

## Asbestos Lessons: The Unattended Consequences of Asbestos Litigation

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Personal injury claims arising from the use of asbestos have been a disaster for many in addition to those who were harmed by exposure to that product. A lesson to be learned from the experience is that disasters of such a scale and such complex causes have radiating consequences that neither our judicial system nor our legislatures have been able to address seasonably. Indeed, the failures call into question the utility of our “blame game” as a method of addressing the social and political issues of public health and work-related disabilities.

One consequence of the crisis has been an epidemic of broad accusations. On the one hand, asbestos claims have occasioned much adverse comment about the trial lawyers representing claimants. On the other, an equal amount of venom has been directed at corporate management for its negligence in failing to protect consumers, workers, and their families from known hazards

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resulting in long-delayed but enormous medical and economic harms. Some of the criticism on both sides has been earned. But responsibility lies broadly on the public and its elected representatives for their failure to respond in a timely and useful way to very serious problems confronted by thousands of businesses, millions of people, and by our judicial systems, both state and federal. The Congress of the United States is particularly deserving of a failing grade.

Virtually overlooked in the exchange of name-calling, however, has been the role of third parties sharing responsibility for the harm and receiving benefits associated with the risks to which the victims were exposed. The state and federal governments equally failed to regulate Corporate America when they could have prevented the taking of profits at excessive risk and expense to employees and consumers. Behind that governmental neglect are the American citizens and their congressmen who have failed to accept responsibility for the consequences of their disinclination to regulate business to prevent foreseeable harms to fellow citizens.

Also, almost unnoticed is the revelation that the American legal system, as we have known it, simply does not work in matters presenting issues of fact requiring consideration of scientific evidence as complex as that needed to sort out the consequences of a plaintiff's historic exposure to asbestos. This is especially so when similar but distinct issues are presented by the tens of thousands at a time. The adaptations made to deal with such issues on the scale required are not acceptable to any sound notion of due process of law. Having made this defense of the courts, it ought also be acknowledged that the judiciary has also at times neglected duties it could have performed. To make these points, a brief history of the subject is required.

## I. A BRIEF HISTORY OF ASBESTOS

### A. *The Advent of the Crisis: Prehistory to 1972*

Asbestos is a common mineral. It was employed by ancient Greeks as "the magic mineral" shielding structures from fire because

of its resistance to heat.<sup>1</sup> Its use over thousands of years prevented many misfortunes. The substance occurs naturally in much of the world's drinking water and its fibers can be found in a wide array of foods and commercial products such as tonics and mouthwashes.<sup>2</sup> In the 1860s it was first commercially used in the United States as insulation.<sup>3</sup> In 1931, a technique was developed for mixing the mineral in cement. It came to be used in brake linings that might overheat. And it was also widely used to cover pipes used to transmit heated air or fluids.

The asbestos industry in the United States was long dominated by The Johns-Manville Corp. It mined the material and fabricated it for a wide range of uses, primarily in the construction and maritime industries. Much of its product was sold to intermediate companies for use in their products. For example, in 1880, Babcock & Wilcox began to design, construct, and sell large commercial boilers for use in power plants, factories, and ships. B&W used asbestos as a lining for its boilers to protect workers and equipment from the high temperatures generated and to assure thermal efficiency of its boilers. Hundreds of thousands of American workers have at some time in their lives worked around a B&W boiler.

As early as the 1930s, executives of The Johns-Manville Corp. were aware of an occupational hazard to miners and factory workers who were exposed to the material.<sup>4</sup> The information was not a secret, but neither was it advertised. It was optimistically assumed that the risk of inhalation by others, such as shipyard or construction workers, was negligible. The Americans who were at work in the 1930s, and the executives of Johns-Manville, Babcock &

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1. In 430 B.C. it was used in lamp wicks and denoted as Carpathian flax. Romans used it as a cremation garment to conserve the remains of persons of noble rank. Charlemagne used it for a table cloth that could be washed in fire. NAT'L INST. OF HEALTH, U.S. DEP'T OF HEALTH EDUC. & WELFARE, PUBL'N NO. 78-1681, ASBESTOS: AN INFORMATION RESOURCE 1 (Richard J. Levine ed., 1978).

