

# ASBESTOS CHANGES

PATRICK M. HANLON AND ANNE SMETAK\*

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\* Mr. Hanlon is a partner at Goodwin Procter LLP in Washington, D.C. Mr. Hanlon has represented defendants in class actions and other complex litigation and administrative proceedings involving mass tort, environmental, ERISA, and other issues. Mr. Hanlon received his A.B. from the University of Chicago in 1967 and a Ph.D. in political science from Harvard University in 1974, before graduating from Harvard Law School in 1976, where he was an Articles Editor of the *Harvard Law Review*. Ms. Smetak was an associate at Goodwin Procter from 2005 to 2006 when this article was written and is presently a staff attorney with the Washington Legal Clinic for the Homeless. Ms. Smetak received her B.A. from Kenyon College in 2000 and J.D. from George Washington University Law School, where she was Deputy Senior Managing Editor of the *George Washington Law Review*, in 2005. The views expressed in this article are their own and not necessarily those of any firm or clients.

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I.  
INTRODUCTION

Asbestos is "the big one" of American mass toxic tort litigation. From an inauspicious beginning in the late 1960s, asbestos litigation has generated over 730,000 claims, at an overall cost of at least \$70 billion.<sup>1</sup> Between seventy-five and eighty companies have been driven into bankruptcy, with more than half of those since the be-

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1. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 71 (2005) (data through 2002).

ginning of 2000.<sup>2</sup> According to Nobel Laureate Joseph E. Stiglitz, these bankruptcies cost at least 60,000 jobs through 2002.<sup>3</sup> The total impact on the economy is, of course, much greater.<sup>4</sup> Employees displaced by such bankruptcies lose an average of \$25,000 to \$50,000 over their lifetimes, and may lose a significant portion of their 401(k) savings.<sup>5</sup> The overall value of such losses is between \$1.4 and \$3.0 billion.<sup>6</sup> Fewer jobs in the manufacturing industries are created as companies battling asbestos litigation have less capital to finance investments and corporate growth.<sup>7</sup> Asbestos litigation is estimated to have caused an overall loss of productivity in certain manufacturing sectors that is valued at more than \$300 billion.<sup>8</sup> It is clear that asbestos litigation has had a profound impact on individual companies, their employees, and the economy as a whole.

If asbestos litigation had run its course, we would still be studying it for its size and historical pride of place as a mass tort, as well as for its amazing capacity to change and adapt. But, of course, asbestos litigation is not just of historical interest. Stephen Carroll and his colleagues at RAND estimate that before the litigation is over—likely in about fifty years—hundreds of thousands, and perhaps over two million, claims could be filed.<sup>9</sup> The total cost from

2. According to the RAND study, there were seventy-three filings through 2004. *Id.* at 109-10, 152 tbl.D.1 (bankruptcies through summer of 2004). There have been several additional filings since that time, including Asarco and API. *See In re A.P.I. Inc.*, No. 05-30073 (Bankr. D. Minn. Jan. 6, 2005); *In re Asarco LLC*, No. 05-21207 (Bankr. S.D. Tex. Aug. 9, 2005).

3. JOSEPH E. STIGLITZ ET AL., THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS 27-29, 42 (2002), [http://freedomworks.org/reports/12\\_01\\_02\\_stiglitz.pdf](http://freedomworks.org/reports/12_01_02_stiglitz.pdf).

4. CARROLL ET AL., *supra* note 1, at 122-23; DENISE MARTIN ET AL., COSTS OF ASBESTOS LITIGATION AND BENEFITS OF REFORM, Executive Summary 1 (Apr. 25, 2005), *available at* [http://www.nera.com/publication.asp?p\\_ID=2459](http://www.nera.com/publication.asp?p_ID=2459). R

5. STIGLITZ ET AL., *supra* note 3, at 3, 43. Workers at bankrupt firms with 401(k) plans lost, on average, about 25% of the value of their savings. *Id.* at 3. R

6. CARROLL ET AL., *supra* note 1, at 121 (citing STIGLITZ ET AL., *supra* note 3, at 29). R

7. *Id.* at 122.

8. MARTIN ET AL., *supra* note 4, at 1. R

9. CARROLL ET AL., *supra* note 1, at 106. The RAND researchers took as their point of departure studies by Tillinghast-Towers Perrin and Milliman, which they verified with their own data. *Id.* These projections were made at the height of the asbestos panic of 2002. If the downturn of filings that began in 2002 continues, these estimates may overstate future claiming. *See infra* notes 276-77 and accompanying text. The most obvious impact would be on non-malignant claims, which are being filed at much lower rates than previously. Even on the most optimistic projection, however, asbestos litigation will last for years, not because of the inge- R

2002 onward could ultimately be between \$130 billion and \$195 billion,<sup>10</sup> which must be added to the \$70 billion already spent by the end of 2002. As will be discussed below, there are reasons to suppose that the future cost of asbestos litigation might be substantially less than that. But even so, there is no doubt that the cost will be huge.

In part, the high cost of asbestos litigation results from the inherent resource intensiveness of the civil justice system. Transaction costs—especially legal fees and related expenses—are very high. According to RAND, through 2002, plaintiffs received only 42% of total spending on asbestos litigation.<sup>11</sup> In other words, defendants and their insurers spent \$2.38 to provide \$1.00 of compensation to claimants. While such costs are arguably justifiable in non-repetitive litigation or in the formative stages of mass tort litigation, they are hard to justify for a mature mass tort such as asbestos.<sup>12</sup>

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nity of trial lawyers but because asbestos-related diseases have long latency periods. In particular, mesotheliomas caused by asbestos are just now reaching their peak, and the epidemic will not subside for decades to come.

10. CARROLL ET AL., *supra* note 1, at 106.

11. *Id.* at 104. The RAND Institute notes that the claimants' share of total dollars grew somewhat from the mid-1990s through 2002. *Id.* at 105. This was partly the result of administrative arrangements that significantly reduced defense costs during this period. Some recent trends—for example, involvement of new defendants in the litigation, an increase in the number of defendants, and a greater willingness of defendants and their insurers to try cases—raise questions as to whether the increase in claimants' net compensation in recent years is a lasting trend. Moreover, analysis of the trend should not conceal the fact that the proportion of the total private cost of litigation that actually goes to claimants is relatively low, and certainly much lower than it would be in a more efficient administrative compensation scheme.

12. The "mature mass tort" concept was described by Duke Law Professor Francis McGovern in 1989. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 689-94 (1989). In its formative stages, a mass tort often involves individualized litigation as plaintiffs and defendants work through the issues of liability, general causation, and the like. This stage of the litigation involves very high costs for plaintiffs' lawyers, who must build the case against the defendant or defendants through extensive discovery and expert testimony. There comes a point, however, when experience in the legal system has generated a metric for evaluating cases. After this point, trials are exceedingly rare, and virtually all cases are settled on the basis of essentially administrative procedures. It is this stage that Professor McGovern calls "mature." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 607 (1997) ("Asbestos personal injury cases are mature mass torts because so many have been tried before so many different juries that the trials are quite routinized and the outcomes are generally predictable. For these cases the trial process is more of a case flow mechanism than a procedure for determining liability, causation, and damages."). It is important not to overdo the organic analogy, of course—a mass tort may be mature as to some injuries, settings, or classes of defendants, and not

Asbestos litigation also poses special costs due to fraud and abuse. The clearest examples come from lawyer-sponsored screening programs that recruit tens of thousands of mostly bogus asbestosis and other non-cancer claims.<sup>13</sup> On September 12, 2005, the

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others. Asbestos litigation in particular has reinvented itself over the years. Thus, at any given time it has been “mature” as to some “traditional” or “core” defendants and formative as to other, “non-traditional” defendants. Nevertheless, since the early 1980s, the overwhelming majority of asbestos cases have been handled administratively, as is usual with mature mass torts.

It is interesting to wonder why plaintiffs’ transaction costs do not seem to have gone down, even during periods in which asbestos claims were processed on a mass basis, with almost no individual evaluation, and when trials were exceedingly rare. See Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. (forthcoming 2007) (manuscript at 19, on file with the NYU Annual Survey of American Law) (“Having created an administrative compensation system within the walls of the litigation system, asbestos plaintiff attorneys maintained a fee structure more appropriate for hard fought high risk litigation long after most asbestos litigation fit that characterization.”). In that situation, the actual cost of processing a claim must be very low. One hypothesis is that plaintiffs’ costs are driven not by litigation expenses but by the cost of maintaining the organizational structure for identifying and recruiting potential claimants and bringing them to the most favorable courts. That cost would include the cost of litigation screening, but also the shared fee arrangements that allow for a division of labor between lawyers whose main job it is to recruit claimants, others responsible for managing litigation in preferred courts, and still others who maintain a plausible threat of successfully trying the case, if it should come to that. There are a lot of mouths to feed.

13. See Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 62–137 (2003); Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96. The problem of screening fraud is definitively discussed in Judge Janice Graham Jack’s opinion in *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 596–637 (S.D. Tex. 2005). With respect to chest x-rays, which are the primary tool for diagnosing non-malignant asbestos diseases, Professor Joseph Gitlin of Johns Hopkins Medical School shows systematic distortions that are consistent with fraud. Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretation of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 848–53, 855 (2004); see also Murray L. Janower & Leonard Berlin, *“B” Readers’ Radiographic Interpretations in Asbestos Litigation: Is Something Rotten in the Courtroom?*, 11 ACAD. RADIOLOGY 841, 842 (2004) (opining that the disparities revealed by Gitlin, which cannot be explained by chance or reasonable difference of opinion, suggest that “objectivity and truthfulness among [plaintiffs’] B-reader radiologists have been supplanted by partisanship and distortion of or departure from the truth driven by financial gain.”). The Manville Trust’s audit of chest x-rays submitted in support of claims in the 1990s showed similar results. See A. RUSSELL LOCALIO ET AL., *The Manville Personal Injury Settlement Trust X-Ray Audit: An Assessment of the Identification of the Underlying Disease Process Implications for Medical Review by Certified B-Readers* 13-17 (1998); Letter from Mark E. Lederer, Chief Fin. Officer, Manville Pers. Injury Settlement Trust, to Elihu Inselbuch, Caplin & Drysdale (Apr. 24, 1998) (on file with the NYU Annual Survey of American Law).

Manville Trust announced that it would no longer accept medical reports from nine doctors and four screening facilities involved in a massive alleged fraud pending completion of grand jury and congressional investigations, and several other trusts have followed Manville's lead.<sup>14</sup> One of those doctors, Ray Harron of West Virginia, is reported to have read the x-rays of more than 75,000 claimants since the early 1990s, accounting for approximately ten percent of all the claims ever filed.<sup>15</sup>

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14. See Memorandum from David Austern, President, CRMC, *Suspension of Acceptance of Medical Reports* (Sept. 12, 2005), <http://www.claimsres.com/documents/9%2005%20Suspension%20Memo.pdf>. In addition, Celotex, Eagle-Picher, and Halliburton Trusts have stopped accepting medical evidence from certain doctors and screening facilities. Memorandum from John L. Mekus, Executive Dir., Celotex Trust, to All Celotex Asbestos Trust Claimant Counsel (Oct. 18, 2005) (on file with the NYU Annual Survey of American Law); Memorandum from William B. Nurre, Executive Dir., Eagle-Picher Personal Injury Settlement Trust, to Claimants' Counsel (Oct. 19, 2005), available at <http://www.cpf-inc.com/includes/content/PhysicianNotice.pdf>; DII Industries, LLC : Asbestos PI Trust, Frequently Asked Questions (FAQ's), Are There Physicians Ineligible to Participate in the Program?, <http://www.diiasbestostrust.org> (follow "FAQ" hyperlink) (last visited Nov. 10, 2006). The conduct of the suspended doctors and screening facilities was criticized by Judge Janice Graham Jack in *In re Silica Products Liability Litigation*, 398 F. Supp. 2d at 596-637. These screeners were responsible for thousands of questionable x-ray readings in the proceedings before Judge Jack, and in the majority of cases the same doctors and screeners had filed asbestos-related claims with the trust.

The fallout from Judge Jack's opinion continues as the allegations of fraud are investigated. When Ohio undertook asbestos tort reform in 2004, it required plaintiffs to make a prima facie showing of impairment, and would "stem the use of" doctors who participated in mass screenings from providing medical evidence in support of the prima facie case. Richard D. Schuster & Nina I. Webb-Lawton, *Ohio's Groundbreaking Asbestos Legislation*, MEALEY'S LITIG. REP.: ASBESTOS, Aug. 18, 2004, at 40. In 2005, federal prosecutors began an investigation of asbestos plaintiffs' lawyers. Jonathan D. Glater, *Lawyers Challenged on Asbestos*, N.Y. TIMES, July 20, 2005, at C1. In March 2006, the House Subcommittee on Oversight and Investigations held hearings on doctors behind silica diagnoses; three of the doctors brought before the subcommittee asserted their Fifth Amendment rights and refused to testify. Mike Tolson, *Exposing the Truth Behind Silicosis*, HOUS. CHRON., May 7, 2006, at 1. Following the hearing, an Ohio court dismissed all cases supported solely by evidence from those doctors noting they "are currently unlikely to testify at any hearing or trial in these matters." Cuyahoga County Asbestos Cases, Special Docket 73958 (Ohio Ct. Com. Pl. Mar. 22, 2006) (order of the court regarding defense motions for evidentiary hearings). Defendants in the federal Multi-District Litigation (MDL) cases moved to dismiss claims that were based on diagnoses by discredited doctors. Certain Defendants' Combined Motion & Brief to Exclude Expert Testimony and for Dismissals 1-2, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875 (E.D. Pa. June 8, 2006).

15. Jonathan D. Glater, *Reading X-Rays in Asbestos Suits Enriched Doctor*, N.Y. TIMES, Nov. 29, 2005, at A1. Dr. Harron reportedly did not regard his x-ray read-

This kind of fraud is only the most obvious. Some lawyers representing plaintiffs have engaged in dubious practices to improve the testimony of their clients; such practices are particularly important in asbestos cases because of the long latency of asbestos diseases and the difficulty in establishing responsibility for (or even the existence of) long-ago exposures.<sup>16</sup>

Even setting aside fraud and abuse, it is unreasonable to compensate hundreds of thousands of people exposed to asbestos, who may have physical markers of exposure, but who have no current impairment from a disease caused by asbestos exposure. Providing compensation to the “worried well” raises troublesome public policy questions in all mass tort settings.<sup>17</sup> Whether or not it can be justified when there is enough money to satisfy all claims, the case

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ings for litigation purposes as practicing medicine. *Id.* On one occasion, he noted a possible lung cancer and notified the law firm who employed him, which failed to inform the person being screened. *Id.* The victim later died. *Id.* Dr. Harron successfully defended a malpractice lawsuit arising out of the incident on the ground that he had no physician-patient relationship with the individual—i.e., he was not the man’s doctor. *Id.*

16. For a comprehensive view, see Brickman, *supra* note 13, at 137–65. See also S. REP. NO. 109–97, at 120–35 (2005) (additional views of Senators Kyl, Cornyn, and Coburn, calling for a federal investigation of systematic litigation fraud). As part of the hearings on the Fairness in Asbestos Injury Resolution Act of 2003, Senator Jon Kyl (R-AZ) presented a comprehensive discussion of witness coaching based on a memorandum that had inadvertently been produced in discovery by an associate at Baron & Budd, a leading plaintiffs’ law firm. S. REP. NO. 108-118, at 85-92 (2003). The Baron & Budd memorandum is reproduced in full as an attachment to the Senate Report. *Id.* at 109-31.

17. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002); see also John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1011 (1995) (“The state of ‘being impaired,’ of suffering actual damages, is a fundamental prerequisite for tort recovery. Courts should have exercised a vigorous gatekeeper function, summarily excluding such cases from the tort system.”). The issue in such cases is whether a physical change that does not cause a current functional impairment is a “harm” for which a claim for damages may be brought. Judges who think so reason that unimpairing physical changes are not *de minimis* as a matter of law where such changes may progress to a more serious non-malignant disease or cancer, and that people in this situation—the “worried well”—are understandably anxious about their future. The United States Supreme Court has struggled with this question. It was unwilling to recognize a cause of action for infliction of emotional distress based on mere exposure to asbestos. See *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442–44 (1997). But, it held in *Norfolk & Western Railway Co. v. Ayers*, that a plaintiff with asbestosis is entitled to recover damages for a genuine and serious fear of future cancer. 538 U.S. 135, 157-58 (2003). The Court’s decision in *Ayers* does not necessarily preclude the argument that asbestosis is not an injury on which emotional distress damages can be predicated unless there is some

for compensating the unimpaired seems very weak if it results in limiting or preventing compensation to people with serious diseases.<sup>18</sup>

Even if all the inefficiency and misallocation of resources were eliminated, the costs of compensating asbestos victims would still be enormous. Behind the asbestos litigation problem, in the U.S. and many other countries, is a public health problem. In the last forty years, thousands of people have lost their health, and often their lives, to diseases caused by asbestos. This tragedy is not over. Asbestos clearly causes two cancers: mesothelioma (a cancer of the membranes that line the chest and abdominal cavities) and lung cancer.<sup>19</sup> Both of these cancers have long latency periods.<sup>20</sup> Mesothelioma incidence in the United States is currently peaking and will likely remain high for many years to come. While excess lung cancers due to asbestos exposure probably peaked a few years

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physical impairment from the asbestosis alone, but the general thrust of its opinion seems contrary to that argument.

Common law countries outside the United States have also struggled with whether a claimant may receive compensation for unimpairing non-malignant diseases caused by asbestos. England, for example, decided in the mid-1980s that non-impairing pleural conditions were compensable injuries. *See Patterson v. Ministry of Defence*, [1987] C.L.Y. 1194; *Church v. Ministry of Defence*, [1984] T.L.R. 130; *Sykes v. Ministry of Defence*, [1984] T.L.R. 172. Early in 2006, however, an English appeals court reversed course and held the presence of pleural plaques alone is not sufficient to state a cause of action. *Rothwell v. Chem. & Insulating Co. Ltd. & Anr.*, [2006] E.W.C.A. (Civ.) 27, ¶¶ 68–69 (Eng.). Although an appeal is expected, if upheld *Rothwell* would be a significant change in English treatment of claims brought by the “worried well.” Australian courts have also awarded damages for non-impairing pleural conditions. *See Murrell v. Stevedoring Indus. Fin. Comm.*, [2005] N.S.W. (D.D.T.) 2 (Austl.); *Ridgway v. Amaca Pty Ltd.*, [2004] N.S.W. (D.D.T.) 42 (Austl.), *vacated*, [2005] N.S.W.C.A. 417 (Austl.). But the compensation of such claims continues to be debated and appealed in the courts. *See Australian High Court Orders Retrial for Man Entitled to Payout for Fear*, MEALEY’S INT’L ASBESTOS LIABILITY, Feb. 2006, at 4 (2006) (discussing *CSR Ltd v. Della Maddalena*, [2006] H.C.A. 1 (Austl.)).

18. Cf. Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 332-33 (2002); 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, 276-79 (2004).

19. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEP’T OF HEALTH & HUMAN SERVS., ASBESTOS TOXICITY 14 (2000) [hereinafter ASBESTOS TOXICITY]; Am. Thoracic Soc’y, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 AM. J. RESPIRATORY & CRITICAL CARE MED. 691, 691 (2004).

20. ASBESTOS TOXICITY, *supra* note 19, at 16-17.



ago, the number remains high.<sup>21</sup> Apart from these cancers, asbestosis also causes asbestosis,<sup>22</sup> a scarring of lung tissue that leads to a reduction in lung capacity and can result in terrible impairment or death. Like the asbestos-related cancers, asbestosis has a long latency period.<sup>23</sup> Medical experts disagree as to whether impairing asbestosis continues to be a significant public health problem. Some say that such cases are rarely, if ever, seen today, while others refer to data from the Centers for Disease Control indicating that mortality from asbestosis is on the rise.<sup>24</sup> But there is no doubt that

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21. CARROLL ET AL., *supra* note 1, at 136-37. Some believe that asbestos causes several cancers other than mesothelioma and lung cancer, while others vigorously dispute that. *Compare* Letter from Dr. William Weiss to Senator Jon Kyl (July 19, 2003), in S. REP. NO. 108-118, at 157 (2003) (“For colorectal cancer the evidence indicates no causality between asbestos and colorectal cancer.”), and Letter from Dr. James D. Crapo to Senator Jon Kyl (July 23, 2003), in S. REP. NO. 108-118, at 148 (“Compensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science.”), with Oluremi A. Aliyu et al., *Evidence for Excess Colorectal Cancer Incidence Among Asbestos-Exposed Men in the Beta-Carotene and Retinol Efficacy Trial*, 162 AM. J. EPIDEMIOLOGY 868 (2005) (reviewing the epidemiological literature and reporting the results of the authors’ own study purporting to find a connection between asbestos exposure and colorectal cancer among certain asbestos-exposed men). The principal cancers at issue in this regard are cancers of the colon and rectum, larynx, stomach, pharynx, and esophagus. The American Cancer Society has projected that 203,900 people will be diagnosed with these cancers in 2006. AM. CANCER SOC’Y, CANCER FACTS AND FIGURES 4 (2006). Colorectal cancer (148,610 new cases) will account for 73% of all these new diagnoses, followed by stomach cancer (22,280, 11%), esophageal cancer (14,550, 7%), cancer of the larynx (9,510, 5%), and pharynx (8,950, 4%). *Id.* In June 2006, a blue ribbon committee of the Institute of Medicine, chaired by Johns Hopkins epidemiologist Jonathan M. Samet, concluded that only with respect to laryngeal cancer was there “sufficient” evidence of asbestos causation. INST. OF MED. OF THE NAT’L ACADS., ASBESTOS: SELECTED CANCERS 6-7 (2006). The committee found that the evidence was inadequate to establish or reject a connection between asbestos and esophageal cancer and that it was “suggestive” but not sufficient to establish causation with regard to colorectal, stomach cancer, and pharyngeal cancer. *Id.* at 5-6, 8-10.

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22. ASBESTOS TOXICITY, *supra* note 19, at 14; Am. Thoracic Soc’y, *supra* note 19, at 697. Asbestos also causes non-malignant pleural changes, typically called “plaques.” ASBESTOS TOXICITY, *supra* note 19, at 15. These rarely, if ever, lead to functional impairment. *Id.*

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23. ASBESTOS TOXICITY, *supra* note 19, at 14; Am. Thoracic Soc’y, *supra* note 19, at 697.

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24. For CDC’s analysis, see Michael D. Attfield et al., Ctr. for Disease Control & Prevention, *Changing Patterns of Pneumoconiosis Mortality, United States, 1968–2000*, 53 MORBIDITY & MORTALITY WKLY. REP. 627, 627-32 (2004). [hereinafter *Pneumoconiosis Mortality*]; DIV. OF RESPIRATORY DISEASE STUDIES, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, *WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT 11-23* (1999). It is difficult to interpret the trend in asbestos-related deaths. The reliability of causes of death listed on death certificates is uncertain, especially

over the past quarter-century thousands of people have suffered from significant asbestosis.

The widespread use of asbestos in the twentieth century, together with inadequate industrial safety precautions, led to widespread disease. This asbestos disease generated a compensation problem, which in the United States (and elsewhere) has also become a litigation problem. Over the years, asbestos litigation has constantly changed in response to external events and, even more, its own internal logic. This article describes three phases in this historical dialectic. It starts in the 1990s, when asbestos litigation seemed under control as a result of mass litigation—and mass settlement—strategies. This era of coping came to an end in 1997, when the U.S. Supreme Court rejected a class action settlement that would have been the first step toward substituting an administrative claims process for litigation in the courts. In the succeeding period, from 1997 to 2002, asbestos litigation exploded, eventually bankrupting virtually all traditional defendants and drawing in thousands of new defendants from practically every sector of the economy. This success set off a sharp reaction. Since the beginning of 2003, defendants and insurers have succeeded in encouraging judicial rethinking of the litigation and using public opinion and the political process to transform the system. Courts and legislatures have effected dramatic tort reform in the states, while Congress has been considering legislation that would replace the tort system altogether with a comprehensive administrative claims resolution system financed by defendants and insurers and managed by the Federal Government. As a result of this pattern of action and

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for relatively rare diseases. See generally Irving J. Selikoff & Herbert Seidman, *Use of Death Certificates in Epidemiological Studies, Including Occupational Hazards: Variations in Discordance of Different Asbestos-Associated Diseases on Best Evidence Ascertainment*, 22 AM. J. INDUS. MED. 481 (1992); Kathryn A. Myers & Donald R.E. Farquhar, *Improving the Accuracy of Death Certification*, 158 CAN. MED. ASS'N J. 1317, 1318 (1998) (concluding that “[t]he inaccuracy of death certificate information is well documented and can occur as a result of errors at a number of the steps in the certification process”); Tobias Kircher et al., *The Autopsy as a Measure of Accuracy of the Death Certificate*, 313 NEW ENG. J. MED. 1263, 1263 (1985) (concluding that autopsies lead to reclassification of specific cause of death in more than 50% of cases, and finding that the “[d]iseases most commonly overdiagnosed were circulatory disorders, ill-defined conditions, and respiratory diseases”). Increases in incidence or mortality of asbestos-related disease may reflect the long latency period of such diseases. *Pneumoconiosis Mortality*, *supra* (providing an editorial note to the effect that “[b]ecause asbestosis mortality peaks 40-45 years after initial occupational exposure to asbestos, this upward trend reflects past exposure to asbestos fibers” (citation omitted)). In addition, outside factors such as the possibility of compensation can influence reporting of cause of death.

reaction, asbestos litigation is today in a period of turmoil. We cannot know whether the pendulum will swing out again, or whether the litigation will settle into a new equilibrium after a period of instability in which liabilities and values are reestablished, or whether the litigation will cease altogether as a result of Federal legislation.<sup>25</sup>

In this article, we examine the twists and turns of asbestos litigation over the years and analyze the various attempts—and failures—to meet the challenge of compensating victims of asbestos exposure. In our view, a federal administrative compensation system, however unlikely, is in principle superior to the tort system, even with the reforms that have taken place the last three years.

