26, 2001) (on file with authors).

12. *Id.*

13. *See Manville Trust Settles 25,600 Claims for $107 Million In First Quarter of 2001*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 16, No. 7 (May 4, 2001).

14. *See* Austern Paper, *supra* note 10.

15. *See generally* Mark D. Plevin and Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 16, No. 6 (April 20, 2001).

16. *See In re Amatex Corp.*, 30 B.R. 309, 310 (Bankr. E.D. Pa. 1983).

17. *See Amatex Reorganization Plan Approved*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 5, No. 7 (May 4, 1990).

18. Presentation of Walter Taggart, Mealey's Asbestos Bankruptcy Conference (June 18, 2001) (on file with authors).

19. *See In re Waterman Steamship Corp.*, 200 B.R. 770, 773 (Bankr. S.D.N.Y. 1996).

20. *See Order for Hearings By Bankruptcy Court Not Appealable*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 10, No. 24 (Jan. 19, 1996).

21. *See Forty-Eight Insulations Settles with Carriers for $37.2 Million*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 9, No. 17 (October 7, 1994).

22. *See Forty-Eight Insulations Liquidation Plan Confirmed*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 10, No. 12 (July 21, 1995).

23. *See* McGovern Presentation Materials, *supra* note 5.

24. *In re Pacor, Inc.*, No, 86-03252G (Bankr. E.D. Pa. 1986).

25. *See Standard Insulations Asbestos Committee Proposes Plan*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 7, No. 6 (April 17, 1992); *Notes: Standard Insulations' Liquidation Plan Confirmed*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 7, No. 20 (November 20, 1992).

26. *See In re Prudential Lines, Inc.*, 148 B.R. 730, 735 (Bankr. S.D.N.Y. 1992).

27. *See* Form 10-K of Janus Hotels & Resorts Inc., Dec. 31. 2000 at Part I, Item 1 (the names of U.S. Lines and U.S. Lines (S.A.) were changed to Janus Industries, Inc. and JI subsidiary Inc. as part of the reorganization).

28. *See id.* at Part I, Item 4.

29. *See In re Gatke Corp.*, 117 B.R. 406, 407 (Bankr. N.D. Ind. 1989).

30. *See In re Nicolet, Inc.*, 80 B.R. 733, 734-35 (Bankr. E.D. Pa. 1987).

31. *See Texas Plaintiffs Seek to Reopen Todd Shipyards Bankruptcy Proceedings*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 15, No. 10 (June 16, 2000).

32. *See* Mem. of Decision and Order Approving Settlement Agreement, *In re* Raytech Corp., (Bankr. D. Conn. 2001) (No. 89-00293).

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33. *See id.*

34. *See id.*

35. *See Bar Date Set for Claims in Delaware Company's Bankruptcy*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 9, No. 24 (January 20, 1995).

36. *In re Celotex Corp.*, 204 B.R. 586 (Bankr. M.D. Fla. 1996).

37. *See id.* at 604.

38. *See* McGovern Presentation Materials, *supra* note 5.

39. Presentation of Lance Pool, Mealey's Asbestos Bankruptcy Conference (June 18, 2001) (on file with authors).

40. *In re Hillsborough Holdings Corp.*, 176 B.R. 223 (Bankr. M.D. Fla. 1994).

41. *Id.* at 229.

42. *Id.*

43. *See id.*

44. *See Hillsborough Holdings Reorganization Plan, Veil-Piercing Settlement Agreement Confirmed*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 10, No. 4 (March 17, 1995).

45. *See Ancor, National Gypsum File for Chapter 11 Bankruptcy*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 5, No. 19 (November 2, 1990).

46. *See In re National Gypsum Co.*, 257 B.R. 184, 187 (Bankr. N.D. Tex. 2000).

47. *See* McGovern Presentation Materials, *supra* note 5.

48. *In re Eagle-Picher Industries, Inc.*, 203 B.R. 256 (Bankr. S.D. Ohio 1996).

49. *See id.* at 260-61.

50. *See* McGovern Presentation Materials, *supra* note 5.

51. *In re H.K. Porter Co.*, 156 B.R. 16 (Bankr. W.D. Pa. 1993).

52. *See H.K. Porter Bankruptcy Plan Confirmed by Judge*, MEALEY'S LITIGATION REPORT: ASBESTOS Vol. 14, No. 11 (July 2, 1999).

53. *See id.* This figure includes both unresolved pre-bankruptcy claims and current claims.

54. *See id.*

55. *See Cassiar Mining Corp. v. Superior Court*, 66 Cal. App. 4th 550, 78 Cal.Rptr. 2d. 167, 168 (1998).

56. *See Jan. 17 Bar Date Set for Asbestos Property Claims Against Kentile*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 11, No. 21 (Dec. 6, 1996).

57. *See* Queena Sook Kim, *Firms Hit By Asbestos Litigation Take Bankruptcy Route*, WALL STREET JOURNAL, December 21, 2000, at B4.

58. *In re Keene Corp.*, 188 B.R. 903 (Bankr. S.D.N.Y. 1995).

59. *See* KEENE CORP., 1992 ANNUAL REPORT 3 (1992).

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60. *See Contempt Ruling Against Keene Trust for Late Payment Upheld in New York*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 14, No. 2 (Feb. 19 1999).

61. *See* McGovern Presentation Materials, *supra* note 5.

62. Additional companies that reportedly filed for bankruptcy protection during the 1980s or 1990s include Continental Products Corp., Powhatan Mining Co. and Atlas Asbestos.

63. *See* McGovern Presentation Materials *supra* note 5.

64. *See id.*

65. *See Confirmation Order Signed in Rock Wool Bankruptcy in Alabama*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 14, No. 22 (December 17, 1999).

66. *See M.H. Detrick Co. Files Notice of Bankruptcy*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 13, No. 2 (Feb. 20, 1998).

67. *See* Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967 (1992).

68. *See In re Fuller-Austin Insulation Co.*, 1998 U.S. Dist. LEXIS 18340 (D. Del. 1998); McGovern Presentation Materials, *supra* note 5.

69. *See 9 Bankrupt Companies Dismissed from Cases on MDL 875 Docket*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 14, No. 13 (August 6, 1999.).

70. *See Rutland Fire Clay Files for Bankruptcy in Vermont*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 14, No. 18 (Oct. 22, 1999).

71. *In re The Babcock & Wilcox Co.*, No. 00-10992 (Bankr. E.D. La. 2000).

72. *Id.*

73. *See* Daniel Gross, *Recovery Lessons From an Industrial Phoenix*, Apr. 29, 2001, N.Y. TIMES at Business 4.

74. *In re Pittsburgh Corning Corp.*, No. 00-22876 (Bankr. W.D. Pa. 2000).

75. *See* Recovery Lessons, *supra* note 73.

76. *In re Owens Corning Corp.*, Nos. 00-3837, 00-3854 (Bankr. D. Del. 2000).

77. *See* Recovery Lessons, *supra* note 73.

78. *In re Armstrong World Industries, Inc.*, No. 00-04471 (Bankr. D.Del. 2000). *See also Citing Overwhelming Asbestos Liability Armstrong Files for Bankruptcy Reorganization*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 15, No. 22 (December 18, 2000).

79. *In re G-I Holdings, Inc.*, No. 01-30135 (Bankr. D.N.J. 2001).

80. *See* Recovery Lessons, *supra* note 73.

81. *See* Plevin & Kalish, *supra* note 15.

82. *In re W.R. Grace and Co.*, Nos. 01-1139, 01-1140 (Bankr. D. Del. 2001).

83. *See* Recovery Lessons, *supra* note 73.

84. *See Grace Reports 81 Percent Increase in Asbestos Filings; Hints at Possible Bankruptcy*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 16, No. 1 (February 2, 2001).

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85. *See Engineering Firm Burns and Roe Files for Reorganization, Cites Recent Spike in Claims*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 15, No. 23 (January 5, 2001).

86. *See* Brad Dawson, *Skinner Engine Seeks Chapter 11 Protection*, RUBBER & PLASTICS NEWS, Vol. 30, No. 22, May 28, 2001, at 3.

87. *See In re United States Gypsum Co.*, No. 01-02095 (Bankr. D. Del. 2001); Patricia Callahan, *USG Files for Chapter 11 After Referring to Senate's Power Shift as Latest Setback*, WALL STREET JOURNAL, June 26, 2001, at A4.

88. *Id.*

89. *See U.S. Mineral Products Co. Becomes latest Asbestos Company to File For Chapter 11 Bankruptcy Protection*, MEALEY'S LITIGATION REPORT: ASBESTOS, Vol. 16, No. 13 (August 3, 2001). ■

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Where Are They Now? Part Two:

A Continuing History Of The Companies That Have Sought Bankruptcy Protection Due To Asbestos Claims

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Commentary

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More than a year ago, we published in these pages what we described then as "a (hopefully) comprehensive chronology of the asbestos-related bankruptcies and a brief summary of the status of the more prominent filings."[1] We also made the not-so-fearless prediction that the June, 2001 bankruptcy filing by USG Corp. "almost certainly will not be the last asbestos-related bankruptcy."[2] Not surprisingly, our crystal ball has proved completely accurate, as there have been at least ten asbestos-related bankruptcies filed in the past year and a half, bringing the total of asbestos-related bankruptcies to nearly 60 companies. More to the point, as noted by the RAND Institute for Civil Justice, both plaintiffs' and defendants' attorneys expect that all "traditional" asbestos defendants will have filed for bankruptcy by the end of 2003.[3]

This article updates our last one by noting the asbestos-related bankruptcies that have been filed in the past eighteen months and summarizing some key developments in asbestos bankruptcies. At the end of the article, we present a chart listing asbestos bankruptcies that have been filed so far.

1. Who Filed The Most Recent Asbestos Bankruptcies?

First among the new asbestos-related bankruptcy filings in the past eighteen months was auto-parts maker Federal-Mogul, which filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware on October 1, 2001.[4] Facing more than 365,000 claims and about $700 million in costs since 1998 and expecting to pay $900 million by 2004 to settle asbestos claims, the Michigan-based company said it was left with no other choice but to pursue Chapter 11.[5]

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Federal-Mogul's filing arguably spurred the extraordinary order issued on November 27, 2001 by Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit, in which he assigned five asbestos-related bankruptcy cases pending in the District of Delaware — Federal-Mogul, Owens Corning, W.R. Grace, Armstrong World Industries and USG Corp. — to U.S. District Judge Alfred M. Wolin of the District of New Jersey for coordinated supervision.[6] Although there has been some speculation that other cases pending in the Third Circuit might be assigned to Judge Wolin (such as G-I Holdings in New Jersey or Kaiser Aluminum in Delaware), his authority has yet to be expanded.

Swan Transportation Company, an inactive subsidiary of Tyler Technologies, was the last asbestos-related bankruptcy filing of 2001. Swan filed for Chapter 11 protection in the U.S. Bankruptcy Court for the District of Delaware on December 20, 2001.[7] Tyler Technologies intends to use the Swan Transportation bankruptcy as a mechanism for resolving approximately 1,400 asbestos and silica claims.[8]

In January, 2002, North American Refractories Co. ("NARCO"), a subsidiary of RHI Refractories Holding Company, filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Western District of Pennsylvania.[9] NARCO cited "overwhelming asbestos claims" as the reason for its filing.[10]

In February, 2002, Kaiser Aluminum Corporation, Kaiser Aluminum and Chemical Corporation and certain wholly owned subsidiaries filed Chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware, citing, among other reasons, the increasing burden of asbestos litigation.[11] At the time of its filing, Kaiser faced approximately 112,000 asbestos liability suits and liability costs of $633 million or more.[12] Kaiser appears to be unusual among the recent wave of asbestos bankruptcy filings in that the debtors also face significant non-asbestos financial pressures. For instance, along with the costs of the asbestos litigation, in announcing its Chapter 11 filing Kaiser cited significant near-term debt maturities, financial problems in the aluminum industry generally, and rising costs of worker retirements and pensions.[13] The fact that Kaiser's bankruptcy is not solely asbestos-driven promises to give the case a layer of added complexity.

Also in February, 2002, Harbison-Walker Refactories Co. and A.P. Green Industries, Inc., subsidiaries of RHI Refractories Holding Company, filed Chapter 11 petitions in the U.S. Bankruptcy Court for the Western District of Pennsylvania.[14] The cases have been consolidated for administrative purposes with the Chapter 11 case of another RHI subsidiary, Global Industrial Technologies, Inc. RHI's press release announcing the Harbison-Walker and A.P. Green filings cited the "soaring number of asbestos claims" as the reason for the filings.[15] Harbison-Walker faced more than 130,000 asbestos-related claims at the time of filing.[16]

Two asbestos bankruptcies were filed during March, 2002. First among these was refractories producer Plibrico, which filed for bankruptcy protection on March 13, 2002 in the U.S. Bankruptcy Court for the Northern District of Illinois.[17] Facing approximately 100,000 asbestos-related claims, Plibrico reported that it had no choice but to seek Chapter 11 protection.[18]

Two days later, on March 15, 2002, Porter-Hayden Co., with 58,000 pending asbestos cases, sought Chapter 11 protection in the U.S. Bankruptcy Court for the District of Maryland.[19] One of Porter-Hayden's attorneys stated that the bankruptcies of other asbestos defendants had resulted in increased settlement demands and new filings from plaintiffs' attorneys that had not previously sued Porter-Hayden.[20]

On April 8, 2002, Shook and Fletcher, facing more than 50,000 asbestos claims, filed a "prepackaged" Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Alabama.[21] The plan includes provisions for the creation of an asbestos trust, along with a scheme for classifying potential claims, methods of distributing settlement payments and determining equity interests, and a protocol for dealing with claim disputes.[22] Shook and Fletcher indicated that if the

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prepackaged plan is not approved, it would be forced to resort to more "traditional" (*i.e.*, more expensive and drawn-out) Chapter 11 procedures.[23]

Citing the rising tide of asbestos claims against it, Artra Group, Inc. filed for Chapter 11 protection in the U.S. Bankruptcy Court for the Northern District of Illinois on June 3, 2002.[24] Facing approximately 50,000 asbestos-related claims and upwards of $100 million in unresolved judgments, the petition encompasses numerous subsidiaries including Synkoloid Co., which has suffered several adverse verdicts over the past years.[25]

On August 19, 2002, Asbestos Claims Management Corporation ("ACMC"), formerly known as National Gypsum Co., filed a prepackaged Chapter 11 plan in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division.[26] ACMC was created under the confirmed Chapter 11 reorganization plan of National Gypsum as a vehicle to compensate asbestos claimants against National Gypsum, which had filed for bankruptcy protection in 1990. ACMC ran out of money to pay asbestos claimants, forcing claimants against ACMC to make their claims directly against "new" National Gypsum Co., a separate company established under National Gypsum's reorganization plan. ACMC and new National Gypsum Co. entered into a settlement in April, 2002 to resolve current asbestos claims as well as an estimated 400,000 future claims. New National Gypsum agreed to contribute $347 million to the creation of an "NGC Bodily Injury Trust."[27] ACMC filed the Chapter 11 plan to implement the settlement and to provide new National Gypsum with an injunction against future asbestos claimants under Section 524(g).[28]

Citing the dramatically rising number of asbestos claims against it as a result of the bankruptcy filings of several other asbestos defendants, ACandS, Inc. filed for Chapter 11 protection in the U.S. Bankruptcy Court for the District of Delaware on September 16, 2002.[29] ACandS reported that it had more than 250,000 asbestos claims pending against it at the time of filing.[30]

Also pointing to an unmanageable number of asbestos personal injury claims against it, A-Best Products Co. Inc. filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware on September 20, 2002.[31] A-Best reported that it was defending approximately 50,000 pending asbestos cases as of May 1, 2002.[32]

On October 1, 2002, JT Thorpe Company filed a prepackaged Chapter 11 plan in the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division.[33] JT Thorpe reported costs for asbestos claims to date in excess of $110 million, half of which has been incurred since January, 2000.[34] JT Thorpe estimated that it has 50,000 current claims against it totaling over $130 million and that the company is being named in approximately 600 new lawsuits per month.[35] JT Thorpe filed its Chapter 11 case to implement a settlement agreement among JT Thorpe, the Asbestos Claimants Committee, and Thorpe Corporation. Thorpe Corporation and its subsidiaries agreed to fund a Section 524(g) trust in an amount equal to the value of JT Thorpe in return for a release of Thorpe Corporation and certain of its subsidiaries from liability for asbestos claims.[36]

It doesn't take much of a crystal ball to predict that the number of asbestos-related bankruptcies will continue to increase during the coming months. As JT Thorpe recently stated, a large proportion of asbestos "claims involve claimants who . . . have manifested no asbestos-related injury. With the demise of traditional manufacturing defendants, claimants are looking more and more to [other] defendants for compensation for their claims."[37] As companies that were heretofore peripheral to asbestos litigation are dragged into the midst of it, we are certain to see an increasing number of those companies fall under the weight of that litigation and seek Chapter 11 protection.

2. New Developments In Asbestos-Related Bankruptcies

In addition to these new bankruptcies, the past months have seen new legal strategies in the bankruptcy arena. With claims against asbestos defendants continuing to rise — some defendants saw up to 90,000 new asbestos lawsuits in 2001 alone[38] — and facing a tort system that has

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not provided any relief, certain companies have asked the bankruptcy courts to take a more active role in changing the asbestos litigation environment.

As noted above, a major development in the field of asbestos-related bankruptcies occurred in November, 2001 when Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit assigned supervisory responsibility over five major asbestos bankruptcies to U.S. District Judge Alfred M. Wolin of the District of New Jersey.[39] In his order, Judge Becker stated:

> [I]t is my considered judgment that these bankruptcy cases, which carry with them tens of thousands [of] asbestos claims, need to be consolidated before a single judge so that a coordinated plan for management can be developed and implemented. It is contemplated that Judge Wolin will assign a portion of these cases to various bankruptcy judges sitting in the District of Delaware so they may assist in moving these matters forward. As a significant portion of the asbestos cases in this country are proceeding under the aegis of this litigation, I deem this assignment and consolidation critically important to the administration of justice.[40]

Judge Becker stated that bringing together the Armstrong World Industries, Federal-Mogul, Owens Corning, USG Corp. and W.R. Grace bankruptcies under the supervision of a single district judge might not only expedite the proceedings, but also provide some level of consistency in the rulings.[41]

After Judge Becker issued this order, the "Big Three" automakers (Ford, Chrysler, and General Motors) and others petitioned the court in the *Federal-Mogul* bankruptcy to use its "related to" jurisdictional power to provide a coordinated and consistent approach for resolving common issues such as medical causation issues in connection with friction products such as brake pads. (28 U.S.C. § 1334(b) extends bankruptcy jurisdiction to state law claims between non-diverse parties where the litigation may have an effect on the debtor's estate).[42] Specifically, the movants alleged that claims against them were "related to" the debtor's bankruptcy because any resulting judgment against the movants would create indemnity claims against the debtor, which would affect the debtor's estate.

Citing the Third Circuit's decision in *Pacor, Inc. v. Higgins*,[43] Judge Wolin held that the claims against the movants did not qualify for "related to" jurisdiction because a judgment against the movants would not bind the Federal-Mogul estate.[44] Alternatively, Judge Wolin said he would abstain from exercising jurisdiction over the claims against the movants in light of concerns for comity and the court's orderly management of the bankruptcy.[45]

The movants appealed to the Third Circuit, which held that it lacked appellate jurisdiction to review Judge Wolin's decision because of federal statutes that preclude review, "by appeal or otherwise," of district court remand orders.[46] The court acknowledged that both the Federal-Mogul bankruptcy and the movants' attempt to remove state court lawsuits to Delaware bankruptcy court were symptoms of what the court termed "the crisis created by the current asbestos litigation."[47] The court went on to say that "[a]rguably, a procedure authorizing the aggregation of state court cases, such as the Friction Product Claims, into a nationwide class action would provide a mechanism for a *Daubert* hearing like the one Defendants seek."[48] However, the court noted, "such proposals, frequently made, have not passed both houses of Congress."[49]

Bankruptcy courts have also been asked to address issues concerning the huge number of claims being filed by so-called "unimpaired" claimants. The experience of the Johns-Manville Trust provides an example of the drain on assets created by unimpaired claimants. New claims filed with the Trust grew from 23,674 in 1997 to 89,438 in 2001.[50] Most of the increase was driven by claimants who do not suffer from any functional impairment, leading the Manville Trust to re-

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port that "non-malignancy claims from principally unimpaired individuals continue to defy projections."[51] Notably, in 2001, 93 percent of the claims filed were by persons who were not suffering from any asbestos-related cancers.[52] Between 1999 and 2001, the Trust actually paid out more for claims in which the claimant did not even assert impairment than it paid out for all cancer claims combined.[53]

In September 2002, the Manville Trust proposed an amendment to its payment provisions based upon the history of claims filed against it and its estimation of future claims. As a result, the value of all claims against the Trust was discounted by 95 percent of the values provided by the payment plan. Individuals with mesothelioma are still paid relatively little when compared to unimpaired claimants under the amended plan, leading many to argue that not enough has been done to address the unimpaired claimant problem. The Manville Trust further proposed to review and revise the payment plan as necessary in one year, based on the manner in which claims come in and are paid during the current year.[54]

Further, in an attempt to manage the increasing number of claims made by unimpaired claimants, and to preserve assets for claimants who are truly sick, USG Corporation and W.R. Grace have sought to establish a substantive claims estimation process in their respective bankruptcy cases, which would require claimants to produce sufficient evidence and demonstrate a sufficient legal grounding for their claims before those claims would be allowed.[55] (There have been similar efforts to employ objective medical crittria in the Babcock and Wilcox and other asbestos bankruptcies.) Both motions are pending before Judge Wolin.

Another noteworthy recent trend is the recent spate of "pre-packaged" bankruptcy filings such as those filed by Shook and Fletcher and JT Thorpe (all discussed above). In these cases, the debtor circulates its plan of reorganization and required disclosure statement pre-petition and solicits the required approvals before filing its bankruptcy case. This procedure is designed to both reduce costs and minimize the amount of time the debtor is subject to bankruptcy court supervision before emerging under the protection of a channeling injunction against asbestos claims under Section 524(g) of the Bankruptcy Code. There are risks, however: for example, if parties dissatisfied with the proposed plan persuade the bankruptcy court to disapprove the disclosure statement used to solicit pre-petition acceptances of the plan or the "futures representative" selected to take part in the pre-petition negotiations, the bankruptcy case may take longer than anticipated, and any pre-petition deals could unravel. Perhaps to minimize the risk of such adverse developments, although the debtor in the ACMC bankruptcy case reached pre-petition plan agreements with its creditors (including asbestos claimants) and certain other parties in interest, it did not solicit plan acceptances before filing its Chapter 11 case, preferring instead to wait for bankruptcy court approval of its disclosure statement before commencing the balloting process.

3. What's Next?

Now, a year and a half since our last article, the fact remains that with the tort system unable to control the asbestos litigation environment and no legislative solution in place, the only remedy for companies facing ever-increasing numbers of asbestos related claims is bankruptcy court. As this article was being finalized, ABB, the parent company of Combustion Engineering ("CE"), announced that mounting compensation payments to asbestos claimants could force CE into bankruptcy protection and that the company was in talks with attorneys representing asbestos claimants.[56] ABB has "seen costs soar to more than $1 billion as thousands of healthy victims have flooded U.S. courts with claims for illnesses that may result from asbestos exposure," and the threat of CE's bankruptcy is a "direct response to [the] continued failure to find any political or judicial solution to the asbestos crisis."[57] ABB's predicament highlights the unfortunate reality that absent a change in the way courts in both the tort and bankruptcy systems manage asbestos claims, the only certainty for the future is that more and more companies will seek protection from asbestos claims through bankruptcy.