2. Andrew Churg, *Non-neoplastic Diseases Caused by Asbestos*, in PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 213, 219-22 (Andrew Churg & Francis H. Y. Green eds., 1988); see also Mesothelioma SOS – Types of Asbestos, <http://www.mesotheliomasos.com/asbestosTypes.php> (last visited April 23, 2007) (listing additional uses of asbestos).

3. *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B. R. 710, 735 (Bankr. E. & S.D.N.Y. 1991).

4. PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 5, 112-13 (1985).

Wilcox or other firms, at that time, grew up expecting to die before they were sixty years old.<sup>5</sup> The risk of infections that might affect the health of workers twenty or thirty years after an exposure—as was the case with asbestos-related injuries—was not a risk deemed worthy of serious attention by most people, even many of the workers themselves.

And given the legal standards of the day, no business executive in 1940 had reason to think of the possibility of corporate liability for harms occurring decades into the future. The law of torts was not then recognized in most states as a primary means of regulating business to discourage management from consciously taking risks with the health and safety of consumers and workers. It was only after 1960 that tort law became recognized as public law,<sup>6</sup> and only then did American courts begin to interpret statutes of limitations as providing for a time to sue that begins to run only when the harm is discovered by the victim.<sup>7</sup> A business executive who had decided in 1940 not to incur the risk to others of making or using asbestos could have been justifiably dismissed for cause by shareholders expecting diligent pursuit of profits.

Among the consumers of asbestos, the largest by far was the United States Navy. During World War II, the Navy stockpiled asbestos as a strategic resource needed to reduce the fire hazard on thousands of vessels constructed at that time for use in combat. Four and a half million Americans were employed in shipyards at that time and were there exposed to the risk of inhalation of asbestos

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5. See NAT'L CTR. FOR HEALTH STATISTICS, DEP'T OF HEALTH & HUMAN SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, LIFE EXPECTANCY AT BIRTH, AT 65 YEARS OF AGE, AND AT 75 YEARS OF AGE, ACCORDING TO RACE AND SEX: UNITED STATES, SELECTED YEARS 1900-2001, 133 tbl. 27 (2003), available at <http://www.cdc.gov/nchs/data/hus/tables/2003/03hus027.pdf> (showing average life expectancy in 1900 was 47 years, rising to 77 years at the end of the century).

6. Leon Green, *Tort Law as Public Law in Disguise* [Installment I], 38 TEX. L. REV. 1 (1959); Leon Green, *Tort Law as Public Law in Disguise* [Installment II], 38 TEX. L. REV. 257 (1960). See also LEON GREEN, *JUDGE AND JURY* (1930) (describing the regulatory role of tort law); WILLIAM L. PROSSER, *LAW OF TORTS* (1941) (recognizing the regulatory role of tort law).

7. Kim Marie Covello, Note, *Wilson v. Johns-Manville Sales Corp. and Statutes of Limitations in Latent-Injury Litigation: an Equitable Expansion of the Discovery Rule*, 32 CATH. U. L. REV. 471 (1983).

fibers.<sup>8</sup> Many of those now dead died of causes to which their exposure to asbestos may have contributed. The Navy was not unaware of risks, but apparently concluded that *c'est la guerre*.<sup>9</sup> Countless sailors who survived naval combat owed their survival to the use of asbestos. But the shipbuilders on whom the compensating risks were imposed were not, alas, provided with the medical services afforded those in uniform through the Veterans' Administration.

Even back on land, whatever the long-term risk to workers and consumers from the use of asbestos, it was not unreasonably deemed to be more than offset by the reduction in the risk of harm to others by fire. It is not unlikely that tens or even hundreds of thousands of Americans were spared a scorching death because of the use of asbestos in buildings and ships. Whether on balance there would have been less suffering in America if asbestos had been taken off the market in 1920 when some knowledge of its possible effects on respiration first materialized is a question with no clear answer.

Gradually it was revealed by medical research that the risks associated with the inhalation of asbestos fibers had been underestimated. A cause of the underestimation was that the harm caused by the exposure was latent. No one inhales a breath of asbestos and dies, or even loses breath. In time, he or she might—but might not—develop pleural fibrosis plaque, a thickening of the lung tissue visible to x-ray. This was long thought to be merely a benign marker of exposure.<sup>10</sup> However, even a person with that symptom might—but might not—develop asbestosis, an impairment of respiration. That impairment could possibly occur in a few months, but more often would not occur for decades. It might become a serious impairment of respiration, but generally the impairment experienced, if any, was no more serious than the impairment experienced by cigarette smokers.