We start with the premise that a truly fair resolution of the asbestos problem is impossible. The original villains, companies like Johns Manville and Raybestos Manhattan, caused far more harm than they could ever pay for. The rest of American industry has been made to fill the gap. That is not fair. But, leaving claimants holding the bag is not fair either. The civil justice system was never meant to address issues like this, which are fundamentally political rather than legal. The inherent dilemma of asbestos compensation cries out for the sort of pragmatic solution that legislatures do best. Such a solution would, however, require a departure from tort system standards as to who is entitled to compensation and what the amount of that compensation should be.<sup>26</sup> It would also require allocating the burdens of compensation in a way that is accepted as fair by defendants and their insurers, a challenge that is in some ways much more difficult than designing a fair claims process. Ex-

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25. This account of the ebb and flow of asbestos litigation focuses on the relationship between the plaintiff side and the defense side. It ignores the array of conflicting interests within the two “sides”—and especially the crucial relationship between defendants and their liability insurers. For a comprehensive (but strongly policy-holder oriented) view, see Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. (forthcoming 2007) (manuscript at 1, 5, on file with the NYU Annual Survey of American Law).

26. An administrative compensation scheme would not necessarily be narrower than the tort system. For example, claimants today may fail to obtain full compensation because they cannot identify the specific product to which they were exposed. Such claimants would presumably be compensated by any sensible fund, as long as sufficient exposure to asbestos could be proved. As this example illustrates, an administrative system would generally provide greater certainty of compensation, greater evenhandedness, lower costs, and possibly somewhat lower values than claimants might receive from litigation, at least in the high value jurisdictions. These are the typical compromises one expects in substituting an administrative compensation system for the courts.

traordinary efforts in the U.S. Senate to solve these problems have so far been unavailing.

A well-designed administrative compensation system would be superior to tort litigation in at least four ways. First, an administrative compensation system is in principle far cheaper to operate. The heroic days, when daring trial lawyers brought the old asbestos industry to its knees, are long over. The problem today is not retribution or deterrence, but compensation. The high costs of individualized justice (which is largely mythical in asbestos litigation anyway) simply make no sense in this context. Second, an administrative system would be fairer. Claimants would not be left out in the cold because they were unable to identify the asbestos products to which they were exposed, and, more generally, similarly situated plaintiffs would be treated the same, regardless of the court in which they sue, the identity of their lawyer, or the quality (or malleability) of their memory. Third, an administrative system is potentially more predictable, and would reduce the threat that asbestos litigation poses to the financial lifeline of companies who find themselves in the cross-hairs. It is important not to put too much emphasis on this. While the operation of an administrative system is likely to be highly predictable once it is established, the establishment of an unprecedented new compensation program involves inevitable uncertainties.<sup>27</sup> Fourth, an administrative system would have many more tools than the tort system to prevent fraud and abuse. As we reflect on the success of recent efforts to attack fraud in silica and asbestos cases, we should remember that it took more than twenty years for those efforts to bear fruit, and even now, ultimate success is uncertain.<sup>28</sup>

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27. If the administrative system operated as designed, the entitlement to benefits would be determined in most instances by the application of fairly mechanical rules. The financial burdens on insurers and defendants would be largely fixed as well. The risk, of course, is that the program will not operate as planned. No one really knows what the pattern of claiming would be in a purely no-fault environment. The best anyone can do is extrapolate from the experience of current asbestos trusts, which is governed by the ebbs and flows of the tort system. If claiming significantly deviates from this baseline, up or down, the cost could be significantly higher or lower than predicted. This kind of uncertainty as to cost is not due to the fact that the program is *administrative*, as much as to the fact that it would be *new*. A different source of uncertainty is that Congress may change the rules down the road. However, this kind of "uncertainty" exists in the tort system as well.

28. We set to one side the question of compensating the unimpaired: neither the tort system nor an administrative compensation scheme could, in a limited-resources environment, justify compensating people who are not sick at the potential expense of people who are.

The civil justice system has, in the past several years, become much less friendly to the interests of asbestos claimants and more solicitous of defendants. This is a necessary correction. Some reforms, such as sensible medical criteria, limitations on forum shopping, and elimination of inappropriate consolidations, seem to be reasonable adjustments to a failed tort system. But the tort reform effort doesn't stop there; other reforms, such as cutting back on joint and several liability, or cutting off liability to wives exposed to asbestos dust brought home on their husband's clothing, are really aimed at making sure that claimants rather than defendants and their insurers bear the brunt of the mismatch between the harm done by asbestos and diminished responsibility of the remaining defendants. In the either-or world of the civil justice system, this struggle is to be expected. A federal legislative solution, however, avoids a win-or-lose situation and can be based on reasonable compromises that protect everyone's interests.

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This article begins, in Part II, with an analysis of the asbestos litigation system as it developed from the first lawsuits in the 1960s through the Supreme Court's 1997 decision in *Amchem Products v. Windsor*. During this period, the essential characteristics of asbestos litigation emerged. After *Amchem*, the asbestos litigation system practically exploded. Filing rates reached 100,000 claims per year or more, verdicts regularly set records, and scores of asbestos defendants sought protection under the bankruptcy laws. This big bang—and the first stirring of reaction against it—are described in Part III. The reactions then took two paths. Part IV examines the wave of tort reform, both judicial and legislative, that swept the states after 2002, and Part V analyzes the alternative response to asbestos litigation, the federal administrative compensation system proposed in the ill-starred FAIR Act. Finally, Part VI takes a *tour d'horizon* of current developments in the asbestos litigation system and considers what might happen next, if Congress does not replace the tort system with an administrative system for compensating asbestos victims.

## II. BEFORE THE STORM

### A. *Asbestos Litigation on the Eve of Amchem Products, Inc. v. Windsor*

Asbestos litigation began in the United States in the late 1960s.<sup>29</sup> In its formative period, from 1969 to 1973, this litigation took a surprising turn. In most countries, private asbestos litigation (if it exists at all) focuses on employers who exposed their employees to asbestos in the workplace.<sup>30</sup> In the United States, however,

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29. See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 6 (1985). For a moving description of the early days of asbestos litigation, see *id.*; see also CARROLL ET AL., *supra* note 1, at 22-23.

30. In some European countries, especially on the Continent, asbestos injuries have traditionally been addressed through the social welfare system. The underlying concept was that asbestos-related diseases, like other occupational injuries, presented a welfare issue and not an issue of commutative justice. As demographic pressure has stressed the welfare system, however, this pattern is beginning to change. France provides a good example of this change. Until recently, workers in France could prevail on a civil suit against their employer only by demonstrating the employer's "inexcusable fault"—a "fault of an exceptional seriousness." Annie Thébaud-Mony, *Justice for Asbestos Victims and the Politics of Compensation: The French Experience*, 9 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 280, 284 (2003). That standard was loosened in February of 2002, such that employees exposed to asbestos may prevail in a civil suit against their employer by demonstrating "the employer knew or should have known that there was a risk and did not take the necessary measures to protect the employee." *Id.* at 284-85. In addition, French social security reform in 2000 established the "FIVA" fund, a no-fault system established with a blend of private and state funds intended to compensate victims of asbestos exposure. *Id.* at 285. As a result, France now has a mixed system, with elements of state responsibility (largely based on a welfare concept) and elements of delictual responsibility (based on a compensation rationale). In part as a result of the effective intervention of victims' groups, asbestos regulation and compensation have received detailed political attention, most recently by a Commission of Inquiry established by the National Assembly, whose report is fundamental. See generally AU NOM DE LA MISSION D'INFORMATION SUR LES RISQUES ET LES CONSÉQUENCES DE L'EXPOSITION À L'AMIANTE, ASSEMBLÉE NATIONALE, 2E LEGISLATURE, NO. 2884, RAPPORT, at 276-384 (2006).

In England there is a dual system of compensation—a non-exclusive administrative compensation regime and the tort system. See N.J. WIKLEY, *COMPENSATION FOR INDUSTRIAL DISEASE* 37-41, 48, 60-65 (1993) (describing both systems); see also Thomas Edward Durkin, *Constructing Law: Comparing Legal Action in the United States and United Kingdom* (June 1994) (unpublished Ph.D. dissertation, University of Chicago) (on file with the NYU Annual Survey of American Law). Most tort cases are brought against employers, which are often easy targets because of violations of safety regulations that were adopted in the 1930s. Cf. WIKLEY, *supra* at 42. Product cases are hard to prove, and the loser-pays system in England discourages the American practice of naming a broad range of defendants many of which may not be liable. Cf. *id.* at 45-47.

asbestos litigation has primarily involved product liability claims against manufacturers of asbestos products.

This development was the result of three factors. First, pressure to compensate asbestos victims increased during the 1960s as a result of increased awareness of the dangers of asbestos.<sup>31</sup>

Second, during the same years, workers' compensation was widely seen as inadequate to the task of compensating workers for occupational diseases. Compensation was modest, and technical barriers often precluded any compensation at all.<sup>32</sup> Typically, however, workers' compensation was the employee's exclusive remedy against an employer. Thus, the lawyers who prosecuted the first asbestos cases had a strong incentive to find defendants other than employers to sue.<sup>33</sup>

Third, a revolution in product liability law that culminated in the late 1960s provided a new set of potential defendants—the manufacturers of asbestos products. With the Restatement (Second) of Torts, it became generally accepted that the manufacturers of a product should, in effect, insure their product against defects that lead to injury. That duty was deemed to flow not from a contractual duty, but from the role of manufacturers in the modern marketplace.<sup>34</sup> A theory was therefore at hand for escaping from workers' compensation and developing a new set of defendants to

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31. The increased awareness of asbestos disease was due in large part to Selikoff's seminal studies of it in insulation workers (done with the close collaboration of the International Association of Heat and Frost Insulators and Asbestos Workers). See, e.g., I.J. Selikoff et al., *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139 (1965). See also IRVING J. SELIKOFF & DOUGLAS H.K. LEE, *ASBESTOS AND DISEASE* (1978) (providing a comprehensive resource of asbestos and disease information).

32. See BRODEUR, *supra* note 29, at 17, 22, 313.

33. *Id.* at 128.

34. Before modern-day product liability law existed, courts required privity, which meant that "a product manufacturer could not be liable in tort to a consumer with whom the manufacturer had no direct contractual relationship." Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1709 (2003). The privity rule began to erode in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), in which Judge Cardozo "put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else." *Id.* at 1053. The rule was a major target of reforming torts professors like Dean Prosser. See generally William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). The citadel fell in the early 1960s with a landmark California Supreme Court case, *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), which imputed the concept of strict liability for manufacturers into tort law. *Id.* at 901. The ultimate revolution was crowned with the incorporation of strict

hold liable for the diseases caused by asbestos. The Fifth Circuit's 1973 decision in *Borel v. Fibreboard Paper Products Corp.* established that manufacturers could be strictly liable under § 402A of the Restatement for failure to provide a warning to people who might be injured by their products.<sup>35</sup> While the strict liability ruling was important, even more important was the court's broader endorsement of product liability lawsuits against the manufacturers of asbestos products.<sup>36</sup> Moreover, *Borel* widely publicized the product liability end run around workers' compensation and sparked new interest in asbestos cases among plaintiffs' attorneys.<sup>37</sup>

After *Borel*, a growing and well-organized plaintiffs' trial bar developed damning evidence of culpability against the main manufacturers of asbestos products. The dominant American producer was the Johns Manville Corporation.<sup>38</sup> During the post-*Borel* period, Manville led defendants in vigorously contesting liability, winning as often as it lost.<sup>39</sup> By the end of the 1970s and early 1980s, however, juries were beginning to hand down sizable punitive damages awards.<sup>40</sup> With the trends running against it and facing 17,000 as-

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liability into § 402A of the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

35. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973) (applying Texas law and noting that "the Texas Supreme Court has adopted the theory of strict liability in tort as expressed in section 402A of the Restatement (Second) of Torts (1964)"). The court wrote:

In reaching our decision in the case at bar, we recognize that the question of the applicability of Section 402A of the Restatement to cases involving "occupational diseases" is one of first impression. But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the foreseeable harm caused by his own negligence. This principle applies to the manufacture of products as it does to almost every other area of human endeavor. It implies a duty to warn of foreseeable dangers associated with those products. This duty to warn extends to all users and consumers, including the common worker in the shop or in the field. Where the law has imposed a duty, courts stand ready in proper cases to enforce the rights so created. Here, there was a duty to speak, but the defendants remained silent. The district court's judgment does no more than hold the defendants liable for the foreseeable consequences of their own inaction.

*Id.* at 1103.

36. See *id.* at 1092-94, 1103.

37. See BRODEUR, *supra* note 29, at 128.

38. *Id.* at 3; see Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, LAW & CONTEMP. PROBS., Autumn 1990, at 27, 28-29 (describing Manville's business and its workers' asbestos exposure).

39. BRODEUR, *supra* note 29, at 106.

40. *Id.* at 105-06, 178, 183; see also Smith, *supra* note 38, at 29 (noting that Manville, in 1982, estimated its asbestos liability at over \$2 billion through 2001).

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bestos cases,<sup>41</sup> Manville unexpectedly filed for bankruptcy protection under Chapter 11 in 1982.<sup>42</sup> The Manville bankruptcy immediately withdrew a large part of the resources available to compensate plaintiffs<sup>43</sup> and, due to Manville's previous leadership role, left the remaining defendants in disarray.

The response to the Manville crisis defined major aspects of the asbestos litigation system for years to come. First, the Manville bankruptcy gave birth to the asbestos trust—an administrative mechanism for paying current and future asbestos claims.<sup>44</sup> The procedures governing the trust became the model for other mass-settlement devices both within and outside the bankruptcy context.

Second, the withdrawal of Manville resources was a long-term phenomenon. With the exception of a brief “coming out” in 1988, which was aborted when a classic run-on-the-bank threatened the trust with immediate insolvency, the Manville trust did not begin to pay claims until 1995. Moreover, a key feature of the Manville trust—reserving trust assets for future claimants by paying only a portion of the liquidated value of current claims—meant that the Manville resources withdrawn from the asbestos litigation system in 1982 would not be fully restored for decades. To make up Manville's share, plaintiffs had to turn to other defendants. As a result, companies previously at the edge of the litigation were drawn into the center.

Third, the asbestos trial bar began aggressive recruitment of unimpaired, non-malignant cases. In cooperation with some labor

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41. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751 (E. & S.D.N.Y. 1991). Note that 17,000 cases would make Manville a bit player in asbestos litigation today. As of the end of 2005, the trust that assumed Manville's liabilities had received 675,927 claims for U.S. exposures. See *infra* note 276 & tbl.2.

42. BRODEUR, *supra* note 29, at 249; Manville Personal Injury Settlement Trust, History, <http://www.mantrust.org/history.htm> (last visited Oct. 22, 2006).

43. Upon filing a petition for bankruptcy protection, the debtor receives an automatic “stay,” which absolves it of the obligation to continue paying claims, asbestos or otherwise. See 11 U.S.C. § 362(a) (2000). Thus, the immediate effect of the filing of a petition is to take the bankrupt's resources out of the system. Thereafter, the bankruptcy system works to reserve the debtor's resources for the payment of all asbestos claims on the same basis, whether they arise next year or forty years into the future. The amount of resources withdrawn from the system by the Manville bankruptcy was large. Approximately 11% of the value of pre-bankruptcy claims was “Manville-only.” Manville's departure from the asbestos litigation system left all of the plaintiffs in those cases high and dry. Manville's share of the remaining claims (89% by value), in which both Manville and co-defendants contributed to the ultimate resolution, was approximately 30%. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 912 app. A & tbl.1 (Report of Mark A. Peterson).

44. BRODEUR, *supra* note 29, at 344-48; CARROLL ET AL., *supra* note 1, at 110-15.

unions, trial lawyers arranged “mass screenings,” whereby lawyers would have x-rays taken of thousands of outwardly healthy workers and file complaints on behalf of anyone with a hint of pleural plaque.<sup>45</sup> The circumstances surrounding these screenings were conducive to fraud.<sup>46</sup> The first asbestos screening scandal came to light in the late 1980s when a judge decried the methods of plaintiffs’ lawyers in *Raymark Industries, Inc. v. Stemple*.<sup>47</sup> The lawyers submitted more than 7000 claims discovered in a mass screening to an asbestos-related class action settlement.<sup>48</sup> A review of the medical evidence for those claims, however, revealed that the diagnoses evidenced a “reckless disregard for the truth,” that many of the claims were “without merit” and that the lawyers for the claimants likely engaged in fraud.<sup>49</sup>

Fourth, after a period of disarray, the remaining defendants organized the Asbestos Claims Facility (“ACF”) to rationalize the system on the defense side.<sup>50</sup> The ACF provided one-stop shopping for asbestos claims, which increased efficiency for plaintiffs and enabled defendants to settle at lower values.<sup>51</sup> Although the ACF only functioned for a brief period, its smaller successor, the Center for Claims Resolution (“CCR”), would continue to play an organizing role for the defendant community until the *fin de siècle* collapse.<sup>52</sup>

Finally, courts, faced with an unprecedented flood of asbestos claims, began to devise innovative means of resolving them on a mass basis. In the early 1980s, some courts began trying common issues to several juries, who would then hear individual issues separately and come up with separate verdicts. This method was abandoned when the juries came up with inconsistent verdicts.

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45. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 748.

46. Fraudulent or not, screening led to a rapid increase in the number of cases. Between 1984 and 1990, the number of pending cases in federal district courts increased from 7923 to 33,182. *Id.* at 745 tbl.

47. No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710, at \*53 (D. Kan. May 30, 1990) (“[G]iven the facts as they appear in this motion, the defendants [who were attorneys for plaintiffs in previous asbestos cases against Raymark] probably committed a fraud on the court.”). The *Stemple* scam is described in Brickman, *supra* note 13, at 97–102.

48. Brickman, *supra* note 13, at 98.

49. *Stemple*, 1990 U.S. Dist. LEXIS 6710, at \*40, \*65, \*67.

50. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, LAW & CONTEMP. PROBS., Autumn 1990, at 13, 13-14.

51. See *id.* at 14-15. The creation of the ACF also reflected a truce between defendants and insurers. *Id.* at 13.

52. See *id.* at 13, 15-17; Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1608-09 (1995).

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Afterwards, judges began to use sometimes massive trial consolidations to resolve cases efficiently (often by creating pressures to settle).<sup>53</sup> Some efforts were even made to use class actions for this purpose, although not with much success.<sup>54</sup>

By the early 1990s, all of these forces had come together to create a sense of crisis. The 1991 report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation found that “the situation has reached critical dimensions and is getting worse.”<sup>55</sup> According to the Ad Hoc Committee:

dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.<sup>56</sup>

While the Ad Hoc Committee famously called for federal legislation to address the crisis,<sup>57</sup> its less dramatic recommendations called for innovative management practices to allow the courts to

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53. The advent of consolidations in asbestos cases is concisely summarized in CARROLL ET AL., *supra* note 1, at 30–34. See also Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 CONN. INS. L.J. (forthcoming 2007) (manuscript at 6-7, on file with the NYU Annual Survey of American Law); GRIFFIN B. BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS’ DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS 22–24 (2002); Victor E. Schwartz & Leah Lorber, Commentary, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 256–57 (2000) (noting the emerging practice among trial judges of joining cases despite significant differences between them).

54. Judge Robert Parker experimented with class actions in *Jenkins v. Raymark Industries*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff’d*, 782 F.2d 468 (5th Cir. 1986), and *Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990). His initial trial plan in *Cimino* was overturned by the Fifth Circuit on mandamus, *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990), and innovative efforts to use statistical extrapolation techniques thereafter was rejected by the Fifth Circuit on appeal. *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 335 (5th Cir. 1998). Judge Reynaldo Garza’s concurrence in the latter decision observed that Judge Parker’s “ingenious but, unfortunately, legally deficient” trial plan was “a striking example of the crisis presented by the state of asbestos litigation in our judicial system” and “urge[d] upon Congress the wisdom and necessity of a legislative solution.” *Id.* at 335 (Garza, J., concurring). On the *Cimino* litigation, see *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 91-92 (1999) (statement of William N. Eskridge, Professor, Yale Law School) [hereinafter *1999 FAIR House Hearings*].

55. REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2 (1991).

56. *Id.* at 3.

57. See *id.* at 3-4, 27-35.

process large numbers of claims more efficiently, with less cost and delay.<sup>58</sup>

*B. The Rise and Fall of the Amchem Settlement*

While the Ad Hoc Committee's alarm did not rouse Congress from its slumber, it did prompt at least one significant reform: federal asbestos cases were consolidated for pre-trial purposes in the U.S. District Court for the Eastern District of Pennsylvania.<sup>59</sup> It was widely expected that the transferee judge, the late Charles Weiner, would facilitate a global settlement involving all defendants and lawyers for substantially all the plaintiffs.<sup>60</sup> After those efforts failed, attorneys for the CCR and plaintiffs' attorneys representing the lion's share of the "market" for asbestos claimants, negotiated their own "futures" class action settlement.

Under the agreement, now known as the *Amchem* settlement, the parties sought to certify a class solely for settlement purposes. The proposed settlement substituted an administrative claims resolution process and alternative dispute resolution (ADR) mechanism for most asbestos tort litigation.<sup>61</sup> The settlement adopted medical criteria for determining eligibility for compensation for the array of asbestos diseases. Among other things, the criteria deferred the claims of the unimpaired.<sup>62</sup> The class action was deliberately designed to apply only to future (and not pending claims)<sup>63</sup> in order to avoid introducing a major diversity of interest into the plaintiff class. This choice, however, exposed class counsel to accusations of "settling" future claims for less than they had settled present claims outside the class action framework.<sup>64</sup> After a vigorous fairness hear-

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58. *See id.* at 36-39.

59. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

60. CARROLL ET AL., *supra* note 1, at 47.

61. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600-03 (1997); Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1902-07 (2002).

62. *Amchem Prods., Inc.*, 521 U.S. at 603-04.

63. *Id.* at 603.

64. *Id.* at 606. The objectors' experts, having failed to convince the district court that the *Amchem* settlement was infected by a conflict of interest on the part of class counsel, took their case to public, or at least academic, opinion. Professor Roger Cramton, one of the objectors' experts in *Amchem*, organized a symposium at Cornell Law School on the use of settlement class actions to resolve mass torts; contributions were published in 1995. *See* Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995). The objectors' other legal experts, John Coffee and Susan Koniak, also made major contributions to the symposium. *See* John C. Coffee, Jr., *The Corruption*

ing, the district court certified a class and approved the settlement in 1994.<sup>65</sup> The objectors, led by prominent plaintiffs' attorney Fred Baron, promptly appealed.

An important thing to notice about the *Amchem* settlement is how natural it was *within the context of asbestos litigation*. For years, asbestos cases had been settled on a collective basis pursuant to administrative agreements between most significant defendants and plaintiffs' lawyers.<sup>66</sup> The settlements varied, but all involved at least a rough matrix of values for different kinds of cases. Moreover, the same basic arrangements were reflected in the trust distribution process of the Manville and other bankruptcy trusts, which provided a point of reference for the *Amchem* negotiators. What was innovative about *Amchem* was the effort to use the class action device to bind future claimants and permanently withdraw asbestos cases from the tort system.<sup>67</sup> While *Amchem* involved only the twenty CCR companies, it was widely expected that similar class action settlements would be negotiated with other defendants if the *Amchem* settlement won appellate court approval.

Alas, it was not to be. While the *Amchem* class settlement may have been a logical outgrowth of settlement practices within the asbestos litigation system, it was a breathtaking departure from the normal principles relating to class actions. The U.S. Court of Appeals for the Third Circuit reversed the district court and held that

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*of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995). Their criticisms of the *Amchem* settlement were influential and may have had a significant impact on the reception of the case in the court of appeals and the Supreme Court.

65. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 334 (E.D. Pa. 1994).

66. CARROLL ET AL., *supra* note 1, at 45-46. For a penetrating analysis of aggregate settlements in mass torts, see Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005).

67. Samuel Issacharoff and John Fabian Witt have persuasively argued that aggregate settlement is inevitable in modern tort litigation even outside the mass tort framework. See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004). See also Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1050-52 (1993). Certainly in the asbestos context, where settlements involve repeat players on both sides and where cases involve limited factual and legal variations, it is almost impossible to imagine doing without aggregate settlement. *Amchem* greatly increased the formality of many of these settlement structures—and for the first time subjected them to judicial oversight. But in general what was replaced by *Amchem's* administrative settlement regime was not traditional case-by-case adjudication but a plethora of informal settlement schemes involving various plaintiffs' lawyers and various defendants.

a class could not be certified for settlement when a certification for trial would be inappropriate—the fact of settlement, and the fact that there would be no trial, were irrelevant.<sup>68</sup> While the U.S. Supreme Court said it did not agree that settlement was irrelevant to the class certification inquiry, it did not give any positive weight to the settlement before it. Instead, it found that the class was too sprawling—too rife with inconsistent interests among various segments (even inchoate segments) of the class—to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure for adequacy of representation and predominance of common issues.<sup>69</sup> Almost ruefully, the Court concluded:

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it.<sup>70</sup>

In effect, the futures problem could not be resolved through the class certification process of Rule 23.<sup>71</sup> The problem could only be addressed through the democratic political process.

### C. Conclusion

The *Amchem* settlement was an “arguably brilliant” effort to transcend the asbestos litigation system by using the class action device to achieve a global settlement based on the various partial set-

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68. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617-18 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591 (1997).

69. *Amchem Prods., Inc.*, 521 U.S. at 628-29. The Supreme Court has been criticized by some commentators for basing its opinion on Rule 23, rather than an explicit due process analysis. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 340-41 (1999); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372-74 (2000).

70. *Amchem Prods., Inc.*, 521 U.S. at 628-29 (internal citation omitted).

71. The “futures problem” arises in global settlements of a mass tort with a stream of future claims. Without some way of binding future claimants, it may be impossible to reach a global settlement that would be in the interest of all claimants, present and future. For a discussion of this issue see Hensler & Peterson, *supra* note 67, at 1045-46; Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1910-13 (2000). In asbestos bankruptcies, the futures problem is at least theoretically addressed by the court’s appointment of a representative for future claimants. See 11 U.S.C. § 524(g)(4)(B) (2000).

lements that had long characterized the system.<sup>72</sup> The essential obstacle to a global settlement was the futures problem. Outside of bankruptcy, the only way to make a global settlement binding on future claimants was the use of the class settlement procedure under Rule 23. Without that support, it would be impossible to transform the asbestos litigation system from within. It would be necessary to obtain some external change in the law.

The Supreme Court's statement in *Amchem* that an administrative settlement regime may be "sensible," and its pointed observation that Congress had not adopted such a scheme, was interpreted by many in Congress as a call for legislation.<sup>73</sup> The call was repeated two years later in *Ortiz v. Fibreboard Corp.*<sup>74</sup> Efforts by defendants to devise a legislative solution to the asbestos litigation problem began within days after the Supreme Court's *Amchem* decision was handed down in July 1997 and continued until May 2000.<sup>75</sup> The time, however, was not yet right. The situation had not gotten bad enough.

### III.

#### ACTION AND REACTION (1997-2002)

In the five years following *Amchem*, the asbestos litigation system nearly collapsed. The perfection of screening techniques and increasingly sophisticated forum shopping led to dramatic increases in filing rates and claims values. That, in turn, led to an unprecedented wave of asbestos bankruptcies. The bankruptcy of most traditional defendants precipitated the Manville process all over again; withdrawal of billions of dollars from the system sparked a search for new defendants and higher demands on the old ones. The magnitude of the reaction threatened to overwhelm the capacity of the system to reestablish equilibrium.

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72. *Georgine*, 83 F.3d at 617.

73. See, e.g., *Finding Solutions to the Asbestos Litigation Problem: The Fairness in Asbestos Compensation Act of 1999: Hearing on S. 758 Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 2 (1999) (opening statement of Sen. Grassley); *Hearing on Asbestos Litigation Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at <http://leahy.senate.gov/press/200209/092502c.html>.

74. 527 U.S. 815, 821 (1999) ("Like *Amchem* . . . this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation.") (internal citation omitted).

75. The early legislative efforts are summarized below. See *infra* notes 121-46 and accompanying text.

The increasing pressure of asbestos litigation caused some defendants and their insurers to seek fundamental reforms. From almost the moment *Amchem* was decided, defendants began to press for federal legislation, relying upon the Supreme Court's repeated calls to Congress for a legislative response to the "elephantine mass" of asbestos cases. While early legislative proposals went nowhere in Congress, they were the beginning of an intensifying battle for hearts and minds. A spotlight began to shine on the economic destructiveness of asbestos litigation and the pattern of fraud and abuse. The media perception began to change. What was once seen as appropriate chastisement for outrageous misconduct came to be seen as a scandal in itself. In 2004, Professor Lester Brickman asserted that asbestos litigation would someday be seen as a scandal comparable to Teapot Dome.<sup>76</sup> Such a statement would not have been taken seriously outside the hard core defense community only seven years earlier.

These processes were not sequential but intertwined. In the period from 1997 through 2002, the post-Manville asbestos litigation system disintegrated. At the same time, sharp reactions to the abuses that were perceived as causing the post-*Amchem* breakdown began to lay the foundations for fundamental changes in the system. These changes began in 2002 and accelerated thereafter. This Section examines the collapse of the asbestos litigation system and the beginnings of the reform movement. The next two Sections will analyze in detail the two major thrusts of asbestos reform: transformation of the tort system at the state and local level, on the one hand, and the establishment of a national administrative compensation program (the FAIR Act), on the other.

### A. *Things Fall Apart*

#### 1. The Trend of Filings

From approximately 1987 through 1994, the year the *Amchem* settlement was approved by the district court, new filings were fairly stable. According to RAND data, the average number of claims filed each year during this period was 29,042, and the median was significantly lower, at 25,496.<sup>77</sup> Filings in 1995, however, jumped to 48,213 and continued at a high rate through 2002.<sup>78</sup> The average number of new filings per year was 53,007 during this period, and

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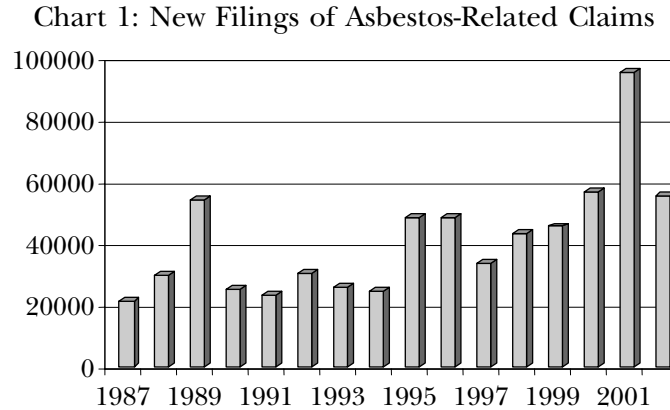
76. Brickman, *supra* note 13, at 35.

77. CARROLL ET AL., *supra* note 1, at 71 tbl.4.1.

78. *Id.*



the median was 48,118. The trend of new filings is shown in Chart 1.



Source: CARROLL ET AL., *supra* note 1, at 71 tbl.4.1.

This sudden increase in new filings blew away the perception that asbestos litigation was more or less under control. Filings at the post-1994 levels had never been seen before. The number of claims filed in 2001, the last year for which RAND had complete information, was over 3.5 times the number of filings in 1993, the year the *Amchem* settlement was negotiated.<sup>79</sup>

2. The Mississippi Model

The reality behind the filings trend was more ominous still. Through 1987, almost half of all asbestos cases filed in state courts were filed in California and Pennsylvania.<sup>80</sup> That began to change in the late 1980s. Prior to 1988, Texas’s share of the “market” for asbestos claims was 3%, which increased to 15% for the subsequent five-year period. Between 1993 and 1997, 44% of all asbestos claims were filed in Texas.<sup>81</sup> That flow of claims was not due to a sudden asbestos epidemic in Texas. Many of those claims came from

79. *Id.* at 71. We are skeptical that the apparent drop in claims from almost 95,000 in 2001 to only 55,000 in 2002 is real. RAND notes that its figures “do not include the approximately 20,000 individuals who [it estimates] had filed asbestos personal injury claims by the end of 2002,” but for whom RAND could not estimate the year of filing or claimed injury. *Id.* If those 20,000 cases are concentrated toward the end of the period considered by RAND, which would not be implausible, they could affect the apparent trend line.

80. *Id.* at 62 tbl.3.3.

81. For claims filings by state, see *id.*

outside the state and were attracted to a small number of Texas courts that were perceived as highly attractive by plaintiffs' lawyers. In the mid-1990s, three Texas *counties*—Harris (Houston), Jefferson (Beaumont), and Galveston—accounted for more than 25% of all new state court filings in the *entire country*.<sup>82</sup>

In 1997, Texas reacted to this influx of cases by enacting legislation requiring Texas courts to dismiss out-of-state claims under certain circumstances.<sup>83</sup> Over 1998–2000, the percentage of new state claims filed in Texas courts fell to only 19%, roughly where it had been in 1988–1992.<sup>84</sup> Defendants and insurers did not, however, breathe a sigh of relief. The withdrawal of the welcome mat in Texas went hand-in-hand with an explosion of new filings in nearby Mississippi, which jumped from 5% of state cases during 1993–1997 to 18% during 1998–2000.<sup>85</sup>

Mississippi had long been a significant venue for asbestos litigation, but until the late 1990s, it had never been considered a problem jurisdiction. Most cases were filed in Jackson County and involved Mississippians who had been injured as a result of their work at the Ingalls Shipyard in Pascagoula. The court was seen as reasonably fair, the number of claims was considered manageable, and settlement values were not excessive.

The great migration of claims to Mississippi courts in the late 1990s bypassed the traditional venues. Plaintiffs' attorneys realized, long before the defendants did, that the best venues for plaintiffs were extremely poor rural counties, like Jefferson, Claiborne, and Holmes.<sup>86</sup> Close relationships between plaintiffs' lawyers and elected local judges, an extremely pro-plaintiff jury pool, and some idiosyncratic legal doctrines made these courts so-called "magic jurisdictions" where a large plaintiffs' verdict was practically guaran-

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82. *Id.* at 63.

83. Act effective May 29, 1997, ch. 424, 1997 Tex. Gen. Laws 1680-84 (Tex. 1997) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 2006)).

84. CARROLL ET AL., *supra* note 1, at 62 tbl.3.3.

85. *Id.*

86. During 1998–2000, 8.8% of all asbestos claims filed in state courts across the country were filed in Jefferson County, Mississippi, and another 3.9% were filed in Claiborne County. Fewer than 2% were filed in Jackson County, although Jackson County had accounted for 8.4% of state filings, and was the busiest state court in the country, in 1988–1992. *See id.* at 64 tbl.3.4. These percentages understate the explosion of Mississippi cases: state courts received a much larger proportion of new filings in 1998–2000 than they had ten years before, and the rate of filing nationwide was also much larger.

teed.<sup>87</sup> The defendants' problems were complicated, moreover, by a very permissive joinder rule, which allowed thousands of claims to be joined together in a single case, and by bonding requirements that effectively eliminated the right of appeal.<sup>88</sup>

The gathering storm broke in 1998 with the *Cosey* trial in Jefferson County, Mississippi.<sup>89</sup> *Cosey* involved the joinder of more than 1,700 plaintiffs, of which twelve were selected for trial.<sup>90</sup> Several of the claimants had no discernible impairment. The trial resulted in a verdict of \$48.5 million for compensatory damages, with a determination of punitive damages to follow.<sup>91</sup> On the basis of this verdict, the court pressed the defendants to settle, threatening trial of the remaining 1,700 claims before the same jury with an instruction to find the defendants liable. A lawyer for the defendants objected that the plan sounded "like this side of hell," to which the judge allegedly replied "[n]o, counselor, that is hell."<sup>92</sup> The Supreme Court rejected a petition for recusal of the trial judge, and those claims (and over the next year, many more) settled.<sup>93</sup>

The *Cosey* trial gave impetus to the flow of claims from all over the country to Jefferson County and other impoverished communities in Mississippi. Because of Mississippi joinder rules, thousands of claims were combined and assigned to judges that defendants, at least, perceived as biased. Most of the claims were filed on behalf of non-cancer claimants without any breathing impairment, and al-

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87. The term "magic jurisdiction" originated with plaintiffs' attorney Richard Scruggs. See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2 (2005) ("What I call the 'magic jurisdiction,' . . . [is] where the judiciary is elected with verdict money. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is."). As it captures so well defendants' sense of outraged impotence in these jurisdictions, the term has been adopted with glee by the American Tort Reform Foundation, which has crusaded against so-called "judicial hellholes" in recent years.

88. CARROLL ET AL., *supra* note 1, at 29. Another anomaly of Mississippi procedure in this period was its refusal to allow defendants' experts to examine the plaintiff. In the real-life world of litigation, this rule could make an enormous difference. As between a local doctor who has laid hands on the plaintiff and a renowned expert who has never seen the plaintiff outside the courtroom, the renowned expert doesn't have a chance when the jury retires. Mississippi did not allow defendants to obtain a medical examination of the plaintiff until 2003. Miss. R. CIV. P. 35 cmt. (as amended in 2003).

89. Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 166.

90. *Id.*

91. *Id.* at 166-68.

92. 1999 FAIR House Hearings, *supra* note 54, at 93 (statement of William N. Eskridge, Professor, Yale Law School).

93. See *id.*

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most all of those “unimpaired” claims were solicited through lawyer-sponsored screening programs. As the consequences of *Cosey* were worked out over the next two years, the filing of “unimpaired” claims accelerated, and Mississippi led the way.

The *Cosey* verdict—and the sense that there were easy pickings to be had in Mississippi—also boosted settlement values. The size of the verdict in *Cosey* ratcheted up plaintiffs’ demands, disrupting established arrangements and putting defendants under stress that made it increasingly difficult to sustain the litigation. The prospect of hitting the jackpot in Mississippi had reportedly attracted over 49,000 plaintiffs to the state by 2002.<sup>94</sup>

### 3. Madison County, Illinois

While Mississippi received the lion’s share of attention in the immediate post-*Amchem* period, the emerging situation in Madison County, Illinois posed an equally grave threat to the defense interest. Madison County is located east of the Mississippi River, a little north of St. Louis. It has long had a reputation as a plaintiff-friendly jurisdiction, and it has been notorious as a venue for nationwide class actions. It did not become a major venue for asbestos cases, however, until the late 1990s. In 1998, 176 asbestos claims were filed in Madison County. Annual filings took off thereafter, reaching 411 in 2000 and 953 in 2003.<sup>95</sup> Compared to Jefferson County, Mississippi, these numbers seem trivial. But Madison County was different: while Mississippi was the forum of choice for unimpaired non-malignant cases, Madison County specialized in mesothelioma and lung cancer cases. Of the 953 asbestos cases filed in Madison County in 2003, 400 alleged mesothelioma.<sup>96</sup> By way of comparison, in the previous year (2002), the total number of mesothelioma claims filed in the entire country was 1,856.<sup>97</sup> A very appreciable portion of the nation’s mesothelioma docket was in one small county in rural Illinois.

Obviously, most of the asbestos cases filed in Madison County had no connection with the county, or even the State of Illinois.<sup>98</sup> As the attractiveness of Madison County as a venue became known, plaintiffs’ lawyers established an organization for recruiting mesothelioma claims from all over the country and referring them

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94. Parloff, *supra* note 89, at 155.

95. Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL’Y 235, 243 (2004).

96. *Id.* at 244.

97. CARROLL ET AL., *supra* note 1, at 71 tbl.4.1.

98. Schwartz et al., *supra* note 95, at 244.

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to a prominent local firm to be filed in Madison County. Until Madison County came along, asbestos forum shopping largely involved mass claims of non-malignant injuries. Afterwards, it included a sophisticated operation by lawyers who specialized in mesothelioma and other fatal cancers.

Madison County had a number of attractions for plaintiffs' lawyers. At the outset, the leading plaintiffs' attorney in Madison County, Randall Bono of the Simmons Cooper law firm, had very close relations with the judges on the county court, having served as a judge on that court himself some years earlier.<sup>99</sup> Moreover, as is generally the case in so-called "magic" jurisdictions, the local judiciary was elected, and the plaintiffs' trial bar was a major source of support for successful judges.<sup>100</sup>

Second, the Madison County court actively thought of itself as a forum, not just for asbestos cases, but for other kinds of consumer and personal injury litigation as well. There was an element of local boosterism in this—a sense that attracting litigation to Madison County was a contribution to the local economy.<sup>101</sup> Of course, a court that competes for litigation of national significance naturally will make itself attractive to plaintiffs' lawyers, because those lawyers choose the forum. It also will be resistant to dismissing cases for *forum non conveniens*.<sup>102</sup> For some Madison County judges, their court was convenient, notwithstanding the absence of any real connection to the parties and the dispute, precisely because it had developed litigation techniques that would speed the litigation along.<sup>103</sup>

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99. See Paul Hampel, *Bono's Firm Opened Floodgate to Asbestos Lawsuits Here*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A9 (describing Bono's election to the court).

100. See Kevin McDermott, *Plaintiff Bar Gives Top Dollar to Judges' Campaigns*, ST. LOUIS POST-DISPATCH, Sept. 21, 2004, at A1.

101. Madison County received significant sums from court filing fees from such suits—fees that went directly into the county's general fund. See Paul Hampel, *Madison County: Where Asbestos Rules*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A1. Indeed, after judicial reforms began to stem the flow of asbestos cases into Madison County, the county faced such a significant decline in revenue that it was forced to consider a hiring freeze. Terry Hillig, *Madison County Hiring Freeze Is Sought*, ST. LOUIS POST-DISPATCH, Oct. 28, 2006, at A8.

102. See Schwartz et al., *supra* note 95, at 244–47. A former Madison County judge once declared that "the *forum non conveniens* analysis systematically recited by litigants and courts is a charade." Gordon E. Maag, *Forum Non Conveniens in Illinois: A Historical Review, Critical Analysis, and Proposal for Change*, 25 S. ILL. U. L.J. 461, 510-11 (2001).

103. *E.g.*, *Hefner v. Owens-Corning Fiberglas Corp.*, 659 N.E.2d 448, 448, 454-55 (Ill. App. Ct. 1995) (discussing the factors used by the trial court judge, Judge

Third, the judge to which all asbestos cases were assigned, Nicholas Byron, implemented a system that made a fair trial almost impossible.<sup>104</sup> The court routinely denied pre-trial dispositive motions, often without troubling to receive a written opposition from the plaintiffs.<sup>105</sup> It refused to require plaintiffs either to plead or to provide in discovery information necessary for the defense of the case.<sup>106</sup> While failing to enforce plaintiffs' discovery obligations in any meaningful way, it very readily limited the defense of the case for technical discovery violations.<sup>107</sup> The sheer number of major cases set for trial—in 2003, more mesothelioma cases were set for trial in Madison County than in New York City<sup>108</sup>—and the speed with which cases got to trial overwhelmed the ability of defendants to prepare each case.<sup>109</sup> Also, the court frequently set several cases for trial on the same day,<sup>110</sup> allowing the plaintiffs' attorney to select the one that would proceed. The defendants could not prepare for every case and were not willing to bet on picking out the one that would go to trial. All of this led to one conclusion: cases in Madison County simply had to be settled, no matter what the cost.<sup>111</sup>

From 2000 to 2003, three cases were tried to verdict in Madison County, and the results confirmed the universal impression among defendants that it was folly to try a case there. All of these trials involved mesothelioma plaintiffs and resulted in extraordinary awards. In *Hutcheson v. Shell Wood River Refinery Co.*, the jury awarded \$34.1 million (\$25 million in punitive damages) after the court struck Shell's defenses as a sanction for alleged discovery violations.<sup>112</sup> The next year, in *Crawford v. ACandS, Inc.*, the plaintiffs received \$16 million (\$7 million in punitive damages).<sup>113</sup> In 2003, the jury in *Whittington v. United States Steel Corp.* assessed \$250 million (including \$200 million in punitive damages) against U.S.

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Byron, in declining to grant a *forum non conveniens* motion, in part because "cases in Madison County are tried faster than in most counties").

104. Case management techniques implemented in Madison County are described in Schwartz et al., *supra* note 95, at 248-52.

105. *Id.* at 248-49.

106. *Id.* at 249.

107. *Id.*

108. *Id.* at 244.

109. *Id.* at 250.

110. *Id.*

111. *Id.* at 252.

112. *Illinois Jury Awards Former Roofer \$34M, Believed To Be Largest Single Plaintiff Verdict*, MEALEY'S LITIG. REP.: ASBESTOS, June 2, 2000, at 3.

113. *Illinois Husband, Wife Awarded \$16 Million By Jury in Living Mesothelioma Case*, MEALEY'S LITIG. REP.: ASBESTOS, Dec. 7, 2001, at 4.

Steel.<sup>114</sup> The *Hutcheson* and *Whittington* verdicts were thought to be the largest asbestos verdicts in history at the time they were rendered, and the *Whittington* verdict may hold that honor still.<sup>115</sup>

The Madison County system was an assembly line. Plaintiffs' lawyers would recruit large numbers of mesothelioma claims from all over the country, file them in Madison County and run them through the Madison County settlement process, knowing the defendants could not afford to try the case. In this situation, the task of making sure that the named defendants were actually liable for the plaintiff's injuries (a task that defendants, at least, thought was an essential condition for fairness) was not even a consideration. The consequence—large settlements at a rapid rate—ratcheted up the pressures on defendants and insurers.

#### 4. Bankruptcies

The first signs of the new, intense pressure on defendants came in 1998, when Owens Corning, generally perceived as the current leading defendant in the tort system, tried to resolve its asbestos liabilities in a series of parallel settlements with major plaintiffs' law firms. This effort was called the "National Settlement Program" ("NSP").<sup>116</sup> By July 1999, the company had settled more than 215,000 claims with some ninety law firms, and the company boasted that the NSP was a "voluntary" way out of the gathering asbestos litigation crisis.<sup>117</sup> The NSP was fatally flawed, however, because it had no way to bind future claimants. It was, in essence, *Amchem* without the class action. With the escalation of claims and claim values after 1998, settlement demands on Owens Corning shot up, so every plaintiffs' law firm had an incentive to try to get paid before the money was exhausted. Eventually the NSP proved

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114. *U.S. Steel Settles Premises Case Following \$250 Million Illinois Verdict*, MEALEY'S LITIG. REP.: ASBESTOS, Apr. 2, 2003, at 3. The *Whittington* verdict was handed down on a Friday afternoon in March 2003, after the stock market had closed. It was settled, for an amount reported to be less than \$50 million, before the market opened again on Monday morning. In the environment that existed at that time, there is little doubt that the punishment that the market would have visited on U.S. Steel when it opened would have far outstripped the amount of the award.

115. The three Madison County verdicts are discussed in Schwartz et al., *supra* note 95, at 251-52. See also Patrick M. Hanlon & Julie S. Lehrman, *Premises Liability* (ALI-ABA Course of Study on Asbestos Litigation in the 21st Century, 2003) (on file with the NYU Annual Survey of American Law).

116. *Fairness in Asbestos Compensation Act of 1999: Hearing on S. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 134 (1999) (statement of Maura J. Abeln, Senior Vice President, General Counsel and Secretary, Owens Corning).

117. *Id.*

unsustainable, and the company resorted to bankruptcy in September 2000.<sup>118</sup>

The Owens Corning bankruptcy was a watershed. Before, asbestos bankruptcies were regarded as occasional bumps in the road that did not fundamentally affect the way outsiders, especially financial markets, looked at companies with an asbestos legacy. Owens Corning was different. It was the most prominent remaining defendant, and outsiders had perhaps accepted too readily the promise of the NSP in helping the company manage its asbestos liabilities. The sudden collapse of Owens Corning caused a sharp reaction on Wall Street that made capital impossible to come by for what were now seen as “asbestos-tainted” companies. This reaction, in turn, pushed other companies over the edge. Armstrong World Industries filed for bankruptcy protection in December 2000, followed in 2001 by G-I Holdings (GAF), USG, W.R. Grace, Federal Mogul (Turner & Newall) and a number of less prominent companies.<sup>119</sup> The pace of bankruptcy filings accelerated in 2002, with eleven new filings including AC&S and A.P. Green.<sup>120</sup>

The surge of bankruptcies in 2000-2002 had the same effects on the litigation system that the Manville bankruptcy had in 1982. As each company went under, its assets were frozen pending reorganization. This triggered higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new recruits to fill the gap in the ranks of defendants through joint and several liability.

