

THE ASBESTOS END-GAME

JAMES L. STENGEL*

INTRODUCTION

Courts have long called on Congress to address the asbestos litigation “crisis.” In *Amchem Products, Inc. v. Windsor*, the Supreme Court observed that “a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.”¹ Shortly thereafter, in *Ortiz v. Fibreboard Corp.*, the court referred to the “elephantine mass of asbestos cases . . . [which] defies customary judicial administration and calls for national legislation.”² In a concurrence in that case, Chief Justice Rehnquist concluded that the asbestos crisis “cries out for a legislative solution.”³ The Court most recently reaffirmed these observations in *Norfolk & Western Railway Co. v. Ayers*.⁴

The United States Senate recently failed to support proposed asbestos legislation in the form of the Fairness Asbestos Injury Resolution Act of 2005 (Fair Act).⁵ The Fair Act was intended to be a comprehensive legislative solution to the problems created by the current state of asbestos litigation. While the vote was a setback in the Fair Act’s development, this was only the most recent incarnation of the legislation, and it is certain that Congress will continue to deliberate the merits of a federally mandated compensation regime.⁶ What follows is a description of the evolving state of the

* B.A. University of Illinois, J.D. University of Michigan. Partner, Orrick, Herrington & Sutcliffe LLP. The views expressed here are those of the author and not of any firm, entity or organization.

1. 521 U.S. 591, 628–29 (1997).

2. 527 U.S. 815, 821 (1999).

3. *Id.* at 865 (Rehnquist, C.J., concurring).

4. 538 U.S. 135, 166 (2003) (citing *Ortiz*, 527 U.S. at 821). *See also* REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 3, 27–35 (Mar. 1991) *reprinted in* MEALEY’S LITIG. REP., Mar. 15, 1991, at sec. A [hereinafter AD HOC REPORT] (concluding that effective reform requires federal legislation creating a national asbestos dispute-resolution scheme); *id.*, at 41–42 (dissenting statement of Hogan, J.) (arguing that “a national solution is the only answer” and suggesting that Congress pass an administrative scheme similar to the black lung legislation).

5. Stephen Labaton, *Asbestos Bill Is Sidelined by the Senate*, N.Y. TIMES, Feb. 14, 2006, at C1. Supporters of the legislation, S. 852, 109th Cong. (2005), were unable to muster the number of votes necessary to override a budget objection. *Id.*

6. *See id.* For previous versions of the Fair Act, see *infra* notes 83–86 and accompanying text.

asbestos litigation regime and a consideration of the relative merits of various responses, including legislation, litigation and bankruptcy.

As the recent Senate vote demonstrates, there is the unfortunate risk that a comprehensive federal legislative solution will not eventuate. It is therefore useful to focus the discussion on alternatives and illuminate the likely future for those unfortunate enough to be caught up in the asbestos litigation process. A survey of the sources of inefficiency, unfairness and distortion in the context of asbestos litigation and the range of potential litigation devices and solutions is also useful for participants in other mass torts. While asbestos litigation is unique in certain dimensions, it shares characteristics with other mass tort litigation and will likely, for better or worse, provide a template for mass tort litigation in the future.

This article focuses first on the current state of asbestos litigation, paying particular attention to those aspects of the asbestos litigation process which, either because they generate false claims or misplace liability while creating expense and diverting resources from deserving claimants, must be addressed in order to achieve a satisfactory overall resolution. There is a substantial and growing scholarship on the asbestos litigation crisis,⁷ but the more limited survey appearing in Part I provides an analytical framework for assessing the efficacy of various options. Having thus outlined the nature of the problem, this article then discusses potential solutions. First, Part II assesses the latest version of the Fair Act, with a particular focus on its success in meeting the identified needs and deficiencies of the existing asbestos litigation system. Part II also analyzes other legislative alternatives. These fall into two broad cat-

7. See, e.g., GRIFFIN B. BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURT'S DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS (2002) [hereinafter BELL, LITIGATION AND LEADERSHIP]; STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION (2005) [hereinafter CARROLL ET AL., LITIGATION]; STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT (2002) [hereinafter CARROLL ET AL., INTERIM REPORT]; Griffin B. Bell, *Asbestos & the Sleeping Constitution*, 31 PEPP. L. REV. 1 (2004); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005) [hereinafter Brickman, *Ethical Issues*]; Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2004) [hereinafter Brickman, *Theory Class*]; George L. Priest, *The Cumulative Sources of the Asbestos Litigation Phenomenon*, 31 PEPP. L. REV. 261 (2004); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001); 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, at 154.

egories: (1) tort reform or medical criteria approaches at the federal level, and (2) state-by-state reform efforts, again targeted primarily, but not exclusively, at focused tort reform. Having examined the legislative solutions, Part III then addresses the procedural tools and structures available to resolve asbestos cases absent legislative relief. Here the focus is on litigation devices as well as potential settlement structures. In broad categories, the litigation can proceed on either a purportedly case-by-case basis, or via formal aggregation devices. Part IV examines the bankruptcy option in both the traditional contested Chapter 11 structure and the pre-packaged bankruptcy as it has evolved in the asbestos context.

Historically, asbestos litigation has clearly demonstrated the maxim that “hard cases make bad law.”⁸ The perceived constraints on the deployment of these procedural options flow from the fact that, in the past, ill-advised litigation structures coupled with what, in some cases, can only be described as overreaching behavior by parties and/or counsel, have predictably led to judicial disfavor. This article attempts to provide an objective assessment of whether—and to what extent—these devices can be useful, and undertakes an objective comparison of each of these options.

I.

ASBESTOS LITIGATION: THE CURRENT LANDSCAPE

In order to assess the efficacy and desirability of the various options available to address the “problem” of asbestos litigation, it is necessary to specify with more precision the constituent evils of the system. Beyond the substantial legal literature recounting the failures of asbestos litigation,⁹ a variety of commentators have focused on the economic waste and inefficiency of the process.¹⁰ These deficiencies are unique in that they are inflicted on both claimants

8. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

9. See, e.g., Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2004) [hereinafter Schwartz et al., *Elephantine Mass*]; BELL, *LITIGATION AND LEADERSHIP*, *supra* note 7; Brickman, *Ethical Issues*, *supra* note 7; Brickman, *Theory Class*, *supra* note 7; Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945 (2003); Priest, *supra* note 7.

10. See generally JOSEPH. E. STIGLITZ ET AL., *THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS* (2002); CARROLL ET AL., *LITIGATION*, *supra* note 7, at 87–122; *Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Frederick C. Dunbar, Senior Vice President, National Eco-

and defendants; the litigation has been, for some time, “a disaster of major proportions to both the victims and the producers of asbestos products.”¹¹ Moreover, absent some solution, litigation will continue into the foreseeable future: “It is possible that millions of claims have yet to be made.”¹²

Conclusory statements lamenting the asbestos litigation “crisis” or describing the system as “broken” support the need to find a solution but have limited utility in designing a specific solution or assessing its likely efficacy. It has taken decades of complex interaction—of action and response—among a large cast of actors for asbestos litigation to evolve into its current state. Historical context is important in asbestos litigation, as there are circumstances which may be inexplicable to an observer that become logical, if not desirable, with the perspective of history.

A. *American Use of Materials Containing Asbestos*

A substantial contributor to the asbestos litigation problem is the utility and ubiquity of asbestos itself. Although known and used in ancient societies for its fire- and chemical-resistant aspects,¹³ the fibrous mineral first saw common use as insulation in the United States in the 1860s.¹⁴ From there the growth in the use of asbestos continued, at times slowly and at other times explosively. Asbestos was used in buildings, foundries, homes, automobiles, and a wide variety of commercial products.¹⁵ It is also a naturally occurring

monic Research Associates), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=777&wit_id=2188.

11. AD HOC REPORT, *supra* note 4, at 2. *See also* *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 265 (E.D. Pa. 1994) (stating that the Judicial Conference Report, which dates from the early 1990s and is predicated on an assessment of conduct up to the 1980s, “was a ringing condemnation of the asbestos litigation process in the tort system”), *vacated*, 83 F.3d 610 (3d Cir. 1996); BELL, LITIGATION AND LEADERSHIP, *supra* note 7; Brickman, *Theory Class*, *supra* note 7. Some commentators believe that the “crisis” label understates the magnitude of the problem. As George Priest concludes: “[T]he asbestos litigation phenomenon has resulted, in contrast, from a cumulative set of intentionally adopted changes in law and procedure that together have created litigation that is and will continue to be unending and infinite in magnitude.” Priest, *supra* note 7, at 261.

12. INTERIM REPORT, *supra* note 7, at 78.

13. *See In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710, 735 (E. & S.D.N.Y. 1991) (discussing a lung disorder known to Pliny the Elder and Strabo, a Greek geographer (citing B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 1 (1986))).

14. *Id.*

15. *See* JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 3 (1983).

mineral, so everyone has some exposure.¹⁶ Substantial increases in use accompanied increased wartime production, although domestic use did not peak until 1973.¹⁷

Although there had been a long-standing understanding of the occupational risks of those who manufactured asbestos-containing products,¹⁸ and there were occupational standards governing permissible workplace exposure,¹⁹ it was through the epidemiological work conducted by Dr. Irving Selikoff and others at Mt. Sinai Hospital in the 1960s and 1970s that the risks for insulators and other heavily exposed workers were publicly identified.²⁰ Partly in response, the federal government established the Occupational Safety and Health Administration (OSHA) in 1970, which issued its initial restrictions on the workplace use of asbestos in 1971.²¹ Subsequently, these regulations were modified to further reduce the allowed level of occupational asbestos exposure.²² As Judge Weinstein has observed: "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."²³

B. Asbestos-Related Injuries

1. Cancer

Many varieties of cancer are associated with asbestos exposure. These include mesothelioma, or malignancy of the thin membrane that lines the chest (pleural mesothelioma) or the peritoneum (peritoneal mesothelioma). Pleural mesothelioma among males is

16. Andrew Churg, *Nonneoplastic Diseases Caused by Asbestos*, in *PATHOLOGY OF OCCUPATIONAL LUNG DISEASE* 213, 219, 224–29 (Andrew Churg & Francis H.Y. Green eds., 1988).

17. CARROLL ET AL., *LITIGATION*, *supra* note 7, at 11.

18. *In re* Joint E. and S. Dist. Asbestos Litig., 237 F. Supp 2d 297, 301 (E.D.N.Y. 2002) ("The major dangers of asbestos were known in this court as early as the 1930s." (citation omitted)).

19. *See In re* Joint E. and S. Dist. Asbestos Litig., 129 B.R. 710, 738–39 (E. & S.D.N.Y. 1991) (discussing early recommendations that child labor not be used in asbestos-related manufacturing, as well as the U.S. Navy's wartime regulations for asbestos-related jobs).

20. *See, e.g.*, I. J. Selikoff et al., *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 *ANNALS OF THE N.Y. ACAD. OF SCI.* 139 (1965).

21. Occupational Safety and Health Standards, 36 Fed. Reg. 10,466 (May 29, 1971) (now codified at 29 C.F.R. § 1910.1001 (2005)).

22. *See* Emergency Standard for Exposure to Asbestos Dust, 36 Fed. Reg. 23,207 (Dec. 7, 1971); Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11,318 (June 7, 1972) (now codified at 29 C.F.R. § 1910.1001 (2005)).

23. *In re* Joint E. and S. Dist. Asbestos Litig., 129 B.R. at 737. Of course, there is to date no bar on the use of asbestos.

viewed as a signature asbestos disease.²⁴ However, there is some dispute as to other causes, and “about half of the reported cases of mesothelioma have no documented exposure to asbestos.”²⁵ Lung cancer, particularly among smokers, has also been attributed to asbestos exposure, although there is substantial question whether asbestos can be considered a cause of lung cancer absent medically documented asbestosis.²⁶ Other cancers of the throat, gut and digestive system have also been attributed to asbestos exposure and have supported recovery in the tort system, but the causal role of asbestos as to these diseases is hotly contested.²⁷ All of these cancers have other causes, and in many cases when there is no doubt that the claimant is sick, there will be substantial debate as to whether the disease was caused by asbestos exposure. Assessing causation is made much more difficult by the long latency that is characteristic of asbestos-related cancers. Latency periods of twenty, thirty, and forty or more years are common, making proof of contemporaneous exposure an exercise in speculation rather than certainty.

2. Asbestosis

The second broad disease category is “asbestosis,” which is a condition involving scarring of the internal structures of the lung. Historically, claimants with heavy occupational exposure to friable (breathable) asbestos have been disabled or died due to asbestosis. As time has passed, these cases have become quite rare, reflecting the diminished occupational exposure. Nonetheless, the medical and legal status of the remaining claims is disputed.

24. See Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1, 15 (1993) (stating that “mesothelioma is a signature disease of asbestos”).