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8. JOSEPH A. ARTABANE & CATHERINE R. BAUMER, DEFUSING THE ASBESTOS LITIGATION CRISIS: THE RESPONSIBILITY OF THE U. S. GOVERNMENT 4-21 (1986).

9. See Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1884-86 (1992) (explaining the government's possible knowledge of the hazards of asbestos exposure and the perceived importance of asbestos to the war effort).

10. Arnold R. Brody, *Asbestos*, in TOXICOLOGY OF THE RESPIRATORY SYSTEM 393, 394 (Robert A. Roth ed., 2000).

By 1935, there was published evidence that asbestos exposure correlated with lung cancer, and in 1955 a paper was published reporting that those exposed to asbestos fibers for twenty years were ten times more likely to contract lung cancer.<sup>11</sup> But given the rarity of lung cancer, this was still a small if significant long-term health risk. Further study in the 1960s revealed that this result was associated with smoking tobacco; the two exposures together created a magnified likelihood that the worker exposed to asbestos who also smokes would contract lung cancer. It was also then discovered that over a period of 15 to 40 years, a person with asbestosis might contract a particularly deadly form of cancer, mesothelioma, a development that seems to have no correlation to smoking tobacco.<sup>12</sup>

By 1970, it was reasonably clear that some workers exposed to asbestos would over a period of decades contract asbestosis and might be increasingly disabled by that condition, some might develop secondary medical problems associated with the asbestosis, some would develop lung cancers, and a few would develop mesothelioma.

After 1973, the use of asbestos declined sharply as knowledge of the risks spread and as the new Occupational Safety and Health Administration called for its removal. The substance was used in the construction of the lower floors of the World Trade Towers, but its use was discontinued as the structures were erected to their great heights. Had the use of asbestos been continued as planned, the towers would have been slower to collapse. However, as a result, the rescuers would have inhaled more of the injurious fiber and had their lives shortened accordingly.<sup>13</sup> Additionally, the construction workers building the towers would also have had marginally shortened life expectancies.

Notwithstanding the decline in the use of asbestos, the premier epidemiological study found that 27.5 million Americans

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11. Richard Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 BRIT. J. INDUS. MED. 81 (1997).

12. Approximately 20% of mesothelioma cases are not caused by asbestos fibers. Michele Carbone et al., *The Pathogenesis of Mesothelioma*, 29 SEMINARS ON ONCOLOGY 2, 3-4 (2002).

13. Kaream Fahim, *Metro Briefing New York: Ground Zero Worker Dies of Cancer*, N.Y. TIMES, March 17, 2006, at B1 (reporting that a paramedic who inhaled asbestos fibers on 9/11 died of mesothelioma in March 2006).

had by 1979 been exposed to the possible risk of inhaling asbestos fibers.<sup>14</sup>

*B. Asbestos Litigation, 1972-1991*

In 1972, a worker suffering from asbestosis sued a building materials manufacturer for failure to warn him of the danger associated with working with the material.<sup>15</sup> The evidence presented was that the defendant knew that work with asbestos carried risks but had not disclosed them to the plaintiff. On that evidence, the worker won a \$68,000 jury verdict.<sup>16</sup> More and more workers formerly employed by Johns-Manville, and intermediate distributors of asbestos such as Babcock & Wilcox, were by then experiencing harms that may have been caused at least in part by the inhalation of asbestos fibers. The use of asbestos had been so ubiquitous and the reactions so long delayed that an afflicted person may have been exposed to the fibers by any of numerous firms. More claims began to be filed. The lawyers filing them were invoking the system of legal risk management that had evolved in the preceding post-war decades.

During the 1970s, about 950 cases were filed in federal courts and perhaps twice that many again in state courts.<sup>17</sup> The number of filings in federal courts increased sharply in the early 1980s; from 1980 to 1984 about 10,000 cases were filed in federal courts, leading one federal court to declare that it was “ill-equipped to handle this avalanche of litigation.”<sup>18</sup> At the time of the utterance, it was scarcely an avalanche. One also began to hear the term “mass tort,” a term suited to aviation disasters but perhaps misleading when applied to a mass of claims each of which is materially different from the next with respect to the question of causation as well as that of measuring individual damages.