### B. Reaction

By the end of 2002, the roster of defendants had grown to about 8400,<sup>121</sup> and the asbestos defense community was in a panic.

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118. Parloff, *supra* note 89, at 168. The year 2000, as it turned out, was the beginning of an unprecedented surge in asbestos bankruptcies. Even before Owens Corning sought Chapter 11 protection in September, Babcock & Wilcox and Pittsburgh Corning, both longstanding participants in the litigation, had filed their own Chapter 11 petitions. CARROLL ET AL., *supra* note 1, at 152-53 tbl.D.1. Babcock & Wilcox’s initial filings traced the way in which the deterioration of the tort system after *Amchem* had forced the company into bankruptcy. The company claimed it was “the target of a wave of litigation that threaten[ed] [its] very existence” due in part to the post-*Amchem* tort system that effectively blocked resolution of asbestos claims. The Babcock & Wilcox Co.’s Informational Brief at 1, *In re* Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. Feb. 22, 2000).

119. CARROLL ET AL., *supra* note 1, at 152-53 tbl.D.1; Hensler, *supra* note 61, at 1899 n.5.

120. CARROLL ET AL., *supra* note 1, at 110 tbl.6.1, 152 tbl.D.1.

121. *Id.* at 79.

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The next three years saw an astonishing turnaround, which was made possible by a seismic shift in public attitudes. In the late 1990s, the public predominantly viewed asbestos litigation as being about the scandalous misconduct of asbestos manufacturers. By 2003, the word “scandal” in the context of asbestos litigation came to mean the perversity of the civil justice system, driven by entrepreneurial trial lawyers and abetted by elected state judges close to the trial bar. This shift in public attitudes was the foundation on which all efforts at reform were built.

To a considerable extent, the change was sparked by a renewed campaign for federal reform legislation that began immediately after the election of 2000. The proponents of reform were defendants, insurers, and some plaintiffs’ trial lawyers who specialized in cancer cases. The main reform would be the adoption of medical criteria to defer the claims of unimpaired claimants until they actually became sick. Although a number of defendants and insurers favored an alternative approach (the adoption of an administrative compensation scheme that would supplant the tort system), that faction worked closely, through 2002, with the proponents of medical criteria in an effort to raise the consciousness of the public and the Congress.

#### 1. A Paradigm Shift

The transformation of asbestos litigation after 2002 was made possible by a sea change in public perception. The Supreme Court said in 1999 that its decision in *Amchem* had shown that asbestos litigation “defie[d] customary judicial administration.”<sup>122</sup> The courts, state and federal, could not reform themselves. A solution to the asbestos litigation problem had to involve an outside force, which would inevitably be political. Thus, any reform—legislative or “non-customary” judicial administration—would have to be supported by a political consensus for change. The views of judges, lawyers, and law professors would continue to be important, of course, but genuine change depended on the emergence of a new perspective in the media and, ultimately, among voters. Throughout the 1990s, the public thought of asbestos litigation, if at all, as a morality play. Asbestos litigation was what the defendants deserved, and the plaintiffs’ lawyers were simply champions of victims against those who had wronged them.<sup>123</sup> By the end of 2002, however,

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122. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

123. The most compelling expression of this pervasive attitude was Paul Brodeur’s 1985 series of articles in *The New Yorker* magazine and the book, *Outrageous Misconduct*, into which they were made. See generally BRODEUR, *supra* note 29. Fit-

there was a general acceptance of the idea that asbestos litigation was itself a major problem. The catalyst of this change was the federal legislative effort, especially in the critical period from 2000 through 2002.

As noted above, defendants almost immediately responded to the Supreme Court's *Amchem* decision by seeking federal reform legislation. These initial efforts proved futile. Bills were introduced in the House and Senate in 1998<sup>124</sup> and again in 1999;<sup>125</sup> both houses had hearings in 1999.<sup>126</sup> In March 2000, the House Judiciary Committee reported H.R. 1283, which would have established medical criteria for asbestos-related diseases and provided a panoply of alternative dispute resolution techniques (optional for the claimant but required for defendants) to promote efficient settlement of qualifying cases.<sup>127</sup> The plaintiffs' trial bar, however, portrayed the bill as a bailout of asbestos companies,<sup>128</sup> and a public relations campaign exploited a multi-part "exposé" in the *Seattle Post-Intelligencer* of the asbestos "poisoning" of Libby, Montana.<sup>129</sup> As a result, the bill was considered radioactive<sup>130</sup> and congressional leaders decided to put it away before the election.<sup>131</sup>

In November 2000, a number of defendant companies decided to try again.<sup>132</sup> This time, the defendants sought not to persuade

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tingly, Brodeur's book received the 1985 ATLA Special-Literary Public Service Award.

124. H.R. 3905, 105th Cong. (1998); S. 2546, 105th Cong. (1998).

125. H.R. 1283, 106th Cong. (1999); S. 758, 106th Cong. (1999).

126. 1999 FAIR House Hearings, *supra* note 54; *Finding Solutions to the Asbestos Litigation Problem: The Fairness in Asbestos Compensation Act of 1999: Hearing on S. 758 Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. (1999).

127. H.R. REP. NO. 106-782, at 3-5, 7-9 (2000).

128. In this period the trial lawyers seriously argued that the asbestos litigation system was not broken at all, a position that they backed away from later. 1999 FAIR House Hearings, *supra* note 54, at 46-47 (statement of Richard H. Middleton, President-Elect, Association of Trial Lawyers of America).

129. Andrew Schneider, *Uncivil Action: A Town Left to Die*, SEATTLE-POST INTELLIGENCER, Nov. 18, 1999, at A1.

130. See John D. Adlock [sic: the author's name is Aldock], Patrick M. Hanlon & Christopher L. Sagers, *Asbestos: Litigation or Bankruptcy?* [sic: the correct title is *Legislation or Bankruptcy?*], in THE ASBESTOS LEGACY 321, 349 (George A. Peters & Barbara J. Peters eds., 2001).

131. 146 CONG. REC. S2097-98 (daily ed. Apr. 4, 2000) (colloquy between Sen. Ashcroft and Sen. Lott).

132. The companies initially involved in the renewed legislative effort included USG, Federal Mogul, Armstrong, Combustion Engineering (ABB), Kaiser Aluminum, and W.R. Grace. All of these companies would be in Chapter 11 within the next several years. See CARROLL ET AL., *supra* note 1, at 152-53 tbl.D.1.

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Congress to impose a legislative solution, but to negotiate a consensual solution with plaintiffs' trial lawyers. Several meetings took place in early 2001 between companies in the so-called "Asbestos Working Group" and members of the plaintiffs' trial bar. From the defendants' perspective, the preferred option was a global settlement that would be implemented by legislation. Only the relative certainty of a global settlement would provide the financial stability necessary to reassure the panicked financial markets. If (as it turned out) a global settlement proved unattainable, the parties were willing to discuss reforming the tort system in targeted ways rather than replacing it with an administrative system. The key elements of the tort reform approach were: adoption of medical criteria that would screen out the claims of unimpaired claimants; elimination of involuntary consolidations for trial; and restrictions on forum shopping. This approach was preferred by plaintiffs' trial lawyers who specialized in mesothelioma claims, but was considered second-best by defendants because of the residual uncertainty and its impact on financial markets.

By April 2001, it was clear that a global settlement would not work. The only option left on the table was a "medical criteria" bill. The medical criteria approach was supported by some cancer specialists in the plaintiffs' trial bar, led by Oakland attorney Steven Kazan, and by the insurance industry, led by the American Insurance Association (AIA). The defendants that had formed the Asbestos Working Group sought the help of the National Association of Manufacturers (NAM) in broadening the base of support for a medical criteria bill. By the end of the summer, there was general agreement on the substance of the legislative approach between the NAM-Asbestos Alliance, the AIA, and the Kazan group.

In the twenty-four months from April 2001 through March 2003, this coalition led the effort to redefine the asbestos litigation problem. A series of transforming events during that time helped to turn the tide of public opinion against the current asbestos litigation system and toward reform.

The first event occurred in June 2001, when the Manville trust reduced the amount that it paid to claimants from 10% of scheduled value of the claim to only 5%.<sup>133</sup> Subsequently, the Manville Trust negotiated an amendment to its trust distribution process, effective in 2002, to tighten eligibility requirements and devote more

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133. Memorandum on Manville Trust TDP Changes and the Status of the Pro Rata Share Review (July 15, 2003), *available at* <http://www.claimsres.com/documents/MEMO.pdf> (last visited Oct. 21, 2006).

resources to the sick. The trust did not, however, increase the five cents on the dollar paid to claimants. The absurdly low payment percentage of the Manville Trust came to symbolize the failure of the tort system to fairly and adequately compensate true victims of asbestos exposure.

The second key event occurred in October 2001, when a Holmes County, Mississippi jury handed down a \$150 million verdict (\$25 million apiece) in favor of six unimpaired men who had never lost a day's work in their lives as a result of any asbestos-related disease.<sup>134</sup> It would be hard to imagine a more dramatic illustration of the argument that the claims of people who were not sick were draining limited resources away from people with fatal asbestos-related cancers. This story caught the attention of *Fortune* reporter Roger Parloff, who made it the centerpiece of an exposé in March 2002.<sup>135</sup>

The third key event was a hearing before the Senate Judiciary Committee in September 2002.<sup>136</sup> The very occurrence of the hearing was remarkable. In 2002, the Senate was controlled by the Democrats, traditionally allies of the plaintiffs' bar, and many were surprised to see the Democratic chairman of the committee, Senator Patrick J. Leahy of Vermont, take the lead in investigating the asbestos litigation scandal. The result of the hearing was even more remarkable. Leading plaintiffs' lawyer Fred Baron tried valiantly to maintain that there was nothing wrong with the asbestos litigation system,<sup>137</sup> but he was completely alone in that endeavor. The keynote of the hearing was struck by Steven Kazan:

The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them. This bankrupts defendants—who are then not there when it comes time to seek compensation for cancer victims and their families—and it

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134. See Parloff, *supra* note 89, at 155.

135. See *id.*

136. *Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002).

137. *Id.* at 97-106 (statement of Fred Baron, on behalf of the Association of Trial Lawyers of America).

drains the assets of the trusts established to pay the claims of these companies after they reorganize in bankruptcy.<sup>138</sup>

The hearing revealed a broad consensus that the asbestos litigation system was broken and that something needed to be done to fix it. To be sure, there was no consensus about what was to be done, but the idea that had taken root was that the system did not work well for anyone except a handful of lawyers.

The fourth transforming event was the American Bar Association's adoption in February 2003 of a resolution calling for federal medical criteria legislation.<sup>139</sup> In November 2002, the ABA Board of Governors appointed a special Commission on Asbestos Litigation to bring a recommendation to the House of Delegates regarding the "widely reported and longstanding problems in asbestos litigation."<sup>140</sup> The Commission was specially charged to address two concerns: protecting the right of the sick to obtain fair compensation in the tort system and preventing scarce resources from being misdirected by a flood of premature claims by people who were not impaired.<sup>141</sup> Given its charge, the Commission's recommendation that Congress adopt medical criteria legislation was perhaps not surprising. Yet in getting to that conclusion, the Commission very carefully laid out the history of asbestos litigation, drew up its indictment, and recommended (after obtaining a wide range of medical opinions) criteria for measuring asbestos-related impairment.<sup>142</sup>

Throughout this period, the press began to reflect the general shift in public perception regarding asbestos litigation. The editorial pages of major newspapers began to portray asbestos litigation as a problem in itself. Thus, the *Wall Street Journal* said in April 2001, "[A]sbestos litigation has transcended the purpose of adjudicating claims and providing fair compensation. . . . An obvious first step would be [for congressional action] . . . before any more companies are crushed by the litigation avalanche."<sup>143</sup> In July 2001, the *Chicago Tribune* said: "The only way out of this mess is for Congress

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138. *Id.* at 188-89 (statement of Steven Kazan, Kazan, McLain, Edises, Abrams, Fernandez, Lyons & Farris).

139. AM. BAR ASS'N, COMM'N ON ASBESTOS LITIG., REPORT TO THE HOUSE OF DELEGATES (2003), [http://www.abanet.org/leadership/full\\_report.pdf](http://www.abanet.org/leadership/full_report.pdf) [hereinafter 2003 ABA REPORT].

140. *Asbestos Litigation Crisis: Hearings Before the S. Comm. on the Judiciary*, 108th Cong. 65 (2003) (written statement of Dennis W. Archer, President-Elect, American Bar Association) [hereinafter *Asbestos Crisis Hearings*].

141. *Id.* at 66.

142. 2003 ABA REPORT, *supra* note 139.

143. Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14.

to act. A national solution is urgently needed.”<sup>144</sup> In March 2002, the *Detroit News* joined the fray: “Congress has tried on 10 occasions since 1981 to limit asbestos liability . . . . It is time to try again . . . [to] restore some sanity to asbestos litigation.”<sup>145</sup> In subsequent months, the *Pittsburgh Post-Gazette*, the *Washington Post*, and the *Los Angeles Times* all weighed in with the same message, best expressed, perhaps, by the *Post* in November 2002:

[N]umerous companies have gone bankrupt, and money that should be used to compensate sick people is going to lawyers for people who are still asymptomatic and may never grow ill. Congress should put a stop to this and make sure that those whom asbestos has harmed are taken care of.<sup>146</sup>

These articles and others reflected that by the end of 2002 and early 2003, the public had come to view asbestos litigation as a serious problem in itself.

## 2. A Fork in the Road

By March 2003, the diagnosis of the asbestos litigation problem may have been firmly established but the solution was unclear. Proponents of reform split into two camps. The “tort reform” approach centered on the adoption of medical criteria that would prevent the misdirection of limited resources to the unimpaired at the expense of the fatally stricken. The defense community sought limits on consolidations and forum shopping—and some sought much more extensive reforms. In general, however, the tort reform approach was “conservative” in the sense that it accepted the continued operation of the tort system for asbestos cases and attempted only relatively limited reforms designed to address specific problems. A part of the rationale for this approach is that anything more extreme would involve complexities that would make legislation unattainable in the long run.<sup>147</sup>

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144. Editorial, *‘Elephantine Mass’ Still Growing*, CHI. TRIB., July 22, 2001, at 16.

145. Editorial, *Don’t Let Asbestos Cases Bankrupt Automakers*, DETROIT NEWS, Mar. 31, 2002, at 16A.

146. Editorial, *Making Justice Work*, WASH. POST, Nov. 25, 2002, at A14; *see also* Editorial, *First, Help the Sick*, L.A. TIMES, Feb. 27, 2003, at B16. Many other newspapers made similar points. *See, e.g.*, Editorial, *The Asbestos Crisis; Some Victims May Miss Out in the Litigation Stampede*, PITTSBURGH POST-GAZETTE, Nov. 10, 2002, at F6; Patti Waldmeir, *A Legal System Insulated from Logic: A New Surge of Asbestos Lawsuits Is Bankrupting US Businesses and Exposing the Failings of the Law*, FIN. TIMES (London), June 7, 2001, at 12; *Growing Chorus Demands Change in Law*, FIN. TIMES (London), Sept. 9, 2002, at 27; Parloff, *supra* note 89. The *Wall Street Journal* has published pieces on too many occasions to enumerate.

147. *See* Adlock [sic: Aldock], Hanlon & Sagers, *supra* note 130, at 345-51.

A number of defendants and insurers, however, had more radical ambitions: to replace the tort system altogether with an administrative claims resolution scheme. The medical criteria approach solved some problems in the tort system—most notably, the diversion of resources to the “worried well” at the expense of the sick—but it did little to solve many others. It would not eliminate manufactured product identification testimony, outlandish verdicts, or unfair processes in places like Madison County. It would not reassure nervous financial markets and protect defendants from the often debilitating indirect effects of asbestos liabilities. It would not control the costs of the tort system. Some defendants and insurers also feared that plaintiffs’ lawyers would seek to compensate for the loss of unimpaired plaintiffs by seeking more from cancer and impaired non-malignant claims. The advocates of an administrative claims facility were convinced that the asbestos litigation system was fundamentally broken *as a system* and that incremental reforms would not be enough to set things right.

There was also a political calculation at work. The majority of plaintiffs’ lawyers opposed a medical criteria approach, and many who did support medical criteria disliked restrictions on consolidations and forum shopping that were important for the industry side.<sup>148</sup> The AFL-CIO vigorously opposed medical criteria but was in principle supportive of creating an administrative claims facility.<sup>149</sup> Some defendants and insurers felt that it would be easier to develop necessary support for asbestos legislation if the bill sought to replace the tort system altogether with an administrative system. In effect, this was envisioned as a global settlement that relied on organized labor to represent the interest of asbestos victims.

The choice ultimately fell to Senator Orrin Hatch (R-UT), then-chairman of the Senate Judiciary Committee. He opted for the trust fund approach, based at least in part on a political calcula-

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148. Plaintiffs’ lawyers supporting medical criteria legislation specialized in cancer cases. They were all concerned that the money going to unimpaired cases was pushing companies into bankruptcy, making it impossible for their seriously injured clients to obtain full compensation. Some of this group, however, were participating in the Madison County System (which primarily involved cancer victims), and the lawyers who were exploiting Madison County understandably took a dim view of restrictions on forum shopping. Although somewhat less important, some otherwise supportive plaintiffs’ lawyers opposed restrictions on consolidations. The weakness of plaintiffs’ bar support for reforms beyond medical criteria, which were essential on the defense-insurance side, undermined the political strategy underlying the medical criteria approach.

149. See *Asbestos Crisis Hearings*, *supra* note 140, at 114-21 (testimony of Jonathan P. Hiatt, Associate General Counsel, AFL-CIO).

tion that only a trust fund could ultimately obtain sufficient bipartisan support to carry the Senate. From that point on, the federal legislative debate focused on Senator Hatch's FAIR Act and its various successors. At the same time, defendants and insurers who favored medical criteria and other tort reforms took their battles to the states, both in the halls of state legislatures and in state courts.<sup>150</sup> There was no single high command guiding all of these efforts, but all drew from a single intellectual source, each was a model for the others, and there was a considerable overlap in participation by defendant companies and insurers.

#### IV. CHANGING THE TORT SYSTEM: ASBESTOS REFORM IN THE STATES

Since 2004, state legislatures and courts have made a number of important changes in key states that have changed the landscape in favor of defendants. The campaign for medical criteria has perhaps received the most attention. But there have been equally important reforms affecting forum shopping, the use of consolidations, and other substantive legal rules such as joint and several liability.

##### A. *Medical Criteria: The Problem of the Unimpaired Claimant . . . and More*

In the early 1990s, a number of courts adopted so-called "pleural registries" or "deferral dockets," which deferred the cases of unimpaired plaintiffs until impairment occurred.<sup>151</sup> This tool for managing asbestos cases subsequently fell out of favor. In part, the declining fortunes of deferral dockets were due to the consolidation of federal cases for pre-trial in the Eastern District of Pennsylvania.<sup>152</sup> Several of the original deferral dockets were adopted by federal courts, and those procedures were effectively superseded by

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150. To be sure, medical criteria bills were also introduced in the House of Representatives in the 108th Congress and the 109th Congress. H.R. 1737, 108th Cong. (2003); H.R. 1586, 108th Cong. (2003); H.R. 1957, 109th Cong. (2005). Those bills were larded with other tort reform provisions that made them highly unlikely vehicles for real legislative reform. Beyond that, however, House leadership was reluctant to devote resources to asbestos bills that did not have any hope in the Senate. Since 2003 the House has consistently declined to move a separate House bill and has waited for the Senate to act. For all practical purposes the FAIR Act was the only game in town.

151. See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 & n.3 (1992).

152. See Schwartz et al., *supra* note 18, at 295 & n.157.



the MDL consolidation. Beyond that, however, during the 1990s, asbestos litigation was migrating into state courts that were not hostile to unimpaired cases and who showed little interest in managing this group of cases. This attitude was characteristic of the “magic jurisdictions” of Mississippi and Texas.

In 2002, however, the deferral docket idea again picked up. In December, Justice Helen Freedman ordered the creation of a deferral docket for unimpaired cases in New York City, and Syracuse followed suit in January 2003.<sup>153</sup> The following month, the ABA House of Delegates adopted its resolution recommending enactment of a federal medical criteria bill.<sup>154</sup> After the federal legislative focus changed, the ABA resolution became the model for the adoption of a number of deferral dockets over the next two years.<sup>155</sup> Some of those dockets are largely symbolic—for example, the deferral dockets in Madison County, Illinois, and nearby St. Clair County had little practical impact, since those courts had very few unimpaired cases. Others, however, very much mattered.<sup>156</sup>

As important as judicially established deferral dockets have been, the main focus of activity has shifted to state legislatures in the last two years.<sup>157</sup> In 2003, a Texas medical criteria bill fell just

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153. *In re* N.Y. City Asbestos Litig., No. 40000/88, at 2 (N.Y. Sup. Ct. Dec. 19, 2002) (Order amending prior case management orders); *In re* Fifth Judicial Dist. Asbestos Litig. (N.Y. Sup. Ct. Jan. 31, 2003) (Amendment to Amended Case Management Order No. 1).

154. *See supra* note 139 and accompanying text.

155. *In re* All Asbestos Litig. Filed in St. Clair County, No. 04-MR-293, ¶ 16 (Ill. Cir. Ct. Feb. 25, 2005) (Order Establishing Asbestos Deferred Registry); *In re* All Asbestos Litig. Filed in Madison County, pt. A ¶ 13 (Ill. Cir. Ct. Jan. 23, 2004) (Order Establishing Asbestos Deferred Registry); *In re* Minnesota Pers. Injury Asbestos Cases, No. C8-94-2875 (Dist. Ct. June 28, 2005); *In re* All Asbestos Cases, No. CL99-399 (Va. Cir. Ct. Aug. 4, 2004) (Order Establishing an Inactive Docket for Cases Filed By the Law Offices of Peter T. Nicholl Involving Asbestos-Related Claims); *see also* Letter from Sharon S. Armstrong, Judge, King County (Wash.) Superior Court, to Counsel of Record, Moving and Responding Parties (Dec. 3, 2002) (on file with the NYU Annual Survey of American Law). Defendants' efforts to persuade the judge presiding over Texas cases under that state's MDL procedure to adopt a deferral docket have been unsuccessful, though to a considerable extent that effort has been overtaken by the actions of the state legislature.

156. Some courts have provided for *de facto* deferral of non-malignant asbestos plaintiffs by ruling that their claims shall be addressed only after completing trials for all malignant asbestos plaintiffs. *See In re* Asbestos Pers. Injury Litig., No. 03-C-9600, at 5-6, 22-23 (W. Va. Cir. Ct. Mar. 25, 2003) (case management order).

157. The various medical criteria laws are thoughtfully analyzed in David M. Setter & Jeanette S. Eirich, *Medical Criteria Legislation: A Response to Screening Scandals*, MEALEY'S LITIG. REP.: ASBESTOS, May 3, 2006, at 43. Mr. Setter has for many years been a leader in the fight against the “diagnosing for dollars” inherent in

short of a two-thirds majority it needed to get to the floor of the Texas Legislature.<sup>158</sup> The struggle in Texas engaged business and insurance interests, not just in Texas but nationwide. In 2004, the American Legislative Exchange Counsel, a conservative organization of state legislators and like-minded private sector members, developed a model state medical criteria bill based generally on the ABA resolution, which has been used as a template in subsequent future reform battles.<sup>159</sup> The same year, Ohio, one of the nation's biggest centers of asbestos litigation, became the first state to enact medical criteria, as a part of a broader asbestos (and silica) reform package.<sup>160</sup>

2005 was the *annus mirabilis* for medical criteria legislation at the state level. In that year, three key states—Texas, Georgia, and Florida—enacted medical criteria bills.<sup>161</sup> The basic structure of each of these bills is the same. The core is medical criteria for unimpaired non-malignant cases. The statutes require plaintiffs to provide evidence at the outset of the case that they have a physical

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litigation screening programs, and his personal contribution to the reforms he describes is incalculable.

158. *Texas Legislature Passes Tort Reform Bill Limiting Successor Liability, Damages*, MEALEY'S LITIG. REP.: ASBESTOS, June 18, 2003, at 12 ("The Texas Legislature was unable to pass Senate Bill 496, which sought to create medical criteria for claims . . .").

159. See Mark A. Behrens & Phil S. Goldberg, *The Asbestos Litigation Crisis in a Nutshell*, STATE FACTOR, July 2004, at 1, 9-16.