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ENDNOTES

1. Mark D. Plevin and Paul W. Kalish, *Where Are They Now? A History Of The Companies That Have Sought Bankruptcy Protection Due To Asbestos Claims*, ***Mealey's Asbestos Bankruptcy Report***, Vol. 1, No. 1 at 27 (Aug. 2001).

2. *Id.* at 31.

3. Deborah Hensler, Stephen Carroll, Michelle White and Jennifer Gross, *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, RAND Institute for Civil Justice (Aug. 2001) at 25.

4. *In re Federal-Mogul Global, Inc., et al.*, No. 01-10578 (Bankr. D. Del., filed October 1, 2001).

5. *See* Terry Brennan, *Asbestos, Debt Drives Federal-Mogul Under, THEDEAL.com* (October 2, 2001), *available at* 2001 WL 25883031; Mitchell Pacelle, *Federal-Mogul Plans to Seek Chapter 11 Protection*, WALL STREET JOURNAL, October 1, 2001, at A3.

6. Order, Designation of a District Judge for Service in Another District Within the Circuit, Nov. 27, 2001, reproduced in ***Mealey's Litigation Report: Asbestos***, Vol. 16, No. 21 (December 7, 2001).

7. *See In re Swan Transportation Co.*, No. 01-11690 (Bankr. D. Del., filed Dec. 20, 2001).

8. *See* Tyler Technologies, Inc., 2001 Form 8-K Report (December 28, 2001).

9. *In re North American Refractories Co.*, No. 02-20198 (Bankr. W.D. Pa., filed Jan. 4, 2002).

10. *Id.*

11. *In re Kaiser Aluminum Corp., et al.*, No. 02-10429 (Bankr. D. Del., filed Feb. 12, 2002).

12. *See* Robert Guy Matthews, *Kaiser Aluminum Files for Bankruptcy Under Chapter 11*, WALL STREET JOURNAL, February 13, 2002, at A4.

13. *Id.* A press release issued by Kaiser at the time of its Chapter 11 filing stated:

    > Kaiser has been facing significant near-term debt maturities at a time of unusually weak aluminum industry business conditions, depressed prices, and a broad economic slowdown that was further exacerbated by the events of September 11. In addition, the company has become increasingly burdened by asbestos litigation and growing legacy obligations for retiree medical and pension costs. The confluence of these factors has created the prospect of continued operating losses and negative cash flow, resulting in lower credit ratings and an inability to access the capital markets.

    See Kaiser Aluminum Files for Chapter 11, Cites Asbestos Litigation as Factor, ***Mealey's Litigation Report: Asbestos***, Vol. 17, No. 2 at 9 (February 2002).

14. *In re Harbison-Walker Refractories Co.*, No. 02-21627 (Bankr. W.D. Pa., filed Feb14, 2002); *In re A.P. Green Indus., Inc.*, No. 02-21639 (Bankr. W.D. Pa., filed Feb. 14, 2002).

15. *See RHI AG Announces U.S. Refractory Subsidiaries Have Filed for Bankruptcy*, ***Mealey's Litigation Report: Asbestos***, Vol. 17, No. 3 at 9 (March 1, 2002).

16. *See* Alexei Barrionuevo and Susan Warren, *Halliburton, Honeywell See Bankruptcies as Way to Manage Woes of Asbestos Suits*, WALL STREET JOURNAL, February 19, 2002, at C23.

17. *In re Plibrico Co.*, Nos. 02-09952 and 02-09957 (Bankr. N.D. Ill., filed March 13, 2002).

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18. *See Refractories Maker Plibrico Files for Chapter 11 Protection in Illinois,* ***Mealey's Litigation Report: Asbestos,*** Vol. 17, No. 5 at 20 (April 5, 2002).

19. *In re Porter-Hayden,* No. 02-54152 (Bankr. D. Md., filed March 15, 2002); *Insulation Company Porter-Hayden Files for Chapter 11 Protection In Maryland,* ***Mealey's Litigation Report: Asbestos,*** Vol. 17, No. 5 at 20 (April 5, 2002).

20. Peter Geier, *The Maryland Daily Record,* Vol. 2, No. 214 (March 19, 2002).

21. *In re Shook and Fletcher Insulation Co.,* No. 02-02771-BGC-11 (Bankr. N.D. Ala., filed April 8, 2002). *See also Shook & Fletcher Set to File for Chapter 11 Protection, Soliciting Votes for Plan,* ***Mealey's Litigation Report: Asbestos,*** Vol. 17, No. 5 at 19 (April 5, 2002).

22. *Id.*

23. *Id.*

24. *In re Artra Group Inc.,* No. 02-21522 (Bankr. N.D. Ill., filed June 3, 2002).

25. *See Artra Group Inc. Announces Chapter 11 Bankruptcy Filing in Illinois Court,* ***Mealey's Litigation Report: Asbestos,*** Vol. 17, No. 9 at 16 (June 7, 2002).

26. *In re Asbestos Claims Management Corp.,* No. 02-37124 (Bankr. N.D. Tex., filed Aug. 19, 2002).

27. *See Asbestos Claims Management Corp. Files for Chapter 11 Bankruptcy Protection in Texas,* ***Mealey's Litigation Report: Asbestos,*** Vol. 17, No. 15 at 10 (Sept. 6, 2002).

28. *See Asbestos Claims Management Corp. Files Prepackaged Chapter 11 Plan,* HARRISMARTIN COLUMNS, October 2002, at 16.

29. *In re ACandS, Inc.,* No. 02-12687-MFW (Bankr. D. Del., filed Sept. 16, 2002).

30. *See ACandS, Inc. Files for Chapter 11 Bankruptcy Protection,* ***Mealey's Asbestos Bankruptcy Report,*** Vol. 2, No. 2 at 4 (Sept. 2002).

31. *In re A-Best Products Company Inc.,* No. 02-12734-JKF (Bankr. D. Del., filed Sept. 20, 2002).

32. *See* Debtor's Motion for Entry of an Order Authorizing the Appointment of a Legal Representative for Future Unknown Asbestos Claimants, *In re A-Best Products Co. Inc.,* No. 02-12734-JKF (Bankr. D. Del. Sept. 20, 2002).

33. *In re JT Thorpe Co.,* No. 02-41487-H5-11 (Bankr. S.D. Tex., filed Oct. 1, 2002).

34. *See* Declaration of Gerald W. Scott in Support of JT Thorpe Company's Voluntary Petition Under Chapter 11 of Title 11 of the United States Code and First Day Motions, *In re JT Thorpe Co.,* No. 02-41487-H5-11 (Bankr. S.D. Tex. October 1, 2002).

35. *See* Notice of Designation as Complex Chapter 11 Bankruptcy Case, *In re JT Thorpe Co.,* No. 02-41487-H5-11 (Bankr. S.D. Tex. October 1, 2002).

36. *See* Declaration of Gerald W. Scott in Support of JT Thorpe Company's Voluntary Petition Under Chapter 11 of Title 11 of the United States Code and First Day Motions, *In re JT Thorpe Co.,* No. 02-41487-H5-11 (Bankr. S.D. Tex. October 1, 2002).

37. *Id.*

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38. *See* Soma Biswas, *Asbestos Reconsidered, THEDEAL.com* (May 16, 2002), *available at* 2002 WL 6790431. *See generally Asbestos Companies Report Annual Numbers of Pending Claims, New Filings in 2001,* ***Mealey's Litigation Report: Asbestos,*** Vol. 17, No. 8 at 9 (May 17, 2002).

39. Order, Designation Of A District Judge For Service In Another District Within The Circuit, Nov. 27, 2001, reproduced in ***Mealey's Litigation Report: Asbestos,*** Vol. 16, No. 21 (December 7, 2001).

40. *Id.*

41. *Id.*

42. *See* 28 U.S.C. § 1334(b). *See, e.g., Pacor, Inc. v. Higgins,* 743 F.2d 984 (3d Cir. 1984); *In re Federal-Mogul Global, Inc.,* ___ F.3d ___, 2002 WL 1763923 (3d Cir. July 31, 2002).

43. *Pacor, Inc. v. Higgins,* 743 F.2d 984 (3d Cir. 1984).

44. *In re Federal-Mogul Global, Inc.,* No. 01-10578 *et al.,* slip op. (Bankr. D. Del. Feb. 15, 2002).

45. *Id.*

46. *In re Federal-Mogul Global, Inc.,* ___ F.3d ___, 2002 WL 1763923 (3d Cir. July 31, 2002).

47. *Id.*

48. *Id.*

49. *Id.*

50. *See Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary,* 107th Cong. (Sept. 25, 2002) (statement of David Austern, General Counsel, Manville Personal Injury Settlement Trust).

51. *See* Year-End Report of the Manville Personal Injury Settlement Trust as of December 31, 2001, *In re Johns-Manville Corp.,* Case Nos. 82-B-11656 through 82-B-11676.

52. *See* David Austern, *Fiction & Facts from the Asbestos Almanacs* 10 (Aug. 2002) (presented at ALI-ABA Conference "Asbestos Litigation in the 21st Century," Sept. 19-20, 2002).

53. *See Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary,* 107th Cong. (Sept. 25, 2002) (statement of plaintiffs' lawyer Steven Kazan) (*citing* Letter from David Austern, General Counsel of Manville Trust, to Joseph Rice, Claims Resolution Management Corporation (Aug. 20, 2002)).

54. *See Manville Trust Distribution Process* (Sept. 4, 2002).

55. Debtor's Motion for Case Management Order for Substantive Estimation Hearings, *In re USG Corporation,* Nos. 01-2094 through 01-2104 (Bankr. D. Del. July 3, 2001); Motion as to All Asbestos Personal Injury Claims for Entry of Case Management Order, Establishment of a Bar Date, Approval of the Proof of Claim Forms and of the Notice Program, *In re W.R. Grace & Co.,* No. 01-01139 (Bankr. D. Del. Apr. 2, 2001).

    USG and W.R. Grace are not breaking new ground with their attempt to use the bankruptcy court to establish a method for determining the validity of asbestos claims. For example, debtor Babcock & Wilcox ("B&W") filed a motion for a case management order in the Bankruptcy Court for the Eastern District of Louisiana on October 18, 2001. In its motion, B&W contended that more than 130,000 of 176,000 claimants who had filed proofs of claim alleging asbestosis did not suffer from any physical impairment. B&W's proposed case management order contained a protocol for determining the validity of asbestos personal injury claims similar to those proposed by USG and W.R. Grace. *See Babcock & Wilcox — Proposed Litigation Protocol,* ***Mealey's Special Reports*** (Oct. 2001).

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56. *See* Alison Langley, *ABB Proposes a Settlement for All Asbestos Lawsuits,* THE NEW YORK TIMES, Nov. 2, 2002, at B2; Dan Roberts, Aline van Duyn and William Hall, *ABB Slumps on Asbestos Warning,* FINANCIAL TIMES.com (Oct. 22, 2002), *available at http://investor.ft.com/custom/ftmarkets-com/news/story.asp?guid={E79AE771-7DBE-4278-B715-919ED34972D7}&FTSite=FTMW. See also ABB's Asbestos Spectre Puts Skids Under Euro Peers,* FORBES.com (Oct. 22, 2002), *available at http://www.forbes.com/newswire/2002/10/22/rtr760441.html*

57. *Id.* ■

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BANKRUPTCY FILINGS OVER THE YEARS

Company	*Year*
UNR Industries	1982
Johns-Manville	1982
Amatex Corporation	1982
Waterman Steamship Corporation	1983
Wallace and Gale Company	1984
Forty-Eight Insulations, Inc.	1985
Philadelphia Asbestos Corporation (Pacor)	1986
Standard Insulations, Inc.	1986
Prudential Lines, Inc.	1986
McLean Industries	1986
Gatke Corporation	1987
Nicolet, Inc.	1987
Todd Shipyards	1987
Raytech Corporation	1989
Delaware Insulations	1989
Hillsborough Holding Company	1989
Celotex Corporation	1990
Carey Canada, Inc.	1990
Ancor Holdings, Inc./National Gypsum	1990
Eagle-Picher Industries	1991
H.K. Porter Company	1991
Cassiar Mines	1992
Kentile Floors	1992
American Shipbuilding, Inc.	1993
Keene Corporation	1993
Lykes Brothers Steamship	1995
Rock Wool Manufacturing	1996
M.H. Detrick	1998
Fuller-Austin	1998
Brunswick Fabricators	1998
Harnischfeger Corp.	1999
Rutland Fire Clay	1999
Babcock and Wilcox Co.	2000
Pittsburgh Corning	2000
Owens Corning Corp./Fibreboard	2000
Armstrong World Industries	2000
Burns and Roe, Inc.	2001
G-I Holdings	2001
Skinner Engine Co.	2001
W.R. Grace	2001
USG Corp.	2001
E.J. Bartells	2001

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BANKRUPTCY FILINGS OVER THE YEARS (cont.)

Company	*Year*
United States Mineral Products Co.	2001
Federal Mogul	2001
Swan Transportation Co.	2001
North American Refractories Corp. (Narco)	2002
Kaiser Aluminum	2002
Harbison-Walker Refractories Corp.	2002
A.P. Green Industries Inc.	2002
Global Industrial Technologies Inc.	2002
Plibrico Co.	2002
Shook & Fletcher	2002
Porter-Hayden	2002
Artra Group, Inc.	2002
Asbestos Claims Management Corporation (ACMC)	2002
ACandS	2002
JT Thorpe Company	2002
A-Best Products	2002

** Note — This list does not include corporations that are asbestos defendants but have filed for bankruptcy primarily for other reasons.*

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Points of View

Don't BANKRUPT Asbestos

It's sad that **bankruptcy** offers the only **rational** method of resolving litigants' claims.

BY MARK D. PLEVIN, VICTOR E. SCHWARTZ, AND PAUL W. KALISH

Obscured in reports of the softening economy, dot-com closures, and bankruptcy filings by both New and Old Economy businesses is the fact that defendants in asbestos litigation are increasingly looking to federal bankruptcy law for help. Just in the last few months, such manufacturers as the Babcock & Wilcox Co., Armstrong World Industries, the GAF Corp., and the Pittsburgh Corning Corp. have filed for relief under Chapter 11 of the Bankruptcy Code. And following an 81 percent increase in new claims in 2000, W.R. Grace & Co. recently announced that it, too, was considering entering bankruptcy. What's prompting this wave of filings?

First and foremost, the cause is frustration with the inability of the current tort system to handle asbestos litigation in a rational way. The number of cases is mushrooming. They doubled from 1993 to 1999—from 100,000 to more than 200,000 cases throughout the country—and they seem to be spiking. Once thought to be a relic of the 1980s, asbestos is proving to be a 21st century phenomenon as well.

Efforts to resolve asbestos liabilities in a coordinated, comprehensive way have proven unavailing. At first, defendants tried to deal with the onslaught of cases through individual, out-of-court settlements. When this proved unsuccessful, defendants tried entering into "bulk" or "inventory" settlements, but still there seemed no end to the claims. An effort to resolve the claims through a certified class of claimants was twice struck down by the U.S. Supreme Court.

The ordinary, everyday litigation system has failed in asbestos. It has failed, in part, because many judges have put expediency above all else. Normal protections that defendants utilize in other tort litigation have been ignored. For example, defendants often face judges who are willing to consolidate cases that are totally dissimilar. It is perhaps the worst aspect of the asbestos litigation climate when judges group together claims of people who are truly sick (for example, suffering from the serious disease of mesothelioma) with those who are not. These improper combinations give personal injury lawyers a lever to extract very high settlements.

And despite the Supreme Court's admonition that the "elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation," efforts to craft a legislative solution also have failed thus far. It will be difficult for legislation to move forward in light of the massive opposition from wealthy personal injury lawyers and unions.

So, a growing number of companies, now totaling at least 25, turn to bankruptcy.

The impact of these bankruptcy claims on asbestos defendants has risen as significant players join the trend. Increasingly, the companies that are left to defend these cases are not only established corporate giants but also much smaller companies that are more likely to buckle under the weight of the rising level of claims.

Companies are increasingly finding that bankruptcy provides a means to deal with these cases in a rational, integrated, lower-cost manner that permits them to quantify and cap their liability. This is because the Bankruptcy Code provides a palette of tools not available elsewhere, which we detail below.

• *Provides automatic stay of litigation.* Section 362 of the Bankruptcy Code provides for an "automatic stay" that enjoins all litigation against the debtor immediately upon the filing of a bankruptcy case. By terminating its involvement in thousands of suits in one fell swoop, the debtor eliminates the staggering cost of defending these suits. The cessation of litigation activity gives the debtor breathing room to figure out how best to address the problems presented by asbestos claims.

• *Centralizes litigation in one court.* The automatic stay, combined with various provisions in the federal judicial code, makes it possible in many cases for the debtor to centralize all claims against it in a single court (either the bankruptcy court where the case is filed or the district court in that district). As a result, instead of battling in dozens of different courts throughout the country, the debtor can bring all the claims to a single forum. This is particularly important for cases being litigated in state courts since there is no other mechanism that permits cases from several states to be centralized in one court that can issue consistent, coordinated rulings.

• *Limits/eliminates exposure to crippling punitive damages awards.* One of the scourges of decentralized asbestos litigation is the repetitive imposition of punitive damages awards that have the effect of punishing the same company over and over again for a single act. This multiplies punishment far beyond any justifiable amount. Moreover, payment of punitive damages awards unfairly favors some claimants at the expense of others by reducing the amounts available to pay injured claimants who come along later. A bankruptcy filing is likely to reduce, if not eliminate entirely, the debtor's exposure to such uncoordinated, repetitive punitive damages awards.

• *Allows for quicker, cheaper resolution of claims and issues.* Asbestos litigation itself is frequently long and drawn-out, increasing costs and delaying compensation to claimants. In bankruptcy, the debtor has the ability to invoke "estimation" procedures to avoid full-blown trials. Estimation can be combined with consolidation of cases to seek across-the-board binding rulings on legal issues that cut across cases. Moreover, a huge proportion of moneys paid by asbestos defendants—60 percent or more by some reckonings—goes to pay transaction costs of asbestos litigation, mostly the contingent fees of personal injury lawyers and the defense fees of the companies' lawyers. The administrative claims process typically established by bankruptcy reorganization plans eliminates much of these costs and streamlines payment to injured claimants.

• *Permits fair provision for future claims.* There is a risk that payment of asbestos claimants now might exhaust available sums, leaving nothing for those who have been exposed to asbestos, but have not yet suffered any injury. Moreover, the possibility that payment of asbestos claims will go on for decades depresses company stock prices and inhibits corporate success.

Section 524(g) of the Bankruptcy Code authorizes the establishment of "asbestos trusts" that not only pay claims of those who are already suffering from exposure to asbestos but also make adequate provision for payment of "future claims" by persons who, although exposed to asbestos, have not yet become symptomatic. These trusts are coupled with "channeling injunctions" that require all asbestos claims—including "future claims"—to be "channeled" to a fund established for the payment of such claims. This means the debtor can emerge from bankruptcy with the assurance that it will not have to face any asbestos claims ever again; all such claims will be channeled to the fund.

Significantly, the channeling provision holds the explanation as to why all asbestos defendants have not filed for bankruptcy: Loss of shareholder control. In order to obtain the §524(g) channeling injunction, the asbestos claimants must get at least a majority share of the company's stock. In many cases, the claimants' share has been closer to 80 to 90 percent. If management believes the company can weather the asbestos litigation storm without seeking bankruptcy relief, they would be understandably loath to dilute the ownership interests of the stockholders to whom they owe a fiduciary duty.

For asbestos companies considering bankruptcy filings, there are also downsides to the process:

• *Forces loss of management control over the company.* A debtor is subject to court supervision during the bankruptcy case itself; its creditors, claimants, and other parties in interest have a broad ability to object to and thus obstruct seemingly routine corporate business decisions. In many asbestos bankruptcies, an official committee consisting of lawyers representing claimants is appointed and seeks to enhance its negotiating leverage by objecting to nearly every significant action the debtor wishes to take. Management may find it difficult to pursue its own business plan in these circumstances.

• *Requires significant costs.* While bankruptcy is

SEE ASBESTOS, PAGE 69

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Tough Rights Issues Will Face Bush's Judges

Top 10, From Page 65

be brought under the Age Discrimination in Employment Act and the Fair Housing Act? While the disparate-impact approach has been a part of Title VII for 30 years and is now written into the statute itself, the Supreme Court has never recognized this sort of claim under these two other important civil rights statutes. Indeed, the Court has expressly reserved the question—for the ADEA, in *Hazen Paper Co. v. Biggins* (1993), and for the FHA in *Town of Huntington v. NAACP* (1988)—and the lower courts are divided.

> Hundreds of school districts remain under court-ordered desegregation plans. How flawless must their records be in following every particular of the Court's plan?

• *Are existing regulations under Title VI of the 1964 Civil Rights Act that ban disparate-impact discrimination valid?* A number of Supreme Court decisions make clear that this statute—which prohibits racial and ethnic discrimination in federally funded programs and activities—bans only disparate treatment. Yet many federal agency regulations incorporate a disparate-impact approach as well.

Some of the amici (including the Center for Equal Opportunity) in *Alexander v. Sandoval*, currently pending before the Supreme Court, urged the justices to strike down these regulations as outside the bounds of agency authority, but the Court seems unlikely to pursue the issue in this case. Its recent decisions, however, make the regulations vulnerable in the future to this line of attack.

• *Is the Americans With Disabilities Act unconstitutional?* Congress cited two sources for its authority to pass the ADA: the commerce clause and Section 5 of the 14th Amendment. But there are problems with each. The effect of disability discrimination on interstate commerce is weak (especially for, say, prisons and funeral homes), and it is hard to argue that the ADA actually helps the economy (the Framers' reason for giving Congress authority to regulate interstate commerce). And in its decision last month in *Board of Trustees of the University of Alabama v. Garrett*, the Court—in the 11th Amendment context—rejected Congress' assertion of Section 5 authority in enacting the ADA.

• *How expensive can a "reasonable" accommodation be?* The ADA requires employers and public accommodations like restaurants, hotels, stores, and so forth, to make "reasonable" accommodations for disabled employees and customers. But at what point do such accommodations become so expensive, or even dangerous, that they amount to an "undue hardship" (another undefined ADA term)? The Supreme Court has heard a number of ADA cases, but has not yet grappled with this issue, which lies at the statute's heart.

• *When should a school district be declared unsegregated?* There are hundreds of school districts that remain under court-ordered desegregation plans. The Supreme Court has made clear that these plans are not supposed to last forever, and that authority for running local schools is to be returned to the school boards once the district has achieved "unitary"—desegregated—status.

But the devil is in the details. How long must the school board wait, and how flawless must its record be in following every particular of the Court's plan? The answer to such questions recently split the judges on a 4th Circuit panel—all three of whom were Clinton appointees—and prompted an *en banc* reargument of the case, *Belk v. Charlotte-Mecklenburg Board of Education*, on Feb. 27.

• *Under what circumstances can a voting standard or procedure that has disproportionate racial "results" be justified?* Section 2 of the Voting Rights Act of 1965 is a marvel of convolution. Like the Civil Rights Act of 1991, it was designed to codify a prohibition that reaches beyond simple intentional discrimination. But it is not clear how far beyond it reaches, especially in contexts other than redistricting. For instance, does it contemplate a claim—like one recently filed in Florida—that a state law disenfranchising felons is illegal if it can be shown that felons are disproportionately black? And, if so, can the state still prevail if it has a good enough reason for the law?