Most personal injury cases are settled, so that not more than 5 out of 100 asbestos cases could be expected to conclude with a trial

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14. William Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality 1980-2030*, 3 AM. J. INDUS. MED. 259 (1982).

15. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

16. *Id.*

17. TERRENCE DUNGWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR* 36 (1988).

18. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986).

on the merits. The federal caseload in 1984 could have been handled with less than one additional asbestos trial every five years by each federal judge. Then, from 1985 to 1989, 37,000 more asbestos cases were filed. The annual total for 1990 rose to 13,000, a number that could result in an asbestos trial a year for each federal judge. That placed a substantial demand on the available resources, but still not one that it was impossible for the judiciary to bear.

These numbers take no account of the filings in state courts, which were surely more numerous, although there is no precise count. By 1991, it was estimated that there were 115,000 asbestos personal injury claims pending in all American courts, state or federal.<sup>19</sup> This was regarded as an appalling number. But it was about four cases per trial judge, and given that most personal injury claims settle before trial on the merits, at least when such trials are imminent, it was not yet a totally unmanageable flood of litigation.

Although most personal injury claims were settled before trial, the incentives to settle asbestos cases were magnified by the complexity of the cases thus presented for decision when the merits were reached. Each and every individual claim presented a set of scientific questions bearing on the nature and extent of the plaintiff's harm and the relationship of that harm to an exposure to the inhalation of asbestos fibers. Such scientific issues would need to be resolved on the basis of testimony by medical and other scientific experts presented by adversary counsel. It would not be extravagant to consume several days of trial to educate a jury and/or a trial judge on the intricacies of the science bearing on any individual claim.

In addition, in each case there was a need to reconstruct events related to the plaintiff's alleged exposure to the risk. In most asbestos cases, those events occurred at least two, and often three or four, decades prior to the trial at which they were to be reconstructed. Also in many cases, the plaintiff might have been exposed to risk at several different times by several different employers or suppliers. Except in cases brought against Johns-Manville, there was also likely to be an issue as to when the defendant acquired knowledge that asbestos fibers are dangerous to the health of those working on the defendant's premises. That issue often turned on the credibility of testimony of business executives

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19. Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES MAG., Feb. 18, 1991, at 75.



denying knowledge.<sup>20</sup> And in some cases it might be possible to prove that the defendant was reckless in failing to disclose the risk, and might thus be held to additional account. Finally, there was in each case an issue of damages. How severely, if at all, is the plaintiff actually disabled? How does the disability affect his or her life and work? And how should his or her suffering be compensated? The resolution of the latter issues requires a trier of fact to assess the veracity of the witnesses, bearing on each individual plaintiff's suffering and economic loss.

These difficult factual issues involving the interface of law and science intersect with uncertainties of substantive law. Can a firm such as Johns-Manville, that mines and manufactures asbestos, be held to account for all the harms? Should it be a defense that millions of Americans were protected by its product? What of a firm such as Babcock & Wilcox that builds boilers according to specifications provided by the United States Navy—were they responsible for knowing of the risk and informing those who worked with or around their boilers? Is it a defense—or at least a partial defense—in a lung cancer case, that the plaintiff chose to inhale cigarette smoke that may have been the primary cause of his sickness? Or can a tobacco company that sold him cigarettes be made to pay some or all the costs? Where there are multiple possible causes of the disability, may liability be apportioned among numerous defendants, or must the plaintiff prove that the wrongdoing of a particular defendant is the predominant cause? What is the liability of a parent corporation for claims against a subsidiary that were latent at the time the subsidiary was acquired? What is the applicable statute of limitations, and when should the period of limitation be deemed to have commenced? Are plaintiffs entitled to compensation for “pain and suffering” associated with the fear of illness resulting from the knowledge that their exposure to asbestos may in the future result in serious illness or death? All these legal issues are governed by the tort law of each state. In many states, the questions may have no clear answers or the answers may depend on the factual circumstances. Moreover, because the states do not answer the questions in the same way, there is a ubiquitous conflict of laws issue as to which state law ought be applied to

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20. A defense lawyer denotes the resolution of the issue as a “swearing match.” Richard O. Faulk, *Asbestos Litigation in State Courts: Why the System is Broken and Some Suggestions for Repair*, 71 U.S.L.W. 2323, 2323 (2002).

resolve any of these specific legal questions in a particular individual case.