25. Victor L. Roggli et al., *Mesothelioma*, in PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 109, 112 (Victor L. Roggli et al., eds., 1992).

26. See, e.g., *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 274 (E.D. Pa. 1994) (“All seven medical experts who testified on this point recognized that there was a difference of opinion in the medical community as to whether underlying asbestosis is required before a lung cancer may be attributed to asbestos exposure or whether it is sufficient that there be exposure sufficient to cause asbestosis, whether or not the claimant has actually contracted asbestosis.”).

27. See, e.g., ARLEN SPECTER, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005: REPORT TOGETHER WITH ADDITIONAL AND MINORITY VIEWS, S. REP. NO. 109-97, at 115 (2005) [hereinafter SPECTER, REPORT] (containing the report of Dr. James D. Crapo, Chairman of the Department of Medicine for the National Jewish Medical and Research Center, that “current medical science does not establish a causal relationship between asbestos exposure and . . . cancers” other than lung cancer and mesothelioma).

The asbestos litigation system has compensated claims that fall far short of the serious and indisputable asbestosis cases. Asbestosis is typically diagnosed via X-rays, the utilization of breathing tests called pulmonary function tests (PFTs), and by a physician making a medically appropriate diagnosis after taking a detailed occupational and personal history. All of this is necessitated by the fact that at lower diagnostic levels, there are more than one hundred other causes of the lung changes which may be viewed as evidence of asbestosis.²⁸

Problematically, X-rays are interpreted according to a somewhat subjective evaluation wherein a certified medical professional (usually a radiologist), termed a “B-Reader,” reviews a patient’s X-ray and assigns a rating from a twelve-point scale developed by the International Labour Office (ILO). The ILO scale runs from 0, which means normal, to 3, which is the most extreme. Two numbers are provided—the first constituting the reviewer’s baseline assessment and the second the next most likely amount of scarring. Hence, a 0/0 is completely normal, while a 0/1 indicates a normal finding coupled with an acknowledgment that another reader might find something there. This subjectivity has created much of the fight over the compensability of low-level asbestos cases.²⁹

A second methodology relating to asbestosis assessment is the PFT test, which assesses breathing capacity. Here a medical practitioner performs a number of tests involving measured exhalation. Test results are expressed in terms of deviation from a “normal” standard. Again, however, this test presents problems for lower level asbestos cases; the PFT test can be misleading due to variations in patient effort, calibration of equipment and the conduct of the tests. The taking of a detailed patient history along with these diagnostic tests is of critical importance, because the test results do not themselves demonstrate asbestos causation.³⁰

3. Pleural Plaque

The third condition that has supported compensation, although not consistently across time or jurisdictions, is a scarring of

28. *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 WL 72588, at *8 (D. Kan. May 30, 1990) (“there are as many as 150 causes of fibrosis”).

29. Brickman, *Theory Class*, *supra* note 7, at 47–51.

30. The fact that pleural plaques are not compensable in many jurisdictions demonstrates the limited usefulness of the diagnostic tests. *See, e.g., In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990); *Wright v. Eagle-Picher Indus.*, 565 A.2d 377, 380–81 (Md. Ct. Spec. App. 1989); *Giovanetti v. Johns-Manville Corp.*, 539 A.2d 871, 875 (Pa. Super. Ct. 1988).

the pleura.³¹ There are extremely rare cases where this scarring leads to reduced lung function, but in almost all “pleural” or “pleural plaque” cases there is no impairment. This condition is revealed only through radiographic examination. While pleural plaques are considered evidence of asbestos exposure, they have other causes. There are disputes about what radiographic evidence is necessary to establish their existence. There is also debate about whether pleural plaques have any predictive value for subsequent asbestos-related disease.³²

C. *History of Asbestos Litigation*

The current litigation system did not spring fully-formed into its current state, but is rather the evolutionary endpoint of a system that has absorbed a number of legal and social changes and has adapted to a variety of often well-intentioned efforts to impose fairness and rationality. Where we are today reflects the collision between best intentions, a serious occupational health crisis, systemic inadequacies, perverse economic incentives, and immense wealth.

Recitals of the history of asbestos litigation typically begin with the Fifth Circuit’s decision in *Borel v. Fibreboard Paper Products Corp.*, which established strict liability against asbestos manufacturers.³³ Before that point, plaintiffs had enjoyed relatively little success, but the next years saw a virtual explosion of asbestos cases.³⁴ By the early 1980s, some twenty thousand claimants had filed cases and \$1 billion had been spent on asbestos litigation.³⁵ That explosion, miniscule as it may appear in hindsight, eventually triggered a seismic event that presaged many of the developments of the next twenty-plus years of asbestos litigation—the Manville bankruptcy.³⁶

Manville’s filing was not a result of actual insolvency, but of projections that indicated the company would soon find itself insolvent. The Manville filing was the consequence of conduct occurring decades earlier. The real history of the litigation goes back to the conduct of a small group of companies from the 1920s to the

31. Brickman, *Theory Class*, *supra* note 7, at 51–54.

32. See SPECTER, REPORT, *supra* note 27, at 114 (citing the statement of Dr. Crapo that “the presence of pleural plaques . . . due to asbestos exposure does not increase the risk of developing either asbestosis or lung cancer”).

33. 493 F.2d 1076, 1092 (5th Cir. 1973).

34. CARROLL ET AL., LITIGATION, *supra* note 7, at 71.

35. JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES V (1984).

36. See *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1987), *aff’d sub nom.* *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

1950s.³⁷ With respect to Manville and the other defendants, plaintiffs were able to document efforts to suppress scientific information and control the contents of publications during time periods where the hazards of asbestos were not generally well known. Further, the nature of the products, typically asbestos-containing thermal insulation, meant that there was extremely heavy occupational asbestos exposure among the relevant workers. Manville was also far and away the dominant manufacturer of asbestos-containing products.³⁸

As a result of this kind of conduct and the serious injuries it caused, asbestos litigation commenced as a contest between sick people and culpable entities. Causation might have been contested, especially as the science of asbestos-related disease developed, but these claimants were typically ill because of demonstrable and sustained exposure to the products of the entities they were suing. If *Borel* in 1973 is viewed as a well-meaning trigger for asbestos litigation, it is remarkable how quickly, in retrospect, courts and commentators identified a developing crisis. By the mid-1980s, filing rates climbed precipitously.³⁹ Courts at that time made reference to an “avalanche of litigation.”⁴⁰ Conditions extant in the late 1980s led to the creation of the Judicial Conference Ad Hoc Committee on Asbestos Litigation. The Committee’s 1991 report concluded that the “situation has reached critical dimensions and is getting worse;”⁴¹ that the litigation was “a disaster of major proportions to both the victims and the producers of asbestos products;”⁴² and that courts are “ill-equipped”⁴³ to handle the masses of claims fairly or efficiently. Contemporary commentators took a similarly dim view of the situation.⁴⁴

37. PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* 13–121 (1985).

38. Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891, 1894 n.13 (1992) (“Before bankruptcy, Manville bore the brunt of asbestos litigation, it had the largest market share of asbestos-product sales and was assessed the highest amount of liability by the tort system.”).

39. *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 263 (E.D. Pa. 1994) (“Although by this time state and federal courts were already burdened by many asbestos claims, amazingly 1986 saw the rate of filing of new asbestos suits *quadruple*.”). See also CARROLL ET AL., *LITIGATION*, *supra* note 7, at 71.

40. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470 (5th Cir. 1986) (citation omitted).

41. AD HOC REPORT, *supra* note 4, at 2.

42. *Id.*

43. *Id.*

44. See, e.g., Lester Brickman, *The Asbestos Litigation Crisis: Is there a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1827–28 (1992) [hereinafter

At almost the same time, the Manville Personal Injury Settlement Trust, the vehicle intended to address Manville's huge liability, was shut down by Judge Weinstein after eighteen months of operation when it became clear that the trust was at risk of dispensing most of its assets to the first-arriving claimants.⁴⁵ The ensuing decade saw failed efforts at a comprehensive legislative solution;⁴⁶ the subsequent failure of narrower attempts embodied in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*;⁴⁷ the revival, albeit at dramatically reduced payout rates, of the Manville Trust;⁴⁸ the repeated failure of the Manville Trust;⁴⁹ the failure of the *Fibreboard* settlement;⁵⁰ and the rise of medical screening.⁵¹ After a brief period of declining annual claims, claiming rates then rose dramatically.⁵²

Throughout this period, necessity, occasioned by the ever-increasing number of cases, resulted in a number of experiments with aggregation.⁵³ However well-intentioned, these experiments failed, not only as mechanisms to clear dockets and to adjudicate the claims then pending, but also by facilitating the increasing rate of claim filings: "[M]ass consolidations only serve to magnify the irrationality of a litigation system that awards massive amounts to the

Brickman, *Crisis*] (arguing that "[t]rend reversal [to] substantially eliminate the claims of the unimpaired . . . is not likely attainable under the aegis of the current tort system"); Note, *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, 554 (1992) (recounting the recent history and manifold inequities of asbestos litigation).

45. Findley v. Falise (*In re Joint E. & S. Dists. Asbestos Litig.*), 878 F. Supp. 473, 485–86 (E. & S.D.N.Y. 1995).

46. See *infra* Part II.A.

47. See *infra* Part III.B.

48. See *infra* Part IV.A.2.b.

49. See *infra* Part IV.A.2.c.

50. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing the certification of a settlement class).

51. See *infra* Part I.D.1.

52. CARROLL ET AL., LITIGATION, *supra* note 7, at 71. Though total claims had declined by over 30% from 1996 to 1997, by 2001, the filing rate was almost twice the 1996 number. *Id.*

53. See, e.g., *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998) (experimenting with consolidation and class actions); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (reversing an experiment with consolidation).

unimpaired while threatening the ability of seriously ill people to obtain compensation in the future.”⁵⁴ As one commentator noted:

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.⁵⁵

D. The Elasticity Problems of Contemporary Asbestos Litigation

There are two fundamental phenomena that interact to create today’s asbestos litigation crisis. The first is “claimant elasticity,”⁵⁶ which refers to the essentially inexhaustible supply of claimants. The second is the correspondingly unbounded source of defendants, here separately labeled as “defendant elasticity.” Both elasticities stem from the same root cause: the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as “solvent bystanders.”⁵⁷

Elasticity, termed “price elasticity of demand,” is an economic concept: if a price increase causes reduced demand, or vice versa, demand is said to be elastic.⁵⁸ In the context of asbestos litigation, the phrase has been used in a general sense to indicate that if com-

54. Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. § 2 (1999).

55. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997) [hereinafter McGovern, *Class Actions*]; see also Brickman, *Crisis*, *supra* note 44, at 1826 (“The more successful courts become in devising ways to more quickly and assuredly compensate the meritorious, the larger the number of unmeritorious claims that were able to enter the system.”); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1839–40 (1995) [hereinafter McGovern, *Analysis for Judges*] (examining the experience of Maryland, which experienced a significant increase in claims after implementing innovations to streamline asbestos trials).

56. “Elasticity,” along with “maturity,” is one of McGovern’s contributions to the analytic lexicon of mass torts. See Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002) [hereinafter McGovern, *Tragedy Commons*]; Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851 (1997); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989); McGovern, *Analysis for Judges*, *supra* note 55; Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

57. Schwartz et al., *Elephantine Mass*, *supra* note 9, at 280 (quoting plaintiffs’ attorney Richard Scruggs (citation omitted)).

58. See KARL E. CASE & RAY C. FAIR, *PRINCIPLES OF ECONOMICS*, 110–11 (5th ed. 1999).

pensation is available along with a mechanism to obtain it, the number of claims will increase, perhaps dramatically.⁵⁹ Here, in an effort to provide additional analytic clarity, the species of asbestos litigation “elasticity” are identified.

1. Claimant Elasticity

“Claim” or “claimant” elasticity, is the classic “If you build it, they will come” variety, referring to the phenomenon of increasing claim populations.⁶⁰ Claimant elasticity requires the ability to harvest claims whenever there are positive economic incentives to do so. This leads to the role that screenings and the unimpaired claimant have had in the history of asbestos litigation.

The label “unimpaired” applies to two very distinct claimant subpopulations. The first involves claimants who have actual asbestos exposure sufficient to cause symptoms or conditions and who have competently-assessed medical evidence of asbestos exposure, such as pleural plaques. These individuals have claims that would be cognizable in a limited number of jurisdictions, whether for medical monitoring, fear of cancer, or any other source of liability. However, their conditions do not interfere in any way with their daily existence. As to these claimants, there is a principled debate about whether they should be entitled to current compensation or should have their claims deferred until they manifest an impairing illness.

The second subpopulation is quite different. These are claimants who have been “diagnosed” via medically deficient procedures and may or may not have had exposure to asbestos sufficient to cause their purported symptoms or conditions. Such claims, if forced through any meaningful evaluation, would be worthless. These “false positive” cases exist by virtue of the perverse economic incentives that are created when the huge number of claims overwhelms the adjudication process.