160. Richard D. Schuster & Nina I. Webb-Lawton, *Ohio's Groundbreaking Asbestos Legislation*, MEALEY'S LITIG. REP.: ASBESTOS, Aug. 18, 2004, at 40 (discussing the enactment of HB 292). The constitutionality of the statute is in question. The statute has been found unconstitutional insofar as it applies to claims pending at the time of enactment. See *In re* Special Docket No. 73958, slip. op. at 2 (Ohio Ct. Com. Pl. Jan. 6, 2006); *Thornton v. A-Best Prods.*, No. CV-99-395724, slip op. at 29 (Ohio Ct. Com. Pl. Jan. 10, 2005).

Following enactment of the Ohio medical criteria bill, Judge Richard J. McMonagle issued an order dictating that claimants who could not satisfy the medical criteria would have their cases dismissed. *Cuyahoga County Asbestos Cases*, Special Docket 73958 (Ohio Ct. Com. Pl. Sept. 16, 2004); *Ohio State Court Creates Inactive Docket for Massive Amount of Asbestos Suits*, MEALEY'S LITIG. REP.: ASBESTOS, Oct. 6, 2004, at 19, 20.

161. See Act of May 19, 2005, ch. 97, 2005 Tex. Gen. Laws 169 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001-.012, 16.0031 (Vernon Supp. 2006)); Asbestos and Silica Compensation Fairness Act, ch. 2005-274, 2005 Fla. Laws 2563 (codified as amended at FLA. STAT. ANN. §§ 774.201-209 (West Supp. 2006)); Act of Apr. 12, 2005, sec. 1, 2005 Ga. Laws 145, 145-56 (codified at GA. CODE ANN. §§ 51-14-1 to -10. (Supp. 2006)). In 2006, Kansas and South Carolina joined the list. See *infra* note 169.

impairment due to asbestos or silica exposure.<sup>162</sup> Defendants may challenge the adequacy of the plaintiff's showing early in the suit, and if the challenge is successful, the claims are dismissed without prejudice.<sup>163</sup> As is true generally in medical criteria bills, the statute of limitations is tolled to ensure that the plaintiff will retain his right of action if he later develops a physical impairment.<sup>164</sup>

The new wave of medical criteria bills differs from the ABA template in addressing cancer as well as non-malignant claims. This is a significant conceptual shift. Cancer criteria do not raise a timing issue as to when, in the course of a disease process, it is appropriate to allow a claim. Nor do they raise an issue as to whether a claimed injury is serious enough to be the basis for a lawsuit; there can be no doubt that cancer meets any conceivable significance threshold. Cancer criteria try to address the question of what evidentiary showing should be required to prove causation, especially

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162. It is important to test whether the plaintiff meets the medical requirements of these bills early in the litigation. Otherwise, all cases would remain active, absorbing litigation resources and maintaining settlement values. Thus, in cases filed after the laws become effective, Texas plaintiffs must serve defendants with detailed medical reports within 30 days of defendant's first appearance. TEX. CIV. PRAC. & REM. CODE ANN. § 90.006(a). Yet, Georgia and Florida require prima facie evidence of impairment with the plaintiff's complaint. GA. CODE ANN. § 51-14-5; FLA. STAT. ANN. § 774.205(2). All of the states require plaintiffs with pending cases on the effective date of the bill to make the requisite medical showing before trial. TEX. CIV. PRAC. & REM. CODE ANN. § 90.006(b)-(c) (requiring Texas plaintiffs to file medical reports 60 days before trial or by Feb. 28, 2006, unless the case goes to trial by Nov. 30, 2005); GA. CODE ANN. § 51-14-5(a)(2) (requiring Georgia plaintiffs to provide medical evidence 60 days before trial); FLA. STAT. ANN. § 774.207(2) (requiring Florida plaintiffs to provide medical evidence 30 days before trial).

163. Defendants may challenge the sufficiency of the plaintiff's showing through a motion to dismiss. TEX. CIV. PRAC. & REM. CODE ANN. § 90.007; GA. CODE ANN. § 51-14-5(a)(2), (b)(5); FLA. STAT. ANN. § 774.205(2). If the court finds that the plaintiff has failed to present adequate evidence of impairment (or in Texas that the motion is "meritorious"), the claims will be dismissed without prejudice. TEX. CIV. PRAC. & REM. CODE ANN. § 90.007(c); GA. CODE ANN. § 51-14-5(a)(2)(E), (b)(5); FLA. STAT. ANN. § 774.205(2). In Texas, the judge who handles asbestos cases pursuant to the state-wide MDL procedure has the authority (in newer cases) to rule on challenges to plaintiffs' effort to show impairment. This means that the effectiveness of the legislation does not depend on the cooperation of county judges in magnet jurisdictions like Jefferson County (Beaumont) or Harris County (Houston).

164. In Texas, a cause of action for asbestos- or silica-related injury accrues for limitations purposes two years from the earlier of the date of death or the date a complying medical report is filed. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003, 16.0031. In both Georgia and Florida, claims only accrue for limitations purposes when the plaintiff discovers, or should have discovered, that the exposed person was physically impaired. GA. CODE ANN. § 51-14-4; FLA. STAT. ANN. § 774.206(1).

for cancers like lung cancer, which are caused by factors other than asbestos.

In Texas, the medical criteria for cancer does not seem to be a major change in existing law. The plaintiff's medical report merely needs to contain a diagnosis of mesothelioma or other asbestos-related cancer and an opinion to a reasonable degree of medical probability that exposure to asbestos was a cause of the cancer.<sup>165</sup> Georgia requires medical reports in cancer cases to exclude other more likely causes of the cancer—an invitation to defendants to challenge medical reports, especially in lung cancer cases, on the ground that smoking was “more probably” the cause of the cancer than was asbestos exposure.<sup>166</sup>

Florida imposes more significant cancer requirements. In order to maintain a claim for cancer of the lung, trachea, pharynx, or esophagus, smokers need to provide a doctor's diagnosis and opinion that exposure to asbestos is a substantial contributing factor to the cancer, evidence of adequate latency, evidence of underlying asbestosis or diffuse pleural thickening (not pleural plaques), and evidence of substantial occupational exposure to asbestos.<sup>167</sup> Moreover, the diagnosing doctor must indicate that the impairment was “not more probably the result of causes other than the asbestos exposure.”<sup>168</sup> These provisions could make it exceedingly difficult for smokers to recover for lung cancer.

The cancer criteria in these bills are procedurally important. They prevent plaintiffs' lawyers from recruiting cancer claims with weak or non-existent evidence in the hope of settling them quietly

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165. TEX. CIV. PRAC. & REM. CODE ANN. § 90.003(a)(1).

166. GA. CODE ANN. § 51-14-2(15)(A).

167. FLA. STAT. ANN. § 774.204(3)(a)-(d). A smoker for purposes of the statute is one “who has smoked cigarettes or used other tobacco products on a consistent and frequent basis within the last 15 years.” FLA. STAT. ANN. § 774.203(29). Nonsmokers who file asbestos-related claims for cancers of the lung, larynx, pharynx, or esophagus are not required to make any prima facie medical showing. FLA. STAT. ANN. § 774.204(4).

168. FLA. STAT. ANN. § 774.204(3)(f). There are similarly strict standards (applicable to both smokers and non-smokers) for cancers of the colon, rectum, or stomach. To assert a claim for colon, rectal, or stomach cancer, a smoker must make a prima facie showing that includes a diagnosis of primary cancer and an opinion that exposure to asbestos is a substantially contributing factor to the disease, latency, and *both* evidence of underlying asbestosis or pleural thickening *and* substantial occupational exposure to asbestos. FLA. STAT. ANN. § 774.204(5). A non-smoker must show *either* underlying asbestosis or pleural thickening *or* substantial occupational exposure to asbestos. *Id.*

and cheaply. The cases will not sit on the docket accumulating settlement value.<sup>169</sup>

### B. *Forum Shopping*

An important characteristic of asbestos litigation has been the ability of plaintiffs' counsel to recruit claims throughout the country and file them in county courts that are extremely favorable to plaintiffs (or sometimes plaintiffs' counsel personally). Accordingly, a major objective of the defense community has been to limit the plaintiffs' choice of forum.<sup>170</sup>

In the last two to three years, the defense interest has had considerable success in establishing the principle that plaintiffs in asbestos cases should sue where they live or where they were exposed.

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169. In mid-2006, two additional states, Kansas and South Carolina, also adopted asbestos medical criteria legislation. For Kansas, see Act of May 19, 2006, ch. 196, 2006 Kan. Sess. Laws, KS LEGIS 196 (Westlaw) (to be codified at KAN. STAT. ANN. §§ 60-4901 to -4911). The Kansas bill requires a fairly rudimentary prima facie showing in cases alleging cancers other than mesothelioma, generally requiring a diagnosis of a primary asbestos-related cancer to which exposure is a substantial contributing factor, ten year latency, and a diagnosis of proximate causation. See *id.* sec. 2(c). For South Carolina, see Asbestos and Silica Claims Procedure Act of 2006, ch. 135, 2006 S.C. Acts, S. 1038, SC LEGIS 303 (2006) (Westlaw) (to be codified at S.C. CODE ANN. §§ 44-135-10 to -110). Neither Kansas nor South Carolina is a major venue for asbestos cases.

170. There is obviously nothing wrong with forum shopping as such. Part of a lawyer's job, in any kind of litigation, is to select the best possible forum for the client's case. The U.S. legal system ordinarily gives the plaintiff wide latitude in choosing a forum, subject to (a) jurisdictional rules, which are quite relaxed when the defendant does business in many states and (b) the general doctrine of *forum non conveniens*, which sets a limit on the plaintiff's ability to force the litigation into an extremely inconvenient forum. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In asbestos litigation, however, forum shopping presents special problems because asbestos claims can be filed nearly anywhere and because of the extreme variability of U.S. courts, especially (but not only) at the state level. In a country such as England, where the court system is nearly uniform and far more shielded from political influence, forum shopping wouldn't matter much. There are no "magic jurisdictions" there. In the United States, however, it is possible to find counties that are far outside the mainstream. The problem for defendants in Illinois, for example, is centered in Madison (and to some extent neighboring St. Clair) county. The problem in Texas is in certain Gulf Coast counties such as Jefferson (Beaumont). The problem in Mississippi is in Jefferson County and a few others. These counties are considered "hell-holes" by pro-defendant groups for a number of reasons: close personal and sometimes political relations between plaintiffs' lawyers and judges, the demographics of the jury pool, and sometimes even the prominence of asbestos cases in the local docket. In extreme situations, giving the plaintiff a choice of forum is tantamount to a denial of due process. And, of course, it is in those very situations that the doctrine of *forum non conveniens* is most useless as a check on the plaintiff's choice.

Texas was the harbinger of this reform, having enacted a jurisdictional law in 1997 that required trial courts to dismiss the claims of asbestos plaintiffs whose claims arose outside of Texas and who were not residents of Texas when their claims arose (as long as the defendant stipulated that the alternative jurisdiction would allow a new claim to relate back to the initial filing in Texas for limitations purposes).<sup>171</sup> West Virginia, a favorite venue for out-of-state plaintiffs, enacted a venue statute in 2003 barring the claims of out-of-state plaintiffs unless a substantial part of the conduct giving rise to the claim took place in West Virginia or plaintiff proves he cannot get jurisdiction over the defendant outside West Virginia.<sup>172</sup> This legislation was invalidated by the West Virginia Supreme Court of Appeals in 2006 as a violation of the Privileges and Immunities Clause of the U.S. Constitution.<sup>173</sup>

Venue reform has made its way into several other state statutes in 2005-2006, including Georgia and Florida.<sup>174</sup> Whether these statutes will be affected by the West Virginia decision is uncertain.

Two other jurisdictions important in the asbestos litigation have addressed the problem of forum shopping judicially, partly through stricter interpretation of venue rules and partly through strengthening of the principle of *forum non conveniens*.

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171. See Act effective May 29, 1997, ch. 424, 1997 Tex. Gen. Laws 1680, 1682-83 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.052 (Vernon Supp. 2003)) (repealed). The 1997 law applied solely to asbestos personal injury and wrongful death claims. *Id.* Although that law was repealed in 2003, Act Effective Sept. 1, 2003, ch. 204, 2003 Tex. Gen. Laws 847, 855, out-of-state asbestos claims continue to be discouraged by the state's general *forum non conveniens* statute. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 2006).

172. Act of Mar. 6, 2003, ch. 83, § 56-1-1, 2003 W. Va. Acts 540 (codified at W. VA. CODE ANN. § 56-1-1(c) (LexisNexis Supp. 2005)). An intended effect of the West Virginia statute was to make it much less likely that that state will return to the pattern of mass consolidations that characterized it through 2003.

173. *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292, 300 (W. Va. 2006), *cert. denied*, 127 S. Ct. 835 (2006). Because the Supreme Court denied certiorari in *Morris*, it will again be easy to bring out-of-state claims in West Virginia (as long as the plaintiff can find some venue-conferring West Virginia defendant), which could give a second life to mega-mass tort litigation in West Virginia.

174. For Georgia, see Act of Apr. 12, 2005, sec. 1, § 51-14-8, 2005 Ga. Laws 145, 155 (codified at GA. CODE ANN. § 51-14-8 (Supp. 2006)). Non-resident claims pending on the effective date of the act may be maintained if the plaintiff provides prima facie evidence of impairment. If the plaintiff was exposed in more than one state, the court must decide which state is the more appropriate forum considering the relative amounts and length of exposure in each jurisdiction. *Id.* Under the Florida statute, an asbestos claim may be brought "if the plaintiff is domiciled" in Florida or if the exposure occurred in the state. FLA. STAT. ANN. § 774.205(1).

The first is Mississippi, where judicial and legislative action went hand-in-hand. Since 2004, Mississippi has undergone significant judicial and legislative changes intended to limit the ability of plaintiffs to bring mass tort claims in plaintiff-friendly counties. Before 2004, plaintiffs could join together massive numbers of “similar” claims, so long as one of the plaintiffs could satisfy the venue provisions.<sup>175</sup> This resulted in “mass joinders”—large numbers of plaintiffs would join in a suit against out-of-state defendants.

Early in 2004, the Mississippi Supreme Court began to interpret joinder rules strictly. In a non-asbestos case, *Janssen Pharmaceutica, Inc. v. Armond*,<sup>176</sup> the court held that cases may be joined only if each plaintiff demonstrates to the court that all of the cases “relat[e] to or aris[e] out of the same transaction or occurrence” and have a common “question of law or fact.”<sup>177</sup> This holding was applied expressly to asbestos litigation in *Harold’s Auto Parts, Inc. v. Mangialardi*.<sup>178</sup>

Moreover, in June of 2004, the legislature passed the Mississippi Tort Reform Act of 2004.<sup>179</sup> Under the act, venue is proper “in the county where the defendant resides,” or “where a substantial alleged” act, omission, or event “that caused the injury occurred.”<sup>180</sup> Alternatively, if the suit is against a nonresident defendant, venue may lie where the plaintiff resides.<sup>181</sup> Each plaintiff must independently satisfy the venue provisions; no longer can thousands of plaintiffs join together to file suit in a plaintiff-friendly jurisdiction where only one plaintiff resides.<sup>182</sup> In addition, the law allows Mississippi judges to transfer or dismiss claims under the doctrine of *forum non conveniens* if “the interest of justice” and the “convenience of the parties and witnesses” would be better served by the case being heard elsewhere.<sup>183</sup>

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175. See *Am. Bankers Ins. Co. v. Alexander*, 818 So. 2d 1073, 1074-75 (Miss. 2001) (joinder permissible as long as one claimant asserts proper venue with respect to one defendant).

176. 866 So. 2d 1092 (Miss. 2004).

177. *Id.* at 1097.

178. 889 So. 2d 493, 493 (Miss. 2004) (noting asbestos cases are not exempted from the requirements of Rule 20).

179. Act effective Sept. 1, 2004, ch. 1, sec. 1, 2004 Miss. Laws 1387 (amending Miss. CODE ANN. § 11-11-3 (West Supp. 2005)).

180. Miss. CODE ANN. § 11-11-3(1)(a)(i) (West Supp. 2005).

181. *Id.* § 11-11-3(1)(b).

182. *Id.* § 11-11-3(2).

183. *Id.* § 11-11-3(4)(a). Interestingly, the Mississippi Supreme Court had revised the Mississippi Rules of Civil Procedure earlier that year to permit intrastate *forum non-conveniens*, despite its recognition that “venue is essentially a legislative matter.” See Miss. R. Civ. P. 82 cmt. (2004). But whether the source of the Missis-

Since *Mangialardi* and the legislative tort reforms, Mississippi judges have severed and dismissed thousands of out-of-state asbestos claims.<sup>184</sup> Due to the judicial and legislative reforms, Mississippi has become a much less hospitable venue for asbestos plaintiffs.<sup>185</sup>

The interrelated judicial and legislative developments in Mississippi were the result of an intense campaign by the business community to put an end to Mississippi's reputation as a jurisdiction uniquely hostile to business. The state elected Republican luminary Haley Barbour in part on a tort reform agenda, and the Mississippi Supreme Court, as Mr. Dooley once said of the U.S. Supreme Court, "followed the election returns."<sup>186</sup>

Public and political pressure also had a great deal to do with the turnaround in Madison County, Illinois. A series of articles in the *St. Louis Post-Dispatch* in September 2004 severely criticized the court's handling of asbestos cases.<sup>187</sup> As public scrutiny of Madison County intensified, Judge Byron decided in early 2004 to give up his

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Mississippi courts' power to dismiss claims on the basis of *forum non conveniens* is legislative or judicial, the Mississippi Supreme Court has made it very clear that the choice of forum of out-of-state claimants deserves only slight deference and that Mississippi courts no longer welcome asbestos claims with no connection to Mississippi. *3M Co. v. Johnson*, 926 So. 2d 860, 866 (Miss. 2006) ("The courts of Mississippi will not become the default forum for plaintiffs seeking to consolidate mass-tort actions.").

184. *Mississippi Judges Order Plaintiffs to Prove That Their Claims Belong in State*, MEALEY'S LITIG. REP.: ASBESTOS, Jan. 5, 2005, at 4; *Mississippi Judges Dismiss Claims; Order Plaintiffs to Prove Cases Belong*, MEALEY'S LITIG. REP.: ASBESTOS, Feb. 2, 2005, at 10, 11; *Mississippi Court Severs 76 Claims, Orders Transfer to Proper Venues*, MEALEY'S LITIG. REP.: ASBESTOS, Apr. 1, 2005, at 26, 27. Late in 2005 the Mississippi Supreme Court applied the *Mangialardi* and *Janssen* cases to remand and sever consolidated silica claims with express orders that the plaintiffs provide "sufficient information to defendants and the trial court for a determination of transfer, where possible, to a court of appropriate venue." *3M Co. v. Glass*, 917 So. 2d 90, 92, 94 (Miss. 2005).

185. The Mississippi Supreme Court recently noted that the intent of *Janssen* and subsequent cases was to remove "Mississippi from its dubious distinction as extremely liberal on Rule 20 joinder." *3M Co.*, 917 So. 2d at 93 (footnote omitted).

186. See Finley Peter Dunne, MR. DOOLEY'S OPINIONS 26 (1901), quoted in THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 392 (Fred R. Shapiro ed., 1993).

187. The first article in the series criticized Madison County for, among other things:

A one-party court system dominated by Democratic judges whose campaigns are financed by contributions from Democratic plaintiff lawyers.

A county where judges are often related to—or at the least used to work beside—the plaintiff lawyers appearing before them.

A history of anti-corporate sentiment that produces sympathetic—and generous—juries.



position as asbestos judge. He was replaced by Chief Judge Daniel Stack, who has enforced the principle of *forum non conveniens* much more stringently.<sup>188</sup> This change—which was not the effect of a change of law, but merely a change in judicial personnel—has fundamentally altered Madison County’s role as the processing machine of mesothelioma cases nationwide.

It is important to keep in mind that the changes described above have affected forum shopping in only a few jurisdictions, and in some cases, they are due to a change in judicial policy and personnel that could be reversed. Already, plaintiffs’ lawyers have been looking for other jurisdictions to replace the ones that have been lost in the reaction of 2003-05. The Simmons Cooper firm, formerly king in Madison County, has recently filed large numbers of cases in Delaware (where many defendants are incorporated).<sup>189</sup> There have also been increased filings in California and reportedly efforts by Arkansas and Oklahoma lawyers to attract cases from nearby Texas. Tort reform has put the brakes on the interstate mobility of asbestos cases, but given the dispersed nature of the American judicial system, it is impossible to control peripatetic tort claims completely.

### C. Consolidations

The massive consolidations that were such a striking feature of asbestos litigation in the 1990s have faded from the scene. The last

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A history of intimidation that makes some judges wary of crossing the powerful plaintiff bar.

Paul Hampel, *Madison County: Where Asbestos Rules*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A1. The other articles include: Paul Hampel, *Bono’s Firm Opened Floodgate to Asbestos Lawsuits Here*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A9; Paul Hampel, *Lack of Trust Poisons Efforts to Overhaul System*, ST. LOUIS POST-DISPATCH, Sept. 22, 2004, at A1; Paul Hampel, *Speedy Court Docket Hijacks Justice, Defendants Say*, ST. LOUIS POST-DISPATCH, Sept. 20, 2004, at A1; Kevin McDermott, *Plaintiff Bar Gives Top Dollar to Judges’ Campaigns*, ST. LOUIS POST-DISPATCH, Sept. 21, 2004, at A1.

188. See Paul Hampel, *Asbestos Judge Tosses Out 3 Lawsuits*, ST. LOUIS POST-DISPATCH, Oct. 7, 2004, at A1 (discussing Chief Judge Stack’s dismissal of cases on *forum non conveniens* grounds, in one of which he noted that a plaintiff’s home was “‘15 miles from the courthouse in Baton Rouge, Louisiana, and is approximately 700 miles from this court’”).

189. *Watch Out Delaware; We’re Chasing Them Out of Illinois*, MADISON-ST. CLAIR RECORD (Ill.), July 10, 2005, available at <http://www.madisonrecord.com/arguments/view.asp?c=162801>. The Delaware courts have rejected defendants’ efforts to obtain dismissal of out-of-state cases on the basis of *forum non conveniens*. See *In re Asbestos Litigation*, No. 05C-05-246-JRS (Del. Super. Ct. Mar. 8, 2006) (mem. opinion denying motion to dismiss based on *forum non conveniens*).

major consolidations of this kind occurred in West Virginia and Virginia, respectively, in 2002.<sup>190</sup> The current West Virginia procedure for managing asbestos cases no longer relies on massive consolidations, although this is in part the result of the West Virginia anti-forum shopping statute, which was recently invalidated on federal constitutional grounds by the state Supreme Court of Appeals.<sup>191</sup>

The Mississippi joinder procedure has served the same purpose as consolidations have elsewhere, as the *Cosey* case demonstrates. While technically, at least, the joinder procedure may still be used in Mississippi to effect large aggregations, the practical problem has been much reduced by the new requirement that all plaintiffs must show individually that venue lies in the county court where they wish to bring a case.

While massive consolidations have diminished in importance, small scale consolidations continue to flourish, especially in key jurisdictions such as New York City and San Francisco. Even these small scale consolidations significantly improve outcomes for plaintiffs.<sup>192</sup> Here too, however, the winds of change can be felt. The recent asbestos statutes adopted in Texas and Georgia prohibit consolidation of multiple-plaintiff cases for trial without the consent of all parties.<sup>193</sup> The Texas law is especially important, because that state has for many years relied upon modest-sized consolidations in trying asbestos cases, often with horrific results for defendants. Some defense lawyers expect the abolition of trial consolidations to

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190. See *Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary, supra* note 136, at 159-66 (statement of Prof. Walter E. Dellinger) (describing the consolidation procedure in a West Virginia trial); Schwartz et al., *supra* note 18, at 281.

191. See *supra* note 173 and accompanying text.

192. See Michelle J. White, *Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials* 11 (Nat'l Bureau of Econ. Research, Working Paper No. 9362, 2002), available at <http://www.nber.org/papers/w9362>.

193. TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (Vernon Supp. 2006); GA. CODE ANN. § 51-14-10. Also noteworthy is an August 9, 2006, administrative order of the Michigan Supreme Court ending the practice of bundling cases for trial and settlement. Administrative Order No. 2006-6: Prohibition on "Bundling" Cases, at 1, available at <http://www.courts.mi.gov/supremecourt/resources/administrative/2003-47-080906.pdf>. Previously, the trial court hearing Michigan asbestos cases had followed a practice of consolidating cases for trial, trying the claims of one or more representative plaintiffs, and then extrapolating the jury's verdict in the exemplar case to the entire group. *Id.* at 5 (Kelly, J., dissenting). While this practice was apparently very conducive to settlement, the Supreme Court was convinced that it also allowed plaintiffs' attorneys to leverage the cases of the seriously ill to obtain settlements in other cases and that "traditional principles of due process" required that every case be heard on its own merits. *Id.* at 2 (Markman, J., concurring).

contribute as much to improving the asbestos litigation environment in Texas as the adoption of medical criteria.