Because the factual and legal issues presented were so complex and their resolutions so difficult to foretell, parties were especially eager to avoid trials on the merits.<sup>21</sup> But even in cases settled without trial, legal costs were very high because of the lawyers' need for access to scientific evidence as a basis for negotiated settlements. It was unsurprising when a 1982 study measuring the costs of dispute resolution concluded that for every dollar reaching an asbestos claimant, \$1.59 was paid to lawyers and medical examiners. The National Association of Manufacturers would in 2006 plausibly up that estimate to \$2.38.<sup>22</sup> For smaller asbestosis claims, the portion actually received was much lower, while for the larger mesothelioma cases, the portion of the cost paid by the defendant that was received by the plaintiff was higher.<sup>23</sup>

If parties were not eager to try these complex cases, the judiciary was even less inclined to do so. There was growing and legitimate concern that the outcomes of trials seemed almost random with similarly situated plaintiffs receiving radically divergent compensation depending on factors such as (1) the persuasiveness of particular expert witnesses; (2) the degree of concern of the judge and jury for the personal tragedy faced by particular plaintiffs; and (3) differences in the law of the jurisdiction in which the cases were tried and decided. Asbestosis cases indeed resembled a lottery.

*C. After 1991: Court Management, Delay, and  
Resolution en Masse*

By the year 2002, 730,000 claims had been filed alleging personal injuries caused by the use of asbestos.<sup>24</sup> Approximately

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21. 95.3% of the cases filed were settled before trial, and another 0.9% after commencement of the trial. JAMES S. KAKALIK ET AL., VARIATIONS IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 19 (1984).

22. *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 32774 Before the S. Comm. on the Judiciary*, 109th Cong. 41 (2006) (statement of John Engler, President, National Association of Manufacturers).

23. KAKALIK ET AL., *supra* note 21, at 89-91.

24. 150 CONG. REC. S4078 (daily ed. Apr. 19, 2004) (statement of Sen. Hatch).

8,400 businesses had been named as defendants in asbestos cases.<sup>25</sup> A total of \$54 billion had been paid to claimants. In each of the last three years, over 100,000 additional claims were filed. This has occurred despite the fact that the usage of asbestos declined precipitously in the 1970s and was substantially terminated by 1980. It is estimated that another million claims will be filed and that the total cost to settle them all will reach \$300 billion unless Congress takes belated action to somehow reduce the costs.<sup>26</sup>

To date, fewer than two thousand out of almost a million asbestos cases have been tried on the merits.<sup>27</sup> By 1991, many courts, dissatisfied with the fact that some plaintiffs were not settling and were seeking trials, began to insist on settlement. Particularly in the federal courts, the idea that it was the business of trial judges to conduct trials—perhaps especially long and puzzling trials—to decide cases on their merits, gave way to a new professional morality. The federal judiciary began to practice what was styled as case management, designed to achieve economy by exercising tighter judicial control over pretrial proceedings, in the hope of inducing a higher rate of settlement. Some federal judges came to regard the conduct of a civil trial not as the core business of their profession, but as an event marking a professional shortcoming of the judge. It may also have been a factor in the seemingly special reluctance of federal judges to decide asbestos cases on the merits that complex issues of state law were presented, issues that federal courts were not commissioned to resolve. It may also have mattered that the product was off the market, so that no decision of any court could be expected to impact others than the parties themselves.

For all these reasons, it became increasingly difficult in many federal courts to get an individual asbestos case to trial. While most asbestos plaintiffs were not eager to go to trial, they did need a firm trial date to induce defendants to settle their claims. Lawyers representing plaintiffs therefore began to contrive to keep their cases in state courts and out of federal courts. This was emphatically so after 1991 when all the cases pending in federal courts were

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25. 150 CONG. REC. S4080 (daily ed. Apr. 19, 2004) (statement of Sen. Hatch).

26. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT (2002).

27. CARROLL ET AL., *supra* note 26, at 56.

consolidated before a single judge.<sup>28</sup> Such a consolidation was authorized for the purpose of conducting more efficient pretrial proceedings.<sup>29</sup> Given that most of the scientific evidence would be specific to an individual case, it was at best unlikely that a single transferee judge could materially diminish the cost or the delay associated with pretrial preparation of an asbestos case. While the federal judges ordering the transfers may have thought otherwise at the time, the transferee judge had no authority to conduct a mass trial,<sup>30</sup> even if that were imaginable.