In the world of asbestos, people without any existing conditions are encouraged to go through a short-form screening process by suggestions that they might receive substantial economic benefits. Marginally qualified personnel, miscalibrated testing equipment, test subjects who are subtly or otherwise informed what their test results need to be for purposes of compensation, and overarching conflicts created by economic incentives for “positive” diagnos-

59. McGovern, *Analysis for Judges*, *supra* note 55, at 1827 n.26.

60. McGovern, *Class Actions*, *supra* note 55, at 606 (explaining how the increased efficiency of claim resolution will only create more claims).

tic results coalesce to create large numbers of claims that have value only in the absence of diagnostic standards or other merits-based filters.⁶¹ These claims are then bundled together and filed in jurisdictions that are viewed as offering special advantages to plaintiffs.⁶²

This screening process has been operating for some time, and experts have demonstrated again and again how it can generate a tremendous number of “false positives.” In 1991, Judge Weinstein observed that plaintiffs’ lawyers “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.”⁶³ Around that time, a panel of court-approved experts determined that out of the group of screened plaintiffs whose medical records they examined, 15% had asbestosis, 20% had pleural plaques and the vast majority (65%) had no basis for a claim of asbestos-related disease.⁶⁴ When

61. Steven Kazan, *Legislative Attempts to Address Asbestos Litigation*, 31 PEPP. L. REV. 227, 228–29 (2004) (“[T]he claiming propensities and rates for [non-cancer] cases have nothing to do with medical science. They are instead a function of the entrepreneurial zeal and efficacy of our free market system. The law creates an economic opportunity, and people take advantage of it There is no requirement in virtually any state that there be a real diagnosis of an asbestos-related disease, or even one that is asymptomatic. Rather, the minimal threshold level for filing a suit seems to be that a doctor somewhere, usually working for a for-profit medical screening enterprise, is willing to sign a report that says he or she sees something on an x-ray that shows signs consistent with asbestos exposure.”); David Egilman, Letter to the Editor, *Asbestos Screenings*, 42 AM. J. INDUS. MED. 163 (2002) (reporting his discovery that sometimes a particular X-ray might be “‘shopped around’ to as many as six radiologists until a slightly positive reading was reported by the last one of them”).

62. Brickman, *Theory Class*, *supra* note 7, at 56–57 (explaining how courts have “allow[ed] enormous aggregations” of unimpaired claimants “that forced defendants to settle cases that they often would have won had they been tried and cases that would never have even been filed but for the aggregations”).

63. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 748 (E. & S.D.N.Y. 1991); *see also*, *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 102d Cong. 77, 100 (1991) (prepared statement of Lester Brickman, Professor of Law, Benjamin H. Cardozo School of Law) (“[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 the active assistance of local union officials. Often, mobile x-ray vans brought to the plant sites are used for the screenings.”); Peter H. Schuck, *The Worst Should Go First: Deferred Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL’Y 541, 564 (1992).

64. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 45 (1991).

the Manville Trust undertook an audit of its claims, using an avowedly “claimant-friendly” diagnostic standard, it found that a substantial percentage of its claims failed.⁶⁵ Similarly, a recent peer-reviewed academic study re-evaluated X-rays submitted in support of litigation claims. The plaintiffs’ doctors found asbestos based on related imaging in 95.9% of the X-rays. However, when independent physician reviewers analyzed these same X-rays, only 4.5% of the X-rays contained evidence of asbestos-related injury.⁶⁶

2. Defendant Elasticity

“Defendant elasticity” refers to the phenomenon whereby the erosion or elimination of standards of recovery, particularly causation and product identification, increases the supply of defendants who can be brought into the litigation.⁶⁷ Defendant elasticity is a precondition for claimant elasticity; without additional sources of compensation there would be no incentive to locate or create claimants.

In the absence of manufactured products or premises identification testimony, how can claimants succeed against peripheral defendants? Several factors explain the ability of claimants to successfully assert claims against solvent bystanders. First, the sheer number of cases reduces or eliminates the opportunity to obtain an adjudication of the ultimate issue. Second, the large number of cases can create a judicial inclination towards consolidation. Consolidation itself may substantially increase the risk of an adverse outcome because of the implied validity thousands of cases could have

65. *Adams v. Harron*, 191 F.3d 447 (4th Cir. 1999); *see also Adams v. Harron*, No. 97-2547, 1999 WL 710326 (4th Cir. Sep. 13, 1999) (unpublished per curiam opinion).

66. Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 *ACAD. RADIOLOGY* 843, 855 (2004).

67. Related to defendant elasticity is the concept of “funding elasticity,” which encompasses the expanded funding made available not only by virtue of having more defendants, but also decisions relating to insurance coverage. Funding elasticity is best illustrated by the development of “special asbestos law” in the context of insurer coverage, which maximized the coverage available to asbestos defendants:

Judge David Bazelon of the District of Columbia Circuit Court of Appeals held that insurance companies that had issued liability policies to asbestos defendants at any time between workers’ initial exposures to asbestos and actual disease manifestation, which therefore encompassed as much as a fifty-year period, were liable up to policy limits for each and every policy issued in each and every year in that time frame. The decision rewrote insurance policies to create, in one fell swoop, tens of billions of dollars in insurance coverage. Brickman, *Theory Class*, *supra* note 7, at 55 (citation omitted).

to a jury (as opposed to the claim of a single claimant) or because the multiplication of even modest individual awards might produce an aggregate outcome beyond the bonding capacity of the defendant, eliminating the possibility of appeal.⁶⁸ For many defendants, both of these factors will lead to the decision to settle on a cost-avoidance basis. Professor Hensler has captured the essence of the process of herding massive case volumes through the settlement process: “Representing large groups of asbestos claimants . . . increased plaintiffs’ attorneys’ leverage in negotiations with defendants, who were willing to settle legally and factually questionable claims in exchange for also resolving large numbers of viable claims without incurring substantial litigation costs.”⁶⁹ In other words, at the point of entry for many “new” defendants, the settlement demands are low enough that settlement is economically rational in the short term because transaction costs, which are higher than the demand, can be avoided.⁷⁰ Third, plaintiffs use the threat of trying cancer claims against a defendant to induce inventory settlements, which “bundle” valid claims with weaker claims and cases that have little or no product identification. Fourth, plaintiffs deploy novel but inapposite legal theories like conspiracy to avoid the need for product identification. Finally, the precise requirements of proof of causation vary from state to state.⁷¹

Plaintiffs’ lawyers have also been very creative. The key for them has been to focus on the bad acts of culpable parties like Manville to establish liability against new defendants while simultaneously avoiding any reduction in awards that would reflect the “absence” of these dominant defendants.⁷² The early asbestos-related

68. FED. R. CIV. P. 62(d) (requiring that an appellant seeking a stay upon appeal must post a supersedeas bond).

69. Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1912 (2002) (citations omitted).

70. See *infra* notes 79–81 and accompanying text.

71. Compare *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986) (holding that the proper standard for causation is the “frequency, regularity, and proximity” test) and *Monsanto Co. v. Hall*, 912 So. 2d 134, 137 (Miss. 2005) (noting that the Third, Fourth, Fifth and Eighth Circuits have all adopted *Lohrmann*) with *In re Joint E. & S. Dist. Asbestos Litig.*, 798 F. Supp. 925, 930 (E. & S.D.N.Y. 1992) (requiring pursuant to state law that plaintiff must prove “that he was exposed to [defendant’s] merchandise and that it is more likely than not that this exposure was a substantial factor in his injury” (citation omitted)) and *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1177 (D.C. 2005) (calling *Lohrmann* too “exacting”).

72. Manville and the other primary defendants are not “absent”; their roles have been assumed by personal injury trusts—though with *pro rata* payments as low as 5% and limits on attorneys’ fees. *Findley v. Trs. of the Manville Pers. Injury*

bankruptcies eliminated a substantial proportion of the “liability share” in asbestos-related litigation. As leading plaintiffs’ counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented “one-half to three-quarters of the original liability share.”⁷³ As a result, the number of defendants has climbed from perhaps one hundred to two hundred in the early 1980s to 8,400 through 2002.⁷⁴ Courts have also noticed this development: “A newer generation of peripheral defendants are becoming ensnared in the litigation” as plaintiffs attempt “to expand the number of those with assets available to pay for asbestos injuries.”⁷⁵

Ultimately, the shift to a system dominated by the healthy plaintiff’s pursuit of peripheral or uninvolved defendants reflects the interaction in varying degrees of the following:

1. An overwhelming number of cases—although the absolute number of cases needed to be considered “overwhelming” has grown dramatically and the sources and quality of the cases has shifted as well.
2. Procedural experiments—what Professor McGovern⁷⁶ has labeled the “if you build it they will come” phenomenon.
3. Strict liability.
4. Joint and several liability.
5. *De facto*, although rarely *de jure*, “market share” or enterprise liability.
6. Elimination of the requirement of current injury.
7. Relaxed causation and exposure rules.
8. Erosion of venue requirements.
9. Expanded access to insurance.
10. The composition and mores of the defense bar.
11. Loosened rules of attorney solicitation that, coupled with the development of mass media and internet mechanisms, made the claims harvesting process easy, inexpensive and almost riskless.

Settlement Trust (*In re Joint E. and S. Dists. Asbestos Litig.*), 237 F. Supp. 2d 297, 302–03, 314, 326 (E.D.N.Y. 2002); Findley v. Falise (*In re Joint E. & S. Dists. Asbestos Litig.*), 878 F. Supp. 473, 556–60 (E. & S.D.N.Y. 1995).

73. Ronald L. Motley & Joseph F. Rice, *The Carlough Settlement—Blueprint for a Sane Resolution to the Asbestos Problem*, MEALEY’S LITIG. REP., July 1, 1993, at 24.

74. CARROLL ET AL., LITIGATION, *supra* note 7, at 79.

75. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 747–48 (E. & S.D.N.Y. 1991).

76. McGovern, *Class Actions*, *supra* note 55, at 606.

12. The creation of claims facilities that, because of minimal standards to qualify for at least some payment, made mass screening essentially riskless.⁷⁷

The most notable efforts to reach mass settlements of asbestos claims are products of this distorted environment. For example, in *Amchem Products, Inc. v. Windsor*⁷⁸ the defendants settled substantial numbers of so-called inventory claims at high values and subject only to minimal qualifying standards. In exchange for this bounty, the settling plaintiffs' counsel agreed to restrict the population of future claimants and the terms on which they could recover. This behavior reflected the zero-sum nature of the process, and the present, represented claimants benefited at the expense of future claimants. Although pragmatic, this solution failed to pass constitutional muster.

E. Needs for Reform

The current asbestos litigation process is costly. Moreover, in terms of direct costs, only a small percentage goes to compensating claimants. RAND estimates that out of each dollar spent on asbestos legislation, \$0.57 is consumed in defense costs and plaintiffs' attorney fees, and \$0.43 goes to claimants.⁷⁹ If litigation continues as expected, the proportion of each dollar that claimants receive may decline.⁸⁰ These are just the direct costs. The indirect costs are also substantial. More than seventy companies have been

77. Professor Priest has developed similar categories, including: (1) the reduced or eliminated requirements of injury; (2) relaxed causation requirements regarding the identification of the injury source; (3) the award of excessive damages; (4) the expansion of joint and several liability; (5) the granting of grossly excessive and overly-frequent punitive damage awards; (6) the unreasonable expansion of insurers' obligations; (7) the destruction of any concept of finality via the adoption of second injury rules; and (8) the relaxation of a variety of procedural rules relating to, among other things, forum choice and aggregation. Priest, *supra* note 7, at 266–67. Professor Brickman contends that 80 to 90% of asbestos claims (1) are recruited by entrepreneurial screening operations; (2) assert claims of injury despite the fact that they have neither a medically cognizable injury or any increased risk of illness; (3) assert those claims in a civil justice system which has reduced or eliminated many evidentiary requirements and proof of proximate cause to facilitate the claims; (4) gravitate toward “forum-shopped” jurisdictions; (5) have claims supported only by specious, quasi-medical, evidence; and (6) frequently support their claims with coached or sculpted testimony. Brickman, *Theory Class*, *supra* note 7, at 38–44.

78. 521 U.S. 591 (1997).

79. CARROLL ET AL., INTERIM REPORT, *supra* note 7, at 61.

80. CARROLL ET AL., LITIGATION, *supra* note 7, at 96–97.

forced into bankruptcy by asbestos liability.⁸¹ Not only does this destroy shareholder value, it affects workers in terms of jobs and pensions. Experts have estimated the overall indirect economic costs of asbestos litigation arising from these impacts and the reduced growth they produce to be in the billions of dollars.⁸² In addition to these costs concerns, the current system raises substantive issues of fairness among claimants and defendants alike. Healthy claimants may exhaust resources that would have been available to the truly ill. Today's claimants may strip the available assets before future claimants have an opportunity to make claims. Trial outcomes, which are lottery-like in their variation, further exacerbate the situation.