This list does not exhaust unresolved civil rights issues. The precise legal limits on racial profiling and on private arbitration of employment discrimination claims, to give just two other examples, could be added. But I hope I've made my point: The judiciary continues to play an extremely important role in the civil rights arena. President Bush's appointments to the bench will make a big difference in how some very basic and fundamental issues are resolved. ■

Bankruptcy Offers a Rational Fix for Asbestos

Asbestos, From Page 68

almost certainly less costly than defending asbestos litigation claims, it is still an expensive process that can also be drawn out.

• *Engenders management reluctance.* Bankruptcy likely means the loss of management positions and perks, as well as a possible stigma for the managers themselves. The employees of companies that go bankrupt also can pay a big price. Some employees will lose their jobs or have their salaries cut. Employees, including hundreds or thousands of hourly workers, can lose their investments in the company's stock. Other groups that have invested pension funds in the debtor's stock also can lose out. Thus, the impact of a bankruptcy will extend far beyond the asbestos litigation.

It is a sad commentary on the legal system that bankruptcy is the only path to resolving asbestos claims in a rational manner. If more judges restored fundamental rules of law to asbestos cases, permitted discovery by defendants of the plaintiffs, consolidated cases only when they were similar, and acted as a gatekeeper to assure that sound science supports each claim, the litigation system might work. Congress, too, could respond to the Supreme Court's strong suggestion and put an end to a system that is making lawyers on both sides of the aisle rich and not putting true victims first.

Until these better paths are pursued, bankruptcy law remains an increasingly attractive mechanism to clean up the asbestos mess. ■

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Law

G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases

By Queena Sook Kim
Staff Reporter of The Wall Street Journal

G-I Holdings Inc. filed for Chapter 11 bankruptcy-court protection, citing its increasing exposure to asbestos-liability claims.

Formerly known as GAF Corp., the closely held holding company based in Wayne, N.J., filed for Chapter 11 Friday in the U.S. Bankruptcy Court in the District of New Jersey in Newark. G-I's only subsidiary, Building Materials Corp. of America, an asphalt-roofing company, wasn't included in the filing.

G-I is the latest company to employ a strategic bankruptcy because of growing asbestos liability. Four other companies used the tactic last year.

G-I said it didn't disclose its total assets and liabilities in the filing. However, a 10-K form filed with the Securities and Exchange Commission in March by Building Materials Corp. listed net income of $24 million and sales of $1.1 billion for 1999. G-I is required to file a 10-K report because it sells securities in the form of bonds to the public.

G-I said its asbestos liability stems from a 1967 acquisition of Ruberoid Co., which made the asbestos insulation, Calcilite. G-I said that during World War II, the U.S. Navy asked Ruberoid to produce asbestos insulation for its ships. After medical studies in the 1960s warned of the dangers of asbestos, the company closed its Calcilite operations, G-I said.

Repeating a refrain common among companies with asbestos liability, G-I said that despite settling more than 500,000 claims to the tune of $1.5 billion, there was no ebb in the tide of personal-injury claims. In fact, G-I's chief executive officer and general counsel, Richard A. Weinberg, said there was a "dramatic increase in the number of claims." About 70,000 cases were filed against G-I last year, compared with about half as many claims in 1996, he said. G-I declined to calculate its future asbestos liability.

Believing it had exhausted its options in court, G-I sought legislative relief in 1999. G-I, then known as GAF, spent more than $6 million to try to push through a bill that would eliminate settlements to plaintiffs who aren't impaired by asbestos. But the bill died, and observers say it will be difficult to resurrect.

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Like Armstrong World Industries Inc. and McDermott International Inc.'s Babcock & Wilcox unit, which both filed for Chapter 11 protection last year because of asbestos liability, G-I said it will ask the bankruptcy court to redefine its liability. Namely, the company doesn't believe it should pay settlements to plaintiffs who were exposed to asbestos but aren't impaired.

"Clearly, we don't believe in paying people who are unimpaired," said a company spokesman. "We believe in compensating people who are sick." G-I said that as many as 80% of its asbestos settlements are paid to unimpaired people, a figure disputed by plaintiffs attorneys.

G-I's Chapter 11 filing comes on the heels of news that Federal-Mogul Corp., a Southfield, Mich., auto-parts maker, plans to fight asbestos litigation rather than file for Chapter 11. Mr. Weinberg, however, doesn't believe that the strategy is a viable option for G-I. "The system is not equipped to handle these cases efficiently and fairly," he said.

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Temple Environmental Law and Technology Journal
Spring, 1990

*1 TOTALLING UP THE COSTS OF ASBESTOS LITIGATION: GUESS WHO WILL PAY THE PRICE?

Patrick J. Hagan
Edwin O. Bailey
Juliet T. Browne [FNd]

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*2 Overview

Asbestos bodily-injury litigation is less than two decades old. Yet is has become the most costly and significant part of the nation's burgeoning product liability caseload. Yearly, tens of thousands of new asbestos bodily-injury claims are added to court dockets, straining the limited resources of the judiciary. The dollar amount of these and future claims is staggering: estimates range from $80 billion to the U.S. Department of Labor's much higher "best estimate" of $228 billion. The impact on defendants--former manufacturers of asbestos or asbestos-containing products--has already been profound. At least seven such companies have filed for bankruptcy, including the largest product manufacturer, Johns-Manville. More companies are expected to declare bankruptcy in the near

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future.

Now a "second wave" of asbestos litigation has begun. Building owners are demanding compensation for the costs of removing or otherwise "abating" asbestos-containing building products. These additional asbestos-related claims--already estimated by the Environmental Protection Agency (EPA) to exceed $55 billion (without taking into account claims by owners of personal residences)--could easily expand to equal or exceed the enormous amounts estimated to be at stake in the bodily-injury claims.

This article examines the total social and economic costs of this litigation, both the bodily-injury and so-called "asbestos-in-buildings" cases. It assesses not only the direct, but also the indirect burden this litigation has had and will continue to impose on the judiciary, on defendants, and on the insurance and reinsurance markets. More fundamentally, it addresses the rhetorical question of who will ultimately pay the real price by exploring the ancillary fall-out of such wide-scale and costly litigation on: the continued competitiveness of American jobs, goods, and services in today's global marketplace; the future availability of product liability insurance and reinsurance in this country; and product innovation, including the application of new technology in American markets.

The article then suggests that the ultimate price to be paid by each of us was not bargained for, may be excessive, and may also be unfair. It was not bargained for because none of us has been given a vote whether traditional principles of tort law should be extended to permit recoveries in cases where the claimant (as is often the case in asbestos litigation) has no present manifestation of disease or injury, but only speculative or perceived risks of future harm. It may be excessive given the high costs that most of us may be required to bear in terms of curtailed future life-style choices; indeed, our very freedom to take certain "risks" that are common today and which spur creative activity and provide diversionary pleasures ***3** may be unduly foreclosed in the pursuit of the illusory goal of a "risk free" environment. And it may be unfair because the "taking" of substantial income and capital assets from some in our society to be judicially redistributed to others on such questionable pretexts may be deemed to be fundamentally inequitable, if not in contravention of the Fifth and Fourteenth Amendments.

To some extent, the EPA must share the blame for this dubious state of affairs. The EPA has thus far failed to develop and articulate precise assessments of the risks to building occupants from exposure to asbestos-in- buildings products, thereby contributing to the "asbestos hysteria" that has driven much of the recent "second wave" property litigation. Presently, there is at least some reason to believe that the sheer potential magnitude of this litigation and its attendant costs in the wake of the EPA's ambivalent position on risks to building occupants may stir that agency to undertake a more careful evaluation.

The courts also need to take a much closer look at the bodily-injury claims that are being filed today to determine whether these actions are premised on a good-faith belief that an asbestos-related injury exists, and that these claims are supported by solid medical evidence and proof of causation. "Shotgun" multiparty trials gloss over the necessarily individualized nature of these claims. Such procedures--thought to aid the claimants--typically produce strenuous and costly defenses by companies whose products could not have been involved. Such procedures also invite "round-ups" of putative plaintiffs-- practices that seriously exacerbate the staggering burden of this litigation.

Lastly, in the asbestos-in-buildings cases the courts should not permit tort claims for economic loss to property where there is no demonstration of present injury to occupants, but only conjecture or speculation concerning future risk of harm. Recovery for the mere risk of future injury has not been a feature of the American common law of torts and nothing about the asbestos- in-buildings claims should alter this well-grounded tradition.

I. Introduction

Asbestos litigation represents the largest and potentially most costly segment of product liability claims ever to confront American industry. [FN1] Continued asbestos litigation will likely bankrupt many companies which currently compensate victims of asbestos exposure, thereby leaving future claimants without compensation. However, the ramifications of this unprecedented litigation are not limited to the members of the alleged "asbestos industry." Rather, the entire United States economy suffers and will continue to suffer the consequences of asbestos litigation.

Asbestos, [FN2] recognized for its characteristics of durability, flexibility, strength ***4** and resistance to fire, serves approximately 3,000 commercial, public and industrial uses. [FN3] It is especially well-suited to fireproofing and

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insulation products in circumstances where fire and excessive heat pose a threat to property and human safety. [FN4] For example, asbestos-containing sprayed-on products were widely used to satisfy building codes which required steel beams and columns to be protected with a fire-resistant coating. [FN5] In addition to its wide use in fireproofing and insulation, asbestos was a common ingredient in a wide variety of building products in the post-War years, and in particular from the early 1950's to the mid-1970's. [FN6]

Claimants in asbestos litigation commonly refer to the defendants collectively as the "asbestos industry." But the term "asbestos industry" most appropriately describes only those companies that now, or once did mine, mill and distribute raw asbestos. From 1971 to 1975, between 80 and 85% of the asbestos used in the U.S. was imported, nearly all (96%) from Canadian mines. [FN7] By 1985, approximately 92% of the asbestos consumed in the U.S. was still being imported from Canada. [FN8] The milling segment of the industry is closely connected to the mining segment, and both were or are generally owned and operated by the same parent corporations. [FN9]

Most asbestos product manufacturers should not be included in the "asbestos industry" because they only used asbestos as an ingredient in the making of building and other products. [FN10] The amount of asbestos in a given product varied substantially--***5** from very small amounts (use as a "binder") to larger amounts (for fire retardation). Lastly, a proper designation of defendants would include those who purchased a finished asbestos-containing product and applied, installed, erected or otherwise used the product without further physical modification, e.g., auto mechanics (gaskets and brakes), builders (thermal ceiling tiles, pipe lagging), and utilities (asbestos cement water pipe). [FN11]

Federal regulations beginning in the early 1970's have drastically reduced all these industrial activities and, as we shall see, have contributed significantly to the "asbestos hysteria" which has been a driving force for much of the subsequent asbestos litigation.

[FN1]. The dollar amount estimated for past, current, and future bodily- injury claims has varied widely. One current estimate places the figure at $80 billion. Wash.Post, Feb. 7, 1989, at C3, col. 4. The United States Department of Labor has estimated that total current and future asbestos related bodily injury liabilities could reach $540 billion, with a "best estimate" of $228 billion. Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 VAND.L.REV. 573, 581 n. 22 (1983) [hereinafter Analysis]. The Environmental Protection Agency has placed the costs for "abating" asbestos products in the nation's primary and secondary schools, and in commercial and public buildings and residential apartments of more than 10 units at some $55 billion. See infra at.

[FN2]. The EPA's ASBESTOS FACT BOOK defines asbestos as follows:
Asbestos is the name for a group of natural minerals that separate into strong, very fine fibers. The fibers are heat resistant and extremely durable, and these qualities have made asbestos very useful in construction and industry. Although there are several different types of asbestos, nearly 95% of all asbestos used in commercial products today is a type called chrysotile.
OFFICE OF PUBLIC AFFAIRS, U.S. ENVIRONMENTAL PROTECTION AGENCY, ASBESTOS FACT BOOK 2 (3d rev. 1986) [hereinafter ASBESTOS FACT BOOK].

[FN3]. U.S. DEPT. OF JUSTICE, THE ATTORNEY GENERAL'S ASBESTOS LIABILITY REPORT TO THE CONGRESS, (97th Cong., 1st Sess.), at 8-9 (1981) [hereinafter 1981 ATT'Y GEN.REP.].

[FN4]. Mansfield, Asbestos: The Cases and the Insurance Problem, 15 FORUM 860, 861 (1980) [hereinafter Asbestos: The Cases].

[FN5]. 1981 ATT'Y GEN.REP. supra note 3, at 9. The use of asbestos products expanded rapidly during World War II, when it was employed extensively in aircraft, vehicles and ships and submarines to protect against lethal exposures to heat and fire.

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[FN6]. Asbestos is present in a multitude of common products:

Primary uses of asbestos include floor tile; gaskets and packing; friction products; paints; coatings; sealants; plastics; asbestos cement pipes; asbestos textiles; asbestos paper; and asbestos-cement sheet.

Secondary uses of asbestos include flooring; valve, flange, and pump sealants; clutch, transmission and brake components; industrial friction materials; automobile coatings; roof coating and patch; electric motor components; piping; conduits for electric wire; packaging components; gasket components; heat and fireproof clothing; insulation for wiring; theatre curtains; fireproof draperies; table pads and heat-protective mats; molten glass handling equipment; insulation products; filters for beverages; appliance insulation; hood vents for corrosive materials; electric switchboards; miscellaneous building materials; appliance components; and cooling tower components.

Consumer uses include piping; decorative building panels; plaster and stucco; molded plastic; acoustical products; asphalt paving; caulking; motor armatures; paint; welding materials; drip cloths; fire doors; car components; oven and stove insulation; siding; shingles; floor tile; chemical tanks; fire hoses; garments; gloves; filter media; boiler insulation; furniture; motion picture screens; roofing; rugs; wallboards; acoustical ceiling material; insulation; electrical switches; hair dryers; clothes dryers; toasters; humidifiers; and toothbrushes.
See Analysis supra note 1, at 578-79 n. 7.

[FN7]. See 1981 ATT'Y GEN.REP. supra note 3, at 11.

[FN8]. Office of Toxic Substances, 1 Environmental Protection Agency Regulatory Impact Analysis of Controls in Asbestos and Asbestos Products 9 (May 6, 1988).

[FN9]. See 1981 ATT'Y GEN.REP. supra note 3, at 11.

[FN10]. Of course, some companies were vertically integrated and owned their own mines and mills. Product manufacturing firms such as Johns-Manville, Raybestos-Manhattan, Inc., and Jim Walter Corporation each held significant ownership interests in mines in Canada. Id. at 12.

[FN11]. Id.

II. The Impact of Government Regulation on Asbestos-Related Industries

Because of its many useful applications, asbestos was once regarded as a "miracle fiber" of great value in the protection of property and human life. [FN12] It could add untold strength to weak products, retard heat and fire, and help make other products adhere to surfaces or retain their shape. It has been estimated that some 30 million tons of asbestos were used in American buildings alone between 1900 and 1980. [FN13]

Ironically, asbestos is now considered by some to be "one of the most dangerous of all natural materials." [FN14] The hazards of prolonged occupational (i.e., high-dose) exposure to asbestos began to be fully understood in the mid-1960's. [FN15] Some years later, concern arose over the release of fibers into the general environment. [FN16] Local and state public agencies began to respond to the awareness that the use of asbestos- containing sprayed-on products might constitute an environmental hazard and a health threat to the workers applying such products. [FN17] Accordingly, the use of sprayed-on asbestos products was banned in several cities and states in 1970 and 1971. [FN18] But it was the federal regulations that had a greater impact. [FN19]

***6** A. Federal Asbestos Regulations

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1. EPA

In 1973, under the authority of the Clean Air Act, EPA banned the use of sprayed-on products containing more than 1% asbestos for use as insulation or fireproofing. [FN20] In 1978, EPA extended its restriction to include sprayed-on products used for any purpose. [FN21] Because the asbestos content of sprayed-on materials typically ranged from 5-50%, [FN22] these regulations effectively eliminated the use of asbestos-containing sprayed-on products. As a practical matter, 1978 marked the end of all manufacture and sale of asbestos-containing building products in this country.

Current EPA regulations continue to focus on the release of asbestos fibers into the ambient air. [FN23] Asbestos mills and the manufacturers of asbestos-containing products, such as automobile brake shoes or gaskets, must either discharge no visible emissions or follow guidelines for cleaning emissions prior to release into the environment. [FN24] Likewise, there are standards and procedures for reducing the release of asbestos during the demolition and renovation of asbestos-containing buildings. [FN25]

The EPA's most comprehensive effort to reduce the release of asbestos fibers in buildings has focused on the nation's primary and secondary schools, both public and private. Beginning in 1982, the EPA required all such schools throughout the country to conduct inspections of their buildings to determine whether any building products containing asbestos were present. [FN26] However, these initial school regulations were of doubtful practical effect. The EPA could only provide general, written guidelines to the schools on whether the apparent condition of an asbestos-containing product justified removal or other abatement. [FN27] Consequently, a concerned Congress passed the Asbestos Hazard Emergency Response Act (AHERA) in 1986 and under its authority the EPA, in 1987, implemented regulations requiring all "local education agencies" (LEAs) (public school districts and private schools alike) to identify asbestos-containing materials (ACM) in their buildings and to take appropriate actions to control release of asbestos fibers. [FN28] These regulations required each LEA to file with the State Governor's office an "asbestos management plan" for every school building under its control by October 12, 1988. [FN29] Thus, the EPA has established abatement guidelines under AHERA, and it has not expressly "mandated" the removal of ACM from any school building. [FN30]

*7 The EPA has further regulated the use of asbestos directly under the Toxic Substance Control Act (TSCA). [FN31] Companies using asbestos must comply with detailed reporting requirements. [FN32] Recently, the EPA has exercised its TSCA authority to phase-out the importation, manufacture or use of virtually all remaining asbestos and asbestos-containing products in this country by 1997 when it estimates that adequate substitute materials for asbestos-containing products manufactured or used today will be available. [FN33]

2. OSHA and MSHA

In addition to regulating the release of asbestos into the environment, the federal government has established standards on allowable occupational exposure to asbestos. Since 1971, the Occupational Safety and Health Administration (OSHA) within the Department of Labor has regulated asbestos in the work- place. [FN34] The current permissible exposure level (PEL) is set at 0.2 fibers per cubic centimeter of air (0.2 f/cc) per eight-hour workday. [FN35] The EPA recently promulgated analogous standards for state and local employees not covered under the Occupational Safety and Health Act. [FN36] Likewise, the Mine Safety and Health Administration (MSHA) regulates the maximum exposure levels to asbestos dust for workers in domestic mines. [FN37]

3. CPSC

The Consumer Product Safety Commission (CPSC) has issued rules banning customer patching compounds containing free-form respirable asbestos and artificial emberizing materials containing respirable free-form asbestos. [FN38] The Food and Drug Administration under the Federal Hazardous Substance Act (FHSA) has banned the use of asbestos in certain clothing. [FN39] The CPSC has also issued labeling requirements for products containing asbestos. [FN40] In addition to federal asbestos regulations, some forty states currently have asbestos laws. [FN41] These laws include provisions for asbestos contractor and worker licensing and certification, establish funds for

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administering asbestos abatement programs, regulate the renovation and demolition of asbestos-containing buildings, dictate abatement procedures and prohibit certain uses of asbestos. [FN42]

B. Asbestos Regulations Have Substantially Reduced the Use of Asbestos and Asbestos-Containing Products

The impact of government regulation of asbestos in the past two decades has ***8** been dramatic. American production of asbestos dropped from 118,780 metric tons in 1971 to 63,520 metric tons in 1982--a 50% decline. [FN43] The manufacturing industry has even more sharply curtailed its use of asbestos. Whereas U.S. consumption peaked at 761,500 metric tons in 1973, by 1982 consumption had dropped to 229,800 metric tons--a 60% reduction. [FN44]

Although it is the asbestos mining and asbestos product manufacturing industries which have borne the direct costs of government regulation of asbestos, where possible, such costs have doubtless been passed on to consumers. For example, when OSHA amended its PEL for asbestos in 1986, it estimated that direct compliance with the new standard would cost $453.5 million a year. [FN45] The bulk (over 95%) of the compliance costs resulted from engineering controls (ventilation and solvent spray). [FN46] Such compliance costs have been incurred each time OSHA has modified the PEL. [FN47]

When government regulation effectively eliminates the use of asbestos in a product, [FN48] a manufacturer must either sell an inferior product, or find or develop an asbestos substitute. The use of asbestos significantly reduced certain risks, for example, the risk of fires. [FN49] Because our society is not willing to return to pre-asbestos fire risk levels, manufacturers have been hard pressed to find or develop asbestos substitutes. [FN50]

Current EPA regulations ban only the use of asbestos in sprayed-on products and molded or wet-applied insulating materials. However, as noted, the EPA has recently decided to prohibit the manufacture, importation and processing of asbestos in virtually all other products by 1997. [FN51] The EPA has estimated that the costs of its ban will be between $460 and $806 million. [FN52] The costs detailed in ***9** EPA's analysis reflect the types of costs already incurred by manufacturers that have voluntarily withdrawn asbestos from their products. [FN53]

There are two types of costs which result from the elimination of asbestos from the market: (1) costs to consumers or users, and (2) costs to producers. Consumer or users costs include increased prices for substitute products. [FN54] The EPA estimates that these costs alone will run to at least $375 million for its recent ban of virtually all remaining asbestos products. [FN55]

American manufacturer losses will also be significant, amounting to no less than $85 million. [FN56] The EPA has acknowledged that such losses will accrue to manufacturers when they are forced to forgo some portion of the return on their capital stock used to produce asbestos products. Those manufacturers with equipment which cannot be readily converted to make other products will suffer significant losses.

However, it is the costs associated with the EPA's recently promulgated AHERA regulations that are the most controversial. These compliance costs--running into the billions of dollars--must be borne in large measure by the local school districts and private schools, despite the federal origin of the law and regulations. These entities are, in turn, attempting to recoup the federally- mandated costs from the manufacturers which produced the ACM present in the schools. The impact of transferring these regulatory compliance costs from the schools to the manufacturers through civil litigation is discussed further in Section III.

III. The Public "Demonization" of Asbestos May Have Economic Consequences That Far Exceed the Predicted Costs of Federal Asbestos Regulations

Some of the economic effects of the asbestos regulations just discussed may be short term. [FN57] Viewed philosophically, one could say that such costs inevitably accompany change, usually through the introduction of new technology. Moreover, in this instance these effects may be somewhat minimized because there never was a significant true "asbestos industry" in this country, i.e., one of mining, milling and processing raw asbestos. Comprehensive government regulation of asbestos has, however, effectively "demonized" a substance that once was

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(and still is) highly important to our modern, post-industrial society. This has resulted in the transformation in the public's eye of a beneficial, naturally-occurring mineral into a feared, frightening substance. The often exaggerated rhetoric on the health hazards of asbestos exposure (even low-dose exposure that does not exceed ***10** ambient, naturally-occurring levels) has served to interfere with attempts by responsible public officials and others to articulate and implement sound public policy on this subject. This "demonizing" process has, and-- unless stopped--will continue to have significant adverse consequences for the nation's economy and, ultimately, the quality of each of our lives. [FN58]

A. Fear of Asbestos Has Seriously Affected the Real Estate Market

Federal and local regulations and concern about future liability to present building occupants have led to a marked reduction in the value of buildings containing asbestos. [FN59] This devaluation sometimes occurs as a result of specific ordinances that place a financial burden on the owners of buildings. [FN60] However, the mere presence of asbestos in a building may adversely affect its market value, even though there are no applicable federal asbestos regulations. [FN61] This results, in large part, from fear of future liability. Building owners fear future claims by tenants alleging injury due to asbestos exposure. [FN62] In addition, as the demonization of asbestos continues, regulations may be imposed requiring all building owners to inspect for and abate asbestos. [FN63] Consequently, the presence of asbestos in buildings ***11** remains a liability, even though it may not pose a significant risk to human health.