At that time in 1991, it was reported by one observer that the backlogs in federal courts would not get to trial for decades. Another found that if asbestos cases were individually tried, it would require 150 years to decide them all.<sup>31</sup> While these forecasts were extreme exaggerations, there was no doubt that the single transferee judge was not expected to decide any of the cases on the merits. Additional facilities would be needed if these complex cases were each to be individually tried, if ever they were to be tried.<sup>32</sup> Meanwhile, asbestos claims pending in federal court were on permanent hold. The transferee forum was merely a place for asbestos cases to languish.

Similar dilatory devices were employed by the courts of many states whose judges likewise sought to avoid deciding the cases on their individual merits. Many judges were especially slow to put asbestos cases on the docket for trial.

But when it was at last discerned that some defendants were exploiting the delay by refusing settlements until cases were set for trial (which was apparently forever), more than a few state court judges began consolidating asbestos cases for common trial. If trying one asbestos case was almost too much to ask of lawyers, judges, and jurors, what could be said for trying six or a dozen cases simultaneously in a single continuous hearing? This was a device for terrorizing recalcitrant defendants and it resulted in some very

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28. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 422-424 (J.P.M.L. 1991).

29. 28 U.S.C. § 1407 (2000).

30. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

31. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 140 (1995).

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

generous settlement offers. The generosity of these settlements, on the basis of limited examination of their merits conducted in the settlement process, had the effect of drawing more plaintiffs into the pool of claimants.<sup>33</sup> This device of coercive judicial consolidation was forsaken by many courts.<sup>34</sup> The Supreme Court of West Virginia in 2001 allowed a trial judge in that state to consolidate twelve thousand asbestos claims for a single trial, an event that obviously cannot happen, but which is a sufficiently appalling prospect to force settlements not based on scrutiny of the merits of the individual claims.<sup>35</sup> A secondary consequence of this device is to concentrate the filing of claims in those jurisdictions employing it. Claimants who filed their claims in West Virginia seemed likely to be compensated more generously than those who were so poorly advised that they filed their claims in a forum in which their case might actually come to trial.

## II. LEGISLATION CONSIDERED

Numerous schemes were advanced to relieve the problem of docket congestion by federal legislation. Most envisioned some kind of administrative agency that would devise a formula for even-handed management of the claims.<sup>36</sup> Such an agency or facility might resemble the industrial accident compensation boards sitting in many states to hear and decide a range of similar matters. Its judges might be expected to acquire a measure of expertise about the science employed to resolve the issues of fact raised regarding causation and damages. It might be directed and empowered to categorize the cases so that like cases would receive like treatment. But hearings to consider such legislative reforms led nowhere,<sup>37</sup> as Congress lacked the will to impose any solution on the problem. One reason was that Corporate America was unable itself to agree on

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33. See generally Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943 (2000) (discussing mass torts and class actions).

34. See Francis E. McGovern, *An Analysis of Mass Tort for Judges*, 73 TEX. L. REV. 1821, 1838-41 (1995) (discussing judicial approaches to mass torts).

35. The Supreme Court of the United States declined to review this decision. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

36. See Brickman, *supra* note 9, at 189 (advocating administrative remedy).

37. The Fairness in Asbestos Compensation Act, H.R. 1283, 106th Cong. (1999).

a solution. Another was that plaintiffs' lawyers were likewise divided. There were those with clients suffering grave mesothelioma and those suffering minor respiratory impediments. There were those whose clients' sicknesses were manifest and immediate and those whose clients' injuries consisted of symptoms indicative of the possibility of future suffering and disability and, finally, those who sought compensation for the fear that they would suffer in the future.<sup>38</sup> A third reason for the impasse was the blindness of Congress to the responsibility of the public to bear a substantial part of the blame and the cost.