Each of the options for reform must be assessed on the basis of its ability to address these problems. Any realistic assessment must take full account of the effects of both plaintiff and defendant elasticities. A comprehensive legislative approach addresses plaintiff elasticity by imposing a variety of filters designed to insure that, before a claimant is compensated, he or she can demonstrate that they have an illness and that exposure to asbestos caused the illness. On one level, the no-fault nature of the trust fund approach renders the identity of a specific defendant irrelevant. More importantly, however, the imposition of specific exposure standards limits the ability to create new claims.

Outside the context of a comprehensive federal legislative solution, the other options for reform fail this test of comprehensiveness and are more or less desirable depending on their ability to change the dynamics of the current system. Unless the expectations of the current system can be constrained by a restored ability to discriminate between good and bad cases, any approach will fail to fix the system.

81. Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 1000 (2005).

82. Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1135 n.61 (2005) (noting that "workers, communities, and taxpayers will bear as much as \$2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos" (citation omitted)).

II. LEGISLATIVE SOLUTIONS

A. *A Federal Compensation Structure*

For almost as long as there has been substantial asbestos litigation, there have been federal legislative efforts to address the problems arising therefrom. But so far these efforts have not resulted in a solution. Congress first attempted to address the matter in the early 1970s and asbestos legislation has returned, intermittently, since then.⁸³ Since the failure of the Hyde Bill in 2000, legislative efforts have intensified and have been largely continuous. Senator Hatch developed an asbestos trust fund bill in the form of S. 1125 in 2002 and 2003.⁸⁴ At the same time, there were competing “medical criteria” bills advanced, among them what become known as the Nickles Bill,⁸⁵ for its sponsor, then-Senator Don Nickles of Oklahoma. Other variations of asbestos legislation were advanced in the House of Representatives.⁸⁶

Recent activity focused on S. 852, the successor to Senator Hatch’s S. 1125. S. 852 was voted out of the Senate Judiciary Committee on a bipartisan basis on May 26, 2005 on a thirteen to five vote. Before being voted down by the full Senate, the bill enjoyed unique bipartisan support, as the comments of Judiciary Committee Chairman Arlen Specter and the Ranking Member, Patrick Leahy in the Report⁸⁷ accompanying S. 852 demonstrated. They concluded that “[o]ur nation’s state and federal courts simply cannot adequately manage the problems in the current asbestos litigation system The [Supreme] Court has called upon the Congress three times since 1997 to address this issue It is time to answer this call.”⁸⁸

83. See, e.g., Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. (1999); Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong. (1981); Asbestos Health Hazards Compensation Act, H.R. 8689, 95th Cong. (1977); Asbestosis and Mesothelioma Benefits Act, H.R. 6906, 93d Cong. (1973).

84. The Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, 108th Cong. (2003).

85. See Asbestos Claims Criteria and Compensation Act of 2003, S. 413, 108th Cong. (2003) (setting requirements for prima facie showings of physical impairment and mandating diagnostic standards, among other things).

86. See e.g., Asbestos Compensation Act of 2003, H.R. 1114, 108th Cong. (2003); Asbestos Compensation Fairness Act of 2003, H.R. 1586, 108th Cong. (2003).

87. See generally SPECTER, REPORT, *supra* note 27.

88. *Id.* at 14 (citations omitted).

1. The Fair Act (S. 852)

The Fair Act envisioned a comprehensive displacement of all private civil asbestos litigation involving claims for personal injury. The Fair Act would have created a publicly administered, privately funded trust to evaluate and pay qualifying claims according to a fixed set of scheduled values.⁸⁹ The structure of the medical criteria and evidentiary standards of the Fair Act reflected concerns arising out of abuses in the current tort system. The medical criteria provisions required some degree of impairment for all but Category I, Medical Monitoring.⁹⁰ The criteria and evidentiary standards were also structured in such a way as to preclude claims generated through commercial screening. There were limitations on which physicians or medical experts could provide information, and the Act required that information be provided by a claimant's own treating physician.⁹¹

The Act created nine categories of compensation for asbestos personal injury, starting at the bottom with a medical monitoring class for those who had evidence of asbestos exposure but no current injury or impairment, through Category IX, which was the category providing compensation for mesothelioma claims.⁹² The range of compensation under the Act ran from \$25,000 to \$1.1 million for qualifying mesothelioma and cancer claims.⁹³ There were limited provisions to adjust awards beyond that level for mesothelioma victims who were below a stated age or who had dependents.⁹⁴ These adjustments operated on an overall cost-neutral basis.⁹⁵ The Fair Act also required occupational exposure to insure that injury was actually related to asbestos exposure.⁹⁶ In that way the Act hoped to restore the proximate cause requirement. The Fair Act used a system of weighted exposure years, so that, for example, claimants with World War II shipyard exposure received substantial credit for that exposure; conversely, claimants who had been exposed post-'86 in a substantially asbestos-free environment received credit for fractional years for each year working in that environment.⁹⁷ Based on the weighted exposure-years provisions, it

89. Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. § 2(b)(1)–(4) (2005).

90. *Id.* § 121(d)(1).

91. *See id.* § 121(b).

92. *Id.* § 121(d).

93. *Id.* § 131(b)(1).

94. *Id.* § 131(b)(3).

95. *Id.*

96. *Id.* § 121(a)(14).

97. *Id.* § 121(a)(16).

was anticipated that, as time passed, fewer and fewer claimants would be able to demonstrate qualification under the Act.

There were controversial categories of compensation under the Act. First among them were the categories offering compensation for lung cancer in individuals who did not have medical evidence of exposure to asbestos; that is, they had neither asbestosis nor pleural plaques. That category was removed as a compensable category during the bill's progress through the Judiciary Committee.⁹⁸ In a similar fashion, controversy attached to the provision providing compensation for other cancers in light of the substantial debate in the medical community as to whether any of these injuries could be caused by asbestos exposure. For that reason, the Act contemplated that a special study would be conducted under the auspices of the Institute of Medicine to determine whether there is a scientific basis to assert a causal link between asbestos exposure and a numerated set of other cancers, ranging from laryngeal to colorectal.⁹⁹ The non-malignancy compensation was geared to the level of impairment shown. \$400,000, for example, was available for a claimant who could show disabling, severe asbestosis.¹⁰⁰ Compensation was reduced as the level of impairment declined.¹⁰¹ The Act contemplated that the Administrator running the program would have substantial audit rights to insure that the provided medical evidence would be reliable and of the highest quality.¹⁰² There were also substantial criminal penalties for asserting false claims.¹⁰³ Additionally, the Act limited attorneys' fees to 5%,¹⁰⁴ a controversial provision but one that could have prevented replication of any of the perverse incentives that exist in today's tort system.

The total funding of up to \$140 billion would come from industry on one side and insurers on the other. On the industrial side, the Act assigned companies a tier based on their historical asbestos litigation expense—whether reimbursed by insurance or not—to the end of 2002, that being a proxy of exposure in the sys-

98. Compare *id.* §§ 121(d)(7), (8) (requiring evidence via particular diagnostic methods of pleural plaques, pleural thickening, or pleural calcification) with The Fairness in Asbestos Injury Resolution Act of 2004, S. 2290, 108th Cong. § 121(d)(7) (2004) (requiring only documentation of asbestos exposure as a causal factor).

99. S. 852, § 121(e).

100. *Id.* § 131(b)(1).

101. *Id.*

102. *Id.* § 105.

103. *Id.* § 401.

104. *Id.* § 104(e).

tem.¹⁰⁵ Within the various tiers, subtiering was determined by the revenues of the participating company.¹⁰⁶ In this way, an approximation was developed for both ability to pay, and, given the tendency of asbestos claims to follow the money, for likely future exposure. There were exceptions to the payment obligation for companies that met the definition of a small business under the Small Business Act, or for those companies who had spent less than \$1 million to the end of 2002 on asbestos litigation.¹⁰⁷ The tiers started with Tier I, which was intended to capture pending asbestos-related bankruptcy cases.¹⁰⁸ Tier I companies, if they were continuing entities, would pay a percentage of revenues on an annual basis. There were special provisions for companies without substantial continuing business that required the payment of either earmarked funds or funds otherwise available to pay into the national trust fund.¹⁰⁹ The tiers also reflected special treatment in Tier VII of Federal Employee Liability Act and Jones Act claims.¹¹⁰ In those cases, the defendant companies were either railroads or substantial employers of longshoremen and seamen. These payments supplemented other obligations under the Act and reflected the fact that, whereas for the rest of the corporate population the workmen's compensation scheme is maintained, the hybrid nature of FELA and Jones Act claims made it necessary to include a parallel structure.

The insurers, who were to contribute approximately 40% of the funding, did not have an agreed-upon compensation scheme. The bill contemplated that a special commission would be formed to allocate the funding obligations among insurers and reinsurers.¹¹¹ The last component of funding was to come from the existing bankruptcy trusts, which were required to provide their assets to the national trust on an accelerated basis.¹¹² The insurers as a group also agreed to accelerate their contributions.¹¹³ This meant that substantial assets would have been available during startup and the early years of trust operation. In addition, the Administrator for the trust had two separate sources of borrowing. First, during the initial phases of the trust's existence, lending was available from

105. *Id.* §§ 202(b), (d).

106. *Id.* § 203.

107. *See id.* §§ 202(a)(3), 204(b).

108. *Id.* § 202(b).

109. *Id.* § 203(b)(3).

110. *Id.* §§ 3(8), 203(h).

111. *Id.* §§ 210–216.

112. *Id.* § 402(f).

113. *Id.* § 212(a)(3)(C).

the Federal Financing Bank.¹¹⁴ Subsequently, the expectation was that the trust would be able to enter commercial markets and borrow on a market basis to the extent short-term cash needs exceeded annual contributions.¹¹⁵ If the trust was unable to meet its obligations—an assessment to be made by the Administrator after evaluating a number of options to stretch out payments, change criteria, or require additional contributions—the Administrator had the obligation to terminate the trust under the so-called “sunset” provisions.¹¹⁶ In this event, cases would have returned to the court system.

2. Assessing the Fair Act

The Fair Act would have provided the comprehensive administrative structure that courts¹¹⁷ and commentators¹¹⁸ have been suggesting for some time. As to objective criteria like transaction costs, it was clearly superior to other possible solutions. The Congressional Budget Office (CBO) estimates that the administrative expenses of the Asbestos Fund would have cost nearly a billion dollars over the first ten years of its existence.¹¹⁹ The CBO estimates that the Fund would have disbursed some \$76 billion to claimants over that same period.¹²⁰ As a result, expenses of the Fund, the equivalent to defense transaction costs, would have been a little more than 1.3% of total spending. As RAND estimates that defense costs constitute approximately 31% of total spending,¹²¹ the Act provided an indispensable advantage to litigation. From the claim-

114. *Id.* § 221(b)(2).

115. *Id.* § 221(b)(1).

116. *Id.* § 405(f).

117. *See supra* notes 1–4 and accompanying text.

118. *See generally* Brickman, *Crisis*, *supra* note 44; *The Asbestos Litigation Crisis Continues—It is Time for Congress to Act: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (testimony of David Austern, President, Claims Resolution Management), available at http://judiciary.senate.gov/print_testimony.cfm?id=617&wit_id=1675 [hereinafter *Austern Testimony*] (“In my view, however, the best legislative solution would be to create a National Asbestos Claims Facility that would ensure recovery to impaired victims, prioritize the claims of those with serious illnesses, preserve the rights of future claimants, and provide certainty to all parties.”).

119. SENATE COMM. ON THE JUDICIARY, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE: S. 852 FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2005, at 5 (2005), available at <http://www.cbo.gov/ftpdocs/66xx/doc6621/s852sj.pdf>.

120. *Id.*, at 8 tbl.2.

121. CARROLL ET AL., *LITIGATION*, *supra* note 7, at 95.

ants' perspective, S. 852 limited fees to 5%¹²² and was designed to obviate the need for an attorney at all in most cases. RAND estimates that claimant transaction costs account for about 27% of total spending,¹²³ which comes to more than 39% of gross compensation.

While certainly cost-effective, the real test of the Fund would have been its ability to provide compensation to claimants with demonstrable illness while avoiding the problems of the current system. As a comprehensive, no-fault system, defendant or funding elasticity would not have been relevant. Claimant elasticity would have remained, however, a real concern—particularly as the administrative processes were designed to facilitate claim filing at lower transaction cost.