Asbestos hysteria has also caused some lenders to cease writing mortgages or to refinance loans on buildings which contain asbestos. [FN64] This has occurred in large part because lenders fear future liability. If the property owner becomes financially insolvent, the lender may be liable for abatement costs. [FN65] For companies willing to finance asbestos-containing buildings, experts estimate that the presence of asbestos can increase interest rates on a loan by one-half to one percentage point presumably in recognition of the potentially reduced value of the mortgaged property. [FN66] Such practices within the lending community further devalue buildings that contain asbestos products.

B. Economic Ramifications of the Asbestos Bodily-Injury Claims

The most significant economic repercussions resulting from historical uses of asbestos to date flow from the bodily-injury litigation, i.e., the "first wave" of asbestos litigation that began in earnest about two decades ago. [FN67] As noted above, some of the real estate devaluation results from fear of future litigation. An examination of asbestos bodily-injury claims illustrates the extent to which the rest of the U.S. economy has already been affected by asbestos litigation.

1. Impact of Asbestos Bodily-Injury Claims on the Judiciary

One direct result of the extensive asbestos bodily-injury claims brought so far has been to burden an already clogged judicial system. It is estimated that by March 1983, 24,000 persons had filed asbestos bodily-injury claims. [FN68] By July 1985, the figure had reached 33,000, [FN69] and by 1988, 60,000 asbestos exposure suits were pending. [FN70] This represents geometric increases in the rate of new cases being filed. Moreover, most of this litigation is complex, involving an average of 20 defendants, some of whom file cross claims against one another. [FN71] The massive paperwork generated by so many litigants makes case management logistically ***12** difficult and has already forced some courts to hire special asbestos law clerks. [FN72] Indeed, one former Congressman, Robert E. Sweeney, testified in 1979 (when the number of cases was still relatively small), that "the level of litigation presently pending ... is so high that the judicial system has literally no means to accommodate all the suits that are anticipated to be filed." [FN73]

The sheer number of these asbestos bodily-injury cases has significantly drained judicial resources. The costs expended on asbestos claims in the federal courts alone increased from approximately $10.1 million in 1984 to $13.4 million in 1987. [FN74] It is anticipated that these court expenses will continue to increase: $18.0 million in 1988, $20.1 million in 1989; and $20.9 million in 1990. [FN75] These costs reflect only the filings in federal

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courts. The drain on state judicial resources is perhaps even more significant. [FN76]

Secondary litigation generated by asbestos bodily-injury claims also places a strain on the judiciary. There have been numerous large cases around the country devoted solely to interpreting the insurance policies covering the defendants. Finally, by overburdening the courts, the asbestos-related claims have seriously impeded the ability of many courts to resolve other cases. [FN77]

2. Impact of Asbestos Bodily-Injury Claims on Defendants

Although the burdens and costs placed on the judiciary resulting from the asbestos bodily-injury litigation are significant, it is the expenses incurred by defendants in these actions that may prove to be of greater importance to the general public. Many of the companies which were previously part of the asbestos products manufacturing industry continue today as viable economic entities, producing non-asbestos containing products. [FN78] These companies contribute to the economy by providing jobs, generating consumer spending, paying taxes, and providing significant goods and services. [FN79] Activity which chronically affects the financial viability of such companies will correspondingly impact upon the public benefits generated by those companies.

***13** In 1983, the Rand Corporation conducted a study to determine the private dollars expended on asbestos bodily-injury claims. [FN80] From the early 1970's through the end of 1982 defendants and their insurers spent approximately $1 billion in compensation and litigation expenses for such claims. [FN81] Compensatory damages amounted to approximately $400 million. Of that amount, individual claimants received an estimated $236 million after deducting approximately $164 million in legal fees and other litigation expenses. Thus, $2.71 in defense litigation and insurance costs were incurred for every one dollar that the plaintiff received. [FN82]

Although the $1 billion dollar figure quoted above is significant enough, these costs have continued to increase in the intervening years. The Rand study reflects only those expenses incurred by defendants and their insurers as of March 1983, when only 24,000 claims had been filed. [FN83] Outstanding bodily-injury claims have more than tripled since then. [FN84] The continuous increase in claims is reflected in the higher litigation costs incurred by defendants. For example, new bodily-injury claims filed against just one defendant numbered 8,900, 11,900 and 20,800 for the years 1985, 1986 and 1987 respectively. [FN85] Annual litigation costs for that company during that same period went from $40,400,000 to $47,000,000, to $63,100,000. [FN86] Of those amounts, $22,700,000, $7,900,000 and $29,600,000 respectively were covered by insurers. [FN87] Other defendants have incurred similar asbestos-related expenses. For instance, Raymark Industries, Inc. recently spent between $2 million and $2.5 million a month in attorneys' fees alone. [FN88]

The litigation and compensation costs resulting from bodily-injury claims are thus undermining the economic viability of the former manufacturers and distributors of asbestos-containing products. Several defendants have already filed for Chapter 11 bankruptcy due to asbestos claims. [FN89] Although the use of Chapter 11 by some asbestos defendants has been controversial, [FN90] equitable reorganization plans may be the only way to protect the interests of future asbestos claimants. [FN91] ***14** As recognized by the Court of Appeals for the Fifth Circuit in Jackson v. Johnson- Manville Sales Corporation, " t here is a real and present danger that the available assets will be exhausted before those later victims can seek the compensation to which they are entitled." [FN92]

Unarco appears to have been near insolvency at the time it filed for bankruptcy in 1982. Despite annual sales of $316 million in 1980, the company suffered a loss of $8.4 million. Asbestos litigation costs amounted to $7.5 million for that period. The following year sales increased to $346 million, but asbestos litigation costs increased to $14 million. [FN93] Although other defendants may not be as near to insolvency, it is only a matter of time before asbestos litigation costs exhaust the resources of a number of the other defendants and some of their insurers. [FN94]

There are broad economic consequences when a company files for Chapter 11 bankruptcy. Typically, the petitioning company, its shareholders, its employees, its retired employees, and its creditors will suffer financially. [FN95] In addition, the mere filing of a bankruptcy petition decreases the overall value of the company. [FN96] Finally, to the extent that a particular company is unable to pay liability judgments, its co-defendants may suffer additional losses to the extent joint and several liability applies.

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3. Impact of Asbestos Bodily-Injury Claims on the Insurance Industry

The impact of asbestos bodily-injury claims on the insurance industry has likewise been significant. Approximately two-thirds of the $1 billion expended on asbestos litigation and compensation as of 1983 was paid by insurers. [FN97] An increase in property/casualty insurance company insolvencies from six in 1981, to 21 in 1985, may indicate that some insurers are unable to sustain such losses. [FN98] In ***15** addition to actual insurer insolvencies, approximately 21% of the insurance companies reporting to the National Association of Insurance Commissioners have been placed on the "watch list" of companies with financial difficulties. [FN99] Although most casualty insurers have apparently maintained the resources to pay asbestos claims so far, the resulting underwriting losses have helped to contribute to the "crisis in liability insurance." This crisis is, in turn, felt throughout the U.S. economy. [FN100]

The crisis in liability insurance has led to a decrease in the availability and affordability of such insurance. For example, the majority of Commercial General Liability (CGL) policies now contain an "asbestos exclusion clause"--companies are simply unwilling to insure against asbestos-related losses. [FN101] The unavailability of insurance is not limited, however, to asbestos and pollution. Some additional areas which insurers refused to cover in 1985-86 included: liquor liability (cases relating to drunk driving); day- care center liability; municipal liability; and high-limit coverage (above $50 million) for industrial concerns. [FN102] Where liability insurance is available, premiums have increased significantly. Americans in 1985 paid $9.1 billion in liability insurance premiums--60% more than in 1983, and a figure roughly equivalent to the combined 1985 budgets of NASA and the CIA. [FN103] Municipalities, which have been especially hard hit, have had premium increases of up to 1,000%. [FN104] Architects and engineers have also encountered significant premium increases, from 200 to 300%. [FN105] These increases in premiums are often accompanied by limitations on the scope of coverage. [FN106]

The absence of affordable liability coverage in the face of potential litigation has caused manufacturers to withdraw some products and even product lines from the market, thereby depriving U.S. consumers of beneficial and sometimes even risk-reducing products and substances. The vaccine market is an apt illustration of the problem. Threat of liability has reduced the number of manufacturers of "combined DPT" (diphtheria, whooping cough and tetanus) from eight to six. [FN107] Not surprisingly, costs have increased accordingly. [FN108] The manufacturer of the swine flu vaccine was unable to obtain any coverage for its product and accordingly ***16** refused to market it. Congress was thereby forced to provide redress under the Federal Tort Claims Act as the exclusive remedy for personal injuries from the vaccine. [FN109]

In addition to reducing the availability and affordability of risk-reducing products, the product liability crisis (hence, liability insurance crisis) may drive U.S.-owned companies out of a particular market, leaving only foreign-owned corporations to continue production. This is what happened with the leading U.S. manufacturer of hospital equipment, Puritan-Bennett. The company ceased making anaesthesia gas machines in 1984, leaving only two foreign-owned manufacturers in a market once shared by a half-dozen companies. [FN110]

The crisis in availability and affordability of liability insurance undermines the competitiveness of American industries in other ways. It has been estimated that U.S. manufacturers pay liability insurance rates 20 times higher than their European counterparts. [FN111] American manufacturers are additionally disadvantaged by the fact that U.S. tort law typically holds manufacturers liable for their products as long as such products remain in use. [FN112] Because many foreign manufacturers have only recently entered the U.S. market, they do not carry this burden. [FN113] The net result is that American-made goods are more expensive than foreign-produced goods. This situation, in turn, contributes numbers adverse to the U.S. trade balance.

There is an even more insidious way in which the liability crisis undermines the competitiveness of U.S. industries. The fear of excessive liability stifles innovation. [FN114] One-third of the companies recently surveyed indicated that liability concerns forced them to cancel or postpone introduction of new products. [FN115] For example, developers of artificial intelligence software are understood to be withholding their products from the market for fear that they might be sued for incorrect decisions made by such programs. [FN116] Liability insurance has likewise proven to be a crippling cost for factory owners seeking to expand, entrepreneurs seeking to launch new enterprises, and young businesspersons seeking to set up shop. For such groups, insurance has become an obstacle

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far harder to surmount than high taxes and interest rates. [FN117]

A 1986 study by the Justice Department concluded that the tort system is a ***17** major cause of the crisis in availability and affordability of liability insurance. [FN118] The study cited an astounding increase in the number of product liability cases filed in federal courts as an indication of a burgeoning tort system. [FN119] A follow-up study by the U.S. General Accounting Office (GAO), on the other hand, questioned the conclusion that there was a "litigation explosion". [FN120] Nonetheless, the GAO noted that asbestos cases accounted for 60% of the growth in product liability filings from 1976 to 1986, [FN121] well over half of the increase in the period.

C. International Ramifications of U.S. Asbestos Bodily-Injury Claims

The economic impact of American asbestos product liability claims extends beyond this country. The reinsurance industry, which provides insurance to insurers, has suffered significant losses on account of U.S. asbestos claims. [FN122] Because the majority of U.S. reinsurance is placed with Lloyd's in London (Lloyd's), [FN123] American asbestos claims have become an "international" problem as well. For instance, recently released figures indicate that Lloyd's received 744 formal resignations of "names" apparently due in large part to U.S. asbestos and pollution claims. [FN124]

Losses suffered by reinsurers impact, in turn, on the U.S. economy. There is an increasing unwillingness among reinsurers to accept U.S. risks. For example, during the 1985-86 policy renewal season almost 60% of U.S. liability business could not be placed. [FN125] Reinsurance is vital to the continued functioning of the U.S. insurance industry. Without reinsurance, some domestic insurance companies ***18** would collapse and the remaining ones would operate very differently. [FN126] The willingness of primary insurers to cover risks is dependent upon the availability of reinsurance. [FN127]

IV. The "Second Wave" of Asbestos Litigation: Claims for Asbestos Property Damage

As already discussed, the overall economic ramifications of asbestos bodily- injury claims, which comprise the largest part of the burgeoning product liability case load in this country, will impact all our lives either directly or indirectly. In addition to contributing to the bankruptcy of otherwise financially sound corporations, these claims have burdened our judiciary and have played a pivotal role in the crisis over the availability and affordability of liability insurance. Now there is a "second wave" of asbestos suits being filed--asbestos "property damage" suits. [FN128] Currently pending in various state and federal courts are approximately 200 of these cases in which claimants hope to recover the costs associated with inspection for, and the removal of asbestos-containing products from buildings. The first property damage cases were brought by individual school districts. Other kinds of asbestos building cases are now being filed in increasing numbers. [FN129]

The magnitude of the potential liability at issue in these cases could be immense. One source has estimated that owners could spend $100 billion over the next 25 years on removal of asbestos-containing products from their buildings. [FN130] It is submitted that allowing recovery for these costs is not only inconsistent with basic principles underlying our tort system, but also unsound economic and social ***19** policy. Asbestos bodily-injury claims, largely premised on past occupational exposure to raw asbestos, are already consuming the resources of defendants and their insurers. Property damage claims, premised only on perceived (not scientifically established) risks of future harm to building occupants, will quickly deplete the remaining, finite reserves and will thereby remove the only funding currently available for occupationally exposed asbestos bodily-injury claimants. Property damage claims will also exacerbate the burdens already placed on the judiciary and the economy at large, discussed earlier.

A. The Potential Extent of Property Damage Claims

A significant number of buildings in the U.S. contain some asbestos- containing products. It is estimated that almost all of the 106,983 primary and secondary schools within the scope of AHERA contain some amount of "non-

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friable" ACM such as floor tile, transite board, and fire doors. [FN131] The EPA has estimated that 44,600 of these schools contain approximately 213 million square feet of surfacing or thermal systems insulation ACM, and that 10,700 have surfacing ACM only. [FN132] In addition, the EPA has estimated that 733,000 (or on-fifth), of all public and commercial buildings in the U.S. contain some ACM. [FN133] It believes that approximately 501,000 of such buildings have some damaged ACM and that 317,000 contain significantly damages ACM. [FN134]

The EPA has reported to Congress that it would cost approximately $51 billion to bring commercial and public buildings into compliance with an AHERA-type regulatory framework. [FN135] The expected costs of AHERA, which applies only to primary and secondary schools, are $3.145 billion. [FN136] Although the combined figure of almost $55 billion is enormous, it does not begin to represent the total exposure to liability for former ACM manufacturers because there are many categories of buildings not included--for example, virtually all of the nation's residential housing. [FN137]

***20** Moreover, claimants in asbestos property cases often seek punitive as well as compensatory damages. For the schools and public and commercial buildings, even the compensatory damages are likely to exceed the EPA's economic impact figures for several reasons. The EPA's estimates represent only the incremental costs resulting from compliance with the regulations. [FN138] Thus, costs that would be incurred in the absence of AHERA (such as non-mandatory asbestos abatement measures as well as removal done in compliance with the Clean Air Act) are not included. The compensatory costs sought by plaintiffs in property damage cases typically include all asbestos-related expenses, not just the incremental costs of complying with federal regulations.

In addition, the EPA's underlying assumptions regarding inspection and abatement costs may be unduly conservative. For instance, the EPA estimates that the cost of an asbestos inspection will range from $1,144 to $1,627 per school. [FN139] However, local experts projected that the per school inspection costs of Philadelphia's 340 schools would be in excess of $2.5 million (or an average of $7,058 per school.) [FN140] Finally, the EPA has erroneously assumed that each school's "response action" would reflect the underlying risk of exposure. [FN141] However, a significant amount of unnecessary abatement has been, and may well be done. For instance, contractors and abatement experts have concluded that only 20% of asbestos- containing product removal is done to counter a perceived "immediate" health risk. [FN142]

Assuming that the EPA's figures were adjusted to reflect the actual expenses incurred in removing or encapsulating asbestos, the new estimates would still not represent the total costs to defendants resulting from property damage cases. As noted in the Rand study discussed earlier, the transaction costs in asbestos cases are particularly high. Compensation to bodily-injury plaintiffs amounted to only 37% of defendants' and insurers' total expenses. Thus, if as one source predicts, property claimants spend $100 billion on asbestos abatement over the next 25 years, [FN143] the resulting costs to defendants and their insurers, including litigation, could be much greater.

B. Allowing Recovery for Asbestos Property Damage Is at Odds With Established Principles of American Tort Law

The first issue which arises in asbestos property damage cases concerns the nature of the alleged injury. Proof of present injury has always been the beginning point for recovery in tort. [FN144] Present injury may be defined as an invasion on ***21** one's lawfully protected interest, producing a harmful effect. [FN145] Mere allegations or speculation that a product or exposure may increase one's risk of future injury do not create a present cause of action. [FN146] Likewise, costs undertaken to reduce the risk of future injury do not create an injury traditionally compensable in tort. [FN147]

Claimants in asbestos property damage cases are attempting to recover the costs undertaken to avoid a perceived risk of future injury. [FN148] But it is ridiculous to argue that all risk-reducing conduct creates a cause of action in tort. Consequently, claimants must allege that the risk of future injury due to the mere presence of asbestos-containing products in buildings is qualitatively and quantitatively different from the multitude of risks society endures every day, and thereby qualifies as a present injury. However, neither legal theory nor scientific evidence supports such an allegation.

Plaintiffs are generally able to recover for anticipated future harm attributable to a present injury. [FN149] Likewise, the cost of monitoring to detect possible manifestation of future harm has been found to be compensable

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in tort. [FN150] However, where there is no current identifiable harm, there is no injury cognizable in tort. [FN151] The money expended by claimants in asbestos property damage cases to reduce the risk of future harm does not transform that risk into a present injury. [FN152]

***22** Even if a policy decision were made to extend the notion of "injury" to include costs taken to avoid a mere perceived risk of future harm, a significant barrier to recovery remains. The dangers of occupational exposure to asbestos have arguably been known for some time. [FN153] However, potential health hazards associated with the presence of asbestos in buildings remains in dispute today. [FN154] At any rate, there has been no responsible claim that the former manufacturers of asbestos-containing building products should have been aware of potential hazards to building occupants from the mere presence of those products in buildings. Thus, claimants in asbestos property damage cases are likely to recover only under a theory of strict liability. However, the imposition of strict liability for "design defects" unknowable to the manufacturer smacks of absolute liability--a concept at least arguably eschewed by the principal commentators on evolving manufacturer product liability. [FN155]

The main justification for strict product liability is that it tends to spread the costs of injury broadly while creating incentives for manufacturers to produce safer products. [FN156] The underlying notion is that manufacturers can insure against ***23** the risk of injury, and that they are then able to pass these added costs on to the public in the form of price increases. However, because the concept of liability for scientifically unknowable "design defects" has only recently emerged, it is clear that manufacturers could not have insured against such a risk at the time their products were sold. It is likewise too late to "pass the cost on" because these products are no longer marketed. [FN157]

The scientific "evidence" on the health risks to building occupants from the mere presence of asbestos-containing products in buildings is speculative and inconclusive at best. [FN158] Likewise, the fact that there are mandatory EPA guidelines relating to the indemnification of and response to ACM in schools does not transform the perceived risk of future harm into a present injury which is compensable in tort. [FN159] Even if EPA guidelines were used to substantiate the alleged risk, it is noteworthy that the EPA has specifically declined to extend such guidelines to public and commercial buildings. [FN160] However, a significant number of lawsuits have already been filed to recover the costs in inspection for all abatement of ACM in public and commercial buildings and that number is growing rapidly.

C. Exposing U.S. Companies to the New Forms of Liability That Could Be Created in the Asbestos Property Litigation Would Impose on Them Additional Costs Not Shared by Their Foreign Competitors in Today's Global Marketplace.

There are at least two fundamental legal reasons why these asbestos-in- buildings claims should not be allowed: (1) the alleged harm (mere presence of ACM in buildings) does not constitute a present injury; and (2) the alleged "product defect" (propensity to emit asbestos fibers in amounts potentially harmful to occupants) was scientifically unknowable at the time asbestos- containing materials were installed in buildings (and, indeed, is still a matter of intense debate in the scientific community). The appropriateness of holding manufacturers liable for "development risks" (i.e., imposing liability for scientifically unknowable defects) is disputed in both the U.S. [FN161] and other countries. [FN162] Although there are examples ***24** in the U.S. and other countries where liability for scientifically unknowable defects has been imposed, as noted above, such liability in fact and in contemplation makes the manufacturer an insurer and thus constitutes absolute liability. Such a doctrine in other countries is not, as yet, well-established. If the new tort doctrine (recovery without present injury but for perceived risks only) sought to be established in these asbestos property cases is generally allowed by our courts, U.S. production costs and prices (because of the increased exposure to tort liability from such a precedent) will be even higher and less competitive than today in comparison to foreign producers.

Many major industrialized countries do not even have an explicit doctrine of "strict liability" as that concept was developed here. However, in some respects comparable results have been achieved in some foreign jurisdictions through the use of evidentiary presumptions and burden-shifting devices. For example, although French tort law presupposes a showing of fault on the part of the defendant, [FN163] a manufacturer who places a defective product into circulation may be presumed to be at fault. Such a presumption is effectively irrebuttable. In addition, the "state-of-the-art defense" does not operate under French law, whether or not the alleged defect was scientifically

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knowable. [FN164]

West German law employs a similar presumption. Once the plaintiff has established the existence of a defect, the manufacturer is presumed to be at fault. [FN165] However, unlike French law, this presumption is rebuttable; under West German law the manufacturer is not liable if he can establish that the defect could not reasonably have been prevented. [FN166] The "state-of- the-art" defense is therefore operative, except (by statute) in cases of personal injury and death involving pharmaceutical products. Thus, West German tort law "does not offer strict liability law for the victim of the defective product other than drugs ." [FN167]

In Japan, the Civil Code imposes a "fault based" system for recovery in tort, but the duty of care and standards for foreseeability are very high for manufacturers of products that are expected to affect human life. [FN168] These standards approach strict liability, but defendants may still resort to "unforeseeability of the defect or injury in question under the existing highest state of the art." [FN169] Thus, in food and drug cases, evidence of a defect in practice constitutes proof of fault. [FN170] Courts may infer fault from the existence of a defect, or they may still require the plaintiff to establish fault, but impose such a high standard of care on ***25** the defendant that the plaintiff's burden is easily met. In either case, unforeseeability of the defect or injury is a defense, but it is rarely successful in food and drug cases.

Until recently, product liability claims in the United Kingdom proceeded under "sale of goods" or "negligence" theories. [FN171] In a tort claim the plaintiff was required to establish the existence of a duty of care, breach by the defendant and damages which are not too remote. [FN172] The standard of care was that of a reasonably prudent manufacturer. [FN173] However, in 1987 the United Kingdom adopted by statute a form of strict product liability in accordance with a recently-enacted European Economic Community (EEC) Directive.