In 2005, the Fairness in Asbestos Injury Resolution Act was approved by the Senate Judiciary Committee. The bill would have established a \$140 billion National Asbestos Trust Fund, managed by an Office of Asbestos Disease Compensation within the Department of Labor, with fixed levels of compensation for different categories of asbestos victims.<sup>39</sup> The fund if established would have been assembled from diverse bankrupt estates supplemented by annual contributions from firms and insurers facing liabilities. In return, contributors would have been exempt from further claims. The Director of the Congressional Budget Office expressed doubt that the fund was adequate to meet the obligations undertaken and forecast that the government would end up holding the bag.<sup>40</sup> Economist Charles Bates predicted that the future claims on the fund would equal \$300 billion.<sup>41</sup> The difficulty of forecasting the future caseload was manifest. The bill did not pass the Senate.

Other schemes for resolving the asbestos crisis were also proposed. Senator Nickles called for reforming the federal law to limit the number of asbestos claims. His proposal would have imposed strict medical criteria whereby a person would have to

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38. Geoffrey Hazard, *The Futures Problem*, 148 U. PA. L. REV. 1901, 1996 (2000). Hazard suggests a legislative solution to the problem. *Id.* at 1916. Other comments on the issue include Linda Mullenix, *Back to the Futures: Privatizing Future Claims Resolution*, 148 U. PA. L. REV. 1919 (2000) and Diane Wood, *Commentary on the Futures Problem*, 148 U. PA. L. REV. 1933 (2000).

39. *Recent Developments in Assessing Future Asbestos Claims under the Fair Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2005) (statement of Sen. Specter, Member, Senate Comm. on the Judiciary).

40. *Id.* at 115.

41. *Recent Developments in Assessing Future Asbestos Claims under the Fair Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 115-17 (2005) (statement of Sen. Specter, Member, Senate Comm. on the Judiciary).

prove asbestos related injuries *before filing* a claim. Imposing strict medical criteria might or might not reduce the number of claims, but splitting the trials would spare courts the need to hear proof of damages in cases in which it was determined that there was no compensable injury. Additionally, his proposal would toll the statute of limitations to protect the rights of people who exhibit signs of asbestos-related disease but develop illnesses in the future.<sup>42</sup> Alternatively, his proposal advocated nationalizing Texas' scheme of establishing inactive dockets: all asbestos related claims would be relegated to inactive dockets and shifted to an active docket only after a claim is certified to involve an asbestos related illness according to established medical criteria.<sup>43</sup> However, because of the ever-present political differences in Congress, these solutions, whatever their merit or demerit, have remained unavailable on a national scale.

Variations on the Texas scheme have been enacted in other states. They have served to reduce the number of claims, at least for the moment. In 2006, Senator Specter sought to revive the FAIR Act aimed at securing the support of those concerned about the cost of paying claims that are premature in the sense that the claimant is not yet physically disabled but is concerned about his or her future prospects of health.<sup>44</sup> His draft would defer consideration of their claims until there is a certified disability, somewhat in the manner of the laws enacted in Texas and other states. Still, insurers were concerned that some claimants might be “double-dipping” by making claims on workmen’s compensation funds for the same injuries compensated by the trust fund.<sup>45</sup> Eric Green, testifying as an expert on alternative dispute resolution mechanisms established by bankruptcy courts, affirmed that that system was working reasonably well. He noted that the Halliburton Company had gone through the bankruptcy process and then prospered, so that it—in the end—paid

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42. 150 CONG. REC. S4258 (daily ed. Apr. 22, 2004) (statement of Sen. Nickles).

43. George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 999-1000 (2003).

44. The Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. (2006).

45. *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 82 (2006) (statement of Edmond F. Kelly, Chairman, Liberty Mutual Ins. Co.).

off all claims in full for the amounts set in the bankruptcy proceeding.<sup>46</sup>

No serious consideration has been given to any proposal to impose any of these costs on federal taxpayers. This is so even though the asbestos problem bore a resemblance to the Black Lung Disease experienced by coal miners. The United States had undertaken to fund care for those afflicted with that illness.<sup>47</sup> The black lung problem was much smaller in scale and it was immediately obvious that the coal companies could not bear the cost. Perhaps these differences explain the inability of Congress to accept even partial financial responsibility for the disaster so that the loss might be distributed to those who have benefited from the use of asbestos.