While a no-fault system makes the identification of specific responsible parties unnecessary, Fair provisions required proof that asbestos exposure caused the illness for which a plaintiff sought compensation. Several requirements of the Act were intended to require documentation of causation. First, the Act required demonstrably "substantial occupational exposure to asbestos."¹²⁴ The years of substantial occupational exposure could vary by claimed category of illness, with relatively longer periods required for those diseases of greater causal ambiguity. In addition, the years of substantial occupational exposure were weighted so that shipyard workers were presumed to have the heaviest exposure while workers from later periods were presumed, because of regulation, to have

122. Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. § 104(e) (2005).

123. CARROLL ET AL., LITIGATION, *supra* note 7, at 103.

124. S. 852, § 121(a)(14). In this provision "substantial occupational exposure" is defined as:

. . . employment in an industry and an occupation where for a substantial portion of a normal work year for that occupation, the claimant—

- (i) handled raw asbestos fibers;
- (ii) fabricated asbestos-containing products so that the claimant in the fabrication process was exposed to raw asbestos fibers;
- (iii) altered, repaired, or otherwise worked with an asbestos-containing product, such that the claimant was exposed on a regular basis to asbestos fibers; or
- (iv) worked in close proximity to other workers engaged in the activities described under clause (i), (ii), or (iii), such that the claimant was exposed on a regular basis to asbestos fibers.

Id. § 121(a)(14)(A). For these purposes "on a regular basis" is defined as "on a frequent or recurring basis." *Id.* § 121(a)(14)(B).

diminished occupational exposure.¹²⁵ As a result, consistent with the observed and anticipated effects of regulation, it would have become less and less likely that claimants could demonstrate substantial occupational exposure. The Manville Trust created a similar requirement for substantial occupational exposure when it revised its Trust Distribution Process in 2002.¹²⁶ The experience of the Manville Trust since that time suggests that the imposition of such a requirement substantially reduces claim flow.¹²⁷

The medical criteria themselves provided further causation requirements, but improvements to the diagnostic procedures required would likely have been more important. The history of asbestos litigation generally, and the experience of the asbestos compensation trusts in particular, is that questionable medical evidence can be generated to meet whatever standard is set.¹²⁸ Requiring that *real* doctors apply medically appropriate tests and standards would have been a substantial improvement. Importantly, the Act required that diagnoses of non-malignant disease be based upon a “physical examination of the claimant by the physician providing the diagnosis,” an evaluation of smoking history, X-ray reading and PFTs, while malignancies could also have been diagnosed by a board-certified pathologist.¹²⁹ In addition, there were substantial penalties for false statements,¹³⁰ and the administrator had substantial audit rights.¹³¹ It was expected that increased exposure and diagnostic standards coupled with the limitation of compensation to those who could demonstrate impairment would have substantially reduced, if not eliminated, the “false positive” claims

125. *Id.* § 121(a)(16). Each year of exposure “before 1976 shall be counted at its full value. Each year from 1976 to 1986 shall be counted as 1/2 of its value. Each year after 1986 shall be counted as 1/10 of its value.” *Id.* § 121(a)(16)(E).

126. *Findley v. Trs. of the Manville Pers. Injury Settlement Trust (In re Joint E. and S. Dists. Asbestos Litig.)*, 237 F. Supp. 2d 297, 329–30 (E. & S.D.N.Y. 2002).

127. *Recent Developments in Assessing Future Asbestos Claims Under the FAIR Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Mark Lederer, Chief Financial Officer, Claims Resolution Management Corporation), available at http://judiciary.senate.gov/print_testimony.cfm?id=1682&wit_id=4865.

128. See, e.g., *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 622, 624 (S.D. Tex. 2005) (noting that the implementation of the relevant medical criteria in this case “ranged from questionable to abysmal,” and that plaintiffs’ experts relied exclusively on occupational and exposure histories “taken by lawyers and clerks with no medical training or supervision”).

129. S. 852, § 121(b)(2)(A)–(D).

130. *Id.* § 121(c)(6).

131. *Id.* § 121(c)(5)(A).

compensated by the Fund, destroying the economic incentive to engage in screening.¹³²

3. Further Requirements

The final passage of federal legislation along the lines of S. 852 will mark only the first step in an “end-game” process. Under any likely scenario, there will be a period when claimants attempt to qualify claims as “pending” in an effort to escape the reach of the legislation. There may be a number of constitutional challenges mounted by plaintiffs’ counsel, bankruptcy trusts, objecting companies and insurers. Assuming that the trust contemplated by S. 852 is up and running, the process of evaluating and paying claims will start first with the so-called exigent claims and will then proceed to the non-exigent. While the legislation should be designed to impose reasonably rigorous medical and exposure standards and limit fees in ways that remove the perverse incentives that fueled the recent explosion in claim filings, the trust itself will need to be vigilant in policing claims and assessing the validity of submitted evidence. In this way, qualifying claims can be processed and paid efficiently and there will be no incentive for private screenings.

Had the Fair Act passed, there still would have been a substantial wealth transfer of up to \$140 billion over the life of the Fund. What effect this liberation of plaintiffs’ and defense counsel who currently devote the bulk of their time to asbestos litigation might have had on other litigation, of course, is uncertain. Needless to say, substantial capacity would have been released.

B. Federal Tort Reform (medical criteria)

Competing legislative proposals have favored medical criteria approaches. While many proponents of federal legislation may find this kind of tort reform philosophically attractive, there appear to be substantial advantages for a trust fund solution along the lines of the Fair Act. A medical criteria bill simply cannot comprehensively solve the asbestos litigation crisis. This conclusion is prompted by substantial experience with the current tort system, the financial impacts of the asbestos litigation crisis, painful familiarity with the transaction costs generated, and exposure to the business-side im-

132. To be sure, there are those who believe that the standards of S. 852 are still too lax. See e.g., SPECTER, REPORT, *supra* note 27, at 97–108 (presenting the views of Senators Coburn, Grassley, Kyl, and Cornyn that “more changes to [S. 852] must be made”).

pacts of the uncertainties and unpredictabilities that the tort system creates.

1. Fraud and Abuse

Leaving any aspect of the tort system in place to deal with this problem creates fundamental issues. The asbestos litigation scandal has taken almost forty years to ripen into its current state. It may be naive, at best, to expect even a well-crafted medical criteria bill to effect substantial change among judges, plaintiffs, and defense lawyers. The historical experience within the litigation system is that with each major change, like the disappearance of the Johns-Manville Corporation—the preeminent defendant prior to its bankruptcy filing—the system adjusts in unpredictable ways to maintain the flow of claims and dollars.¹³³ As Lester Brickman and others have so ably illustrated, we have a litigation system rife with fraud and abuse.¹³⁴ Writing new rules is unlikely to change that.

For example, it is relatively simple for a single administrator to police the source and quality of medical evidence and disallow the payment of any claims based on the submissions of bad doctors. It is obviously much more difficult to achieve that result by way of litigation before courts in fifty different states—or even in federal courts, for that matter. It is unlikely that the genie of fraudulent claims can be returned to its bottle only by way of federal tort reform.¹³⁵

2. Certainty and Finality

The financial markets have historically responded to the uncertainties of the current system by increasing the costs of capital for defendants. Business needs finality. A continuation of the current system as altered by a medical criteria bill is unlikely to address this problem.

A trust fund approach, however, would clearly and concretely resolves these uncertainties. While it is a fair observation that changes to the Fair Act eroded the bill in this respect, the sunset

133. See, e.g., Brickman, *Theory Class*, *supra* note 7, at 59–165 (surveying the issues of unimpaired claimants, attorney sponsored screening, questionable medical evidence, and witness coaching).

134. *Id.*

135. Cf. Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319 (2002) (examining why there is continuing rise in asbestos litigation despite the simultaneously growing number of asbestos defendants who have filed for bankruptcy).

and reversion provisions acceptable to business would have provided reasonable certainty in both the short and longer term.

3. Transaction Costs

High transaction costs in the tort system are another substantial concern. With approximately 40% of plaintiffs' gross awards going to contingent fees and other legal expenses, and with expenses being taken before the fee is applied, plaintiffs in many cases see about half of the amounts defendants pay them.¹³⁶ Recall that on every dollar spent on asbestos litigation, 31% or more goes to defendants' transaction costs.¹³⁷ A significant amount is also diverted to plaintiffs' counsel instead of the victims themselves. An efficient administrative scheme could substantially reduce or eliminate these litigation expenses. This is reflected in the testimony Governor Engler gave on behalf of the National Association of Manufacturers (NAM) at the January 11, 2005, Senate Judiciary Committee hearing conducted by Senator Specter. As Governor Engler said:

We strongly support the trust fund approach. Removing claims from the court system is the only way . . . to eliminate the enormous transaction costs. According to RAND, asbestos victims receive only 43 cents of every dollar spent on asbestos litigation, with the remainder going to transaction costs, such as legal fees. That is a grave injustice. The money must go to victims, not lawyers.¹³⁸

A trust fund is the only viable mechanism to police transaction costs, which have remained very high in the current system.

4. Equity and Fairness

From a claimant's perspective, the current system provides substantially inequitable treatment. While a good medical criteria approach with very strong venue restrictions might remove one dimension of that inequity—that is, compensation of the unimpaired at the expense of the impaired—there would still likely be substantial variation among jurisdictions as to what like-situated

136. Brickman, *Ethical Issues*, *supra* note 7, at 840 (concluding that in today's asbestos litigation environment, 40% constitutes an "unreasonable" fee); *see also* CARROLL ET AL., LITIGATION, *supra* note 7, at 102.

137. CARROLL ET AL., LITIGATION, *supra* note 7, at 95.

138. *The Fairness in Asbestos Injury Resolution Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of John Engler, President and CEO of the National Association of Manufacturers), *available at* http://judiciary.senate.gov/testimony.cfm?id=1350&wit_id=3940.

claimants receive for their illnesses. Experts suggest that the primary determinant of recoveries in the asbestos litigation system is not the disease, age or financial situation of the claimant, but first the jurisdiction and second the identities of the plaintiff's lawyer and the defendant.¹³⁹ While the issue of jurisdiction might be addressed, in part, by venue restrictions, tort reform solutions ignore this stark evidence of inequity and dysfunctionality in the current system.

C. State Legislative Reform

In the recent past, state courts and legislators have accelerated efforts to deal with asbestos litigation. Courts in a number of jurisdictions have adopted so-called deferred dockets or plural registries.¹⁴⁰ These structures give docket priority to cases of claimants who can demonstrate impairment while tolling the applicable statutes of limitations as to deferred claims. State legislatures have enacted both asbestos-specific litigation reform¹⁴¹ as well as general tort reform measures. These measures are, of necessity, piecemeal, but have been successful in reducing the flow of unimpaired cases. Of course, geographically limited reforms are always subject to avoidance. There is a concentration of cases in the hands of a small number of generally well-coordinated plaintiffs' firms,¹⁴² and these firms will migrate cases to more attractive jurisdictions. The RAND

139. *Austern Testimony*, *supra* note 118 ("The system is unfair to victims, and is plagued by fortuity. Whether victims receive compensation at all and, if so, how much they receive depends on the fortuity of where and when they file claims, who the defendants happen to be, whether those defendants are solvent at the time the claims are filed, and the leverage and skill of the trial lawyer. The amount of victim awards diverge wildly—some victims receive grand slam awards, while others receive little or nothing.").

140. A growing number of jurisdictions have adopted such registries, including Boston, Chicago, New York and Baltimore. Schwartz et al., *Elephantine Mass*, *supra* note 9, at 286–95.

141. H.B. 416, 2005 Leg., Reg. Sess. (2005) *codified starting at* GA. CODE ANN. § 51-14-1 (2005); H.B. 13, 2004 Leg., 1st Spec. Sess. (2004) *codified variously in* MISS. CODE ANN. (2005); H.B. 342, 2004 Leg., Reg. Sess. (2004) *codified at* OHIO REV. CODE ANN. §§ 2505.02, 2307.84–2307.90, 2307.901, 2307.902 (2005); H.B. 292, 2004 Leg., Reg. Sess. (2004) *codified at* OHIO REV. CODE ANN. §§ 2505.02, 2307.91–2307.94, 2307.941, 2307.95, 2307.96, 2307.98 (2005); S.B. 15, 2004 Leg., Reg. Sess. (2004) *codified variously in* TEX. CODE ANN. (2005).