Since 1976 there has been an effort within the EEC to harmonize the differing member state laws on recovery for harm caused by defective products. In July 1985, an EEC Directive was finally adopted which would, when implemented, establish joint and several liability for defective products on the producers, importers and sellers of such products. [FN174] A product is "defective" when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including its expected use as well as the time that has passed since it was put into circulation. [FN175] The injured party must prove injury, defect and the causal connection between the two. [FN176]

The EEC Council recognized that advances in science and technology and the natural aging of products make it unreasonable to hold producers liable indefinitely for defects in their products and therefore instituted a three- year "period of limitations" for bringing claims. [FN177] The period starts to run from the day the plaintiff should reasonably have become aware of the harm, the defect and the identity of the producer. [FN178] In addition, no claim may be brought more than ten years from the date the product was put into circulation.

Finally, the Directive allows as a defense, "that the state of scientific and technical knowledge at the time when [the defendant] put the product into circulation was not such as to enable the existence of the defect to be discovered." Member states may exclude the state-of-the-art defense entirely, [FN179] or may impose financial limits on liability for death and personal injury. [FN180] Compensation for non-material damages was not specifically addressed in the Directive, although the laws of most member states include recovery for such damages. [FN181]

The Directive is binding upon each member state as to the result to be achieved, but it leaves to national legislation the choice of form and method to be used to ***26** implement that obligation. [FN182] Member countries were given until July 30, 1988, to implement the Directive. However, it was not expected that all member countries would meet that deadline. [FN183] (As of April 1988, only the United Kingdom had implemented the Directive.) Finally, in implementing the Directive, member countries may either incorporate the exact language of the Directive or adopt more precise language as the United Kingdom did with respect to the "state-of-the-art" defense.

The United Kingdom implemented the EEC Directive in Part One of its 1987 Consumer Protection Act. [FN184] The Act brought about a change in United Kingdom product liability law by allowing recovery from injury without a showing of fault. However, the United Kingdom has opted to allow the "state- of-the-art" defense. The Act allows the defense to succeed if the defendant took appropriate steps to avoid a defect using practices that were

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"generally" applicable in the relevant industry at the time. [FN185]

The Act further provides that no inference of a defect may be drawn from the fact that the safety of a product developed or supplied at a later date is greater than that of the product in question. [FN186] Without such a provision it is acknowledged that manufacturers might be discouraged from improving the safety standards of their own products. [FN187]

Except for West German law on medicines, the EEC Directive represents the first formal imposition of strict liability for the member countries. [FN188] However, as discussed earlier, elements of strict liability are present in French civil law where the courts in practice impose strict liability. [FN189] Likewise, other countries (e.g., Belgium and Luxembourg), by either inferring negligence or imposing a high standard of care, have achieved some of the same results available under strict liability. [FN190]

Although the problem of holding manufacturers liable for development risks is addressed in the recently-adopted EEC Directive, [FN191] the Directive does not focus on the issue of whether the type of harm alleged in U.S. asbestos property damage cases constitutes a "compensable" injury. American product liability law allows victims to recover costs for anticipated future harm, assuming that there is a demonstrable present injury. [FN192] However, plaintiff victories in the pending asbestos property damage cases would allow the alleged victims to recover costs undertaken to reduce the risk of future injury, where no physical injury (indeed, no actual bodily-injury claimant) has emerged.

If the U.S. courts permit recoveries on such dubious premises (in effect allowing asbestos property recoveries to be a surrogate for inchoate, future bodily-injury ***27** claims), then a precedent will have been established whereby every U.S. product manufacturer will not only become an insurer against actual injuries from its products (the de facto predicate justifying today's strict U.S. product liability), but also would be obliged to be an insurer against each claimant's imagined risk of future harm, regardless of foreseeability or the care taken in product design or manufacture. Since research discloses no such foreign precedents, U.S. manufacturers, forced to operate under such costly legal constraints, would be even further disadvantaged in the global marketplace because of our domestic laws than they are today.

D. Widespread Judicial Recovery for Alleged Property Damage Due to the Mere Presence of Asbestos-Containing Products in Buildings Would Have Economic Repercussions Felt Throughout Our Economy

If the American tort system were liberalized to allow recovery for each claimant's perceived risk of future injury due to the presence of asbestos- containing products in such buildings, the result would be court orders effectively requiring the "rebuilding" of a large part of this country's real estate. Yet, it has been estimated that the combined assets of all former ACM manufacturers and their insurers are not even sufficient to cover the bodily injury claims, let alone, such massive asbestos-in-buildings liability. [FN193]

As discussed above, at least seven former ACM manufacturers have already filed for bankruptcy due to bodily-injury claims alone. The repercussions within the insurance industry from such bodily-injury claims have also been significant. However, the costs alleged in property damage cases could prove to be far greater than those associated with bodily-injury claims. Consequently, new jurisprudence imposing such costs on the former manufacturers and distributors of asbestos-containing products could seriously debilitate those companies, and their insurers and reinsurers as well.

Thus, even if future bodily-injury claims continue to mount, the dollars at stake in the property damage cases may far surpass the total bodily-injury claims figure. [FN194] The average compensation in bodily-injury cases through 1982 ranged from $54,000 for asbestosis to $265,000 for mesothelioma. [FN195] However, the costs of removing asbestos from just one floor of a Manhattan office building could reach $1 million. [FN196]

Even if one concluded that former asbestos product manufacturers and their ***28** insurers should pay abatement costs of such enormous magnitude, neither are financially capable of doing so. The net worth of all likely defendants and their insurers was estimated in 1982 to be only $35.3 billion. [FN197] Yet, Johns-Manville alone had an estimated $69 billion in asbestos-related claims outstanding in June 1985. [FN198] At the time it filed for

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bankruptcy in 1982, Johns-Manville had a net worth of $1.1 billion. [FN199] Although such assets were sufficient to rank Johns-Manville as a Fortune 500 company, [FN200] they would cover only 1.25% of the company's outstanding claims.

The combined assets of the other regularly named defendants are likewise not likely to be sufficient to cover future asbestos claims. Nor is there likely to be enough insurance coverage, if the combined exposure exceeds the hundreds of billions of dollars some have estimated. [FN201] In addition, coverage for asbestos property damage claims may be disputed. [FN202] And, even if a given insurer is obligated to pay such claims, it may be financially unable to do so. [FN203]

At the time the policies at issue were written, tort claims of the kinds and on the scale represented by the asbestos bodily-injury and property litigation were not foreseen by the insurers. Premiums did not reflect the possibility that thousands of building owners might be "injured" in the future from exposure to a product. [FN204] In addition, at the time many of these policies were written there was no well-understood strict product liability for design defects. Thus, not only did a consumer have to prove present injury and negligence or fault, but also the notion that a manufacturer of a product might be liable for scientifically unknowable defects simply did not exist. [FN205]

Premiums likewise did not reflect the risk that manufacturers might be liable in tort for costs incurred to reduce the mere perceived risk of future injury. [FN206] As ***29** discussed earlier, one of the traditional elements in tort law has been the existence of present injury. However, insurers in asbestos property damage cases are being told retroactively that they insured against the risk of a product not causing an injury, but causing the risk of an injury. In a society where essentially every activity entails some risk of injury, it is simply nonsensical to think that insurance companies would insure against the risk that a product might create a risk of injury.

The ramifications of the asbestos property claims for the insurance marketplace affect all levels of insurance, i.e., primary, excess and reinsurance. As noted above, Lloyd's, the world's largest reinsurer, has already sustained significant losses because of U.S. asbestos bodily-injury claims. Even if Lloyd's retained the financial capacity to cover U.S. asbestos property damage claims, it cannot be assumed that it will agree to do so. The notion that insurers must cover costs incurred to reduce the risk that injury might result from asbestos in buildings at some uncertain time in the future to some unknown person is unique, both to American tort law and foreign product liability law. Foreign entities that provided reinsurance to former asbestos product manufacturers that are now defendants in asbestos property cases may well--perhaps successfully--dispute coverage for claims under the laws of their own countries (e.g., Lloyd's policies commonly provide that they will be interpreted under Brittish law).

In sum, even though U.S. defendants may theoretically have significant insurance coverage, their insurers may challenge such coverage to the full amount of the potential U.S. asbestos-property damage claims. To the extent that such claims are paid as they arise (on a first come, first served basis), future claimants (including those former asbestos workers who can demonstrate actual injury from occupational exposures) may go uncompensated. When available insurance is exhausted, either through coverage limits or insurer insolvency, the defendants' assets will be used to pay these claims, until they too are exhausted.

V. Conclusion

Asbestos bodily-injury and property litigation has imposed and will continue to impose a heavy price on all of us. This article has attempted to identify these costs both in dollar terms and in terms of the stresses and strains that have been placed on this country's vital legal and commercial institutions. It has discussed how these debilitating costs and dubious product liability principles (such as allowing compensation for risk of possible future harm) will ultimately undermine the competitiveness of U.S. products (compared with foreign marketers not similarly handicapped by heavy liability costs) and will stifle innovation (because no manufacturer in this country would feel commfortable about introducing novel products or services without adequate insurance which may not be available in an era of absolute manufacturer liability).

***30** What, then, can be done--if anything--to diminish the burden imposed by the two waves of asbestos litigation? There are several answers to this question which, taken together, could go some distance in eliminating the current problem and restoring confidence in the tort liability system.

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To begin with, the EPA and Congress must acknowledge their roles in the "demonization" of asbestos which has led to the "asbestos hysteria," a driving force for much of the litigation. The EPA's February 1988 submission to Congress advocating that AHERA-type regulations not be applied to all commercial and public buildings in the country pending further investigation of the scientific validity of earlier assessments of non-occupational exposures to asbestos is a step in the right direction. In that submission, the EPA acknowledged that it had sparse data, at best, to support valid risk assessments of health hazards to occupants of buildings with asbestos- containing materials. It has asked for (and received from Congress) an additional three years to conduct further studies, including a reexamination of earlier low-dose risk assessment data and the scientific technology previously used to measure fiber levels in buildings.

Hopefully this work will yield much more precise information on the true nature of the risks, if any, to those occupying buildings containing asbestos materials. If this research tracks the British experience, the EPA should be in a position to declare that the risk of occupying buildings with ACM is negligible; that a "rebuilding" of America is simply not justified; and, indeed, that such an effort could even lead to a worse health hazard by creating unnecessary asbestos dust from products that are now in place and presenting no health hazard. [FN207]

For their part, the courts need to take a much closer look at the asbestos bodily-injury claims that have been filed recently to determine whether such actions are premised on a good-faith belief that asbestos-related injury exists and supported by solid medical evidence and proof of causation. A large portion of the asbestos bodily-injury claims relate to War-time experiences in which the claimants were involved with applying asbestos--often raw asbestos--to weapons of war, such as naval vessels. These "shipyard" and similar cases--which predated the OHSA PEL levels announced in the early 70's-- will inevitably run their course. Once that era has passed, and the impact of the new workplace criteria is felt, the cases should begin to decline. The courts should, therefore, be especially wary of increasing numbers of claims after many more years, especially given the difficulty of causally-relating diseases to an asbestos exposure. For example, one of the most common claims--for lung cancer--must be especially scrutinized, given the well-known association of smoking to that disease, a proposition which has been reiterated by the Surgeon General for the past 25 years.

The courts should also refine the process of evaluating bodily-injury claims by eliminating some of the multi-party trial practices which have been installed with a view towards accelerating recovery by claimants. These proceedings, in some cases class actions, have inevitably led to the "roundup" of plaintiffs whose "claims" must receive special scrutiny by the courts. [FN208]

***31** Lastly, the courts should resist the temptation to permit recovery for economic losses to property under tort theory where there has been no demonstration of injury to occupants other than conjecture or speculation of future harm. As this article has suggested, allowing such recovery for the mere risk of future harm inevitably would establish a precedent that would place U.S. manufacturers at a distinct competitive disadvantage in today's global marketplace and would stifle innovation and the introduction of new technology beneficial to all Americans.

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[FN12]. See Analysis supra note 1, at 578.

[FN13]. See ASBESTOS FACT BOOK supra note 2, at 2.

[FN14]. See Analysis supra note 1, at 578-79.

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[FN15]. See 1981 ATT'Y GEN.REP. supra note 3, at 19-33, 52.

[FN16]. The EPA has expressed this health concern in the following terms:

Exposure to high levels of airborne asbestos is associated with a debilitating lung disease called asbestosis; a rare cancer of the chest and abdominal lining called mesothelioma; and cancers of the lung, esophagus, stomach, colon and other organs. The relationship between exposure level and health risk is complex. The best available data on asbestos worker exposure indicate that the risk of asbestosis, lung cancer and mesothelioma decrease in direct proportion to a decrease in total asbestos exposure (the average airborne asbestos concentration multiplied by the duration of exposure). At exposure levels below those allowed for asbestos workers, the risk of asbestosis is negligible. Some scarring of lung tissue may appear on x-rays after many years of low exposure, but no impairment of respiratory function is likely to occur....

Asbestos related lung cancer usually appears after age 45, and its occurrence is heavily influenced by cigarette smoking.

OFFICE OF PESTICIDE AND TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE FOR CONTROLLING FRIABLE ASBESTOS-CONTAINING MATERIALS IN BUILDINGS 1- 1, 1-2 (1983).

[FN17]. See 1981 ATT'Y GEN.REP. supra note 3, at 52.

[FN18]. Id. at 53 (the cities and states included Boston, New York, Philadelphia and the State of Illinois).

[FN19]. For a recent overview of asbestos regulations, see Kirkland, What's Current in Asbestos Regulations, 23 U.RICH.L.REV. 375 (1989).

[FN20]. 40 C.F.R. § § 61.21-.22 (1973). These regulations did not distinguish between asbestos fiber types but considered all types to be equally harmful.

[FN21]. 40 C.F.R. § 61.21 (1978).

[FN22]. See 1981 ATT'Y GEN.REP. supra note 3, at 49.

[FN23]. See 40 C.F.R. § § 61.140-.156 (1987).

[FN24]. 40 C.F.R. § § 61.142-.146(b), § 61.154 (1988).

[FN25]. 40 C.F.R. § 61.145-.147 (1988).

[FN26]. 40 C.F.R. § 763 (1982).

[FN27]. Comment, Asbestos in Schools and the Economic Loss Doctrine, 54 U.CHI.L.REV. 277, 280 (1987).

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[FN28]. 40 C.F.R. § § 763.80-.99 (1987).

[FN29]. 40 C.F.R. § § 763.80-.99 (1987).

[FN30]. See, e.g., Safe Building Alliance v. EPA, 846 F.2d 79 (D.C.Cir.1988) (No. 87-1669, Joint Brief for Petitioners at 21-22).

[FN31]. See 40 C.F.R. § § 763.63-763.126 (1983).

[FN32]. Id.

[FN33]. 40 C.F.R. § 763 (1989).

[FN34]. 29 C.F.R. § 1910.1001 (1971).

[FN35]. See 29 C.F.R. § § 1910.1001(c), 1926.58(c) (1988).

[FN36]. See 40 C.F.R. § § 763.120-763.121 (1988).

[FN37]. In 1978, the permissible level was lowered to 2 f/cc. 30 C.F.R. § 71.702 (1978).

[FN38]. CPSC, Consumer Product Safety Act Regulations, 16 C.F.R. § § 1304, 1305 (1987).

[FN39]. CPSC, Federal Hazardous Substances Act Regulations, 16 C.F.R. § 1500.17 (1987). The FHSA is now administered by the CPSC.

[FN40]. 51 Fed.Reg. 33,910 (1986).

[FN41]. See Asbestos Abatement Rules: The Complete Resource Guide (BNA) at B-3 (1988).

[FN42]. Id.

[FN43]. OFFICE OF TOXIC SUBSTANCES, ENVIRONMENTAL PROTECTION AGENCY, REGULATORY IMPACT ANALYSIS OF CONTROLS ON ASBESTOS AND ASBESTOS PRODUCTS, Vol. II at Exhibit A.2.1-1 (1988). However, the mining, milling and distribution of asbestos remains a significant industry in other countries. For example, Canada, the largest supplier of asbestos, produced 821,960 metric tons of asbestos as recently as 1982. Id. at A.2-1.

[FN44]. Id. at Exhibit A.2.1-5.

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[FN45]. 29 C.F.R. § § 1910, 1926. (1986).

[FN46]. Id.

[FN47]. Since OSHA implemented its first standard in 1971, it has twice modified the PEL. Such regulatory changes result in what OSHA calls "dead weight loss," i.e., the value of transactions that will no longer be permitted because of the revised standard. For the most recent PEL, OSHA estimated the dead weight loss to be $1.7 million per year. This loss reflects the percentage change in profits suffered by the manufacturers of asbestos- containing products. The 1986 change in PEL was expected to result in an 11.5% decline in profits for manufacturers of primary friction products, a 38% decline in profits for the primary asbestos sheet producers, and a 23.2% decline in profits for the secondary manufacturers of gaskets. Other primary and secondary manufacturers were expected to suffer less significant declines in their profits. Id.

[FN48]. This may occur directly when a regulation explicitly bans the use of an asbestos-containing product, as was the case with asbestos-containing sprayed-on products. It may also occur indirectly when it no longer makes good business sense to use asbestos as an ingredient.

[FN49]. Asbestos was such an effective fire retardant that some Federal Government regulations required its use. For example, military specifications mandated inclusion of asbestos in products sold to the Government until 1976. See Asbestos: The Cases, supra note 4, at 871.

[FN50]. In some cases, it clearly remains to be seen whether asbestos substitutes will prove to be less "harmful" than asbestos is alleged to be. For example, a variety of manmade fibers have been used as alternatives to asbestos in insulation products. Some of these fibers have recently been declared to be "possible carcinogens" by the World Health Organization's International Agency for Research on Cancer (IARC). See IARC, PUB. NO. 77, MANMADE FIBERS (1988).

[FN51]. 54 Fed.Reg. 29,460 (1989) (to be codified at 40 C.F.R. § 763); 54 Fed.Reg. 37,531 (1989).

[FN52]. Id. at 29,484. The ban will affect 94% of the remaining U.S. imports and production of asbestos-containing products, eliminating most of the 85,000 metric tons of asbestos still consumed annually. EPA Press Release R-130, July 6, 1989, at 1. The EPA estimates that between 120 and 202 "quantifiable cancers" will be eliminated, or substantially less than one manifestation of cancer per million persons in the total population. 54 Fed.Reg. 29,485 (1989).

[FN53]. Most defendants named in asbestos suits today ceased manufacturing asbestos-containing products in the 1970's.

[FN54]. 54 Fed.Reg. 29,484 (1989) (to be codified at 40 C.F.R. § 763).

[FN55]. Id.

[FN56]. Id. This figure, like the consumer loss figure, would be twice as large using the EPA's alternative cost assumptions.

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[FN57]. The costs of the EPA's AHERA regulations is a notable exception because of the magnitude of the task of establishing asbestos programs for hundreds of thousands of school buildings throughout the country.

[FN58]. That we have become a nation easily manipulated by the media into believing that risks to our lives lurk everywhere is now the subject of frequent commentary. It is suggested that we are losing the capacity to discern real risks from those that are purely speculative. See, e.g., Seeing Risks Everywhere, Wash. Post, May 7, 1989, at A1.

[FN59]. For example, the Exxon Building in Manhattan sold for $100 million less than expected due to the presence of asbestos in the skyscraper's fireproofing. Main, Exxon's Fire Sale, FORTUNE, Jan. 5, 1987, at 9.

[FN60]. For example, New York City now has stringent laws governing the presence of asbestos in buildings. Building owners must submit a certified asbestos specialist report identifying the presence (or absence) of asbestos when applying for a permit to renovate, alter or demolish a building. If asbestos is present, the permit application must include a plan for controlling any friable asbestos. Penalties for non-compliance can reach $10,000 per violation. See Toll, Asbestos Poses Major Economic Issues for Owners, Managers, Lenders, and Insurers, REAL EST.FIN.J., 45, 47 (Spring 1987).

[FN61]. So far, the EPA has confined its building asbestos regulations to primary and secondary schools as required by AHERA. It has been reluctant to extend this program to other public and commercial buildings without further evidence on the real risks to building occupants from in-place ACM. The EPA itself has estimated the cost of such an extension to exceed $50 billion. Accordingly, it has asked and received funding from Congress to further evaluate, inter alia, whether the AHERA program, costly as it is, leads to any improvement in the public's health. This work will take at least three years. See U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA's STUDY OF ASBESTOS- CONTAINING MATERIALS IN PUBLIC BUILDINGS, A REPORT TO CONGRESS (Feb. 1988) [hereinafter EPA REPORT TO CONGRESS].

[FN62]. In one such lawsuit filed against a building owner a jury in Cleveland awarded $400,000 to a woman who alleged injury due to asbestos exposure at work. Richman, Why Throw Money At Asbestos?, FORTUNE, June 6, 1988, at 155, 158.

[FN63]. On May 4, 1989, Cong. James J. Florio (D-NJ), one of the authors of AHERA and earlier asbestos schools legislation, introduced H.R. 2123 to require the EPA, under TCSA, to apply AHERA inspection and follow-up procedures to all public and commercial buildings. Congress has not acted on this proposed legislation and, as noted, the EPA has requested and received funding to examine further the issue of federal asbestos regulation in the building environment before making its own recommendations. Specifically, Congress intends the new research:

to determine actual airborne exposure levels prevalent in buildings, to characterize peak exposure episodes and their significance, and to evaluate the effectiveness of asbestos management and abatement strategies in a scientifically meaningful manner. The conferees believe it is important that the sponsorship of and participation in this effort encompass the full range of private interests, including current and former product manufacturers, realtors, developers, building owners and managers, mortgage bankers, the insurance industry, labor organizations and environmental groups.

CONF.REP. TO ACCOMPANY H.R. NO. 4800, Aug. 3, 1988, at 15.

[FN64]. For example, 37% of 140 institutional lenders surveyed refused to write mortgages for buildings containing asbestos. Richman, Why Throw Money at Asbestos?, supra note 62, at 162. See also Krizan, Asbestos in Buildings Scaring Lenders Away, ENGINEERING NEWS RECORD, July 10, 1986, at 10 (indicating that three of

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the nation's largest insurance companies are closing the door on loans for commercial buildings containing asbestos.)

[FN65]. See U.S. v. Maryland Bank and Trust Co., 632 F.Supp. 573 (D.Md.1986) (bank liable for cleanup of toxic wastes on a foreclosed property).

[FN66]. N.Y. Times, Apr. 28, 1988, § D at 7, col. 3.

[FN67]. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir.1973), cert. denied, 419 U.S. 869 (1974), is commonly believed to be the seminal asbestos bodily-injury decision because it was the first decision to uphold a plaintiff's contention that the defendant had knowledge of the harmful effects of asbestos in the workplace and did not provide adequate warnings to asbestos users. See 1981 ATT'Y GEN.REP. supra note 3, at 45.

[FN68]. J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION 3, (Rand Corp.1983) [hereinafter KAKALIK].

[FN69]. D. HENSLER, W. FELSTINER, M. SELVIN, & P. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 21 (Rand Corp.1985) [hereinafter HENSLER].

[FN70]. INSURANCE INFORMATION INSTITUTE, Occupational Disease: Insurance Issues, DATA BASE REPORTS 3 (Nov. 1988).

[FN71]. WILLING, TRENDS IN ASBESTOS LITIGATION, (Federal Judicial Center, 1987) at 12 [hereinafter WILLING].

[FN72]. Id. at 12, 114.

[FN73]. Comment, Relief for Asbestos Victims: A Legislative Analysis, 20 HARV.J. ON LEGIS. 179, 183 n. 33 (citing Occupational Diseases and Their Compensation, Part I: Hearings on H.R. No. 2740 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 96th Cong., 1st Sess. 395, 555 (1979)).