*D. Joint and Several Liability*

At least since the Manville bankruptcy in 1982, asbestos litigation has been characterized by a steady expansion in the ranks of defendants. That trend has accelerated since the late 1990s. With most traditional defendants in bankruptcy, plaintiffs often are unable to sue the companies that are truly responsible for their injuries. Their lawyers must therefore seek out a solvent defendant with at least some responsibility for the plaintiff's injury—even though the obvious cause of the injury may be years of heavy exposure working with the product of a bankrupt defendant.<sup>194</sup> This dynamic is made possible by joint and several liability—the principle that all joint tortfeasors are responsible individually for the entire harm suffered by the plaintiff.

The principle of joint and several liability is somewhat tattered. Only a few states continue to observe it without qualification, although the majority observe it in some form.<sup>195</sup> This is critically important in asbestos litigation because a pure regime of proportionate responsibility for loss would make it uneconomical to seek out the marginal defendant who is responsible only in trivial part for the plaintiff's injury. Eventually, the search for the solvent bystander would run out of gas, and asbestos litigation would stall.

Several significant jurisdictions have tightened up the rules of joint and several liability in recent years. To some extent, this was the continuation of a general trend that went beyond the context of asbestos. In New York, however, the impetus was specific to asbestos cases, and in both Texas and Ohio, the legislature eliminated previous special (and adverse) treatment of defendants in toxic tort cases, which include asbestos. The special impact of the new rules

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194. Defense lawyers note that today's asbestos plaintiffs typically say they have changed asbestos-containing brakes on their cars or have worked with asbestos-containing joint compound in finishing their basements. It is possible, of course, that such handiwork became more popular in the 1960 and 1970s, and we are seeing the results now. It is also possible that the search for the solvent bystander has caused plaintiffs to remember home handiwork that they did not have to remember when the insulation products of prominent defendants were obviously the overwhelmingly predominant cause of their disease.

195. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 reporter's note to cmt. A (2000); 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, 209, 214-15 (2003).

on asbestos cases in particular cannot have been lost on legislators in those states.

### 1. New York

The first major step was taken in New York in 2002. New York had attempted to curtail joint and several liability in personal injury and wrongful death claims in 1986, by enacting C.P.L.R. § 1601, which provides that a defendant who bears 50% or less of the culpability for plaintiff's claims may be jointly liable for economic damages but only severally liable for non-economic damages.<sup>196</sup> Section 1601 provides, however, that "the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action."<sup>197</sup> Some courts, including the U.S. Court of Appeals for the Second Circuit, interpreted this provision to mean that bankrupt companies responsible for part of the plaintiff's damages in an asbestos case could not appear on verdict forms because the automatic stay in bankruptcy rendered them beyond the court's jurisdiction; the liability share of such companies had to be reallocated among the other defendants.<sup>198</sup> Because of the large number of asbestos defendants in bankruptcy, this reading of the statute led to the imposition of joint liability on defendants with less than 50% of actual responsibility for the plaintiff's damages.<sup>199</sup>

In 2002, however, Justice Helen Freedman, the managing judge for New York City asbestos cases, ruled that New York juries must consider the proportionate responsibility of bankrupt tortfeasors when allocating fault, so long as those tortfeasors are subject to the personal jurisdiction of the court.<sup>200</sup> The New York Appellate Division agreed and upheld Justice Freedman's ruling, saying: "Notwithstanding the automatic stay resulting from bankruptcy, [a] tortfeasor is not exempt from consideration of damages" and the bankrupt entity's culpability "can still be calculated in ap-

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196. N.Y. C.P.L.R. § 1601(1) (McKinney 1997).

197. *Id.*

198. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 844-45 (2d Cir. 1992).

199. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 798 F. Supp. 940, 954-59 (E. & S.D.N.Y. 1992).

200. *In re N.Y. City Asbestos Litig.*, 750 N.Y.S.2d 469, 479 (Sup. Ct. 2002), *aff'd*, 775 N.Y.S.2d 520 (App. Div. 2004).

portioning liability.”<sup>201</sup> This ruling will have a major impact on asbestos litigation in New York.

## 2. Texas

Texas addressed joint and several liability in 2003. First, the legislature brought the rules applicable in toxic tort cases into line with those applicable in other kinds of cases. Previously, a toxic tort defendant would be jointly and severally liable if the jury found that its proportionate responsibility for the plaintiff’s injury was 15% or more, while in every other kind of case, the threshold for joint and several liability was 50%.<sup>202</sup> As amended in 2003, the new code provides that all tortfeasors are liable to a plaintiff only for their proportionate share of responsibility, unless “the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent” or the defendant has acted in concert with “specific intent to do harm to others” actionable under selected provisions of the Texas penal code.<sup>203</sup> Leaving to one side the intentional tort exception, the new rule in Texas is basically that a defendant will only be jointly and severally liable if its conduct was the predominate cause of the plaintiff’s harm.

Second, the 2003 legislation made a series of changes that together ensure that the jury considers the proportionate responsibility of all relevant actors—including bankrupt parties and employers shielded from tort liability by workers’ compensation exclusivity. Thus, a defendant may designate a “responsible third party” for purposes of allocating responsibility *even if the third party cannot be joined in the suit*.<sup>204</sup> At the same time, the statute repealed previous provisions exempting bankrupt tortfeasors and employers covered by workers’ compensation from the allocation of responsibility.<sup>205</sup> These provisions make it more difficult to expand litigation in Texas to engulf new defendants because it is hard to show that the marginal defendant is responsible for more than 50% of the liability once the bankrupt share and the share of employers are taken into account.

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201. *In re N.Y. City Asbestos Litig.*, 775 N.Y.S.2d 520, 520 (App. Div. 2004) (citation omitted).

202. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(c) (Vernon Supp. 2003) (amended 2003).

203. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a)-(b) (Vernon Supp. 2005).

204. *Id.* §§ 33.003(a)(4), 33.004.

205. *Id.* § 33.011 (amending TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (Vernon 1997)).

### 3. Ohio

In 2003, Ohio enacted Senate Bill 120, which implements reforms of joint and several liability similar to those in the Texas bill.<sup>206</sup> For all Ohio causes of action accruing after April 9, 2003, defendants are liable only for their proportionate share of the plaintiff's damages unless their share of responsibility exceeds 50% or they committed an intentional tort.<sup>207</sup>

### 4. Mississippi

Mississippi has addressed the issue of joint and several liability twice since 2002. In 2003, it eliminated joint and several liability for non-economic damages and provided limitations on joint and several liability for economic damages.<sup>208</sup> In the wave of Mississippi tort reform in 2004, however, Mississippi simply adopted pure proportionate liability.<sup>209</sup> Under the modified law, a joint tortfeasor "shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault."<sup>210</sup> Joint and several liability may, however, be imposed on those "who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it."<sup>211</sup> Mississippi law is also clear that the bankrupt share must be taken into account in determining proportionate liability under the new rule.<sup>212</sup>

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206. Act of Jan. 8, 2003, file 240, 2002 Ohio Laws (codified at OHIO REV. CODE ANN. § 2307.22 (West 2004)), OH LEGIS 240 (2002) (Westlaw).

207. OHIO REV. CODE ANN. § 2307.22.

208. See Act of Dec. 3, 2002, ch. 4, sec. 3, § 85-5-7, 2003 Miss. Laws 1289, 1291. Under this version of the bill, joint liability applied only to defendants who were at least 30% responsible for plaintiff's injuries—even then, defendants were only liable to the extent necessary for the plaintiff to recover 50% of his economic damages. See *id.*

209. Act effective Sept. 1, 2004, ch. 1, sec. 6, 2004 Miss. Laws. 1387, 1393 (amending MISS. CODE ANN. § 85-5-7 (West Supp. 2005)).

210. MISS. CODE ANN. § 85-5-7(2).

211. *Id.* § 85-5-7(4).

212. A number of other states have restricted joint and several liability since 2002. Minnesota enacted a statute in 2003 to apply joint liability only to those defendants who are more than 50% responsible for a plaintiff's injury, to those who commit intentional torts, and several other specialized cases. Act of May 19, 2003, ch. 71, 2003 Minn. Laws 386 (codified at MINN. STAT. ANN. § 604.02 (West Supp. 2006)). South Carolina enacted statutes in 2005 providing that joint and several liability does not apply to defendants less than 50% responsible. See Act of Mar. 21, 2005, 2005 S.C. Acts, H.B. 3008, SC LEGIS 27 (2005) (Westlaw); Act of Apr. 4, 2005, 2005 S.C. Acts, S.B. 83, SC LEGIS 32 (2005) (Westlaw) (codified at S.C. CODE ANN. § 15-38-15(A)(1) (Supp. 2005)). Arkansas adopted pure several liability and requires the jury to allocate liability among all tortfeasors without regard to whether they are or could be joined in the suit. See Civil Justice Reform Act

## 5. Florida

In April 2006, Florida adopted pure proportional liability.<sup>213</sup> Although the new law was not directed particularly at asbestos lawsuits, it will have a major impact on asbestos litigation because so much of the “fault” for asbestos injury is attributable to companies that are no longer amenable to suit. Notably, the Florida bill does *not* require that all parties to which fault is charged must be before the court. It is enough for the defendant to identify the other culpable person and prove that person’s share of fault. Accordingly, so far as one can tell from the face of the statute, the bill allows defendants to try their case against the “empty chair”—or chairs—that would be occupied in a fairer world by Manville, Raybestos, and other asbestos manufacturers. At the end of the day, each defendant would be liable (as is true in all pure proportionate liability systems) only for its own percentage share of the plaintiff’s damages.<sup>214</sup>

The new law will be effective on the date of enactment and will apply to all claims that accrue on or after that date. Thus, pending claims (as well as claims that have accrued but have not yet been filed) will continue to be subject to the old rules on joint and several liability.

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of 2003, Act 649 §§ 1, 2, 2003 Ark. Acts 2130, 2130-32 (codified at ARK. CODE ANN. §§ 16-55-201, 16-55-202 (Supp. 2005)). West Virginia enacted a statute in 2005 to prohibit the application of joint and several liability to defendants 30% or less at fault. Act of Apr. 9, 2005, ch. 65, § 55-7-24, 2005 W. Va. Acts 496 (codified at W. VA. CODE ANN. § 55-7-24 (LexisNexis Supp. 2005)). Georgia removed joint and several liability in a 2005 statute. Act of Feb. 16, 2005, sec. 12, § 51-12-33, 2005 Ga. Laws 1, 15 (codified at GA. CODE ANN. § 51-12-33 (Supp. 2006)). A 2005 Missouri statute provides that some defendants who are less than 51% at fault shall not be held jointly and severally liable. *See* Act of Mar. 29, 2005, § 537.067, 2005 Mo. Laws 650 (codified at MO. REV. STAT. § 537.067 (Supp. 2005)).

213. Act of Apr. 26, 2006, ch. 2006-6, sec. 1, § 768.81, 2006 Fla. Sess. Law Serv. 134 (West) (amending FLA. STAT. ANN. § 768.81(3) (West 2005)).

214. Prior to the April 2006 enactment of proportionate liability, Florida, like many other states, had a hybrid system of apportioning liability—that is, it did not have either pure joint and several liability or pure proportional liability—but a compromise between the two. FLA. STAT. ANN. § 768.81(3) (West 2005). There was pure proportional liability for any defendant whose share of the fault was less than 10%. Defendants whose share of fault was greater than 10% were held jointly and severally liable subject to a sliding scale of caps, depending on the actual percentage of fault. There were two scales of caps depending on whether the plaintiff was also at fault. *Id.* All of this was swept away by the new act which provides simply that a party is liable “on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability.” Act of Apr. 26, 2006, ch. 2006-6, sec. 1, § 768.81, 2006 Fla. Sess. Law Serv. 134 (West).

## V.

## REPLACING THE TORT SYSTEM: THE FAIR ACT

While several key states took aim at asbestos litigation in the courts in the period 2003-2005, the Senate was trying to develop workable legislation that would preempt asbestos lawsuits and substitute an administrative claims processing regime. The result of this effort was the Federal Asbestos Injury Resolution (FAIR) Act, which would create a privately financed national fund to compensate asbestos claimants and keep asbestos litigation out of the courts. While the basic political thrust of the tort reform approach to asbestos litigation is to the right, the FAIR Act is politically centrist. It is a fabric of compromises, and its political support comes from moderates in both parties. These political dynamics are part of the reason why the FAIR Act is a more promising way to balance the interest of claimants and defendants than the tort reform movement, which tends to resolve all issues in favor of the defense side.

Although the course of the FAIR Act never did run smooth, the bill's mere pendency had a major impact on the tort system and on the political discussion at the state level. The FAIR Act always provided a bully pulpit for developing the case against the asbestos litigation system, and local reform efforts built on congressional hearings and media attention generated by the FAIR Act to garner support for local reform. And, of course, the case for the FAIR Act was often buttressed by arguments and evidence gathered at the state level. For most of the period in question, the two legislative campaigns were symbiotic, each drawing strength from the other. Not until 2005 did a serious tension emerge between the two approaches, when insurers and defendants opposed to the FAIR Act began to tout medical criteria at the state or federal level as the preferable approach to the problem.

*A. Evolution of the FAIR Act*

After Chairman Hatch decided to pursue an administrative compensation scheme in 2003, he encouraged negotiations among stakeholders (other than the trial lawyers) to flesh out the details of the concept. When those discussions stalled, Senator Hatch introduced S. 1125, the Fairness in Asbestos Injury Resolution (FAIR) Act of 2003.<sup>215</sup> Although the Judiciary Committee's debate on the FAIR Act was long and contentious, the committee reported the bill in July.<sup>216</sup> By that time, the bill was, if not dead, certainly comatose.

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215. S. 1125, 108th Cong. (2003).

216. See S. REP. NO. 108-118 (2003).



The AFL-CIO strongly opposed it,<sup>217</sup> despite the numerous concessions that had been made to the views of organized labor. Insurers were alienated by the escalating cost and increased possibility of “leakage” of asbestos claims from the administrative system back to the courts. The two main industry organizations—the NAM Asbestos Alliance and the Asbestos Study Group—were supportive of the process, but did not support the bill that emerged from the committee.

The FAIR Act was rescued from this shipwreck by Senator Arlen Specter (R-PA), who enlisted the help of Judge Edward R. Becker of the Third Circuit to mediate the many issues among the stakeholders.<sup>218</sup> The “Becker” process began in August 2003. Shortly thereafter, Majority Leader Bill Frist and Chairman Hatch presided over a contentious process of allocating the costs of the asbestos bill among defendants and insurers. These negotiations resulted in an agreement in November 2003.

During the winter of 2004, Senator Hatch rewrote the FAIR Act to incorporate the agreements reached so far in the Becker process, the cost-allocation understanding reached under the auspices of the Majority Leader, and a number of additional provisions. The new bill, S. 2290, was introduced in April of 2004.<sup>219</sup> The Majority Leader attempted to bring the bill to the floor that month, but was unable to avoid a filibuster.<sup>220</sup> By agreement with the Minority Leader, then-Senator Tom Daschle, Judge Becker continued his mediation efforts, with a special focus on the amount of money that would be necessary to fund the program.<sup>221</sup> After that mediation failed, the Majority Leader and the Minority Leader engaged in direct negotiations that ultimately resulted in agreement on the overall financial commitment to the bill of \$140 billion over thirty years.<sup>222</sup> By that time, however, there was no opportunity to bring

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217. Press Release, AFL-CIO, Statement by AFL-CIO President John J. Sweeney on Asbestos Defendants’ and Insurers’ Funding “Agreement,” (Oct. 17, 2003), available at <http://www.aflcio.org/mediacenter/prsptm/pr10172003.cfm>.

218. S. REP. NO. 109-97, at 5 (2005) (discussing Judge Becker’s involvement). Judge Becker’s role cannot be overstated. He had the rare intellectual ability to grasp the workings of an extraordinarily complex bill, and he had the quality of leadership to act by turns as a goad, mediator, and arbitrator as the bill took shape. He emerged with the respect and affection of everyone who worked with him. Judge Becker passed away after a long illness in May 2006, and he will be missed.

219. S. 2290, 108th Cong. (2004).

220. 150 CONG. REC. S4257 (daily ed. Apr. 22, 2004).

221. See S. REP. NO. 109-97, at 5 (discussing Judge Becker’s involvement).

222. Senator Daschle made an oral proposal to Senator Frist, which was subsequently memorialized, with some changes, in an undated memorandum provided to the Majority Leader. Memorandum from Sen. Tom Daschle to Sen. Bill Frist

the bill to the floor before a new Congress was installed in January 2005.

Senator Arlen Specter was elected chairman of the Senate Judiciary Committee in early 2005, and immediately commenced negotiations with other committee members regarding the shape that the FAIR Act of 2005 would take. In April, Chairman Specter introduced S. 852, which was supported by the Ranking Member of the Committee, Senator Patrick Leahy of Vermont.<sup>223</sup> The bipartisan bill received Judiciary Committee approval on May 26, 2005.<sup>224</sup>

The success of the committee mark-up masked some danger signals. Four of the Republicans on the Judiciary Committee expressed serious doubts about the bill and indicated that they would not support it on the floor unless their concerns were addressed. Moreover, insurers opposed to the bill and their allies in the defense community intensified their opposition during the summer and sought (with some success) to widen the split in the business community on the merits of the bill. In the fall, floor action was delayed by the need to address the issues raised by Hurricane Katrina and the reconstruction of New Orleans and the Gulf Coast, as well as two Supreme Court nominations. Again, the clock ran out before the FAIR Act could be brought to the floor. Majority Leader Frist promised, however, that the FAIR Act would be the first new item on the agenda in 2006, and he was a man of his word.

Debate on the FAIR Act began on February 6, 2006. The bill cleared its first hurdle—a threatened filibuster on the motion to proceed. The key test, however, was expected to be a point of order objecting to consideration of the bill for technical noncompliance with a provision of the budget resolution adopted in 2005.<sup>225</sup> A motion to waive the point of order would require sixty votes, and

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(undated) (on file with the NYU Annual Survey of American Law). Senator Frist responded with a detailed counterproposal, which had been reviewed by interested defendants and insurers, dated July 14, 2004. Memorandum from Sen. Bill Frist (July 14, 2004) (on file with the NYU Annual Survey of American Law). This initial exchange was followed up in further correspondence. Letter from Sen. Bill Frist to Sen. Tom Daschle (July 30, 2004); Letter from Sen. Tom Daschle to Sen. Bill Frist (Sept. 15, 2004) (accepting Senator Frist's proposed \$140 billion aggregate funding level); Letter from Sen. Bill Frist to Sen. Tom Daschle (Sept. 27, 2004) (expressing concern over how pending claims will be handled); Letter from Sen. Tom Daschle to Sen. Bill Frist (Oct. 6, 2004) (all on file with the NYU Annual Survey of American Law) (presenting a new comprehensive proposal incorporating the \$140 billion figure).

223. S. 852, 109th Cong. (2005).

224. S. REP. NO. 109-97, at 6.

225. For the point of order, see H.R. CON. RES. 95, 109th Cong. § 407(b) (2005).

opponents of the bill could count on at least some support from conservative senators who would be reluctant to cast a vote that could be characterized as undermining budget discipline. The point of order was made on February 9, 2006,<sup>226</sup> and the motion to waive failed by a single vote on February 14.<sup>227</sup> Senator Inouye was absent due to a family emergency and has said he would have been the sixtieth vote for the motion.<sup>228</sup> The Majority Leader changed his vote from “yes” to “no” on the motion to waive in order to reserve the right to move for reconsideration later.<sup>229</sup>

Senator Specter introduced a new version of the FAIR Act on May 29, 2006 (S. 3274). Among other things, S. 3274 addresses concerns about the allocation of the financial burden among defendants and strengthens the integrity of the claims process (without, however, changing the bill’s medical criteria). S. 3274 did not reach the floor in 2006. It did not have enough support to overcome the obstacles that stymied S. 852. Moreover, at best the bill would have required extensive floor time that was simply unavailable either in the period leading up to the 2006 election or in the lame duck session thereafter. With the Democrats’ victory in the midterm elections, the influence of the trial bar is generally thought to be decisive. There is no prospect that the FAIR Act, having been reborn from the ashes every year since 2003, can imitate the phoenix once again in 2007.

The FAIR Act was not doomed only by the vicissitudes of politics. Behind the politics were substantive issues inherent in any effort to replace the tort system with an administrative compensation scheme. The issues are extremely difficult to resolve, and they are the nodes on which political opposition to the bill tends to accumulate. Accordingly, a brief summary of the structure of the FAIR Act and the key outstanding issues provides a helpful glimpse into why this enterprise was so hard.<sup>230</sup>

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226. 152 CONG. REC. S960 (daily ed. Feb. 9, 2006) (statement of Sen. Ensign).

227. 152 CONG. REC. S1168-69 (daily ed. Feb. 14, 2006).

228. Press Release, Senator Arlen Specter, Specter Comments on Asbestos Bill (Feb. 14, 2006), available at [http://specter.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=777&Month=2&Year=2006](http://specter.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=777&Month=2&Year=2006) (last visited Nov. 9, 2006).

229. 152 CONG. REC. S1169 (daily ed. Feb. 14, 2006) (statement of Sen. Frist).

230. The substantive challenges facing the FAIR Act are addressed in greater detail in Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 CONN. INS. L.J. (forthcoming 2007).

### B. Structure of the FAIR Act

The FAIR Act is more than 400 pages long. Senator Leahy, the Chairman of the Judiciary Committee, has called it “one of the most complex legislative undertakings” he has been “involved with in [his] 30 years in the Senate.”<sup>231</sup> The main elements are as follows:

#### 1. Administration

The bill creates in the Department of Labor a no-fault administrative compensation system for listed asbestos-related diseases.<sup>232</sup> The program would be headed by an Administrator whose responsibilities include claims processing and financial management.<sup>233</sup> The Administrator would have broad authority to contract for both kinds of services.<sup>234</sup>

#### 2. Claims Processing

The claims processing procedure is designed for speed and efficiency in claims processing while preserving program integrity. It is non-adversarial; most claims would be routinely processed, and claimants would receive timely notice as to the amount, if any, of their awards.<sup>235</sup> Nevertheless, the bill sets detailed standards regarding the nature and quality of the information that must be submitted in support of the claim, and it imposes significant penalties on those who file false or misleading reports.<sup>236</sup> The bill also gives the Administrator authority to audit medical and other submissions in order to protect the program from the fraud and abuse that has beset the tort system and the current bankruptcy trusts.<sup>237</sup> Some claims—notably, claims involving cancers other than lung cancer and mesothelioma and other claims that for one reason or another do not meet the technical medical requirements of the bill—would be referred to a panel of neutral physicians for an expert medical

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231. *Hearing on “The Fairness in Asbestos Injury Resolution Act” Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Sen. Patrick Leahy) available at <http://leahy.senate.gov/press/200501/011105.html>.

232. FAIR Act of 2006, S. 3274, 109th Cong. § 101(a)(1)-(2) (2006).

233. *Id.* § 101(c) (Duties of Administrator).

234. *Id.* § 101(c)(1)(C) (contracting authority); *id.* § 106(b) (sole source contracts at startup).

235. *Id.* § 114(b) (proposed decision within ninety days).

236. *Id.* § 113 (filing requirements for all claims); *id.* § 121 (filing requirements for specific injury levels); *id.* § 401 (penalties).

237. *Id.* § 115(a) (auditing of medical and exposure evidence).

decision.<sup>238</sup> The Administrator is required to establish an outreach program and provide training to claimant assistants and representatives.<sup>239</sup> Claimants’ attorneys’ fees are generally limited to 5% of the award,<sup>240</sup> and under the non-adversarial trust system, defense attorneys are done away with altogether.

3. Eligibility and Awards

The bill’s eligibility criteria are generally modeled on the criteria used by the Manville Trust. Unimpaired claimants are entitled to medical monitoring, but not a monetary award.<sup>241</sup> To this extent, the FAIR Act is effectively a medical criteria bill. The other eligibility categories are summarized in Table 1.

Table 1: Eligibility Categories and Award Levels under FAIR Act<sup>242</sup> (in thousands)

Level II Mixed Disease with Impairment	\$ 25	Level VI Other Cancer	\$200
Level III Asbestosis/Pleural Disease B	\$100	Level VII Lung Cancer with Pleural Disease	\$300 Smokers \$725 Ex-Smokers \$800 Non-Smokers
Level IV Severe Asbestosis	\$400	Level VIII Lung Cancer with Asbestosis	\$600 Smokers \$975 Ex-Smokers \$1100 Non-Smokers
Level V Disabling Asbestosis	\$850	Level IX Mesothelioma	\$1100

Claimants with impairing non-malignant conditions due to asbestos (Levels III through V) receive awards between \$100,000 and

238. *Id.* § 121(d)(6)(B) (referral to Physicians Panel for Level VI claims); *id.* § 121(g)(4)(A) (referral for exceptional medical claims). In dealing with “other cancers,” the Physicians Panels are required to follow the findings of a study on cancer causation to be performed by the Institute of Medicine on cancer causation. *Id.* § 121(e). That study was completed in June 2006 and found that the evidence of asbestos causation was “sufficient” only with regard to cancer of the larynx. *See supra* note 21.