142. Hensler, *supra* note 69, at 1920 ("One of the anomalies of asbestos litigation has long been its concentration among a small number of law firms."); Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1928 (2002) ("The plaintiffs' market operates through an elaborate referral system that concentrates cases in the hands of a small number of repeat-player firms."); Samuel Issacharoff & John Fabian

data provide historical evidence of the “portability” of asbestos litigation. The states hosting the most ongoing asbestos litigation have changed over time.¹⁴³

Courts can and do produce irrational outcomes that do not appear to be the result of any inherent defect in the substantive or procedural law of a particular jurisdiction. For evidence of that fact, it is unnecessary to look beyond the unhappy recent experience of defendants in Madison County, Illinois, where the filing rate for national class actions has exploded.¹⁴⁴ Illinois has conventional venue rules, and state substantive law generally does not seem to offer special advantages to asbestos claimants. Nonetheless, Madison County still became an infamous magnet jurisdiction.¹⁴⁵

In addition, most of these reform efforts have been directed toward a more effective solution for the problem of the unimpaired claimant. They are, therefore, better at addressing plaintiff elasticity than defendant elasticity, an issue that an administrative scheme

Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1622–23 (2004).

143. CARROLL ET AL., LITIGATION, *supra* note 7, at 61–63; Brickman, *Theory Class*, *supra* note 7, at 39 n.17 (listing the ten jurisdictions that currently account for 85% of all asbestos cases). Plaintiffs’ counsel Steven Kazan testified that:

[T]he absence of medical criteria is exacerbated by interstate mobility of claims. . . . Claims are routinely brought in states that have no connection with the plaintiff or the facts of the case because they are perceived as being favorable. Unlike most tort cases, asbestos litigation is truly national in scope. This strategic mobility has two effects. To begin with, it allows plaintiffs’ lawyers to avoid the effect of state efforts to bring asbestos litigation under control. Thus, for example, if Pennsylvania requires functional impairment as a prerequisite for bringing an asbestos claim, Pennsylvania cases will migrate to other jurisdictions such as West Virginia or Mississippi. Moreover non-malig-nant claims in particular accrue value they wouldn’t otherwise have because they can find the courthouses with the most favorable procedural practices and most generous juries.

Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan, Partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farris), available at http://judiciary.senate.gov/print_testimony.cfm?id=472&wit_id=1206 [hereinafter *Kazan Testimony*].

144. See John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL’Y 143, 169 (2001) (documenting the significant increase in class action filings); Press Release, U.S. Chamber of Commerce, Chamber Urges Fairness, Justice in Madison County Courts—Calls on IL Citizens and Leaders to Stop “Litigation Madness” (June 5, 2003), available at <http://www.uschamber.com/press/releases/2003/june/03-91.htm> (“Madison County has more class actions filings per capita than any other county in America.”).

145. See Brickman, *Theory Class*, *supra* note 7, at 36.

like that proposed in the Fair Act could resolve. Recent enactments that address issues like the requirement of proof of substantial contributing cause¹⁴⁶ may offer some hope in this regard, but that is less certain.

III. LITIGATION SOLUTIONS

Absent the enactment of a comprehensive federal legislative scheme to resolve the asbestos crisis, what does the future of litigation look like? That litigation will proceed simultaneously with experiments in state-by-state litigation reform via legislative changes, amendments to court rules, and the adoption of practices such as deferral dockets and unimpaired registries, as well as new experiments in asbestos bankruptcy practice and the revival of the class action device as a mechanism to litigate or resolve asbestos cases.¹⁴⁷ As a result, future asbestos litigation will be different in ways that are difficult to predict.

A. *Litigation*

Experts have recently placed tremendous attention on the deficiencies of the asbestos litigation system, such as the prevalence of unimpaired or minimally impaired claimants, the process of commercially screening claims, the development of plaintiff-friendly or “swamp” jurisdictions, the potential for shaped or created testimony, and the conflicts and abuses which can arise in mass settlement programs. Logically, this collection of factors should lead defendants to behave more aggressively in defending cases. Moreover, as the defendant population shifts from core defendants—old-line asbestos product manufacturers generally and manufacturers, distributors or installers of asbestos thermal insulation products in particular—the defenses available become stronger and more varied. For these reason, it can be expected that in the future more resources will go toward defense.¹⁴⁸

146. One recent Ohio bill requires demonstration of the frequency, regularity and proximity of asbestos exposure as evidence that any defendant’s asbestos was a substantial cause of a plaintiff’s illness. *See generally* H.B. 292, 2004 Leg., Reg. Sess. (2004) *codified variously in* OHIO REV. CODE ANN. (2005), *available at* <http://www.ohioconstructionlaw.com/legalservices/practice/govern/silica/text292.pdf>.

147. For more on the bankruptcy options, see *infra* Part IV.

148. There are other reasons why defendants may adopt more aggressive strategies. As plaintiffs seek more peripheral defendants, it is likely to be the case that the asbestos exposure of those companies will be relatively small compared to

But as new defendants begin (or are forced) to litigate more aggressively, transaction costs will increase. At the end of the day, defendants will need to cooperate to maximize their success.¹⁴⁹ Since the Johns-Manville bankruptcy filing in 1982, defendants have appeared to pay more attention to shifting liability to co-defendants and identifying potential new defendants than to working together to successfully defend a case. The variety of defendants and the differences in their litigation positioning led not only to a failure of cooperation, but also to conflicting strategies that redounded to the detriment of all defendants.¹⁵⁰

Secondly, litigation will continue to involve substantial exposure and risk in ways that are unrelated to the merits of any particular claim. Asbestos trials, particularly in risky venues, can produce varied and irrational results. When \$150 million verdicts can be

the overall economic size of the defendants. To that extent, the reduced liability facing any particular defendant is likely to be reflected in its share prices.

149. See McGovern, *Tragedy Commons*, *supra* note 56, at 1741–44 (explaining how defendants' failure to cooperate undermined the "individually rational" strategies behind acting independently).

150. The best examples are perhaps those instances where large numbers of defendants faced mass consolidations. In the most recent West Virginia Kanawha County mass consolidation, the cases of eight thousand plaintiffs were consolidated against what at the beginning was a total of 259 defendants. The court's stated plan was to try all claims against all defendants simultaneously. Simply stated, that trial model would have been an impossibility and, were defendants to have cooperated and coordinated their efforts, the process could have been brought to a grinding halt. Instead, defendants made individual settlements; at the end of the day, all but two defendants settled. That settlement process, which was, of course, the intention of the consolidation in the first instance, had its effect, but the defendants' failure to cooperate was fatal to the effort to end the mass consolidation. As a consequence, hundreds of millions of dollars were paid to settle claims of little or no value, at least as to the named defendants. See generally West Virginia *ex rel.* Mobil Corp. v. Gaughan, 563 S.E.2d 419 (2002); see also Lisa Stansky, *Unusual Clash in Asbestos Case*, NAT'L L.J., Oct. 31, 2002, available at <http://www.law.com/jsp/article.jsp?id=1032128856491>.

There have been successful cooperative efforts in the past, at least as regards cost reduction. The Center for Claim Resolution ("CCR") was a consortium of twenty or more defendants formed to coordinate litigation and settlement activity. See generally Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 L. & CONTEMP. PROBS. 13 (1990). The CCR processed large number of claims and produced, for a time, stability and cost reduction for its members. The CCR eventually collapsed when, in the face of increasing demands, certain of its largest participants disappeared into bankruptcy. The success of the CCR is of greater question with regard to dealing with increasing demands for the unimpaired claims. That may be more properly viewed as a systemic failure, not one attributable to any defendant or group of defendants. The variety of defendants and the differences in their litigation positioning led not only to a failure of cooperation but to conflicting strategies that redounded to the detriment of all defendants.

obtained for unimpaired claimants, there can be few claims of fairness, consistency or rationality.¹⁵¹ Until courts recognize that not all (or perhaps none) of the plaintiffs before them have valid claims, and that even those with demonstrable injury may not have a valid basis to proceed against the existing defendants, conditions will, to the extent possible, worsen.

B. Class Actions

Defendants have resisted class treatment for litigation purposes in mass torts generally and in asbestos litigation specifically. Courts considering class actions in the mass tort context have been influenced by Judge Posner's reasoning in *In re Rhone-Poulenc Rorer, Inc.*, refusing to certify a class in a case involving HIV-contaminated blood factors:

[O]ne jury, consisting of six persons, . . . will hold the fate of an industry in the palm of its hand. This jury . . . [may] hurl the industry into bankruptcy. . . . [This] need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and diverse sample of decision-makers.¹⁵²

Rhone-Poulenc was followed a year later by the Fifth Circuit's decision in *Castano v. American Tobacco Co.*, which relied on a similar risk calculus in denying certification of a smokers' class.¹⁵³

Class actions have had two roles in asbestos litigation. The first is as an aggregate litigation mechanism to facilitate large numbers of claims. The class action experiments in *Jenkins v. Raymark Industries*¹⁵⁴ and *Cimino v. Raymark Industries*¹⁵⁵ fell into this category. More notorious, and perhaps of greater relevance for asbestos litigation, are the attempted class action settlements in *Amchem Products, Inc. v. Windsor*¹⁵⁶ and *Ortiz v. Fibreboard Corp.*¹⁵⁷ Given *Amchem's* description of the "sprawling class"¹⁵⁸ (although a settlement class) in the context of a diversity claim, it seems unlikely that a Federal Court would find that a litigation class to adjudicate large

151. See generally Parloff, *supra* note 7.

152. 51 F.3d 1293, 1300 (7th Cir. 1995).

153. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

154. 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

155. 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

156. 521 U.S. 591 (1997).

157. 527 U.S. 815 (1999).

158. 521 U.S. at 622.

numbers of asbestos claims could ever meet the “predominance” and “superiority” requirements of Rule 23.¹⁵⁹

There is one avenue that defendants might explore: the so-called “issues” class of Rule 23(c)(4)(A).¹⁶⁰ In the past, mass tort parties defending common issues have tended to elect bankruptcy,¹⁶¹ but an issue class might appeal to defendants with particularly strong defenses on common issues. However, the risk of an adverse outcome will likely constrain enthusiasm for this option, and judicial support may be limited by the fact that these class proceedings will not be dispositive of the entire litigation.

The second role for class certification in asbestos litigation is with respect to settlement. Here it is probably the case that for a settlement to have Rule 23 viability, subclasses will need to be created for malignant and non-malignant illnesses; subclassing by jurisdiction may be necessary to accommodate differences in underlying state law; and, finally, there will need to be a representative for future claimants. If the subclassing process were adequate to capture the myriad interclass conflicts residing within a large body of asbestos claims, and if the settlement were scrupulous in its equivalent treatment as between current and future claimants, that settlement class might be certifiable under Rule 23.¹⁶² Nonetheless, it is difficult to project with certainty which subclasses would be necessary in order for the settlement to survive appellate review, suggesting that in the wake of the Supreme Court’s decisions in *Amchem* and *Ortiz* there may be little or no remaining utility in the class action device in the context of asbestos litigation.¹⁶³

159. FED. R. CIV. P. 23. State class actions have not been common in asbestos litigation, in part because states have used consolidation or special asbestos causation rules to achieve the same results. See generally *West Virginia ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (2002); see also Stansky, *supra* note 150. The other factor may be that the ongoing practice of de facto aggregation through settlement has, at least in the past, eliminated the need.

160. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1499–1507 (2005).

161. See, e.g., *Lindsey v. O’Brien (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996).

162. The practical problem, however, is that nothing in Rule 23 would stop litigation while this settlement was being negotiated. The strict equivalence between current and future claimants would likely be extremely expensive.

163. The predominance and superiority aspects of *Amchem* would be difficult, if not impossible, to meet. It is also likely that an opt-out right of some sort would be needed, as, absent an otherwise fixed fund, *Ortiz* has probably foreclosed the use of a limited fund class action where the limits of the fund are defined by negotiation between and among the parties.

Although viewed in some quarters as the third strike for mass tort class action settlements in the United States Supreme Court, *Dow Chemical Co. v. Stephenson*¹⁶⁴ may ironically offer some grounds for optimism. In *Dow Chemical Co.*, an equally divided Supreme Court let stand a decision by the Second Circuit¹⁶⁵ allowing later-manifesting claimants to pursue claims against defendants despite the existence of a putatively binding class action settlement. The settlement of Agent Orange exposure claims, which had been reached in 1984, was the subject of extensive litigation¹⁶⁶ as well as a prior collateral attack.¹⁶⁷ The district court had dismissed plaintiffs' cases on the basis of the settlement. The plaintiffs challenged the binding effect of the settlement, arguing, among other things, that since their particular diseases had not manifested until after the cash component of the settlement was disbursed, they were not adequately represented. Thus, to bind them to the terms of the settlement would constitute a due process violation.¹⁶⁸ Relying on *Amchem* (and to a much lesser extent, *Ortiz*), the Second Circuit agreed, freeing plaintiffs to proceed.¹⁶⁹ What is interesting here is the fact that the court did not read the "sprawling" class dimensions of *Amchem* to constitute a legal deficiency distinct and independent of the conflicts between current and future claims. The Second Circuit, in effect, merged the two issues, raising the possibility that, in the Second Circuit at least, a class action settlement that affords equivalent treatment to current and future claimants might satisfy Rule 23.¹⁷⁰

Nevertheless, it should be remembered that the Supreme Court did not approve *Dow Chemical Co.*, and absent changes in the law or the dynamics of the underlying asbestos litigation, it would appear unlikely that class actions could play a dominant role in future proceedings.