[FN74]. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON LABOR STANDARDS, COMM. ON EDUCATION AND LABOR, ASBESTOS: GROWTH OF FEDERAL CLAIMS, COURT CASES, AND LITIGATION COSTS (Apr. 1988) at 21.

[FN75]. Id.

[FN76]. It is estimated that asbestos bodily-injury claims in federal courts comprise only one-third of all such asbestos cases. See, e.g., Rubin, Mass Tort and Litigation Disasters, 20 GA.L.REV. 429, 430 (1986) [hereinafter Mass Tort]; see also HENSLER, supra note 69, at 21.

[FN77]. Moreover, the asbestos bodily-injury cases are not uniformly distributed throughout the courts. For example, 34.5% of asbestos federal claims filed from July 1, 1977 to June 30, 1986 were filed in the Fifth Circuit.

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The First Circuit had the next highest load at 17%. See WILLING supra note 71, at 14. Concentration in filings tends to reflect the fact that a large percentage of cases involve shipyard workers from cities with major port facilities. Id. at 13.

[FN78]. It is these companies which are targeted as defendants in asbestos bodily-injury and property damage claims.

[FN79]. For example, the annual report of one of the defendants frequently named in asbestos suits indicated the following for 1986: total sales of $1,920,345,000; 21,667 people employed; and $517,352,000 paid in wages and salaries. ARMSTRONG WORLD INDUSTRIES, 1986 ANNUAL REPORT, SEC, Form 10-K at 18, 22.

[FN80]. See KAKALIK supra note 68, at vi.

[FN81]. Id.

[FN82]. Id. at vii-viii.

[FN83]. Id. at 3.

[FN84]. Total filings reached 60,000 by 1988. See supra note 70 and accompanying text. This number fails, of course, to consider the cases disposed of in the interim. By now, the total number of cases which have been filed may well exceed 100,000.

[FN85]. See EAGLE-PICHER INDUSTRIES, INC. 1987 ANNUAL REPORT, SEC, Form 10- K.

[FN86]. Id.

[FN87]. Id.

[FN88]. ASBESTOS LITIGATION REPORTER, at 17,297 (July 8, 1988). Raymark Industries, Inc. has since been the subject of involuntary bankruptcy petitions by persons holding asbestos bodily-injury judgements against it. In re Raymark Industries, Inc., 99 Bankr. 298 (Bankr.E.D.Pa.1989).

[FN89]. In re Johns-Manville Corp., 36 Bankr. 743, 745 (Bankr.S.D.N.Y. 1984), aff'd 52 Bankr. 940 (S.D.N.Y.1985); In re Amatex Corp., 30 Bankr. 309, 310 (Bankr.E.D.Pa.1983); In re UNR Industries, Inc., 29 Bankr. 741, 743 (N.D.Ill.1983) appeal dismissed, 725 F.2d 1111 (7th Cir.1984); In re Standard Insulation, No. 86-03413 (Bankr.W.D.Md.1986); In re Forty-Eight Insulations, No. 85-B-5061 (Bankr.N.D.Ill.1986); and In re Nicolet, Inc., No. 87-03574S, 80 Bankr. 733, 734 (Bankr.E.D.Pa.1987). See also In re Pacor, 72 Bankr. 927 (Bankr.E.D.Pa.1987), aff'd, 86 Bankr. 808 (1988).

[FN90]. See, e.g., Analysis supra note 1, at 818, 843. Because companies may lawfully seek the protection from claims under the automatic stay provisions of the Bankruptcy Code without demonstrating present insolvency, they are vulnerable to the challenge that resort to the Bankruptcy Court is simply a way to avoid paying asbestos-related

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claims.

[FN91]. For example, Johns-Manville (now Manville Corp.) filed for protection under Chapter 11 of the Bankruptcy Code in August 1982 "to avoid billions of dollars in product-liability claims from people afflicted with sometimes fatal asbestos-related diseases." The company emerged from bankruptcy through reorganization on November 28, 1988, but the "financial toll from the company's asbestos manufacturing days is far from over." Manville has "accepted the responsibility for at least $2.6 billion of what has grown into an estimated $80 billion in asbestos claims. Under its reorganization plan, the company could wind up paying $4 billion to asbestos claimants, depending on its earnings in the next 27 years." These payments are made through a trust fund established as part of the company's reorganization in bankruptcy. Wash.Post, Feb. 7, 1989, at C3. Under the reorganization plan, Manville's personal injury trust was "initially funded with $880 million, of which $615 million was supplied by insurance settlements." Id. Manville has also established a separate property damage trust fund. Manville Corp.--Insurance Settlement Adds $15 Million to Property Fund, Asbestos Abatement Report (BNA), No. 17 at 7 (Feb. 6, 1989).

[FN92]. 750 F.2d 1314, 1330 (5th Cir.1985), cert. denied, 106 S.Ct. 3339 (1986).

[FN93]. See Analysis supra note 1, at 820-21.

[FN94]. Fearing an inability to meet the total bodily-injury claims outstanding, Raymark Industries, Inc., proposed a mandatory nationwide class action of all such cases to be administered by the Federal District Court for the Northern District of Georgia. The Court accepted this proposition, but the United States Court of Appeals for the Eleventh Circuit reversed following a writ of mandamus by the plaintiff. In re Temple, 851 F.2d 1269 (11th Cir.1988).

[FN95]. For example, Manville Corporation said "it had a net loss of $1.31 billion for the fourth quarter (1988) after $1.29 billion in extraordinary charges to reflect its emergence from bankruptcy law proceedings." Wall Street J., Feb. 7, 1989, at A12, col. 2.

[FN96]. The day after Manville filed for bankruptcy in 1982, the price of its stock dropped 35%. It also lost its 52-year old position as a component of the Dow Jones Industrial average. See Analysis supra note 1, at 818, n. 1698.

[FN97]. See KAKALIK supra note 68, at v.

[FN98]. Although it is not clear that these insolvencies were a direct or total result of asbestos claims, the impact of asbestos claims has been significant. Most of the insurance insolvencies in the 1960's and 1970's involved companies writing high-risk automobile insurance. However, the 1984 and 1985 increases in insolvencies occurred in commercial lines companies whose coverages included asbestos, longhaul trucking, dram-shop and medical malpractice. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 30 (Mar. 1987) [hereinafter TORT POLICY WORKING GROUP UPDATE].

[FN99]. Los Angeles Daily J., May 11, 1988, at 4.

[FN100]. The "insurance crisis" has been described as follows: "The retreat should have been gradual, a slow, steady reaction to the 20-year advance of new tort principles. The pressure did indeed grow steadily over the years, like stress along a geological fault. But the reaction in fact came with the sudden violence of an earthquake. A first shock hit in the mid-1970's, a second in 1985." P. HUBER, LIABILITY, THE LEGAL REVOLUTION AND

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ITS CONSEQUENCES 138 (1988) [hereinafter HUBER].

[FN101]. CGL policies likewise contain a similar "pollution exclusion clause." REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 54-55 (February 1986) [hereinafter REPORT OF THE TORT POLICY WORKING GROUP].

[FN102]. Id. at 8-13; See also Remember Me: A Survey of Insurance; The Balloon's Going Up, THE ECONOMIST, June 6, 1987, at 8.

[FN103]. Church, Sorry, Your Policy is Cancelled, TIME, Mar. 24, 1986, at 16-17.

[FN104]. REPORT OF THE TORT POLICY WORKING GROUP, supra note 101, at 8.

[FN105]. Id. at 9-10.

[FN106]. See, e.g., TORT POLICY WORKING GROUP UPDATE, supra note 98, at 21.

[FN107]. See Vaccine Liability Threatens Supplies, N.Y. Times, June 26, 1984, at C1, col. 1.

[FN108]. Lederle Laboratories, one of two remaining companies selling diphtheria, pertussis, and tetanus (DTP) vaccines, increased the price of its product from $2.80 a dose to $4.29 a dose to cover legal and insurance costs. Brody, When Products Turn Into Liabilities, FORTUNE, Mar. 3, 1986, at 20, 22.

[FN109]. See generally National Swine Flu Immunization Program, Pub.L. No. 94-380, 90 Stat. 1113 (1976).

[FN110]. See When Products Turn Into Liabilities, supra note 108, at 22. Foreign manufacturers are, of course, vulnerable to product liability suits in the U.S., assuming personal jurisdiction can be established. However, they can limit their overall exposure to the assets available in this country, and can more easily withdraw entirely from the U.S. marketplace than can their U.S.-based competitors.

[FN111]. See Mass Tort, supra note 76, at 436. Another source estimates that American companies pay insurance eight times higher than the Japanese, thereby increasing the cost of American goods by 10%. American Product Liability--Nobody to Blame, THE ECONOMIST, Apr. 30, 1988, at 66-67.

[FN112]. See When Products Turn Into Liabilities, supra note 108, at 23.

[FN113]. Id. For example, U.S.-based Piper Aircraft Corp.'s insurance bills reflect the risk of lawsuits over any Piper aircraft still flying. Such costs amount to $75,000 for every new plane built. New foreign competitors are not similarly burdened.

[FN114]. American Product Liability--Nobody to Blame, supra note 111, at 66.

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[FN115]. Id. at 67.

[FN116]. Id.

[FN117]. See Church, Sorry, Your Policy is Cancelled, supra note 103, at 17.

[FN118]. REPORT OF THE TORT POLICY WORKING GROUP, supra note 101, at 45.

[FN119]. Id. There was a 758% increase in product liability filings in federal courts between 1974 and 1985. The authors believed that a similar trend applied to state courts.

[FN120]. U.S. GENERAL ACCOUNTING OFFICE, Product Liability Extent of "Litigation Explosion" in Federal Courts Questioned, GAO/HRD-88-36BR at 1 (Jan. 1988).

[FN121]. Id. at 2-3. GAO used 1976 as its base year because of procedural changes made in 1974 and 1975 in how product liability claims were classified.

[FN122]. One source has estimated that the leading provider of reinsurance, syndicates at Lloyd's, could suffer $1 billion in asbestos claims losses over the next 5 years. Remember Me: A Survey of Insurance; Room for Improvement, supra note 102, at 21.

[FN123]. Even domestic and other foreign reinsurance eventually ends up at Lloyd's through either risksharing or another level of reinsurance with a Lloyd's member. See GOLIATH: LLOYD'S OF LONDON IN THE UNITED STATES; CENTER FOR STUDY OF RESPONSIVE LAW (1988) at 14-15 [hereinafter GOLIATH].

[FN124]. See, e.g., JOURNAL OF COMMERCE, July 18, 1988, at 9A, col. 4. "Names" are those individuals with unlimited liability who subscribe to (that is, underwrite) coverage at Lloyd's:

Lloyd's of London is an insurance marketplace, where Lloyd's brokers approach Lloyd's underwriters who represent companies called syndicates. A syndicate's capital is provided by anywhere between two and over 3,000 member/investors called "Names." Each Lloyd's Name accepts unimited personal liability for the risks he or she assumes. Consequently, Lloyd's has strict wealth requirements for Names. Managing agencies control all of a syndicate's affairs.

GOLIATH, supra note 123, at 6.

[FN125]. See Christian Science Monitor, Feb. 11, 1987, at 21. See also HUBER, supra note 100, at 141. Huber has observed:

Not surprisingly, reinsurers (who act as insurers' insurers) retreated too. In 1984, London reinsurers labeled the U.S. liability market "uninsurable" and started a mass exodus. By 1985, Lloyd's, the world's biggest reinsurer, was scrambling to get out. "The liability insurance scene in the U.S. has lost all predictability," declared one member, "and therefore has become impossible to assess in terms of premium rates." "America is now as unpredictable from an underwriter's point of view as a banana republic," another English underwriter stated. By 1985, 90 reinsurers--almost one- third of the companies that were doing business worldwide in 1983--were gone.

Id.

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[FN126]. See GOLIATH, supra note 123, at 14.

[FN127]. The reinsurance industry's evaluation of the American liability marketplace has not only been influenced by the sheer magnitude of the asbestos cases and the new tort principles and procedures that have been applied to handle these cases, but also by the ex post facto interpretation which the courts have placed on the insurance policies covering the defendant asbestos product manufacturers. The most expansive interpretation on coverage is called the "triple trigger." See HUBER, supra note 100, at 145. Huber explains:

The Keene Corporation manufactured asbestos products between 1948 and 1981, during which time it bought liability policies from many different insurers. Which of Keene's insurers would be called upon to pay asbestos workers who claimed to have been injured over the years by Keene's product? All of them, was the final answer, up to the maximum limits under each and every one of the policies. Any insurer that had done business with Keene when the workers were actually exposed to the asbestos, or when the disease first manifested itself in latent form years later or when the disease actually materialized in a harmful form, would have to pay.

Id.

[FN128]. See, Note, Asbestos Abatement: The Second Wave of the Asbestos Litigation Industry, 27 WASHBURN L.J. 451 (1988).

[FN129]. The first school district case was Cinnaminson Township Bd. of Education v. U.S. Gypsum Co., 552 F.Supp. 855 (D.N.J.1982), which resulted in a jury verdict for the defendant. Although there have been a number of individual cases filed in the meantime, the largest action is now pending in the Federal District Court in Philadelphia which has certified a voluntary class action under FED.R.CIV.P. 23(b)(3) in which the majority of school districts and private schools around the country have elected to participate. See In re School Asbestos Litigation, 789 F.2d 996 (3d Cir.1986), cert. denied, 479 U.S. 852, 107 S.Ct. 182. With increasing frequency, states have also brought suit to recover the costs of asbestos inspection and abatement on behalf of all their public buildings (sometimes numbering in the thousands), and claims by hospitals, private colleges, and residential building owners have also been filed. For a review of the asbestos-in-building cases, see, Hoyle, Current Status of Asbestos-in-Buildings Litigation, Asbestos in Buildings, Law Journal Seminars--Press No. 927 (1989) at 179.

[FN130]. See Why Throw Money at Asbestos?, supra note 62, at 155.

[FN131]. See Asbestos-Containing Materials in School, 52 C.F.R. § § 41, 826, 41,845 (1987). "Friable" asbestos-containing products are those that are deemed capable of releasing asbestos fibers as a result of the application of physical force. "Non-friable" asbestos-containing products, by contrast, do not release such fibers in those circumstances.

[FN132]. Id.

[FN133]. See EPA REPORT TO CONGRESS, supra note 61, at 8.

[FN134]. Id. at 9. These figures do not include residential structures of 10 or less units. Thus, homeowners represent another class of claimants in property damage cases. In a class action suit brought by California homeowners, plaintiffs' potential compensatory damages exceeded $41 billion. See Supplemental Brief of Respondents at 2, 21, filed in Mullen v. Armstrong World Industries, Inc., 200 Cal.App.3d 250, 246 Cal.Rptr. 32 (1988). The trial court dismissed plaintiffs' amended complaint for failure to state a claim. The California Court of Appeal affirmed. 200 Cal.App.3d 250, 246 Cal.Rptr. 32 (1988).

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[FN135]. See EPA REPORT TO CONGRESS, supra note 61 at 5-22.

[FN136]. See Absbestos-Containing Materials in School, 40 C.F.R. § 763 (1987).

[FN137]. The CPSC staff has been conducting air sampling of private houses in San Francisco, Cleveland and Philadelphia. So far it has been unable to identify any basis for concern:

The levels of asbestos found throughout these 45 homes are low. In fact, taken as a group, the indoor values are essentially not greater than background levels since the distribution of indoor levels in these homes is similar to the background distribution of levels seen outdoors. It is important to bear in mind that there are background levels of asbestos fibers in indoor and outdoor air. There were no measurements above the EPA recommended clearance level following asbestos removal of 0.01 f/cc for fibers greater than 5 um in length. Although shorter fibers were present, the toxicological significance of these fibers is not clearly understood.

Phase One Report of Asbestos-in-House Monitoring Study, CPSC CHEMICAL HAZARD PROGRAM at 4 (Feb. 24, 1988).

[FN138]. Asbestos-Containing Materials in School, 40 C.F.R. § 763 (1987) (cost estimates for inspections).

[FN139]. Id.

[FN140]. See comments submitted by School District of Philadelphia in Response to April 30, 1987 EPA Proposed Rulemaking, Asbestos-Containing Materials in Schools: Proposed Rule and Model Accreditation Plan, 52 Fed.Reg. 15,820, 15, 823 (1987), [to be codified at 40 C.F.R. § 763].

[FN141]. Asbestos-Containing Materials in School, 40 C.F.R. § 763 (1987) (economic impact).

[FN142]. Krizan, Asbestos: Hazard and Hysteria: Construction Firms Struggling to Meet the $100-Billion Abatement Challenge, ENG'G NEWS RECORD, June 2, 1988, at 20.

[FN143]. See Why Throw Money at Asbestos?, supra note 62, at 155.

[FN144]. RESTATEMENT (SECOND) OF TORTS § 902, comment a (1977).

[FN145]. See RESTATEMENT (SECOND) OF TORTS § 7, comment a (1965); Kanner, Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation, 18 RUTGERS L.J. at 343, 348 (1987) [hereinafter Emerging Conceptions].

[FN146]. The majority of courts that have considered claims for enhanced risk of harm in the absence of present, physical injury in the bodily-injury context have rejected such claims. Ayers v. Jackson Township, 106 N.J. 557, 593, 525 A.2d 287, 306 (1987) (residents not allowed to recover on claim that they suffered from a present condition of enhanced risk of cancer due to toxic waste contamination of their well water). See also School District of City of Independence, Mo., v. U.S. Gypsum, Mo.App. Mar. 1, 1988, 750 S.W.2d 442, 457, 56 U.S.L.W. 2572 (for cause of action in tort, there must have been a release of toxic asbestos fibers into the environment and the ability to ascertain a substantial and unreasonable risk of harm from that release). See also, Reina, Recovery for Fear of Cancer and Increased Risk of Cancer: Problems With Gideon and a Proposed Solution, 7 REV. OF LITIGATION 79 (1987).

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[FN147]. For example, automobile shoulder straps represent a significant improvement in automobile safety. However, the manufacturers who previously produced cars without shoulder straps are not liable in tort for the cost of installing such devices in old cars, or for injuries sustained in older vehicles built and distributed without such safety restraints. See, e.g., Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 203 n. 6, 447 A.2d 539, 546 n. 6 (1982).

[FN148]. See, e.g., Third Amended Complaint for Property Damage and Damage for Private and Public Nuisance at 13, 17, 19 and 21, Los Angeles Unified School Dist. v. Owens-Corning Fiberglass Corp., No. C 440-317 (Cal.Super.Ct.1984).

[FN149]. See, e.g., 81 A.L.R. 423 (1932) (listing myriad old cases where damages were awarded for future pain and suffering likely to result from present injuries); RESTATEMENT (SECOND) OF TORTS § 912 comment e (1977).

[FN150]. See Kanner, supra note 145, at 366.

[FN151]. See generally id. For example, in the Three-Mile Island tragedy, one group of plaintiffs attempted to characterize their risk of future harm in terms of alleged present injury--chromosomal damage or breakage. However, the Federal District Court in Pennsylvania explicitly declined to address the "justiciability of a latent injury claim" and denied a requested class certification of plaintiffs due to the diverse nature of the claims. By contrast, the court did allow class treatment on the issue of entitlement to medical detection services. The case then settled and the claimants alleging economic loss (due to reduced income, evacuation costs, diminution of real estate value, etc.) recovered $20 million. A $5 million fund was also established to finance studies on the long-term health effects of the accident. In re Three-Mile Island Litigation, 87 F.R.D. 433, 441-42 (M.D.Pa.1980); 557 F.Supp. 96, 97 (M.D.Pa.1982) (related reference).

[FN152]. See Note, Asbestos in Schools and the Economic Loss Doctrine, 54 U.CHI.L.REV. 277, 305 (1987).

[FN153]. See, e.g., Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir.1973), cert. denied, 419 U.S. 869 (1974). Following this decision, the flood gates to the asbestos bodily injury litigation in this country were open.

[FN154]. Because asbestos occurs naturally in the environment, any increased risk of disease from mere exposure to asbestos-containing products by occupants of buildings must be regarded as an increment over a natural baseline. However, this baseline has never been established and, because of the extraordinarily low levels of exposures to asbestos fibers in buildings, predictions as to the actual risks to occupants are highly debatable. The EPA has resorted to "extrapolations" of much higher occupational exposure levels to the low level environment of a building in order to compute risk to occupants. These techniques, however, are highly suspect and their validity must be doubted, which even the EPA admits: "Effects at low levels of nonoccupational exposure have been estimated by extrapolation from higher levels although the validity of this approach has not been empirically demonstrated." EPA Report to Congress, at 5. In fact, because of the extraordinarily low dose and exposure in buildings, the usual form of study of disease in human populations--epidemiology--is essentially unworkable. Thus, no epidemiological studies have ever demonstrated injury to occupants of buildings causally linked to exposure of asbestos-containing products. The leading British study has found the risk to occupants of buildings containing chrysotile asbestos, the type most commonly used in the United States, to be "negligible." See Doll, Peto, Effects on Health of Exposure to Asbestos, U.K. HEALTH AND SAFETY COMMISSION (HMSO 1985) at 47, 48; see also Summary of Symposium on Health Aspects of Exposure to Asbestos in Buildings at 4, 5 (Cambridge 1989) (Harvard University

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Energy and Environmental Policy Center, John F. Kennedy School Government) [hereinafter Harvard Symposium]. The 1 in 100,000 chance of a building occupant exposed to ACM contracting an asbestos related disease, a conservative projection, is "far less than most other commonly experienced environmental health risks, such as those attributable to environmental tobacco smoke or radon." Moreover, "[r]emoval [of ACM] is not without risk," and disturbing ACM may "even increase, health risks." Id.

[FN155]. See, e.g., Wade, On the Nature of Strict Tort Liability for Products, 44 MISS.L.J. 825, 828 (1973) (strict liability for products clearly not that of an insurer); Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 YALE L.J. 1055 (1972) (strict liability has never meant that the party held strictly liable is to be a general insurer for the victim no matter how or where the victim comes to grief). The notion of "design defect" implies that the manufacturers of products knew or should have known that their products presented some danger to health or harm to those exposed to the product. Such concerns were not present in the public domain-- at least at the federal level--until October 1975, when the EPA published its first study of the sampling of fibers in and around buildings. See W.J. Nicholson, Asbestos Contamination of the Air in Public Buildings (prepared for the U.S. Environmental Protection Agency, Oct. 1975). Even today, the EPA is continuing to study the actual levels of exposure to fibers in buildings under special funding by Congress. The EPA's evaluation of exposure levels using modern techniques for fiber measure could lead to a recommendation to Congress that it not adopt AHERA-type legislation to apply to all public and commercial buildings in addition to the primary and secondary schools.

[FN156]. See, e.g., Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal.2d 453, 461-62, 150 P.2d 436, 440 (Cal.1944); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 205-09, 447 A.2d 539, 547-49 (1982).

[FN157]. If defendants and their insurers could have anticipated such novel liability (for scientifically unknowable defects), and if insurers had agreed to cover such risks, asbestos-containing products would have been available only at astronomical costs.

[FN158]. See supra note 154. Nonetheless, the public concern is high: "Even though the risk posed by inplace asbestos is very small, both in absolute and relative terms, the public perception of these risks is high, which often leads to the decision to simply remove all of the asbestos-containing materials from buildings that have ACM." Harvard Symposium, supra note 154, at 5. Occasionally, the media publish articles that tend to put the asbestos issue in a different light. See, e.g., Stevens, "Despite Asbestos Risk, Experts See No Cause for 'Fiber Phobia' ", N.Y. TIMES, Sept. 5, 1989, at C4, col. 1.