239. *Id.* §§ 104(a), 225(a).

240. *Id.* § 104(e)(1)(A). Unlike S. 852, S. 3274 allows claimants’ attorneys to charge more than five percent in the event of successful appeals, but the fee is still limited to a reasonable hourly rate. *See id.* § 104(e)(1)(B). All attorneys’ fees are paid from the claimant’s award and are not separately paid by the fund.

241. *Id.* § 121(d)(1) (medical criteria limits for Level I claims); *id.* § 131(b)(1) (awards for Level I claims).

242. *Id.* §131(b).

\$850,000, depending on their level of impairment.<sup>243</sup> Level II is a compromise category, in which there is evidence of an asbestos impairment that may be masked by obstructive lung diseases, typically induced by smoking. Because causation is inherently less clear in such cases, the award is reduced to \$25,000.<sup>244</sup>

Claimants with an asbestos-related cancer other than lung cancer or mesothelioma would be entitled to \$200,000. Lung cancer claimants receive varying amounts, from \$300,000 to \$1.1 million, depending on the amount of exposure they had, whether they also have asbestosis or asbestos-related pleural conditions, and their smoking status (smoker, former smoker, or non-smoker).<sup>245</sup> Mesothelioma victims receive \$1.1 million, although the Administrator has authority to adjust mesothelioma awards, in a cost-neutral way, to take into consideration a claimant's dependent children.<sup>246</sup>

#### 4. Funding

The program would be paid for by contributions from insurers and defendants and by the assets of the existing bankruptcy trusts.<sup>247</sup> The total commitment of funds would be approximately \$140 billion.<sup>248</sup> If the program ran out of money, it would sunset, and claimants would be allowed to return to the tort system to obtain compensation.<sup>249</sup> If the actual cost of the program is less than \$140 billion, there would be stepdowns and funding holidays to prevent over-funding.<sup>250</sup>

The defendant share is allocated among companies based on the amount of their prior asbestos expenditures (including amounts covered by insurance) incurred prior to December 31, 2002, and their gross revenues for their fiscal year prior to that date.<sup>251</sup> There are provisions for adjustments based on hardship

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243. *Id.*

244. *Id.* §§ 121(d)(2), 131(b).

245. *Id.* § 131(b).

246. *Id.* § 131(b)(3). Under S. 3274, the administrator must decrease award values in categories other than Level IX (mesothelioma) in order to increase mesothelioma awards in especially dire cases while maintaining cost neutrality, but he may not reduce the award level in any other category by more than 10%. The Administrator has discretion in deciding which other categories will be reduced: there is no requirement of a proportional rollback in all categories.

247. *Id.* §§ 202(a)(1), 212(a), 402(f) (defendants, insurers, and bankruptcy trusts, respectively).

248. *Id.* §§ 202(a)(2), 212(a)(2), 222(c)(4).

249. *Id.* § 405(g)-(h).

250. *Id.* § 205(a)-(b).

251. *Id.* §§ 202-203.

(where, a company cannot pay the required contribution) or inequity (where as a result of heavy insurance coverage or other factors, it would be unfair to ask the company to pay full freight).<sup>252</sup> Within this general framework, there are many exceptions and adjustments that reflect the give-and-take of the political process.

There is no allocation system for insurers. Instead, the bill envisions an “Asbestos Insurers Commission” that would establish an allocation methodology and apply it to determine each insurer’s contribution to the program.<sup>253</sup> It is anticipated that the insurers will come to an agreement on allocation rather than entrusting their fate to a commission. The bill allows for such an agreement.<sup>254</sup>

#### 5. Transition

Generally, the bill would preempt all claims that are not in trial on the date of enactment.<sup>255</sup> There is an exception, however, for claimants with mesothelioma or others with less than a year to live—so called “terminal” claimants.<sup>256</sup> The bill establishes an elaborate procedure whereby defendants settle terminal claims on behalf of the program, setting off the cost of the settlement against their future contributions to the Fund.<sup>257</sup>

#### 6. Relationship to Other Means of Compensation

Awards under the FAIR Act are reduced to take into account tort judgments and settlements.<sup>258</sup> They are not reduced to take into account amounts that the claimant may have received through public or private health or disability insurance, or workers’ compensation, and, notwithstanding any contrary provision in contract

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252. *Id.* § 204(d)(2)-(3). S. 3274 made several significant changes in the system of adjustments. First, it capped the required contributions for smaller defendant companies generally, *id.* § 204(a)(2), and (subject to limits) for small companies with big past expenditures, in particular. *Id.* § 204(d)(4). Companies in the latter situation are generally conduits to insurance companies, and there is arguably a special unfairness to them in requiring sharply higher out-of-pocket payments on account of asbestos liabilities. The new bill also removes limits on the total amount that the Administrator can grant in financial hardship adjustments, *id.* § 204(d)(2), and clarifies the standards for both hardship and inequity adjustments. *Id.* § 204(d)(2), (d)(3)(B).

253. *Id.* §§ 211(a), 212(a)(1)(B).

254. *Id.* § 212(c).

255. *Id.* § 403(d)-(e).

256. *Id.* § 106(c).

257. *Id.* § 106(f)(2).

258. *Id.* § 134(a).

or state law, insurance carriers and employers do not have a lien on the claimant's award to obtain reimbursement for their outlays.<sup>259</sup>

### C. *The Fundamental Challenges*

While substituting an administrative claims process for the tort system may be a "sensible solution" to the vexations of the tort system, as Justice Ginsburg has said, the substantive challenges are enormous.<sup>260</sup> The FAIR Act tried to address those challenges through balance and compromise.

The first problem is *striking a balance between administrative efficiency and accuracy*. There is a trade-off between administrative efficiency and protection of the integrity of the program. The drafters of the FAIR Act protected the integrity of the program through detailed submission requirements, extensive audit authority, disqualification of doctors and laboratories who fail to observe required standards, and severe penalties for fraud.<sup>261</sup> Some categories of claims necessarily involve a more individualized expert determination. These categories include claims for "other cancer" and "exceptional claims" where the claimant fails to meet the normal medical criteria but claims to have comparably reliable evidence of a compensable condition.<sup>262</sup> Those claims would be individually reviewed by a panel of neutral doctors.<sup>263</sup>

Second, there was *not even an agreement on the appropriate principles for determining eligibility criteria and claim values*. Two general approaches are possible. One takes the tort system as a point of departure. Under that approach, claims that have value in the tort system should have value in the administrative system and that value should be measured in some way by tort system values. The other general approach is "technocratic." It starts, not with the imperfect compromises of the tort system, but with scientific questions—for example, what evidence would an impartial doctor accept as showing that a particular type of cancer is caused by asbestos? The scientific "purity" of the technocratic approach causes

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259. *Id.* §§ 134(b), 135(b).

260. For a thoughtful analysis of the general problems of substituting administrative compensation systems for tort liability in mass tort contexts, see Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *STAN. L. REV.* 1361 (2005). Although Professor McGovern focuses primarily on claims facilities that result from settlements, many of the issues he raises are present in equal or greater measure in the asbestos-legislative context.

261. S. 3274 §§ 113(c), 115, 121(a)-(d), 401(a).

262. *Id.* § 121(d)(6), (g).

263. *Id.* §§ 105, 121(d)(6)(B), 121(g)(4)-(5).



endless difficulties, however, because experts do not agree on the answers to the key scientific questions.

Third, the *cost of an administrative system is inherently uncertain*. Defendants and insurers were unwilling to write a blank check to cover the system's costs, and no one was willing to impose the risk of a funding shortfall on claimants. In the absence of a third-party guarantor, such as the federal government (a political non-starter in this age of budget deficits), there was no alternative to shutting the program down if it runs out of money. But that proved an unsatisfactory solution for two reasons. In the first place, it undermined the "certainty" that was supposed to come from replacing the tort system with an administrative system. Defendants and insurers, in particular, worried about spending \$140 billion only to wind up in the same asbestos litigation system they thought they were putting behind them. More importantly, many conservatives did not believe that a future Congress would in fact allow the program to sunset. They wanted evergreen funding or at least an automatic process that minimizes the chance that Congress will intervene with taxpayer dollars to keep the program alive. Thus, while most stakeholders learned to live with sunset, a key group of senators did not.<sup>264</sup>

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264. This perspective is captured perfectly by the testimony of Douglas Holtz-Eakin, former head of the Congressional Budget Office, before the Senate Judiciary Committee in June 2006. After emphasizing the uncertainty involved in projecting costs over 50 years, Dr. Holtz-Eakin argued that the sunset provisions "raise a fundamental question of equity." *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 3274 Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Douglas Holtz-Eakin, Director, Council on Foreign Relations), available at <http://judiciary.senate.gov/hearing.cfm?id=1931>. The most likely outcome, in the event of insolvency, would be that "a future Congress faced with the precedent of having paid awards, an unexpected need to sunset the Fund, and the prospect of transparent inequities among claimants will choose to modify the legislation and avoid a sunset." *Id.* It is in principle impossible to answer this criticism in a way that is satisfactory to those inclined to believe it in the first place. The bill could not be clearer or more emphatic that, if administered in accordance with its terms, it addresses the budgetary concerns Dr. Holtz-Eakin raises. But Dr. Holtz-Eakin asserts (on fairly superficial grounds) that a future Congress will "most likely" not respect the compromise made in the bill (and assumes that Congress would bail the fund out rather than, for example, tightening eligibility criteria or changing claim values). Of course, no one can know what a future Congress will "most likely" do. Senators who fear that the FAIR Act will lead to a federally financed trust fund will not want to take the first step, and certainly will not want to put a future Congress to the test. The only way to overcome that fear is to show with certainty that the private financing of the Fund will in fact work, so that a fail-safe mechanism isn't necessary. It is not clear that even the best analysis of the costs and funding of the bill could meet that exacting standard.

Fourth, *agreement even on the principles for allocating the costs of the program among defendants and among insurers, and between the two, was simply impossible*. In theory, the costs could be allocated in accordance with each company's share of the future cost of the tort system, but estimation of future liabilities (either on a company-by-company basis or overall) is expensive and uncertain. One could look to past expenditures (as the bill does),<sup>265</sup> but past expenditures are not necessarily predictive of future burdens. One could go behind expenditures to examine alleged liability-creating activities. That, however, would be a morass. There will often be disagreement over whether a given activity should be treated as giving rise to liability at all. And in any event, the activities that give rise to liability are too varied to yield a workable allocation formula. Many defendants—including manufacturers, intermediate sellers, premises owners, and contractors—are potentially liable for different reasons for the same exposure. In addition, different activities can give rise to vastly different exposures. Making asbestos insulation products, for example, is far more dangerous than making gaskets or valves or asbestos-containing brakes. Further, different defendants sold asbestos products, or used them, or worked on them, at different times. Thus, a company that exited the market years ago may have much less risk of future liability than one that stayed in the market for a longer period of time.

It would be easy to multiply examples of the sheer diversity of ways in which defendants engaged in liability-creating activities. The essential difficulty is that, unlike market share liability, where every company will have participated in a single market in a similar way and market share may be a reasonable way to allocate the burden of compensation, there is no practical way to make such an allocation here. No amount of analysis will solve this problem; it is a Gordian knot, and it can only be cut.

Fifth, the *transition* to a new system takes time. If legislation preempts the tort system upon enactment, some claimants will have to wait for compensation. On the other hand, if the tort system is allowed to continue while the administrative system is being put into place, there will be an effort to push as many cases through the tort system as possible.<sup>266</sup> This, in turn, can lead to huge additional

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265. S. 3274 §§ 202(b), 202(d), 203.

266. Under the FAIR Act, there is a partial conflict of interest between the plaintiff and his lawyer on the question of whether the plaintiff should push his lawsuit forward as quickly as possible. Typically, the lawyer will expect a fee of up to 40% from any recovery in the tort system, but under the FAIR Act, his fee is generally limited to 5%. *Id.* § 104(e)(1). The lawyer generally would have an in-

costs and a diversion of resources away from people who meet the eligibility criteria for the national program toward people who do not.

The FAIR Act tried to deal with this inherent problem in several ways. At the outset, it whittled the problem down by minimizing delay.<sup>267</sup> Even in the best case scenario, however, there will be some delay in implementing the program, and the FAIR Act therefore prioritized cases. Unimpaired non-malignant claimants, who are entitled to medical monitoring under the bill, would not be allowed to return to the tort system.<sup>268</sup> Mesothelioma claimants, and others who have less than a year to live, would receive priority treatment, be paid by the Administrator if the program is partially in operation, and be paid by defendants or insurers under a complicated offer-of-judgment procedure if the Administrator is unable to handle the claim.<sup>269</sup> Under the offer-of-judgment procedure, the settlement would be offset against the defendant's future contributions to the program—in effect making defendants interim bursars for the national program.<sup>270</sup> Finally, if the Administrator has not succeeded in getting the program into operation within twenty-four months, there would be a temporary reopening of the tort system to allow impaired claims to go forward even though they are not exigent.<sup>271</sup>

The intrinsic difficulties of creating a privately funded administrative compensation scheme for asbestos injuries provide fault lines where the political pressures tend to build. For example, a

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terest in pressing forward with the tort lawsuit, while the claimant would naturally have a preference, absent countervailing factors, for an award from the national program. Countervailing factors might include the expected time-to-award (the economic value of which is measured by the interest cost for delay), differences in the probability of success in the two forums, and any differences that might exist in the expected value of a recovery. Where the strength of the countervailing factors is in doubt, the claimant and his lawyer will have different personal interests when each tries to assess the situation.

267. For example, the bill provides for an Interim Administrator to avoid the delay consequent on the confirmation process. *Id.* § 106(e). It mandates contracting with existing claims facilities in order to expedite the claims processing function and allows sole-sourcing in the initial period. *Id.* § 106(b), (c)(4)–(5). And it establishes short deadlines for participant contributions and requires participants who wish to challenge their contributions to pay first and sue later. *Id.* § 203(b) (defendant payments); *id.* § 212(a) (insurer payments); *id.* § 305(a) (forbidding courts from issuing a stay of a required payment into the Fund).

268. *See id.* § 106(f)(3)(A).

269. *Id.* § 106(c), (f).

270. *Id.* § 106(f)(2)(A)(xiii).

271. *Id.* § 106(f)(3)(A).

number of conservative Republicans distrusted the bill's use of the tort system as the starting point for eligibility. These senators considered it extremely important not to compensate lung cancer victims whose disease may be caused by smoking and not exposure to asbestos.<sup>272</sup> Since they credit experts who believe that lung cancer cannot be attributed to asbestos in the absence of underlying asbestosis, they would eliminate Level VII, which allows people with lung cancer to obtain an award if they have asbestos-related pleural conditions and not asbestosis.<sup>273</sup> However, other experts believe that enough exposure to asbestos causes lung cancer in the absence of underlying asbestosis and that it is arbitrary to condition an award even on the presence of pleural conditions.<sup>274</sup> Whether to push the scientific question to a resolution or to adopt the rough accommodations of the tort system becomes one of the most important political issues surrounding the bill.

## VI.

### WHERE THINGS STAND: A *TOUR D'HORIZON*

The possibility that Congress will establish an administrative compensation system and put an end to asbestos litigation altogether has overshadowed the tort system since at least 2003. Plaintiffs' lawyers have reportedly cut back their investments in recruiting new clients and in working up the cases of existing clients for fear that the investment will be lost if the FAIR Act passes. Several Chapter 11 proceedings have slowed down because some parties in interest hope that they will do better if the bill passes than if a plan of reorganization is confirmed, although current skepticism about the FAIR Act has broken the log-jam.<sup>275</sup> Also, there are

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272. S. REP. NO. 109-97, at 103-04, 107 (2005) (additional views of Sens. Coburn, Grassley, Kyl, and Cornyn).

273. *Id.* at 103 (additional views of Sens. Coburn, Grassley, Kyl, and Cornyn); *id.* at 150 (additional views of Sens. Kyl and Coburn).

274. *See id.* at 201 (minority views of Sens. Kennedy, Biden, Feingold, and Durbin) (discussing the views of Dr. Philip J. Landrigan and Dr. Laura Welch).

275. After years of relative stasis, a number of Chapter 11 plans were confirmed in the first nine months of 2006, including Babcock & Wilcox, USG, Combustion Engineering, Kaiser Aluminum, Porter Hayden, and Armstrong World Industries. *See In re Combustion Eng'g, Inc.*, No. 03-10495 (D. Del. Mar. 1, 2006); *In re Kaiser Aluminum Corp.*, 343 B.R. 88 (D. Del. 2006); *In re Porter Hayden Co.*, No. 06-201 (Bankr. D. Md. July 7, 2006); *In re USG Corp.*, No. 01-2094 (Bankr. D. Del. June 15, 2006); *In re Babcock & Wilcox Co.*, No. 00-10992 (Bankr. E.D. La. Jan. 17, 2006); *Delaware Federal Judge Confirms Armstrong International's Plan*, MEALEY'S ASBESTOS BANKR. REP., Sept. 2006, at 10. Owens Corning/Fibreboard may be confirmed later this year, and a number of other plans may be confirmed by early 2007. *See Owens Corning Files Reorganization Plan in Delaware Bankruptcy Court*, MEA-

reputed to be many bankruptcy proceedings waiting in the wings for definitive word of the FAIR Act's demise.

Even with the failure of the FAIR Act, asbestos litigation has been transformed by the accumulation of reforms since 2003, and that reforming spirit is by no means spent.

With all that has changed, it is important to remember what has not. For example, while medical fraud is being addressed in a major way, other abuses—particularly the manufacturing of product identification testimony—continue to be important problems. Similarly, the basic factors that make it possible to mobilize cases from all over the country and file them in a few favorable courts still exist. The jurisdictions *du jour* may be different, but the underlying structure is the same. While some states and courts have severely cut back on consolidations, others have not. Joint and several liability has been limited in some important states, but even so, it continues to allow the spread of asbestos litigation to new defendants. Injuries due to asbestos will continue for many years to come. Finally, the plaintiffs' trial bar has not lost its legal creativity or entrepreneurial talent, nor its incentive to invest both in asbestos litigation.

A. *The Rate of New Filings Has Dramatically Declined*

The comprehensive data assembled by RAND stops at 2002. The first place to look for current filing trends, therefore, is the Manville Trust. Table 2 summarizes the Manville Trust's filing history from 2003 through 2005.

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LEY'S ASBESTOS BANKR. REP., Jan. 2006, at 9, 10. Several of the plans of reorganization—for example, USG, Babcock & Wilcox, and Owens Corning—feature plans of reorganization that require a contribution to a trust formed to compensate asbestos claims that is much larger if the FAIR Act succeeds by a certain date than if it does not. See Sixth Amended Joint Plan of Reorganization for Owens Corning and Its Affiliated Debtors and Debtors-in-Possession (as Modified) §§ 1.92, 3.3(c)(ii)(A)(3), *In re* Owens Corning, No. 00-03837 (Bankr. D. Del. July 10, 2006); First Amended Joint Plan of Reorganization of USG Corp. & its Debtor Subsidiaries at 24, *In re* USG Corp., No. 01-2094 (JKF) (Bankr. D. Del. Mar. 27, 2006), available at <http://www.usg.com/downloads/plan.pdf>; Joint Plan of Reorganization as of September 28, 2005, as Amended Through January 17, 2006, at § 1.1.57, Exhibit C § 7.2, *In re* Babcock & Wilcox, No. 00-10992 (Bankr. E.D. La. Jan. 17, 2006). USG, for example, would have paid about \$900 million for asbestos claims if the bill had passed by the end of the year and \$3950 million if it does not. The former figure is roughly equivalent to the present value of USG's contributions under the FAIR Act. Even though the new bankruptcy trusts will reserve part of their assets for future claimants, the trusts will still reinject billions of dollars into the asbestos compensation system relatively quickly. Whether this will lead to a reverse Manville syndrome—reducing pressures on peripheral defendants as the funds begin to flow from the bankrupts—remains to be seen.

Table 2: Manville Trust Filings 2003–2005 U.S. Claims Only<sup>276</sup>

Year	Lung Cancer	Mesothelioma	Non-Malignant	Other Cancer	Other	Total
2003	4944	2809	79,372	1269	5370	93,764
2004	1071	1816	9556	339	562	13,344
2005	1825	2036	10,971	600	1175	16,607

The first thing that appears is marked instability. To a considerable extent, this is the artifact of administrative changes, particularly the negotiation of new eligibility criteria in 2002, which took effect in October 2003 for non-malignant claims. The high rate of new filings in 2003 was doubtless due in very large part to an acceleration of filings to obtain the benefit of the old eligibility criteria. This acceleration could be expected to reduce filings in 2004, with new filings in 2005 beginning to return to normal.

Obviously, it is not possible to place too much weight on the precise year-to-year fluctuations in the Manville filing data. Nor is it necessary to do so; the distortions that may exist as a result of the trust's change in eligibility rules cannot mask the dramatic drop in new filings. It is completely implausible that Manville filings will soon return to numbers even approaching the numbers that the trust saw in 2001-2003. Something significant has been going on.

This conclusion is supported by the experience of other entities. The Celotex Trust, for example, saw filings radically decline from 2002 to 2005. Filings against traditional defendants tell a similar story. Table 3 shows the drop in new filings for several such defendants:

Table 3: New Filings for Selected Defendants 2003 and 2004<sup>277</sup>

Company	2003	2004	Change
Dow Chemical	122,586	58,240	-52.5%
Georgia Pacific	39,000	26,500	-32.1%
Honeywell	25,765	10,504	-59.2%
Owens Illinois	26,000	15,000	-42.3%
St. Gobain (CertainTeed)	62,000	18,000	-71.0%

276. Filings data, current as of December 31, 2005, provided to authors by the Manville Personal Injury Settlement Trust, and on file with the NYU Annual Survey of American Law.

277. Data compiled from The Dow Chemical Co., Annual Report (Form 10-K), at 14 (Feb. 17, 2006); Georgia-Pacific Corp., Annual Report (Form 10-K), at 99 (Feb. 28, 2005); Honeywell Int'l, Inc., Annual Report (Form 10-K), at 75 (Feb. 25,

This consistent trend shows that the Manville experience reflects not just its own particular condition, but a broader development in the asbestos litigation system.

*B. The Mix of Cancer and Non-Malignant Cases Has Changed*

As RAND has pointed out, the explosion of filings from 1995 through 2002 was primarily driven by a dramatic increase in non-cancer cases.<sup>278</sup> Of lesser significance in terms of the number of claims, but great significance in terms of the overall cost of the litigation, was a steady increase in mesothelioma filings.<sup>279</sup> The decrease in asbestos filings in the last two years has primarily involved non-cancer claims, with more modest reductions in filings for lung cancer and “other cancer.” Mesothelioma filings have remained stable.

The net effect of this trend has been a major shift in the mix of diseases. In 2002, non-malignant claims accounted for about 90% of total U.S. filings.<sup>280</sup> In 2005, Manville’s “non-malignant” claims were about 66% of U.S. claims.

What accounts for this change? Filing rates for claims alleging non-malignant diseases are driven by the recruitment strategies of plaintiffs’ lawyers. The litigation environment in 2005 is much less favorable to non-malignant claims than it was a few years ago, for several reasons. First, the pendency of the FAIR Act has had a depressing effect on the recruitment of new non-malignant cases. Lawyers have been reluctant to develop new non-malignant cases given the possibility that a change in law could render the investment in new cases useless. The lore on the street, at least, is that lawyers began shutting down litigation screening in 2003-2004, and the full effects of that are just being felt today. It remains an open question whether screenings will recommence. Second, reforms in venue and consolidation rules in Mississippi and West Virginia have made those states, previously the haven of mass screeners, much less attractive (although the West Virginia Supreme Court’s recent decision striking down the state’s venue reform law could lead to a rebound of litigation screenings in West Virginia).<sup>281</sup> Third, the prevalence of formal and informal mechanisms for giving priority to the sick provides a disincentive for investing in the advertising

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2005); Owens-Illinois Group, Inc., Annual Report (Form 10-K), at 84 (Mar. 16, 2006); SAINT-GOBAIN, 2004 ANNUAL REPORT 176 (2005).

278. CARROLL ET AL., *supra* note 1, at 73-74.

279. *Id.* at 74.

280. *Id.* at 75.