164. 539 U.S. 111 (2003).

165. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001).

166. See, e.g., *In re Agent Orange Prod. Liab. Litig. (Agent Orange III)*, 818 F.2d 145 (2d Cir. 1987); *In re Agent Orange Prod. Liab. Litig. (Agent Orange I)*, 635 F.2d 987 (2d Cir. 1980).

167. *Ivy v. Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425 (2d Cir. 1993).

168. *Stephenson*, 273 F.3d at 251, 257–59.

169. *Id.* at 259.

170. The Second Circuit also cited the concerns expressed in *Amchem* about the ability to provide adequate notice to "exposure only" class members. *Id.* at 261.

IV. THE BANKRUPTCY OPTION

The question for defendants in asbestos litigation, if Congress fails to act, is whether bankruptcy is a viable path to resolve their asbestos liability. The experience to date suggests that apart from those situations in which the defendant accepts that its solvency is overwhelmed by existing and future asbestos claims and where the function of the bankruptcy is merely to distribute limited assets to creditors, bankruptcy has not improved the lot of asbestos defendants.

There is explicit “special asbestos law” in the bankruptcy context. Section 524(g) of the Bankruptcy Code¹⁷¹ applies to asbestos-related bankruptcy, although it contains additional, rather than exclusive, requirements for the confirmation of a plan of reorganization. There is now substantial experience with asbestos-related bankruptcy, more than seventy companies¹⁷² having elected this remedy. Historical experience indicates that bankruptcy is a consensual process, creating delay and expense; and that despite some theoretical advantages, like federal jurisdiction, the bankruptcy process does not alter the balance between plaintiffs and defendants.

A. *The Historical Experience: The Confirmed Asbestos Bankruptcy Trusts*¹⁷³

1. The Manville Trust and Section 524(g)

The bankruptcy of the Johns-Manville Corporation was triggered by a financial crisis stemming from projections of the company's future claims liability. After years of arduous negotiations, a structure to address asbestos claims emerged. Rather than liquidating the company pursuant to Chapter 7 and distributing the proceeds to current creditors, the plan provided for the creation of trusts to resolve Manville's current and future asbestos liability.¹⁷⁴

A primary concern of the case was freeing a reorganized Manville from the claims of individuals who had not manifested any asbestos-related condition or who might not even know that they had been exposed to asbestos at the time of the case. The plan

171. 11 U.S.C. § 524(g) (2005).

172. Brickman, *supra* note 81, at 1000.

173. These are personal injury compensation vehicles created pursuant to confirmed plans of reorganization modeled on the Johns Manville Trust or § 524(g) of the Bankruptcy Code.

174. Trusts were created to deal with personal injury and property damage claims respectively. Only the former is material for this article.

looked to the court-appointed future claims representative to satisfy constitutional concerns regarding the treatment of future claims. The plan also provided that all present and future claims would be “channeled” to a trust designed to pay present and future claimants, and that no subsequent claims of any kind could be pursued against the reorganized debtor. Finally, the plan enjoined future litigation against certain third parties, most notably Manville’s products liability insurer.

The corpus of the Manville trust consisted primarily of Manville stock and insurance proceeds, along with a promise to pay dividends to the trust. The market’s concerns that the plan might not successfully protect the reorganized company from future claims depressed Manville’s stock price and ultimately led Congress to enact § 524(g). Section 524(g) applies only in asbestos Chapter 11 cases. It permits courts confirming asbestos Chapter 11 plans to issue extremely broad injunctions prohibiting any entity from taking legal action against the debtor on a claim or demand¹⁷⁵ that is to be paid by trusts that satisfy the various criteria of that section. The § 524(g) injunction may protect not only the reorganized debtor, but also third parties. To qualify, the alleged asbestos liability of the third party must arise from certain specified connections with the debtor, including but not limited to ownership of a financial interest in the debtor or in a past or present affiliate of the debtor.¹⁷⁶

The *raison d’être* of the § 524(g) injunction is its application to future claims. Section 524(g) contains a number of preconditions, the most important of which are:

1. The establishment in the plan of a trust that will assume the asbestos-related liabilities of the debtor. The assets of the trust must be used to pay the claims and demands.

175. Whether a future “claim” is a claim at all in the bankruptcy sense is not clear. Section 524(g) adroitly sidesteps the issue by referring to “demands,” defined as:

a demand for payment, present or future, that—

- (A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;
- (B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and
- (C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

11 U.S.C. § 524(g)(5).

176. *Id.* § 542(g)(4)(A)(ii).

2. The trust must own or, if certain contingencies occur, become entitled to own, a majority of the voting shares of the debtor.
3. A separate class of asbestos claimants must be created and must vote, "by at least 75 per cent of those voting" in favor of the plan.
4. The court must appoint a legal representative to "protect[] the rights of persons that might subsequently assert demands"
5. The trust must be designed in such a way as to "provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner."¹⁷⁷

2. Flaws in Confirmed § 524(g) Bankruptcy Trusts

Between 1982 and 1999 there were approximately thirty-one "asbestos-related" bankruptcies.¹⁷⁸ A number of these cases resulted in compensation trusts created pursuant to confirmed plans of reorganization modeled on the Johns-Manville Trust or on § 524(g). These are often known as Confirmed Trusts, and include trusts such as UNR, Amatex, H. K. Porter, Pacor, National Gypsum, Celotex and Eagle Picher. Several common themes recur in the more than twenty-year history of these trusts.

a. Startup Delay and Cost

RAND looked at eleven major asbestos bankruptcies and found that the average duration between filing and plan confirmation (which is the earliest date payments could start) was six years.¹⁷⁹ One case took ten years.¹⁸⁰ During these periods the trusts pay no money to claimants.¹⁸¹ Furthermore, in the typical case plan con-

177. *See generally id.* § 542(g).

178. There are slight variations in these historical numbers as a result of classification issues and the treatment of affiliated entities.

179. CARROLL ET AL., INTERIM REPORT, *supra* note 7, at 68; *see also* Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 218 (2003) ("The length of time a business stays in bankruptcy reorganization is 'critically important' to whether the business will successfully re-emerge" (citations omitted)).

180. CARROLL ET AL., INTERIM REPORT, *supra* note 7, at 68.

181. In certain cases, limited exigent or hardship payments have been made *post* confirmation but in periods where payments have either not generally commenced or have been suspended.

firmation itself can precede any payment by months, if not years, due to various startup delays.¹⁸²

In this respect, the UNR experience is instructive. The bankruptcy case lasted from 1982 until 1989. The Trust did not commence payments of any form until 1991—and then only pursuant to a *de minimis* flat sum payment program. As the Federal Judicial Center reports: “Thus, some claimants who were already suffering from asbestos-related injury in 1982 were forced to wait more than a decade to receive any compensation from UNR, and the compensation they did receive was the modest sum of \$400.”¹⁸³

Of course, while no money goes to claimants, the bankruptcy process does impose a variety of costs in terms of employment, pensions, and other payments.¹⁸⁴ Further, the direct costs of bankruptcy in terms of professional fees are high and are positively related to the duration of the reorganization.¹⁸⁵ For instance, the fees and expenses for the Manville bankruptcy were approximately \$100 million in 1988 dollars.¹⁸⁶ Another example, the relatively small Eagle-Picher reorganization, made available a little over \$700 million to tort claimants but consumed \$42.6 million in fees and expenses.¹⁸⁷

b. Reductions in Payment

While the gross amounts paid by the trusts are immense, from the perspective of individual claimants the trusts have promised much and delivered very little. According to David Austern, the general counsel of the Manville Trust: “No existing Asbestos Trust, except for Manville, has ever paid full liquidated value to any claim-

182. CARROLL ET AL., LITIGATION, *supra* note 7, at 118–19.

183. S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 185 (2000).

184. See generally JOSEPH E. STIGLITZ ET AL., *supra* note 10; JESSE DAVID, THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES (NERA Econ. Consulting, January 23, 2003), available at <http://www.nera.com/image/5832.pdf>.

185. Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. EMPIRICAL LEGAL STUD. 111, 128 (2004).

186. Kevin H. Hudson, Comment, *Catch 23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 EMORY L.J. 665, 694 n.115 (citing Adler, *Author Blasts Tort “Deform,”* BUS. INS., Aug 15, 1988, at 3, 27).

187. GIBSON, *supra* note 183, at 98, 240.

ant.”¹⁸⁸ The payment history of the trusts is sobering, as the following table illustrates:¹⁸⁹

TABLE 1

Trust	Payment Percentage or Status
Manville	5%*
Celotex	11.25%
Eagle Picher	15%
HK Porter	de minimis payments
UNR	payments to malignant cases only after payment of \$100 filing fee
National Gypsum	payments to recommence
Fuller Austin	payments to commence
Pacor	.6%**
Prudential Lines	Claims processed, no payment
Lykes	Claims processed, no payment
Rutland	\$25 per claim
US Lines	\$0
Swan Transport	payment suspended***
RayTech	no current payments
Keene	no current payments
Wallace and Gale	no current payments
Nicolet	no current payments
Shook & Fletcher	Claims being processed but not currently being paid
American Rockwool	\$10 to 25 per claim
Kentile	in bankruptcy
Joy Technology	in bankruptcy
Waterman Shipping	in bankruptcy

* Paid 100% to claimants during first period of operation, reduced to 10% in 1995, and was more recently reduced to the current 5%.

** Pacor claims are processed through the Manville Trust and claimants are paid 12% of the Manville 5%.

*** Approximately 4,000 claimants were paid prior to suspension.

While the trusts have been a dismal failure for claimants,¹⁹⁰ they have paid lawyers quite handsomely. The trusts provide com-

188. David T. Austern, *Presentation at the American Bankruptcy Institute Winter Conference*, Dec. 4, 2003, at 6 [hereinafter Austern, *Presentation*].

189. Prepared by the author with the assistance of the consulting firm of Hamilton, Rabinovitz & Altschuler.

190. Some claimants may have claims against several trusts. Nonetheless, many only have claims against one of the bankrupt entities and their trusts. For

pensation via an administrative process that imposes limited burdens on counsel for claimants; the Manville Trust, for instance, offers an “e-claims” service, which allows for electronic filings. The lawyers, in short, can easily increase claim volume, and they have. While 5% of \$3,000 (less 25% for fees) may seem trivial, from the lawyer’s perspective the relevant calculation is their percentage fee against the total payment for their inventory. To place this in context, of the \$3.1 billion spent by the Manville Trust, between 25% and 40% went to plaintiffs’ counsel as fees.¹⁹¹

c. Repeated Failures

There is also the severe problem of serial trust failures. The Manville example is instructive. Although the Manville Trust first became operational in 1988, six years after the Johns-Manville bankruptcy filing, it remained operational for little more than eighteen months before expending virtually all its available cash on then-current claimants. This compelled a federal court to step in and suspend the Trust’s operations.¹⁹² That suspension lasted almost five years, during which the standards for compensation of claimants were renegotiated and the payment percentages reduced from 100% to 10%.¹⁹³ The Trust became operational again in 1995, but was forced to impose a payment moratorium in 2001.¹⁹⁴ Another hiatus ensued, during which time the rules were renegotiated once more and the payment percentage lowered to 5%. As a result, in the twenty-two years since the Manville filing in 1982, the Trust has been operating for fewer than seven years. In addition, the rules for qualifying as a claimant have been materially altered on two occasions and the payout reduced twice.¹⁹⁵

Unfortunately, this experience has not been unique to Manville. As noted, all trusts pay only a fraction of claim value, most have reduced payments (often dramatically), and several have failed. National Gypsum and related entities filed for bankruptcy in

example, one person estimated that up to 13% of the claims filed against Manville Trust are “Manville only” claimants. See *In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710, 935 (E. & S.D.N.Y. 1991). For those claimants, interruptions and reductions in payment are determinative; 5% is, in fact, all these claimants can hope to receive, no matter how sick they are. *Id.*

191. *Findley v. Falise* (*In re Joint E. & S. Dists. Asbestos Litig.*), 878 F. Supp. 473, 537 (E. & S.D.N.Y. 1995); Brickman, *Ethical Issues*, *supra* note 7, at 840.

192. *Findley v. Falise* (*In re Joint E. & S. Dists. Asbestos Litig.*), 878 F. Supp. 473, 486 (E. & S.D.N.Y. 1995).