[FN159]. This would be comparable to permitting car owners to sue manufacturers because they must bear the costs of state-mandated safety inspections which, if not conducted, could increase the risk of harm to the owner for failure to properly maintain his car.

[FN160]. EPA REPORT TO CONGRESS, supra note 61, at 36-2, 5. As noted in the cover letter accompanying EPA's Report to Congress, "[r]emoval of asbestos from buildings, although attractive in concept, is not always the best alternative from a public health perspective."

[FN161]. See, e.g., Henderson, Coping with the Time Dimension in Products Liability, 69 CALIF.L.REV. 919, 923 (1981); Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM.L.REV. 277, 292-93 (1985).

[FN162]. The main barrier to adoption of a draft European Economic Community (EEC) Directive on product liability law was whether or not manufacturers should be liable for development risks. The draft Directive called for such liability, but allowed for a limitation of manufacture liability in part to avoid the product liability and

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insurance crisis perceived to be developing in the U.S. which could hamper the introduction of new technology and detract from overall consumer welfare. See generally Herndl, Products Liability Litigation in 3 MODERN LEGAL SYSTEMS CYCLOPEDIA 1151, 1151- 71 (K. Redden ed. 1984).

[FN163]. See W. FREEDMAN, INTERNATIONAL PRODUCTS LIABILITY 257 (1986).

[FN164]. See Herndl, supra note 162, at 1151; C. Bouckaert and R. Byrd, Product Liability Defense in France, 54 DEF.COUNS.J. 536, 543 (1987).

[FN165]. Boger, The Harmonization of European Products Liability Law, 7 FORDHAM INT'L L.J. 13. (1984).

[FN166]. Id. at 14.

[FN167]. W. FREEDMAN, supra note 163, at 254.

[FN168]. Fuita, PRODUCTS LIABILITY, AN INTERNATIONAL MANUAL OF PRACTICE 25 (W. Freedman ed. 1987).

[FN169]. Id. at 26.

[FN170]. Id. at 16.

[FN171]. Mackie, Holgate & Hunter, United Kingdom, PRODUCTS LIABILITY, AN INTERNATIONAL MANUAL OF PRACTICE 2 (W. Freedman ed. 1988) [hereinafter PRACTICE MANUAL--UNITED KINGDOM].

[FN172]. Id. at 15.

[FN173]. Id. at 16.

[FN174]. 28 O.J.EUR.COMM. (No. L 210) 29 (1985) (Council Directive of 25 July 1985) [hereinafter COUNCIL DIRECTIVE].

[FN175]. Id. at 31.

[FN176]. Id.

[FN177]. Id. at 30.

[FN178]. Id. at 31.

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[FN179]. Id. at 32.

[FN180]. Id.

[FN181]. Perez, Coping with the EEC Directive on Products Liability, 12 BEST'S REV., PROPERTY/CASUALTY INSURANCE ED. 112 (April 1988).

[FN182]. Boger, supra note 165, at 2 n. 7.

[FN183]. Perez, supra note 181, at 113.

[FN184]. Id.

[FN185]. Marsh, Brussels Opposes U.K. Law on Product Liability, Fin.Times, Feb. 24, 1988, at 22, col. 5.

[FN186]. See Practice Manual--United Kingdom, supra note 171, at 25-26.

[FN187]. Id. at 26.

[FN188]. Comment, Products Liability in Europe, 34 Am.J.Comp.L. 789, 791 (1986).

[FN189]. Id.

[FN190]. Hendrl, supra note 162, at 1151.

[FN191]. The Council Directive allows the "state-of-the-art" defense. See Council Directive, supra note 174, at 31.

[FN192]. See Emerging Conceptions, supra note 145.

[FN193]. See Jackson v. Johns-Manville Sales Corporation, 750 F.2d at 3330 (5th Cir.1985) (en banc), cert. denied, 106 S.Ct. 3339 (5th Cir.1985) (en banc) cert. cenied, 438 U.S. 1021 (1986).

[FN194]. The EPA has estimated that there are 733,000 public and commercial buildings which contain friable asbestos. Presumably, the owners of these buildings are all potential plaintiffs. See supra note 133. School districts have brought actions throughout the country and a class containing essentially all other public school districts and private schools has recently been certified. In re School Asbestos Litigation, 789 F.2d 996 (3d Cir.1986), cert. denied, 479 U.S. 852, 915 (1986). There would still remain the millions of private residences and multi-family residences of fewer than 10 units which are not included in either the schools proceedings or the EPA's estimate. The owners of these structures could also bring suit.

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[FN195]. Hensler, supra note 69, at 1. Mesothelioma is a rare cancer of the lining of the chest, the pleura, or the lining of the abdomen, the peritoneum. T. Stedman's Medical Dictionary 861 (24th ed. 1982).

[FN196]. Richman, supra note 62, at 162.

[FN197]. Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1340 (5th Cir.1986).

[FN198]. In re School Asbestos Litigation, 789 F.2d 996, 1000 (3d Cir.1986).

[FN199]. Wall Street J., Aug. 27, 1982, at A1, col. 6.

[FN200]. Fortune's Directory of the 500 Largest Industrial Corporations, Fortune, May 3, 1982, at 266.

[FN201]. For example, at the time Johns-Manville filed for bankruptcy, it estimated that it had only $500 million of insurance to cover billions of dollars in claims. See Analysis supra note 1, at 829.

[FN202]. See Asbestos: The cases, supra note 4, at 875.

[FN203]. See supra Section III.

[FN204]. Huber has explained the insurers' (and manufacturers') predicament this way:

As we have seen, the courts were also resetting the clock on litigation, so that a suit could be filed years or even decades after the car gearbox, herbicide, or strip-mining machine was designed or used. Defects in technology, like negligence in human conduct, depend critically on the context of time and place. The best designed cars of 1950 were clearly deficient by 1980 standards, as were the best medical procedures, industrial chemicals, pesticides, or home appliances. The problem is especially acute in mature industries with long-lived products. When the sun never sets on the possibility of litigation, each improvement in method, material, or design can establish a new standard against which all of your earlier understandings, of no matter what vintage, will then be judged. Finding a way to do better today immediately invites an indictment of what you did less well yesterday or 20 years ago.

Huber, supra note 100, at 160.

[FN205]. See e.g., Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982). A seminal case on this issue, it was not even decided until 1982, four years after the manufacture of asbestos-containing buildings products in this country effectively ceased.

[FN206]. Insurance companies have, of course, attempted to adjust to the new realities of selling insurance in the U.S. marketplace. Certain lines of coverage have been eliminated, deductibles have been increased and premiums raised. As Huber reports:

By 1986, most of the country's 400 largest consulting engineering firms were unable to buy pollution liability insurance in any amount, or at any price, and were refusing to handle toxic waste sites unless there clients assumed all liability....

In one line after another, the gap between premiums paid and coverage provided began to narrow rapidly. The W.H. Brine Company, a manufacturer of sports equipment, was offered a premium of $200,000 for $1 million of coverage (a premium to coverage ratio of 0.2); the City of Hartford, Connecticut was charged $1.8 million for $4

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million of coverage (a premium to coverage ratio of 0.45); and the Speciality Systems Company, an asbestos removal firm, paid a liability premium of $460,000 for $1 million of coverage (a premium-to-coverage ratio of 0.46).
Huber, supra note 100, at 140-141.

[FN207]. See e.g., Mossman, et. al., Asbestos: Scientific Developments and Implications for Public Policy, Science, Jan. 19, 1990, at 294, for a recent assessment by noted experts that "[a]vailable data do not support the concept that low-level exposure to asbestos is a health hazard in buildings and schools."

[FN208]. A class action settlement, captioned Wells v. Raymark Industries, Inc., No. 87-1016-K, pending in the United States District Court for the District of Kansas, provided for the disposition and processing of some 20,000 claims against that company based on harm allegedly caused by exposure to its asbestos-containing products. In the course of this proceeding, thousands of "tire worker" claims were made by certain plaintiffs' counsel. In examining the origin of these claims, Raymark discovered certain alleged improprieties and brought suit against plaintiffs' counsel for fraud and violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § § 1961-1968. In denying plaintiffs' counsel's motion to dismiss these charges, the Court observed:

According to the allegations, [plaintiffs' attorneys] are the principal instigators of the whole tire worker process: they have encouraged litigation, mobilization of prospective claimants, and the unmistakable solicitation of each; they have designed, financed and engaged the format which includes diagnosis solely by analysis of x-rays by doctors with questionable credentials, and have filed claims based on such diagnoses, having never met their clients. In this court's view, this is the shabbiest form of claims practice. The professional code of conduct is clear. See Canon 2 of Code of Professional Responsibility. Certainly, claims solicited, encouraged, and financed by lawyers should be discouraged and challenged.
Raymark Industries, Inc. v. Stemple, 714 F.Supp. 460, 467 n. 1 (D.Kan.1988).

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Asbestos Quagmire

Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material

By Susan Warren

A YEAR AGO, Robert Arkell, general counsel of Longview Fibre Co., was puzzled to learn the paper maker was the target of an asbestos lawsuit. He knew the company had never made anything containing asbestos. It must be a mistake, he thought.

Hardly.

Because Longview used a product that contained asbestos in one of its paper plants, it was swept up in a new wave of asbestos lawsuits targeting thousands of companies with seemingly remote connections to the deadly fireproofing and insulating mineral. By the end of the year, the company was facing about 600 lawsuits. "We were taken by surprise, and we continue to be surprised," Mr. Arkell says.

Now, with most of the original asbestos miners and asbestos-using product makers through bankruptcy-court protection, plaintiffs' attorneys are turning to companies once considered too small to sue. Many of the smaller fry lack resources to defend thousands of lawsuits or pay huge verdicts. But the companies do have one thing in common: plentiful insurance.

As a result, lawsuits are piling up against consultants, engineering firms, plant owners, and maintenance and construction contractors, all of whom are being blamed for workers' exposure to asbestos. Recent research at RAND Corp. shows that more than 8,000 companies now are named as defendants in asbestos litigation, up from only 300 in 1982.

The newest wave of claims is hitting a range of companies, from Exxon Mobil Corp. and Dow Chemical Co. to smaller companies such as WS Bellows Construction Corp., a commercial office builder in Houston. "It has very little to do with whether anybody knowingly did anything wrong," says Bellows Vice President Jim Stevens. "It's more about who has deep pockets."

Plaintiffs' lawyers in search of potential clients have conducted mass X-ray

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screenings across the country. Workers whose lungs show the scarring that can indicate asbestos-related disease often are recruited for new lawsuits, even though most aren't suffering ill effects at the time of filing.

About 200,000 claims in the U.S. are pending, each typically naming dozens of companies as defendants. As of 2000, about $54 billion had been paid to asbestos claimants, a RAND Institute of Civil Justice report said.

With smaller companies, plaintiffs' lawyers are eyeing defendants' insurance coverage for "premises" or "operations" claims, which cover injuries occurring on the insured party's property. Consultants, engineers, construction contractors and any company that ever operated those plants can be sued.

A recent suit against 73 defendants cited claims against any company that ever "manufactured, sold, designed, supplied, distributed, mined, milled, relabeled, resold, processed, applied or installed" asbestos-containing materials. About 35 of the defendants were contractors or operators who didn't use asbestos directly. Longview, a company with $875 million in annual revenue, said in a financial report it was named in the suits after a plaintiffs' attorney discovered its name among the sales records of an asbestos-product maker. Mr. Arkell says the company on Friday succeeded in having most of its cases dismissed for lack of evidence -- but only after it spent all year, and "significant" money, contesting them.

Most original asbestos claims were against those who mined the mineral or used it in manufacturing and were covered under product-liability policies, which insure manufacturers against liability for defective or harmful products. Those policies typically are capped at a certain dollar amount, and many companies have exhausted their coverage. But businesses that have tapped out their product-liability insurance may still have ample insurance to pay premises claims covered by their general liability policies.

Two years ago, National Service Industries Inc. of Atlanta was a minor player in asbestos lawsuits and considered its asbestos liability a manageable problem, says general counsel Nancy Morgan. But in the past 18 months, she says, more claims have poured in and settlement demands have skyrocketed. Now, the envelope maker and linens-service company, which posted $560 million in sales last year, is fighting more than 30,000 claims from employees of other companies who say they were exposed to asbestos-tainted insulation installed at their workplace by a former National Service subsidiary. In filings with the Securities and Exchange Commission, National Service said it believes it has ample insurance to pay for most of the claims but has several continuing disputes with its insurance carriers. (The National Association of Mutual Insurance Companies, a trade group, says its 1,300 members are seeing triple the number of claims they had a few years ago.)

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The surge in premises claims is leading to more legal battles between insurance companies and their policyholders. Kirk Liddell, president and chief executive of Irex Inc., says his insurance companies are "fighting us at every corner."

Irex, Lancaster, Pa., owns general, mechanical and industrial-contracting companies, including AC&S Inc., an installer of insulation. AC&S used to settle cases for fairly small amounts, readily paid by its insurers. In recent years, as AC&S's claims have risen and settlement demands have jumped, insurers have balked at paying higher amounts, Mr. Liddell says, though AC&S should have ample insurance to pay its claims.

AC&S Inc. filed for bankruptcy-law protection in September. It is suing one of its insurers, Aetna Casualty Insurer, now owned by Travelers Property Casualty Corp., charging it improperly limited coverage of AC&S's 200,000 pending claims.

Along with its competitors, Travelers Property Casualty is fighting on another front of the asbestos wars as plaintiffs file lawsuits holding insurers directly responsible for a worker's asbestos exposure.

Randy Maniloff, an attorney with Christie Pabarue Mortensen Young in Philadelphia, which represents insurers in asbestos cases, says: "The real change that is taking place on the asbestos landscape is an all-out effort by plaintiffs and policyholders to find ways to increase the insurance industry's share of the total asbestos bill."

Paying a Price

Asbestos litigation is taking a growing toll on workers and companies. A snapshot:

Costs to date: $54 billion*

Future estimated costs: $145 to $210 billion

	As of 1982	As of 2002
Claimants	21,000	750,000
Defendants	300	8,000
Bankruptcies	3	67

*As of 2000

Source: Rand

(See related article: "Swamped Courts Practice Plaintiff Triage" -- WSJ Jan. 27, 2003)

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---- INDEX REFERENCES ----

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SPECIAL REPORT THE ASBESTOS CRISIS - The toxic time-bomb exploding throughout the corporate world.

In Ancient Greek, "asbestos" means unending or unquenchable. The word, later used to name a fire-retardant mineral relied on by industry for much of the 20th century, has proved to be eerily appropriate.

Waves of litigation have crashed over companies and insurers on both sides of the Atlantic since the early 1980s. But a rising tide of claimants in the US is now causing more businesses to drown than ever before.

Last year, nine US companies declared bankruptcy as a direct result of asbestos liabilities and at least 90,000 new cases were filed against those that remained. A record 11 companies have gone under already this year, 200,000 claims are pending, and experts predict the peak is yet to come.

Those that vanished in past years have been small and obscure - the original producers and distributors of asbestos that were the obvious first targets of compensation claims. Since then, victims' lawyers have had to turn to other companies in a relentless search for solvent defendants.

One effect has been to increase the pressure on a dwindling number of former users of asbestos products that find themselves picking up a growing share of settlement costs.

Halliburton, the Texas oil services company formerly run by Dick Cheney, US vice-president, increased its provisions in July from a manageable $96m to a crippling $483m.

ABB, the Swiss-Swedish engineering group that made the mistake of buying a US boiler maker with asbestos liabilities, has found that the cost of dealing with this legacy has spiralled to $470m.

This domino effect, rippling steadily further away from the primary producers, also places some unlikely looking companies in the firing line.

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The latest mass trial due to start this month in West Virginia includes 3M as a defendant, even though its only crime seems to have been to make general-purpose facemasks that some employers claimed could protect their workers from asbestos dust.

A sample of the others involved reads like a who's who of American industry: ChevronTexaco, ExxonMobil, Honeywell, Monsanto, Lockheed Martin, DaimlerChrysler, General Motors and Pfizer are all swept up, some for the first time. Even foreign governments are exposed. Another defendant is Westinghouse, a subsidiary of British Nuclear Fuels, which remains a state-owned company.

The growing list of bankruptcies is hampering attempts to compensate the sick too. The process of seeking protection from creditors is cumbersome and expensive. And court-appointed trusts set up to distribute the remaining assets among successful claimants can take years to pay out.

In the case of victims exposed by Turner & Newall, once the largest asbestos manufacturer in the UK, the result is particularly distressing. It was taken over by Federal Mogul, a US automotive group, shortly after hundreds of British sufferers were finally offered compensation for mesothelioma, an untreatable and fatal cancer almost invariably linked to asbestos exposure.

The sums of money typically awarded by British courts - perhaps t50,000-t100,000 ($78,000-$156,000) - are tiny compared with the $10m-$20m routinely paid to US mesothelioma victims. But before these relatively small payments could be made, Federal Mogul filed for Chapter 11 bankruptcy protection as a result of the deluge of claims it was receiving in the US.

This meant all the money was frozen while a trust was established, even though the trust's administrative fees alone are many times the size of the UK settlements.

When mesothelioma victims or, more usually, their surviving relatives do eventually receive payment from such trusts, the results can be extremely disappointing.

Johns-Manville, the largest US producer of asbestos products, was among the first to go bankrupt in 1982, leading to the creation of a substantial fund to pay future claimants. But the recent explosion in claims has heavily diluted its ability to meet such demands. The Manville Trust now pays as little as 5 cents for every dollar of compensation awarded by the courts.

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The proportion looks certain to shrink further. David Austern, an administrator of the trust, is convinced the number of claims has not peaked. "I think there is a large backlog of unfiled claims," he says. "There is an almost endless pool of people out there who have been exposed."

Mr Austern estimates that at least 75,000 new claims will be lodged in 2002, slightly down on the 90,000 in 2001, because of a temporary moratorium this year while an electronic filing system was installed to handle the volume.

Due to its historic prominence in the US asbestos industry, almost all compensation claims include Johns-Manville among the defendants, so the number of annual claims made against the Trust are used by others as a proxy for the total level of new claims.

Mr Austern's gloomy predictions, therefore, do much to undermine the argument used by several big defendant companies that predict the problem is being brought under control.

Other independent experts also dispute the relative optimism of companies such as ABB and Halliburton. Both the Rand Institute and Tillinghast-Towers Perrin, two of the most respected asbestos researchers, believe the peak is far from over. If they are right about the number of new cases, the increased provisions made by these companies this year are still woefully inadequate compared with their potential outstanding liability.

Stephen Carroll of the Rand Institute outlines the two possible scenarios. "One theory is that we have got a temporary spike as there has been a rush to get claims in ahead of all these bankruptcies. The other is that the plaintiff attorneys have just discovered how to find more claimants."

An examination of the financial incentives fuelling the latest explosion in claims shows that the second theory is far more convincing.

The roots of the present crisis lie partly in the behaviour of bankruptcy funds such as the Manville Trust. The existence of large pots of money dedicated to paying anyone who can prove they have suffered from asbestos exposure has attracted a new breed of entrepreneurial lawyers like bees to honey.

Law firms, already rich from earlier phases of asbestos litigation and

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the successful class-action settlements against tobacco companies, have invested heavily in attracting new clients. Newspaper advertising and websites enticing workers to realise the potential of their "million dollar lungs" have raised awareness. Most controversially, lawyers have funded mobile x-ray facilities to conduct mass screenings of workers and union members at factories where asbestos was used.

Most have no outward symptoms, not even of the milder forms of breathing difficulties known as asbestosis, but the lawyers have instead convinced courts to accept evidence of potential exposure in the form of scars on the lungs. These "plueral plaques" may be the first sign of more serious asbestosis or cancers such as mesothelioma. However, defendants' lawyers argue most willhave been caused by other atmospheric pollutants such as smoking or will go on to cause no harm.

Lawyers have been accused of flooding courtrooms in states across the US with thousands of new cases. A few judges have even been willing to lump together large numbers of the so-called "unimpaired" cases with more serious mesothelioma victims in an attempt to process the claims more quickly. In these mass trials, "unimpaired" cases can outnumber more serious cancers by 10 to one, but defendants have been unwilling to challenge juries to distinguish one from the other for fear of losing and being forced to pay compensation to all the claimants at once.

Each time a company settles out of court for a relatively small compensation payment instead, yet more lawyers are attracted by the prospect of easy wins.

Attempts to resolve the crisis by negotiating with the lawyers have backfired spectacularly. Several times in recent years, companies have tried to settle all future liabilities at once through "class action" cases designed to settle the problem once and for all. Unfortunately, this has required both sides to advertise heavily to alert all potential beneficiaries of the class action that such a move was being conducted in their name.

When the US Supreme Court blocked the last attempt in 1999, arguing it would deprive some future victims of their rightful day in court, the defendant companies were left worse off than before because many more Americans had been alerted to the legal goldrush. The stampede that this setback triggered is only now beginning to take its full toll.

"The bankruptcies and lost jobs from asbestos far outweigh the effects of Enron or WorldCom, but it's happening very slowly and it's difficult to get people's attention," says Mr Austern.

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Some critics have begun to notice. In March, Fortune magazine described the growth in unimpaired claims as a " $200bn miscarriage of justice". But the issue has become easily hijacked by those on the US political right who see it as an egregious example of power tilting against big business in favour of the liberal legal establishment.

Yet despite the obvious greed of many lawyers and healthy plaintiffs, the growing incidence of asbestos-related illnesses is real.

Doctors believe there is a latency period of up to 40 years between initial exposure and diagnosis of mesothelioma. Since asbestos use peaked in 1973, it is no surprise that some European research suggests as many as half a million more people will die from exposure over the next 35 years.

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---- INDEX REFERENCES ----

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Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial

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Mr. Lanier Took On MetLife As Suits Cast Wider Net To Land Deep Pockets

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Campbell Soup in the Mix

By Richard B. Schmitt
Staff Reporter of The Wall Street Journal

ANGLETON, Texas -- Metropolitan Life Insurance Co. thought it was pretty well insulated from asbestos lawsuits. Then it was exposed to Mark Lanier.

Last year, the Houston lawyer filed suit in Texas against the New York-based insurer on behalf of asbestos victims. The central claim: MetLife, as a result of group life-insurance policies it wrote in the 1930s for asbestos companies, was "part of the foundation to put asbestos everywhere."

MetLife agreed last month to pay about $20 million to settle asbestos-related injury claims with 3,000 of Mr. Lanier's clients. MetLife won't comment on the settlement; the company has previously denied any wrongdoing. Mr. Lanier, meanwhile, is already planning other asbestos lawsuits, against MetLife and other targets.

"The asbestos companies are going bankrupt faster than you and I can eat the food," Mr. Lanier says over a meal of chicken and green beans. "We need to find someone else to pay the victims."

Like the ubiquitous mineral itself -- once prized for its fire-retardant and insulating qualities -- asbestos lawsuits are proving to be ineradicable. Banned in the 1970s by federal regulators, asbestos has spawned more lawsuits than any other product in the history of personal-injury litigation. Over the years, companies that used asbestos in everything from drywall joint compound to brake linings have paid roughly $20 billion in damages and court costs in cases of people exposed to the mineral. A generation ago, some experts predicted that asbestos suits would be tailing off by now. But the pace is only picking up. The U.S. Supreme Court has called asbestos litigation an "elephantine mass" that defies the normal rules of judicial administration.