281. *See supra* note 173.

and screening that is necessary to recruit non-malignant claims by the thousands or tens of thousands. The recent medical criteria legislation in Ohio, Texas, Georgia, Florida, Kansas, and South Carolina should accentuate this trend. Finally, the reek of scandal has at least temporarily discouraged the abusive screening practices that were, until recently, routine. Those practices can be expected to attract intense scrutiny by courts, the media, and even prosecutors. It is not a good business to be in.<sup>282</sup>

At the same time, the value of cancer claims—especially mesothelioma claims—has been increasing. When asbestos litigation was in its nascent stages, mesothelioma claims accounted for 6% of the total claims and 18% “of the gross compensation paid all claimants combined.”<sup>283</sup> More recent studies estimate that although only about 3% of claimants file mesothelioma claims, those claimants receive 20-38% of the gross compensation.<sup>284</sup> Similarly, claims for lung and other cancers have declined from 12-14% to 5%, but the compensation level has remained steady at 20% of the total spending—representing a significant increase in the value of an individual cancer claim.<sup>285</sup> This trend is also reflected in the payment ratios in bankruptcy trusts (or proposed trusts). For example, under the Manville Trust’s 1995 Trust Distribution Process (“TDP”), the ratio between the scheduled value of a mesothelioma claim and the scheduled value of unimpaired non-malignant claims was eight to one.<sup>286</sup> Under the 2002 TDP, the ratio increased to

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282. A microeconomic study of screening practices over time could shed much light on the likelihood that mass screening practices will make a comeback, and in what form. See Francis E. McGovern, *Economic Opportunities for Plaintiffs and Asbestos Claims Resolution Facilities* 15 (undated) (unpublished manuscript) (on file with the NYU Annual Survey of American Law). Many of the reforms in the tort system may have made it much less attractive to recruit vast numbers of claims with dubious x-ray readings and no genuine impairment. For example, medical criteria legislation on the ABA model both reduces the return on screening by raising the bar for recovery (and reducing settlement values) and increases the cost of screening by imposing procedural requirements such as a physical examination. It is possible to imagine developments that could reduce the costs of screening—e.g., low cost mobile CT scan technology—and increase returns—e.g., establishing values for cases that show a decrement in pulmonary function from a previous baseline (even if the resulting functioning is not below the normal range), concentrating more on lung cancer claims detected during screenings, and finding new jurisdictions that are relatively friendly to non-malignant claims. It is not self-evident that mass screenings will never reappear in some form, as they did after early scandals in the 1980s. See *supra* notes 45-54 and accompanying text.

283. CARROLL ET AL., *supra* note 1, at 99.

284. *Id.* at 99-100.

285. *Id.* at 100.

286. MANVILLE PERSONAL INJURY SETTLEMENT TRUST, 1995 TRUST DISTRIBUTION



twenty-nine to one.<sup>287</sup> Plans proposed in many current bankruptcies also reflect an increase. The 2002 proposed plan in the Babcock & Wilcox bankruptcy envisioned an eight to one ratio between mesothelioma and unimpaired non-malignant claims, while the final approved plan increased that ratio to eighteen to one.<sup>288</sup> The economics makes it much more attractive to pursue higher value claims.

In many ways this change is very welcome. It would be a mistake, however, to assume that the increased prevalence of cancer claims means that “good” cases have prevailed over “bad” cases. Many of the problems described above affect cancer cases just as much as they affect unimpaired non-malignant claims. Thus, the long latency period of asbestos disease, and the particularly long latency of mesothelioma, makes product identification inherently difficult. In the absence of objective records on product identification, the system will continue to be vulnerable to reconstructed memory. And, of course, the procedural nightmare that was Madison County, Illinois, primarily involved mesothelioma claims.

*C. Plaintiffs’ Trial Lawyers Are Searching for New Jurisdictions to Replace Yesterday’s Venues of Choice*

As we have seen, several plaintiff-friendly jurisdictions—especially Texas, Mississippi, and Madison County, Illinois—have become much less attractive in the last two years. However, the underlying structural features of the American judicial system that allow plaintiffs a wide choice of forum continue to exist. Plaintiffs’ lawyers have the technical ability to recruit plaintiffs from anywhere in the United States (and to some extent, also abroad), and to bring the cases anywhere they can obtain personal jurisdiction over the necessary defendants. Given expansive long-arm statutes and the nationwide business of many asbestos defendants, it is technically possible to bring asbestos cases in a vast number of state courts.

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TION PROCESS 8 (1995), *available at* <http://www.mantrust.org/FTP/1995TDP.pdf> (last visited Oct. 20, 2006).

287. MANVILLE PERSONAL INJURY SETTLEMENT TRUST, 2002 TRUST DISTRIBUTION PROCESS 7 (2002), *available at* <http://www.mantrust.org/FTP/C&DTDP.pdf> (last visited Oct. 20, 2006).

288. *Compare* Debtor’s Amended Plan of Reorganization as of May 7, 2002, Exhibit E, at 16, *In re* Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. May 7, 2002), *with* Joint Plan of Reorganization as of September 28, 2005, as Amended Through January 17, 2006, Exhibit B, at 25-28, *In re* Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. Jan. 17, 2006), *available at* <http://www.babcock.com/pgg/pr/ExhibitsAmended11706.pdf>.

If courts were all pretty much interchangeable, this technical capability would be of only limited importance. Plaintiffs would normally prefer to bring their lawsuits in a forum that is most convenient to them, which normally would be where they live, though it could also be where they were exposed. American state courts are not interchangeable, however. In the first place, judges have the power to make many discretionary decisions that cannot be easily controlled on appeal and that can fundamentally affect the course of justice. We need only remember the trial judge's conduct following the *Cosey* trial or Judge Byron's modus operandi in Madison County to understand how sensitive justice is to the discretion of judges. Unlike some European countries, America does not have a cadre of professional judges whose esprit de corps creates a certain uniformity from court to court.<sup>289</sup> The federal judicial system comes somewhat closer than state courts to that ideal, but in recent years asbestos cases have generally not been brought in federal court.

The sheer diversity that characterizes the American court system is amplified by the fact that judges in the United States are usually elected. It is generally thought that the plaintiffs' trial bar has an especially strong influence in judicial elections, in part because plaintiffs' lawyers have traditionally had close personal relationships with local judges. Moreover, those personal relationships themselves can affect what happens in judges' courtrooms. Even if in particular instances the pattern of influence works differently, the plaintiff has the power to choose his forum, at least initially, and so cases naturally flow to courts where these patterns work most strongly in their favor.

Secondly, there are great differences in the jury pool from place to place. Juries in Mississippi, New York, the Texas Gulf Coast, Los Angeles, and southern Illinois are notorious for high verdicts.<sup>290</sup> This may reflect local conditions—for example, the high cost of living in New York—and sometimes it may reflect rules of jury selection that prevent the jury from being a true cross-section of the community.

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289. See Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure* 12-13 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Working Paper Series, Research Paper No. 39, 2002), available at [http://ssrn.com/abstract\\_id=306759](http://ssrn.com/abstract_id=306759).

290. AM. TORT REFORM FOUND., *JUDICIAL HELLHOLES* 10-11, 14-20, 25-26, 31-32 (2004); AM. TORT REFORM ASS'N, *BRINGING JUSTICE TO JUDICIAL HELLHOLES* 6-7 (2003); see also *New York Jury Awards \$47 Million in Premises Suit to Meso Victim*, MEALEY'S LITIG. REP.: ASBESTOS, Apr. 2, 2003, at 3, 4 (discussing a \$47.1 million verdict for one mesothelioma sufferer in a 2003 New York case).

Since plaintiffs' lawyers have the ability to move cases around the country, looking for the most favorable venues, and since they have an incentive to do so because the choice of forum has a huge impact on the value of a case, it is no surprise that they have responded to reversals in the magic jurisdictions of yesterday by looking for other favorable venues. Thus, the Simmons, Cooper firm of Madison County began in 2005 to bring cases in Delaware (the state of incorporation of many companies), in an effort to recreate a case processing system that has some of the features of Madison County.<sup>291</sup> Other plaintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases. Still other plaintiffs' lawyers in Arkansas are said to be attempting to lure Texas cases eastward as a result of the adverse trends in Texas in the last few years.

No one knows which courts will be the asbestos courts of the future. It is important to realize that the plaintiffs' trial bar is not just looking for a friendly, plaintiff-oriented judge or jury, though of course that helps. At least as important may be a court's willingness to experiment with extraordinary methods of judicial case management to deal with a mass of asbestos cases on its docket. The experiments with class actions, consolidations, and rocket dockets have all had the effect of drawing cases to the jurisdictions that employ them—as well they should, since these techniques are invariably designed to force defendants to settle early and to avoid actually litigating the case. To the extent, however, that trials become a more prominent element in the asbestos litigation system (as we anticipate), plaintiffs' counsel will be drawn to jurisdictions that are attractive trial venues even apart from the use of creative techniques to force settlement. The resurgence of Los Angeles as a forum for asbestos cases may be due to this factor.

While plaintiffs enjoy a choice of forum, and while official doctrine accords great weight to the plaintiff's choice, defendants are not completely helpless. They can, and have, sought to have cases against them in unfavorable venues dismissed in favor of a more convenient forum. The attitude of local and appellate courts to *forum non conveniens* motions can greatly restrict the use of "venues of convenience" with no discernible relationship to the plaintiff or the plaintiff's injury.

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291. See *supra* note 189 and accompanying text.

The asbestos litigation system is currently in a process of sorting out venues. In the past, however, the litigation has been characterized by cycles—explosive growth in jurisdictions of convenience (recently, Texas, Mississippi, Madison County), followed by a reaction, and a new surge elsewhere. It is highly doubtful that the current balance will last indefinitely. The underlying economics of litigation and the structure of the American court system tends to keep the cycle going.<sup>292</sup>

*D. The Plaintiffs' Trial Bar Will Invest in Developing New Factual and Legal Cases*

Over the last thirty years, the plaintiffs' trial bar has characteristically reacted to setbacks by expanding asbestos litigation to include new defendants and new theories. Over the whole period examined in this article, plaintiffs' lawyers have been pushing the envelope, and it is still unclear how much success they are having.

Probably the most significant new development has been the emergence of second-hand exposure cases. These cases typically involve a situation where a mesothelioma victim was exposed to asbestos brought home from work by another family member (usually a husband or father).<sup>293</sup> The plaintiff in such cases can be young, and the circumstances of childhood exposure can be especially appealing to juries.

The plaintiffs' bar has also been attempting to establish the liability of new kinds of defendants. There has been a great deal of interest in the liability of premises owners to the employees of their independent contractors (or to the spouses or children of their employees).<sup>294</sup> Since premises defendants are typically large corpora-

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292. Forum selection patterns are influenced by the goals of the people choosing the forum—the plaintiffs' lawyers. For example, a lawyer whose strategy is based on mass screenings and filing of unimpaired, non-malignant cases would be attracted to the Mississippi of a few years ago (and to some extent even today), but would be wholly uninterested in Madison County. As the economics of the mass screening model changes, what plaintiffs' lawyers look for in a court will also change. Los Angeles, for example, has a reputation as a friendly jurisdiction to plaintiffs who are willing to work up and try cases. Thus, lawyers who litigate a small number of cancer cases may be attracted to Los Angeles while lawyers who rely on "wholesale" settlements may not.

293. See, e.g., *California Jury Awards \$11.5 Million for Second-Hand Asbestos Exposure*, MEALEY'S LITIG. REP.: ASBESTOS, Dec. 20, 2002, at 10 (discussing a case in which the wife of a pipefitter developed mesothelioma after being exposed to asbestos from her husband's clothing).

294. See generally Patrick M. Hanlon, *Developments in Premises Liability Law 2005* (ALI-ABA Course of Study on Asbestos Litigation in the 21st Century, 2005) (on file with the NYU Annual Survey of American Law). The California Supreme

tions, and since their insurance policies typically do not have aggregate limits, establishing the case against such defendants is of great practical importance.<sup>295</sup> There have been huge verdicts in premises (or employer) cases, but such cases face significant legal obstacles in many states.<sup>296</sup> The most that can be said is that premises liability is still a major battleground.

Similar battles have been fought over a number of different kinds of “low-dose” cases, especially claims involving gaskets and

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Court addressed the issue of liability to employees of a premises owner’s independent contractors in *Kinsman v. Unocal Corp.*, 123 P.3d 931 (Cal. 2005).

295. On the question of non-products insurance coverage, see Stempel, *supra* note 25 (forthcoming) (manuscript at 26-47, on file with the NYU Annual Survey of American Law). R

296. For a discussion of the U.S. Steel and Shell cases, both in Madison County, see *supra* notes 112, 114 and accompanying text. In addition, in March of 2003, a New York jury returned a \$47 million verdict against Consolidated Edison and Long Island Lighting Company in favor of a boilermaker who had worked for various independent contractors at the utilities’ plants. *New York Jury Awards \$47 Million in Premises Suit to Meso Victim*, MEALEY’S LITIG. REP.: ASBESTOS, Apr. 2, 2003, at 3. While there have not been comparable blockbuster verdicts since 2003, some verdicts in premises cases are still quite high. For example, in 2005 a Texas jury awarded over \$25 million to a woman who claimed to have contracted mesothelioma as a result of washing her husband’s asbestos-laden clothing. *Texas Jury Awards \$25.7M in Meso Household Exposure Case*, MEALEY’S LITIG. REP.: ASBESTOS, Nov. 2, 2005, at 4 (citing Court’s Charge to the Jury). R

An area of recent debate is whether premises liability should extend to claims by workers’ household members who suffer from asbestos-related conditions resulting from exposure to asbestos dust the worker brought home. Courts faced with this issue divide into two camps. Some have held that the danger to family members from take-home exposure was foreseeable and thus premises defendants may be held liable for resulting injuries. See *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (holding that a premises defendant “owed a duty to spouses handling the workers’ unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing”). Others, however, have held that a premises defendant has no liability for injuries caused by take-home exposure. See *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) (“[T]he employer’s duty to provide a safe workplace is not to be extended to persons outside the workplace.”); *In re N.Y. City Asbestos Litig.*, 840 N.E.2d 115, 116 (N.Y. 2005) (finding that the Port Authority of New York and New Jersey owed no duty to a Port Authority employee’s wife who contracted mesothelioma from take-home exposure). Defendants and insurers are engaged in an active campaign to try to avoid premises liability for injuries stemming from take-home exposure. See, e.g., *Briefs Focus on Texas Stance on Duty of Premises Owner to Exposed Household Members*, MEALEY’S LITIG. REP.: ASBESTOS, Feb. 15, 2006, at 8 (noting that defendants are arguing that Texas should not “‘extend current tort law and legal duties to a new class of plaintiffs . . .’”). If premises defendants and insurers are successful in convincing courts to limit employer and landowner liability for injuries caused by take-home exposure, pressure will grow to extend the same rule to product manufacturers.

valves and automobile and truck friction products cases (e.g., brakes and clutches).<sup>297</sup> In addition, new attention is being paid to community or neighborhood exposures and even exposures resulting from the negligent removal of naturally occurring asbestos.<sup>298</sup> The important point here is not to handicap legal and factual theories and defendants, but simply to note the energy, creativity, and entrepreneurial talent that goes into establishing the case against new defendants (or old defendants in new situations).

Defendants and insurers are not passive spectators in this process. For example, premises defendants have struck back hard, obtaining favorable legislation in some states and court decisions limiting liability in others. The shape of asbestos litigation in the future will be largely determined by the outcome of the struggles between the plaintiffs' bar and defendants and insurers in a multitude of different settings. These struggles become even more crucial with limits on joint and several liability.

*E. Asbestos Litigation Is Likely to Proceed on a More Individualized Basis, with Less Reliance on "Management" of the Mass and More Emphasis on Trials*

Several factors suggest that asbestos will be a less massive mass tort, at least in the near future. First, the reduction in filings should make defendants' asbestos dockets more manageable. Depending on the practices of the courts in which the cases are filed, it may be possible to single out more claims for individualized treatment.

Second, as the case mix tends more toward cancers, more is at stake in each individual lawsuit. The most successful plaintiffs' lawyers will be the ones who can obtain top values for these cases. That can only be done by maintaining a credible trial threat. As the relative weight within the plaintiffs' bar begins to shift in favor of lawyers who try cases rather than lawyers who manage the settlement process, there should be more trials.

Third, defendants (and even more, insurers) have an interest in contesting the expansion of asbestos litigation to new contexts, new theories, and new circumstances. As plaintiffs' lawyers attempt to push the envelope, they will encounter resistance until a new steady state emerges. New limitations on joint and several liability will provide an additional incentive to litigate, since a possible re-

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297. See, e.g., *Florida Asbestos Jury Awards \$31M in Friction Brake Case*, MEALEY'S LITIG. REP.: ASBESTOS, Dec. 21, 2005, at 4.

298. See, e.g., *Large Study Links Exposure to Naturally Occurring Asbestos, Meso*, MEALEY'S LITIG. REP.: ASBESTOS, July 20, 2005, at 10.

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sult of litigation may be to reduce the potential liability of whole categories of defendants to a proportionate share.

That said, there is little likelihood of a return to a pattern of litigation dominated by individual trials. While the rate of filing of new claims is a fraction of what it was in the 1998-2002 period, the Manville trust still received more than 16,000 new U.S. claims in 2005, and most of those claims continue to be non-malignants. That filing rate is only somewhat lower than the rate of the late 1980s, at which time asbestos litigation was already the nation's most massive mass tort and judges were experimenting with mass resolution procedures. The function of new trials in the next few years will be to set new settlement values in a changed litigation environment, with new participants on the plaintiff side and the defendant side. After a period of instability, a new balance is likely to emerge, and with it, a return to routine settlements according to a matrix created by the litigation experience of the next few years.<sup>299</sup>

*F. There Will be a Continued Use of Bankruptcies to Achieve Final Resolution of Asbestos Liabilities*

Even in tomorrow's brave new world of asbestos litigation, there will be companies who are either eager to obtain a global resolution of their liabilities or who are unable to withstand the onslaught of asbestos lawsuits. For such companies, bankruptcy will continue to be the only real option. Moreover, as asbestos litigation becomes more litigious, more and more companies will be inclined to seek the resolution (as expensive as it may be) that bankruptcy provides.

Even apart from new bankruptcies, many existing bankruptcies will proceed to confirmation. It is impossible to know in advance how much money will be directed to trusts for the payment of asbestos claimants, but even a conservative estimate puts the amount

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299. The demise of the unimpaired non-malignant case as a result of inactive dockets, medical criteria legislation, scandal, and the changed economic strategy of the plaintiffs' trial bar will not necessarily reduce costs for defendants as much as they hope. In the past, some plaintiffs' lawyers have been willing to settle cancer cases for less in order to induce defendants to settle groups of non-malignant cases. If this spreading of the value of the cancer case is eliminated, it is inevitable that cancer demands will go up. At the same time, plaintiffs' lawyers will have an incentive to step up their recruitment of cancer claimants, which could further increase costs for defendants and insurers. And, of course, a litigation strategy that depends more on individualized litigation will inevitably be more expensive. Thus, while medical criteria are probably helpful on balance from the defendant's perspective, they are by no means a panacea.

in excess of \$30 billion. Depending on the outcome of future insurance litigation and other factors, the amount could be higher. Although a major portion of trust assets will be reserved for future claimants, over the next five to ten years the amount of money returning to the asbestos litigation system from bankrupt defendants through trusts will be very significant. Certainly, asbestos trusts will be a much larger component of the overall set of arrangements for compensating asbestos victims than has been true in the past. In effect, there will be a very sizable administrative claims resolution system (or a number of parallel systems) alongside the tort system, all aimed at resolving asbestos claims.<sup>300</sup>

This situation is unprecedented. No one can predict exactly how this parallel administrative system for paying asbestos claims will affect the underlying tort system. For example, the availability of “easy” money from asbestos trusts could reduce pressure to develop a case against peripheral defendants (just as the withdrawal of these funds from the tort system with the bankruptcies of 2001-2003 increased that pressure). Moreover, as significant funding from the bankrupt returns to the system, calls by defendants and insurers for reform in joint and several liability may seem more persuasive. At the very least, the solvent defendants will be looking for ways of making sure that recoveries from the bankruptcy trusts are taken into consideration in determining their liabilities, either in court or in the informal system of settlements.

## VII. CONCLUSION

Asbestos litigation has been an ever-changing mass tort. Since its inception in the late 1960s, it has transformed itself over and over again as the environment has changed. There are several underlying factors at work in all of this change. First, the nature of asbestos injury has created a much more fluid situation than exists in most other mass torts. Asbestos was used everywhere in the twen-

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300. The various trusts are engaged in a process of *de facto* consolidation. For example, the Celotex Trust has recently agreed to provide claims handling services to the new Babcock & Wilcox Trust. This trend toward consolidation has at least two causes. First, the claims facilities formed or retained by the older trusts have relatively high fixed costs, and as filing rates have declined, it has become economically efficient to sell claims processing services to other trusts in order to utilize otherwise idle capacity. Second, the newer trusts find consolidation somewhat easier since their trust distribution processes were designed more or less simultaneously, by more or less the same people. Relative homogeneity in this area makes it much easier to retain one claims facility to manage the distribution processes of several trusts.



tieth century. Exposures occurred in a wide variety of settings and involved millions of people, many of whom will contract serious diseases and many more who will develop minor conditions that may serve as a predicate for compensation for fear of the more serious ones. Numerous companies can be said to have been responsible for the same exposures. The latency of asbestos diseases is so long that evidence to evaluate asbestos claims is frequently unavailable. This complexity makes it possible for the litigation to take many different forms, and to survive problems that would put an end to other mass torts.

Second, the asbestos plaintiffs' bar has been an extraordinary institution. It has mobilized claims in vast numbers, both non-malignant and cancer. It has created a sort of interstate market in claims, taking advantage of its ability to find and exploit especially favorable courts. It has been imaginative in developing new claims against new defendants, reacting to such catastrophes as the demise of Manville by finding others to fill, and overfill, the gap. Much of the adaptiveness of asbestos litigation is due to the ability of the trial bar to react to change and to make the best of it from their own point of view and (frequently) that of their clients. This is not to deny or excuse the fraud and abuse that has characterized the system at least since the 1980s. Fraud is part of the story, but it is by no means the whole story.

Third, an important part of the story is the decentralization and sheer variability of courts in the United States. It is the combination of a centralized trial bar and an extremely decentralized court system that opens up many of the opportunities that have made asbestos litigation what it is.

Fourth, the biggest threat to the asbestos litigation system has always been its own success. The pattern that began with Manville has been repeated over and over: the collapse of key defendants, followed by a period of uncertainty resulting in the expansion of the system to new defendants and new kinds of claims. Logically, this pattern should eventually reach a limit, but no one knows where that limit is or when it will appear.

The wild swings of asbestos litigation described in these pages illustrate the workings of these underlying factors. What is new is the very wildness of the oscillation. The expansion of asbestos litigation in the period from 1998 through 2002 was exuberant, and it provoked an exceptionally strong reaction. Perhaps the most interesting thing about that reaction is the way in which it relied on a change of public perception and consequent political pressures that affected both state legislatures and courts themselves. Asbestos

litigation was no longer the province of customary (or even extraordinary) judicial administration: it was a public issue. The federal legislative effort and legislative successes for the defendants in key states involved in the asbestos litigation have created a new environment and a new challenge for all participants in the litigation process.

The current asbestos litigation system is unstable. If the trends of the last two years hold up—and many of them are eminently reversible—it is likely that asbestos litigation will become more costly, more adversarial, and more focused on the seriously ill. At the same time, an intense struggle is underway as plaintiffs' lawyers seek to expand the ranks of defendants and increase the liability share of existing defendants, while defendants and insurers try to create a firebreak that limits the spread of the litigation to new defendants and new settings. As the litigation picks up in intensity, more and more defendants are likely to resort to bankruptcy to settle their liabilities and put asbestos litigation behind them. These new bankruptcies will, of course, aggravate the ongoing struggle between the plaintiffs' trial bar and the remaining solvent defendants.

In this struggle, it is important not to lose sight of the claimant. Over the next forty years, tens of thousands of people will die of mesothelioma and lung cancer due to their exposure to asbestos products.<sup>301</sup> Most of the companies responsible for that exposure are already in bankruptcy, and the only assets available for compensating these people are in existing asbestos trusts or the ones that are in the process of formation. If the defense side succeeds in holding the asbestos litigation within bounds, many of the undoubted victims of asbestos exposure will not receive appropriate compensation, and some will receive no compensation at all. If the defense does not succeed, there will be compensation, but it will be paid largely by the wrong companies, with a significant adverse impact on the economy.

The only way to ensure that the sick are compensated without undue burdens on American industry is to replace the tort system altogether, as Congress has attempted to do with the FAIR Act. Creation of a new compensation scheme is a huge challenge. But the alternatives are either unfairness to innocent victims or continuing with the stream of bankruptcies and the outrageous costs of the tort system forever. There should be a better way.

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301. See CARROLL ET AL., *supra* note 1, at 135-39.