193. CARROLL ET AL., INTERIM REPORT, *supra* note 7, at 79–80.

194. *Id.*

195. *Id.*

1990 and emerged relatively quickly in 1993.¹⁹⁶ Pursuant to the National Gypsum Plan, a personal injury compensation trust was established and is now known as the Asbestos Claims Management Corp. ("ACMC"). ACMC struggled with a mismatch of assets and liabilities over its entire life, and by 2000 it projected that it would face in excess of \$2.1 billion in asbestos personal injury claims, compared to assets of no more than \$220 million.¹⁹⁷ In an effort to address that mismatch, the ACMC itself filed for bankruptcy on August 19, 2002.¹⁹⁸

d. Lax Standards and Misallocation of Assets

There is no national database available to identify the total payments by the asbestos trusts to date, who has been paid, and what showing, if any, has been required to support payment by the trusts. Once again, however, the Manville Trust is a reasonable proxy for the trusts as a group. As of October 31, 2003, the Manville Trust had received 689,466 claims, settled 596,068 of these, and paid \$3.1 billion in total settlements.¹⁹⁹ Prior to the last interruption in the Manville Trust's operations, 60% of the funds expended by the Trust went to non-malignancies and the unimpaired.²⁰⁰ It is clear that this distortion in allocation is getting worse.

e. Domination by the Plaintiffs' Bar

All of the trusts have been created as part of negotiated reorganizations. As a result, it is not surprising that a small subset of the plaintiffs' bar has come to dominate trust operations. These lawyers handle a huge percentage of pending claims;²⁰¹ this is critical in light of the § 524(g) requirement that a 75% supermajority of claimants must approve any plan. This provides key members of

196. *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp.* (*In re Nat'l Gypsum Co.*), 118 F.3d 1056, 1059 (5th Cir. 1997).

197. Debtor's Informational Brief at 4-5, *In re Asbestos Claims Mgmt. Corp.*, 294 B.R. 663 (N.D. Tex. 2003) (No. 02-37124).

198. Brief of Asbestos Claims Management Corp. in Support of Motion for Partial Withdrawal of Reference at 5, *In re Asbestos Claims*, 294 B.R. 663 (Bankr. N.D. Tex. 2003) (No. 02-37124).

199. *Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Chuck Hagel, Former Trustee of the Manville Personal Injury Settlement Trust), available at http://judiciary.senate.gov/testimony.cfm?id=777&wit_id=2182.

200. Austern, *Presentation*, *supra* note 188.

201. *Id.* As an example, of the 2003 filings against the Manville Trust, over 70% of the claims were filed by only twenty firms. *Id.*

the asbestos plaintiffs' bar with huge leverage in the bankruptcy process, which, in turn, allows them to insist on trust procedures that will ensure their dominance over trust operations.

Manville Trustee Frank Macchiarola has described the ability of these lawyers to distort the payment procedures in their favor, concluding that "[their] self-dealing . . . is readily apparent, particularly considering the limited funds we now know [are] available."²⁰² He ultimately observed, as an explanation for these unfortunate events, that "[t]he Trust, in essence, was captured and held hostage by the plaintiffs' bar."²⁰³ In this respect, all of the trusts resemble the Manville Trust.

3. Summary

The history of the confirmed bankruptcy trusts has not been a happy one. Despite their purpose—to compensate the victims of the central asbestos defendants—they have delivered meager and sometimes non-existent compensation to the most seriously ill claimants. There has also been a substantial diversion of funds to those without serious disease and, indeed, to those without any valid evidence of disease or exposure at all. Despite the expenditure of billions of dollars, the trusts have been most successful in creating the legal and economic conditions that have fueled the current wave of unimpaired claimants. They have been a critical component of the asbestos claim "superhighway."²⁰⁴

B. The Current Wave of Asbestos-Related Bankruptcies

The current wave of asbestos-related bankruptcies is generally considered to have begun with Babcock & Wilcox's filing in early 2000. Since then, thirty-two new filings (and counting) have taken place. The current cases are as follows:²⁰⁵

202. Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 585 (1996).

203. *Id.* at 603.

204. See McGovern, *Tragedy Commons*, *supra* note 56, at 1746.

205. Prepared by the author with the assistance of the consulting firm of Hamilton, Rabinovitz & Altschuler.

2000	Babcock & Wilcox Pittsburgh Corning Burns & Roe E. J. Bartells Co. Owens Corning Armstrong World Industries
2001	G-I Holdings (GAF) W. R. Grace Skinner Engine Co. USG (U.S. Gypsum) Corp. Federal-Mogul Eastco Industrial Safety Washington Group, Int'l, Inc. Bethlehem Steel
2002	U.S. Minerals North American Refractories Kaiser Aluminum Plibrico Refractories Porter-Hayden J. T. Thorpe American Club Huxley Development Harbison Walker Refractories Continental Producers Co. A. P. Green Industries Shook & Fletcher Atra Group Inc. (Synkoloid) Asbestos Claims Management Corporation (National Gypsum) Western MacArthur
2003	AC&S Combustion Engineering Congoleum U.S. Minerals Halliburton-related entities
2004	Oglebay Norton Utex Industries Westpoint Stevens Inc. Quigley Co. Flintkote
2005	API, Inc. ASARCO LLC

It is reasonable to anticipate that if current legislative efforts fail, there will be substantial additions to this list.

The current wave includes some novel categories of cases. First are the Chapter 11 cases filed with an intent to use the bankruptcy process to litigate liability issues and to reduce the liability of the debtor and affiliated entities. In *re Babcock & Wilcox* is an example

of this category of case.²⁰⁶ The second is the so-called “pre-packaged” asbestos bankruptcy. In re *Combustion Engineering* is an example of this category.²⁰⁷ It will likely be years before litigants conclude a sufficient number of these cases to provide a firm precedential basis, so any assessment is necessarily predictive. However, the current state of these bankruptcies indicates a situation that is worsening rather than improving.

The pre-pack model involves a legal stratagem whereby pending asbestos claims are settled and claimants are given rights to a pre-petition trust.²⁰⁸ Once a substantial portion of the available assets are devoted to current claimants, the residue is made available, often on more onerous terms and conditions, to later-arriving and future claimants. The result of this process is the acceleration of the inequities of the tort system coupled with a prospective beggaring of the rights of future claimants. Further, because the so-called “pre-petition” settlements occur outside the supervision of the bankruptcy court, substantial disparities exist even as to *current* claimants.²⁰⁹

Moreover, there appears to be an irresistible—and perhaps professionally required—impulse on the part of current claimants and their lawyers to seek immediate and substantial compensation at the expense of future claimants, even those with serious disease, who, experience teaches, will be either unrepresented or inadequately represented during these negotiations. Of course, this unfair disparity in treatment is what animated the Supreme Court’s disapproval of a massive class action settlement in *Amchem Products, Inc. v. Windsor*.²¹⁰ Nonetheless, lawyers will do the best they can for their clients, who, by definition, are all “current” claimants, whether they are impaired or not. Absent substantive reform, there is no reason to expect a procedural device like bankruptcy to change rules and, hence, outcomes.

206. No. 00-0558, 2000 WL 422372 (E.D. La. April 17, 2000) (granting a partial withdrawal of claims from the bankruptcy court to prevent duplicative proceedings).

207. No. 03-10495, 2005 Bankr. LEXIS 2623 (Bankr. D. Del. Dec. 19, 2005).

208. See generally Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883 (2003).

209. See generally Ronald Barliant et al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441 (2004) (tracing the development of the pre-pack bankruptcy model).

210. 521 U.S. 591, 629 (1997).

C. The Future of Bankruptcy

Noting this extensive catalog of legal and practical deficiencies, does bankruptcy retain viability as a device to resolve asbestos cases? The answer is a qualified yes. For those debtors who wish to employ bankruptcy to avoid litigation, the risks are well known: by filing, the debtor places the entire equity value of the company at risk; the debtor can lose control of the process; the courts may or may not be willing to engage in extensive pre-confirmation litigation, and potential litigation can result in losses; transaction costs are high and delay is inevitable; and, at the end of the day, a deal of some sort with certain tort claimants and the future class representatives will be necessary.

However, there are corresponding advantages: the automatic stay; concentration in a single court; concentration of insurance disputes; the fact of federal jurisdiction with the potential advantage that provides, especially as to scientific evidence by virtue of the *Daubert* evidentiary standard;²¹¹ and the arguable availability of the claims objection process.

This last point will likely prove to be determinative, and there may be some basis for optimism. Though courts have thus far been largely unwilling to engage in broad, pre-confirmation claim-testing litigation, the intense scrutiny of asbestos litigation and the attention given to weak or invalid claims may encourage courts to be bolder. External developments like deferred registration or state-by-state tort reform efforts may give defendants valid arguments as to why questionable claims should neither vote nor be compensated. To the extent that the Manville Trust refuses to accept claims supported by defective medical evidence,²¹² it would seem that courts could be persuaded to take a hard, judicial look at such claims. Whether these changes will occur remains to be seen, however, and in light of better alternatives like that offered in the Fair Act, such uncertainty seems wholly unnecessary.

211. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–95 (1993) (setting out the standard for the admission of expert evidence in federal trials).

212. *CRMC To Stop Accepting Reports Prepared by Silica MDL Doctors*, E-MAIL BULLETIN (Mealey's Litig. Rep.: Asbestos Bankr.) Sept. 14, 2005 (reporting the announcement by the president of Claims Resolution Management Corp. that "the group would stop accepting the reports of 11 doctors or facilities based on legitimate challenges that were raised in the silica multidistrict litigation") (on file with the NYU Annual Survey of American Law).

CONCLUSION

Courts and litigants currently find themselves between the proverbial rock and hard place when it comes to asbestos litigation. Aggregation is a necessary and inevitable requirement of litigation,²¹³ but history proves that the available aggregation models tend to impair, if not destroy, the ability of the system to evaluate claims—to the detriment of both defendants and deserving claimants. For these reasons, options can be ranked in terms of how effectively they will restore the ability to evaluate claims while avoiding excessive costs. By these measures, a comprehensive trust fund—like the one the Senate recently failed to advance—that provides for an administrative process to assess claims according to consistent and transparent rules and includes procedures to assure funding equity becomes the clearly preferable choice.

Comprehensive medical criteria standards for asbestos claims may eliminate the invalid or undocumented claims from the system, but their proponents must assume that such standards will sufficiently reduce the flow of claims and allow courts to engage in meaningful adjudication. This assumption is conjectural at best. In addition, comprehensive standards do not provide assurance that the appropriate defendants will be called upon to pay. Further, there will likely be expense reduction only at the margins of what will remain a litigation-driven system. Similarly, unless a complete uniform-laws approach were successful in all jurisdictions, state-by-state reform is piecemeal; given the demonstrated portability of asbestos claims, this also can only constitute improvement at the margins. These solutions also require some form of legislative action, which may or may not occur, and they all bear risk in that they may require untested legal structures.

On the litigation side, the growing awareness of the unimpaired claimant issue will likely lead to great success in implementing deferral registries and similar court-imposed docket controls. It may also embolden litigants and judges to take a hard look at the bona fides of the pending cases, and defendants may find ways to cooperate in order to make their defenses more effective and efficient. Finally, as widespread use of asbestos decreases, the number of claims should begin to decline.

But there are also substantial risks associated with continued litigation. The most intractable issues going forward will likely re-

213. Issacharoff, *supra* note 142, at 1927 (“The issue in the asbestos cases is not *whether* to proceed in the aggregate, but *how* to properly structure the inevitable aggregation of these cases.”).

main those associated with defendant elasticity. As long as liability can be shifted among defendants, there will be an incentive to pursue these cases. Further, while there may be some growing awareness of unimpaired claims and the historical prevalence of bogus claims, the attitudes of potential jurors about asbestos and asbestos defendants are unlikely to change. More magnet jurisdictions like Madison County may arise, and it is unclear whether the nascent trends toward venue litigation can staunch the flow of highly mobile asbestos claims to new "plaintiff friendly" jurisdictions. Finally, the cost of this litigation, both as to individual defendants and the economy as a whole, will remain embarrassingly high.

Nor will bankruptcy provide a better path for litigating or resolving these cases. Absent changes to the bankruptcy laws, the leverage will remain with those who control the vote: the dominant players in the plaintiffs' bar. Their incentives to behave differently in the future are unclear, and there is already a tremendous amount of legal uncertainty as to the viability of asbestos-related bankruptcy. Furthermore, judicial attitudes, particularly the reluctance to engage in any meaningful assessment of claim quality for voting purposes, need to change. To the extent that they do, bankruptcy proceedings may become more focused on compensating claimants with medically valid claims against the debtor in question. At that point, bankruptcy may realize its substantial, heretofore largely theoretical, advantage as a mechanism to resolve asbestos litigation. Even then, however, it is likely to remain hugely expensive and involve long delays.

In the end, it is no accident that, on multiple occasions, when faced with critically important appeals from asbestos cases, the Supreme Court has called for legislative action in the form of a comprehensive administrative scheme. The justices, acutely aware of the limits of what courts and litigants can reasonably expect to achieve, have identified the best solution.