The litigation's longevity reflects in part the devastating health effects of asbestos, including 2,000 or so new cases each year of an incurable cancer that

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can fester for 40 years before producing full-blown symptoms. For plaintiffs and their lawyers, it also reflects some compelling economics, as defendants have found it more cost-effective to settle even marginal claims than to take them to trial. These days, most of the people suing aren't ill, though they show signs of asbestos exposure, such as scarring on their lungs, which gives them the right to their day in court.

Over the years, law firms have built huge "inventories" of tens of thousands of asbestos cases still to be resolved. Lawyers have trolled for clients at shipyards, chemicals plants, union halls and churches, where they post medical technicians to screen people for evidence of asbestos exposure.

The asbestos legal market continues to attract new entrants, including young lawyers from established firms looking to make a name on their own. Dallas firm Baron & Budd, which has been handling asbestos cases since the 1970s, has several offspring, including a firm that won a $19 million verdict against Pittsburgh Corning Corp. last spring, a few weeks before the defendant entered Chapter 11 bankruptcy-law proceedings.

"You want to be a starter, and show what you can do," says Roger Worthington, another alumnus, with offices in Dallas and Orange County, Calif.

The Internet has been a further engine for growth. A search on the word "mesothelioma" -- the fatal cancer, usually affecting the lining of the chest cavity, that is linked to asbestos -- yields a lot of sites aimed at asbestos victims, especially lawyers offering their services. Several lawyers use the Web to refer big asbestos-injury cases to other lawyers, earning what are, in essence, brokerage fees.

All this activity fuels more litigation, and that, in turn, is prompting lawyers to sniff out new defendants to compensate their clients as former deep pockets such as Owens Corning and G-I Holdings Inc. (formerly GAF Corp.) head to bankruptcy court, swamped by unrelenting claims.

Today, the household names in asbestos suits include the likes of Procter & Gamble Co. and Campbell Soup Co., both of them added to a pending complaint in California Superior Court in San Francisco alleging that asbestos was found at company factory sites. Sears, Roebuck & Co. recently became one of the first major retailers named in an asbestos case, sued by a former salesman in New York Supreme Court who claims that floor tiles and roofing products he bought from the company starting in the 1940s caused an asbestos-related cancer he developed. In another San Francisco Superior Court suit, a former insulator has sued Dow Jones & Co., publisher of The Wall Street Journal, claiming he became sick after being exposed to asbestos at a Journal printing plant in Palo Alto. In all these cases, the companies deny any wrongdoing. Onetime asbestos-company

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insurers, besides MetLife, are being accused of conspiring long ago to keep consumers in the dark -- shades of allegations in the 1990s that the tobacco industry hid decades of research into the dangers of cigarette smoking.

"We are trying to turn this litigation away from its traditional targets," says Shepard Hoffman, a Baltimore asbestos lawyer. Last month at a conference in Washington, Mr. Hoffman helped teach a workshop called Asbestos 101, which included tips for suing "nontraditional defendants" and handling "unimpaired claims" of people exposed to asbestos fibers but without discernible symptoms of disease.

Some defendants have fought back by suing the plaintiffs' lawyers. A suit filed in January by G-I Holdings in U.S. District Court in Manhattan accuses three big law firms that have handled asbestos cases of racketeering, alleging that they stirred up thousands of bogus lawsuits and used "extortionate" tactics to kill a GAF-sponsored bill in Congress that would have curbed asbestos claims. The firms deny any liability.

Mr. Lanier, 40 years old, didn't start representing plaintiffs in asbestos cases until the mid-1990s, when another lawyer approached him, looking to unload several hundred cases. Mr. Lanier had caught the eye of the other attorney because he had a growing track record against corporate defendants, including a $500 million verdict in a breach-of-contract case against a major oil company. The referrals quickly paid off. In 1998, Mr. Lanier argued in court that an asbestos-laden industrial grinding wheel made by a former unit of BP Amoco PLC had sickened some Alabama steelworkers. That resulted in a $115 million verdict -- one of the largest ever in an asbestos injury case -- for the workers. The case was later settled for an undisclosed sum.

Mr. Lanier, whose first job out of law school was at the white-shoe Houston firm Fulbright & Jaworski, seems an improbable champion of asbestos victims' rights. The biggest asbestos-related case he has won was for a defendant, Turner & Newall, a major supplier of asbestos in the 1930s. Two years ago, the company was hit with a $1.6 billion court award in a suit by a former asbestos-product manufacturer claiming that Turner & Newall covered up early warning signs of asbestos problems. Turner & Newell sought out Mr. Lanier because it was impressed with his courtroom skills in handling injury claims he had previously filed against the company. Teaming up with the defense lawyers, Mr. Lanier ultimately got the big judgment set aside and helped broker a settlement, which he says meant more money for asbestos victims -- rather than for the other manufacturer.

Today, his 11-lawyer firm in a downtown Houston office tower occasionally represents corporations, as well as doctors charged with malpractice. He and several other partners are staunch Republicans. One of them was a big fund-raiser for the Texas gubernatorial campaign of George W. Bush, who, as

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governor, spearheaded tort reform, including limits on punitive damages.

On an office wall hangs a cartoon lampooning the art of jury selection. "A great man said you can fool some of the people all of the time," it says. "I am looking for 12 of those." In a good year, Mr. Lanier can pull down more than $10 million in fees. On his 20-acre spread outside Houston, he hosts the office Christmas party, which last year drew 4,000 people and featured a private concert by singer Diana Ross.

In court, he likes to pull up a chair to interview witnesses, as though he were chatting with a neighbor on the back porch. A former divinity student, he also laces his court arguments with Bible stories. He spends so much of his time trying cases in small towns that he bought himself a recreational vehicle to ensure that he has a decent place to sleep and eat.

Until late last month, what Mr. Lanier calls his "trial mobile" was parked outside the Brazoria County courthouse, an hour south of Houston, in a part of East Texas known for its rice farms, chemicals plants and, for years, huge verdicts by working-class juries against big corporations.

In the MetLife case, Mr. Lanier alleged that the insurer, while working for Johns-Manville Corp. and other leading producers of the day, suppressed studies it had sponsored or reviewed that showed the health hazards of asbestos as early as the 1930s. If the information hadn't been suppressed, he argued, many companies wouldn't have made asbestos-containing products that later killed many people.

MetLife defended itself against similar allegations at two other trials that resulted in a verdict, winning both, including a suit in state court in Hawaii in 1992, where a judge ruled for MetLife even before the company had to put on a defense. In other suits, the company has settled individual cases for roughly $2,000 each, in the days when other defendants were available to pay the bulk of plaintiffs' damages. In regulatory filings, the company says it is adequately insured against losses from asbestos suits.

For the trial, Mr. Lanier made much use of a Brown University medical historian who operates a Web site called "The Metropolitan Life Insurance Company Conspiracy," and who is a walking encyclopedia of alleged MetLife misdeeds. With the help of forensic accountants, Mr. Lanier sifted through old MetLife investments and unearthed big holdings of asbestos-company stock -- a possible motive for the alleged coverup. Through a private investigator, he located and flew in from Maine a former colleague of MetLife's medical director in the 1930s, who recalled the official once bemoaning cancer researchers as "troublemakers."

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Mr. Lanier filled the front rows of the courtroom with families of the four named plaintiffs, all with mesothelioma, two of whom had already died. He played videotaped depositions of the two now-deceased plaintiffs and arranged a live satellite feed of a third from his bedroom. The fourth plaintiff sat in the courtroom with her family. MetLife attorneys lodged strenuous objections throughout the proceedings.

Among the evidence: a MetLife study of asbestos miners in Canada in the 1930s that showed that one in five had asbestos-related disease, along with a study of laboratory mice in the 1940s, which showed more than 80% developing tumor-like growths. Mr. Lanier produced correspondence showing that MetLife ran a 1935 study of the health risks of asbestos past lawyers at client Johns-Manville. In another document, the MetLife medical director, Anthony Lanza, throws cold water on a plan at a Manville plant in Illinois to post asbestos-warning signs, citing "the extraordinary legal situation."

MetLife's sphere of influence, Mr. Lanier said in court, ran from membership in an industry research group called the Konicide Club (from the Greek for "killer dust") to picking up costs for a U.S. Public Health Service official who later helped to develop standards for asbestos exposure in the workplace -- standards that remained in effect for generations.

"A house is only as good as its foundation -- it goes back to Bible times," Mr. Lanier said, alluding to the story of the wise man who built his house upon a rock. MetLife, he asserts, was part of "the foundation to put asbestos everywhere."

In court, MetLife's lead attorney, Peter McKenna, decried the case as "plaintiffs' attorneys trying to establish guilt by association." He said the insurer wasn't hiding anything, and that the studies cited had various design flaws. He pointed out that Dr. Lanza, who died in the 1960s, published a book in 1938 that acknowledged a connection between asbestos and lung problems.

"MetLife makes money when people live long and healthy lives," Mr. McKenna said. "They would have to be fools writing life insurance knowing that all of these people were going to die."

But after Mr. Lanier brought on his star witness from Maine, who is legally blind, MetLife abruptly attempted to have the trial halted and moved to federal court, suggesting that it feared local bias. A U.S. district judge summarily dismissed the petition as a "dubious" delay tactic. At one point, Mr. McKenna, a partner at Skadden, Arps, Slate, Meagher & Flom, compared his plight to that of Joe Pesci as the fish-out-of-water New York lawyer trying a murder case in rural Alabama in the movie "My Cousin Vinny."

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At the end of last month, after Mr. Lanier finished putting on his evidence, the two sides settled before the case went to the jury. Terms are confidential. Mr. Lanier said it covers each of his four trial plaintiffs, who had been seeking $1 million apiece, about 40 other people diagnosed with asbestos-related cancer and up to 3,000 or so "unimpaired" cases. Based on his pretrial demands and MetLife's track record, other lawyers with asbestos suits who watched the trial figure the settlement was worth about $20 million.

MetLife's trials aren't over. Mr. Lanier says he already has been contacted about helping with suits against the company in West Virginia and California. He figures he will be back in court in a month or so. Numerous other lawyers have put in requests for the official court transcript to check out his handiwork. He is already lining up other targets -- among them, a Canadian mining concern that was once a major asbestos supplier. He has been taking out newspaper ads to find potential witnesses to testify against the company.

---- INDEX REFERENCES ----

COMPANY (TICKER): Metropolitan Life Insurance Co. (X.MLI)

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REVIEW & OUTLOOK (Editorial)

Lawyers Torch the Economy

Pull on a thread in this week's stock market turmoil and you'll likely find it leads to an insulating material that hasn't been manufactured in 30 years. The steep earnings drop at American Express, which touched off Tuesday's rout, was due in part to a rash of bankruptcies among building-supply makers in Amex's bond portfolio -- and, no, the manufacturers weren't victims of the housing market, which remains relatively strong.

The companies once manufactured asbestos, and for years they've been working steadily through a backlog of claims by sick workers. Yet somehow the backlog of litigation keeps getting bigger, the workers show less and less sign of illness, and their recollections of what materials they were exposed to correspond strangely to the shrinking pool of former asbestos companies that happen still to be in business.

We won't prolong the suspense. Regular readers know that asbestos litigation has transcended the purpose of adjudicating claims and providing fair compensation. It has become a racket, in which specialist law firms feed at an endless trough. No less than the Supreme Court has pleaded twice with Congress to clear the "elephantine mass" of litigation, which has done more to enrich plaintiffs lawyers, including buying Peter Angelos the Baltimore Orioles, than to speed compensation to the truly injured.

So great has the pig-out become that, against their own interests, the lawyers have driven two dozen viable companies -- companies that were generating cash to pay plaintiffs -- into Chapter 11. Since just before last year's election, bankruptcy filings have suddenly accelerated, including Owens Corning, Armstrong World Industries, the former GAF and this week's victim, W.R. Grace.

The looting stepped up after Congress failed to pass a bipartisan bill last year to clear the backlogs, but the action became frantic when asbestos lawyers started sniffing a Bush victory in the Presidential race. Tort reform was a big plank in the Bush campaign.

Moreover, the net has spread from the asbestos makers to companies far

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removed from the scene of any putative wrongdoing. Ford Motor has $1.7 billion in cases outstanding. Crown Cork has paid millions because, for three months in the early 1960s, it owned a small insulation sideline after taking over a bottle-cap maker. And Sears was just hit with a $1.5 million judgment for selling home insulation to a man 50 years ago.

So we have four companies in bankruptcy since Election Day, affecting not just plaintiffs with legitimate claims, but employees, shareholders and bondholders like American Express. Asbestos is the longest-running, most over-the-top manifestation of a litigation system that has handed too much power to the manipulators and impresarios of the plaintiffs bar.

The genius of the American system is that the pendulum never swings too far without spawning the political forces to push it back. Mr. Bush was an early favorite of many business-oriented voters, especially small business types, who've seen the mess our product-liability system has become and were impressed by the President's tort reform achievements in Texas.

An obvious first step would be to revive the asbestos resolution bill that Congress booted last year, before any more companies are crushed by the litigation avalanche. The next step would be to draft some model tort reform legislation and commit some political capital to getting it passed. Punitive damages ought to be done away with, or at least circumscribed so defendants aren't driven to settle meritless claims to avoid the risk of a jackpot jury. And contingency fee regulation needs to be looked at.

The British have found that a "loser pays" rule discourages random lawsuits in search of a lucky strike -- the kind that companies, hauled into our sketchier jurisdictions, settle just to cap their risks. One such was a Toshiba payout last year of $147 million to lawyers for a laptop flaw so trivial that none of the class victims alleged an injury. Compaq, a Texas company facing a Texas jury, has boldly resisted a similar class-action, brought by big Clinton-Gore contributor Wayne Reaud. But stamping out these fires is expensive and tedious.

Of course, the news you never read about is the thousands of small businesses driven under by one employment suit, one slip-and-fall, one product-liability case.

Tort reform by itself may not restore the confidence of investors, but surely among the excesses that built up during the last few years was the apotheosis of the trial lawyers, culminating in the Clinton-enabled tobacco settlement -- which, you'll notice, has done nothing to stop smoking.

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Let that be the zenith of lawsuit power in America, the symbol of a pendulum that swung dangerously far. In defense of its own integrity, it's time the political system pushed back.

---- INDEX REFERENCES ----

NEWS SUBJECT:	Editorials and Columns; Commentary/Opinion; Labor Issues; Labor Issues; Lawsuits; Legal and Judicial; Public Policy & Regulatory Issues; Wall Street Journal; Editorial Page; Editorial; Content Types; English language content; General News; Corporate and Industrial News; Political and General News (EDC NEDC LAB GJOB LWS C12 PBP WSJ EDI NEDI NCAT ENGL GEN CCAT GCAT)
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Wednesday, April 12, 2000

Asbestos Suits Target Makers Of Wine, Cars, Soups, Soaps
By Susan Warren
Staff Reporter of The Wall Street Journal

Allwood Door Co. sells wooden doors. So when the little San Francisco company was sued for making someone sick from asbestos, president Bob Howell was flabbergasted. "I just couldn't believe it," he says.

Believe it. Allwood is one of a vast and growing fraternity of unlikely new targets of asbestos litigation. As the coffers of asbestos makers and heavy asbestos users have been depleted by litigation expenses, plaintiffs' attorneys have cast their nets wider to find companies to blame for clients' asbestos-related illnesses and complaints or exposure that could lead to illness in the future.

Allwood is a defendant in about half a dozen lawsuits filed by construction workers because it sold fire-barrier doors made by another company in the 1960s and 1970s. The wood-sheathed doors contained asbestos in their mineral core, says Mr. Howell, who adds, "I had no knowledge that asbestos was even there."

Allwood's insurance company has had some of the lawsuits thrown out, but others remain pending, Mr. Howell says. The door seller is in stellar corporate company. Auto-repair workers are suing Ford Motor Co. and General Motors Corp., as well as auto-parts stores, alleging they were exposed to asbestos from brakes and clutches. Alcoa Inc. became a defendant because its aluminum linings allegedly cut into asbestos insulation, releasing fibers into the air.

Campbell Soup Co. and Colgate-Palmolive Co. are being sued by workers who handled or worked near equipment that contained asbestos. Other corporate defendants in asbestos suits include such well-known names as E. & J. Gallo Winery, Novartis AG's Gerber Products Co., General Electric Co., DuPont Co., Lockheed Martin Corp., AT&T Corp. and Dow Jones & Co., publisher of The Wall Street Journal.

Hospitals and colleges that had ceiling tiles or insulation with asbestos also are being sued, as well as banks that financed asbestos-contaminated properties. "You have to look under every stone," says James Early, whose New York law firm specializes in asbestos litigation. "The deeper you dig into the industry, the more you find."

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Asbestos was a ubiquitous product from World War II through much of the 1970s. The mineral was valued for its fireproofing and insulating qualities and was the standard material used for almost anything associated with heat, ranging from massive industrial equipment like turbines and boilers to mundane household items like hair dryers, oven mitts and phonograph records. Because it was cheap, it also was used as filler in floor tile and ceiling plaster.

Plaintiffs' attorneys contend that even a single fiber of asbestos can lodge in a lung and can cause the deadly cancer called mesothelioma. Other plaintiffs say their lung problems were caused by asbestos exposure that caused debilitating lung scarring known as asbestosis. The bulk of new cases involve plaintiffs who aren't ill but have some scarring that they fear will lead to future problems.

Nearly all asbestos-related claims are eventually settled out of court since trials are so expensive and risky. An object lesson: A jury awarded steel-mill workers more than $100 million from a company that made mill equipment containing asbestos.

While individual settlements are kept secret, companies say they generally have settled cases for an average of $2,000 to $4,000 per claim. But they fear they will face more suits and bigger payment demands. And their ranks seem sure to grow.

"Virtually every company involved in traditional basic industries is a potential defendant in asbestos litigation," says Jay Hughes, senior litigation counsel for chemicals maker W.R. Grace & Co., which made construction products that used asbestos. As of October 1999, Grace had paid out $398 million to resolve 154,000 claims dating back to the early 1980s. More than 100,000 claims are still pending, and more are being filed every week.

Plaintiffs' attorneys say the expanding roster of defendants is the natural evolution of complex litigation. Over the years, a more diverse slate of plaintiffs began showing up ill from asbestos, indicating that smaller degrees of exposure still caused health problems.

In this kind of lawsuit, plaintiffs typically name every company -- usually dozens -- that might have provided asbestos products to the work site. One group tracking asbestos litigation estimates that more than 2,400 companies have been accused in lawsuits of having made, sold or used asbestos-containing products that made people sick. That's up from about 300 companies in the early 1980s, when asbestos litigation was gathering steam.

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Some of these companies and institutions face only a handful of suits, and most say the litigation isn't a significant financial threat right now. But in the past year, companies say average settlement demands have doubled, and in some cases quadrupled. Settlement requests have gone up simply because there are fewer deep pockets, says Fred Baron, whose Dallas firm, Baron & Budd, has handled thousands of asbestos claims.

"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," Mr. Baron says.

At least 22 companies facing asbestos litigation have filed for bankruptcy protection, by the count of the Coalition for Asbestos Resolution. The coalition, a business group, is promoting the Asbestos Compensation Act of 2000, introduced in Congress by Republican Rep. Henry Hyde of Illinois, chairman of the House Judiciary Committee. The act would control the flood of lawsuits and create an administrative process to resolve more than 200,000 pending asbestos claims.

(See related letter: "Letters to the Editor: Cash-Hungry Lawyers Drive Asbestos Suits" -- WSJ April 28, 2000)

---- INDEX REFERENCES ----

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NEW YORK COURT RULING IMPACTS "PERIPHERAL" ASBESTOS DEFENDANTS

by
John S. Stadler

In a decision that is likely to substantially reduce asbestos defendants' potential liability in over 30,000 asbestos personal injury cases pending in the New York City area, New York State trial court Justice Helen E. Freedman recently ruled in four cases, *Tancredi, et al. v. AC&S, Inc., et. al.*, 2002 N.Y. Misc.LEXIS 1459 (N.Y. Sup., N.Y. Co.), that, with respect to awards of noneconomic damages, asbestos defendants who are found by the jury to be 50% or less at fault (as usually occurs in these cases) are not liable for the entire award on a joint and several basis, but instead are liable only for their percentage share of fault. Most important, Judge Freedman, who is assigned to preside over all asbestos personal injury actions in the New York County court system, issued a declaratory ruling that the jury, when calculating the defendants' percentage share of fault for the plaintiff's noneconomic injuries, should also assess the degree of contributing fault of bankrupt nonparty tortfeasors. Thus, under this ruling, most solvent defendants in the New York City asbestos litigation are not likely to be required to absorb or bear responsibility for any portion of the bankrupt tortfeasors' fault for the plaintiff's noneconomic damages.

The court expressly acknowledged the significance of its decision, noting that because over sixty companies historically sued in asbestos cases have now filed for bankruptcy, "the bankrupt tortfeasors' shares of fault can comprise much or most of a large verdict." Those bankrupt entities were the "traditional" asbestos defendants, and the primary targets in the litigation, as they had either mined asbestos or manufactured or installed asbestos-containing products. In comparison, the solvent defendants, who have increasingly been brought into asbestos litigation in recent years, consist for the most part of either "downstream" users and distributors of asbestos-containing products or manufacturers of products in which the asbestos was encapsulated in some form. These "downstream" and peripheral defendants are likely to be the major beneficiaries of the Court's ruling in *Tancredi*, which recognizes that "low-fault, 'deep pocket'" defendants have been paying "a disproportionate share of damage awards."

The New York statute discussed in *Tancredi*, Section 1601(1) of the New York Civil Practice Law and Rules, provides that unless a plaintiff can show that he was not able with due diligence to obtain jurisdiction over a tortfeasor and join it as a defendant, the non-party tortfeasor's share of fault will be considered by the jury when calculating party-defendants' relative percentages of fault for the injury. The precise issue framed by the Court in *Tandcredi* was whether under Section 1601(1) the plaintiffs were "unable to obtain jurisdiction" over several tortfeasors simply because the tortfeasors had filed for bankruptcy, triggering the automatic stay of any prosecution of claims against them, as set forth in Section 362 of the United States Bankruptcy Code. The plaintiffs argued that the automatic stay deprived the New York courts of any "effective jurisdiction" over the bankrupt entities and, therefore, that the bankrupt entities' percentage of fault should not be assessed or taken into account by the jury. The defendants argued that a bankruptcy filing by a tortfeasor does not "divest a plaintiff of jurisdiction that it might otherwise obtain over the bankrupt." The court noted that if the plaintiff's argument prevailed, and the bankrupt entities' percentage of fault were disregarded, in many of these cases a solvent defendant's percentage of fault would rise above fifty percent, causing that defendant, albeit peripheral,

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to have to pay the entirety of what is usually a multi-million dollar damages award.

The court found that defendants had the better of the argument on this issue, expressly holding that the term "jurisdiction" as used in Section 1601(1) means "personal jurisdiction," rather than subject matter jurisdiction. Specifically, the court determined that "[p]ersonal jurisdiction is unaffected by a party's bankruptcy filing and the attendant automatic stay: a bankruptcy stay merely suspends other court proceedings outside the bankruptcy proceeding, and does not divest those courts of jurisdiction over the bankrupt." In reaching this conclusion, the court was mindful that its ruling would have an "immediate and powerful effect on the plaintiffs and defendants as they weigh the risks and benefits of litigating these four cases, as well as the entire docket of asbestos personal-injury lawsuits statewide." Given the thousands of asbestos personal injury claims still pending nationwide, and the continuing trend of bankruptcy filings by traditional and primary target defendants, the *Tancredi* decision is a hopeful sign that the remaining solvent defendants may not be required to bear more than their proportionately small and fair share of any noneconomic damages assessed in asbestos cases.

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