### III. SOLUTIONS DEvised BY JUDGES AND PARTIES

Meanwhile, courts and parties, left largely to their own devices by Congress for thirty years, sought to fashion systems for mass resolution of these diverse individual claims. The West Virginia case previously referred to was a parody of other forms of aggregation. The first of these aggregative responses was the filing of a petition in bankruptcy by the Johns-Manville Corp. As noted, there was evidence that Manville executives had some knowledge of the risks that they had not shared with the public, and they were in fact the producers of most of the material used in the United States. And most of the cases filed before 1982 were filed against the Johns-Manville Company.<sup>48</sup> It was that year that Manville filed its bankruptcy petition. Accordingly, all asbestos claims then pending against it were stayed. The viable assets of the firm (including the trade name) were sold and the proceeds placed in trust for the

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46. *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 82 (2006) (statement of Eric Green, Founder, Principle, Resolution, LLC).

47. See ALAN DERICKSON, *BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER* 143-182 (1998) (describing the process by which coal miners afflicted with black lung disease obtained public benefits).

48. Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 *CARDOZO L. REV.* 1891, 1894 n.13 (1992); see also *Kane v. Johns-Manville Corp.*, 843 F.2d 639 (2d Cir. 1988) (discussing high number of suits to which Manville had been a party).



claimants, those with pending claims and those anticipated in the future.<sup>49</sup> The firm thus remained in business while its ownership changed. It was envisioned that the trust would settle individual claims in accordance with a formula established by it with the approval of the court.

This was a radical solution. Most corporate executives understandably dread bankruptcy. It is, however, now often the result that an enterprise will survive bankruptcy in a reorganized form, as did Johns-Manville, and that management will survive even while the shareholders' interests are wiped clean. So far as appears, no managers have been the object of shareholders' derivative suits for their failures to protect shareholders from liability for asbestos claims, although if management was truly negligent, it would seem that the managers should not be allowed to pass all the loss on to the ill-served shareholders.

Many of the firms in bankruptcy as a result of asbestos claims remain, like Johns-Manville, profitable while the bankruptcy stops claimants dead in their tracks, at least while it is determined that there is a net worth to be divided among them. As Eric Green observed, some like Halliburton have managed to revive and pay off all claims in full.<sup>50</sup> Never mind the former shareholders.

Similar aggregation could also be achieved outside bankruptcy by means of cooperation among plaintiffs' lawyers. Asbestos cases are likely to be referred from the lawyer having a direct relationship with a plaintiff to another lawyer who specializes in the settlement of asbestos cases. The lawyer or lawyers to whom the cases are referred can then speak of an inventory of claims that can be simultaneously presented to the defendant and settled together. In the 1980s, lawyers representing plaintiffs discovered that corporate managements could be intimidated into more favorable settlements if their claims could be aggregated so that settlement conversations would center on sums of such magnitude that they might affect the market value of shares.<sup>51</sup> A problem with

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49. *MacArthur Co. v. Johns-Manville*, 837 F.2d 89, 89 (2d Cir. 1988).

50. *The Fairness in Asbestos Injury Resolution Act of 2006: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 82 (2006) (statement of Edmond F. Kelly, Chairman, Liberty Mutual Ins. Co.).

51. DEBORAH HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORT LITIGATION* (1985); Deborah Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1912-13 (2002). This affect had been earlier discovered by antitrust lawyers, leading one

these settlements en masse was that they did not always prescribe the amount to be received by each member of the lawyer's inventory of plaintiffs. Thus, either the lawyer had to divide the take among his or her clients, a task presenting a direct conflict of interest, or some form of alternative dispute resolution was needed to make the division, thereby transferring the cost of defending claims from the defendant to the plaintiffs collectively. "Claims facilities" relieved judges and defendants' lawyers of workloads and their tasks were performed by other lawyers whose services were not necessarily less costly. Alternatively, in some cases a "reverse auction" occurred, pitting plaintiffs' lawyers in competitive bidding to be the lawyer who settles a mass of cases and shares in the proceeds.<sup>52</sup> In all its forms, aggregation complicates the ethical responsibilities of plaintiffs' lawyers.<sup>53</sup>

A disincentive to business management considering such a deal has been the prospect that future claimants, whose numbers are unknown, would demand treatment equal to that afforded in the previous settlement. Managers hoped for global peace that would bring closure to their liability for asbestos claims and enable their firms to concentrate on the future rather than the distant past. Not only does global peace serve the interest of long-term investors, but it is also favored by investment managers who are acutely sensitive to swings in the prices of shares in which they have invested. And it is especially remunerative to corporate managers who make the settlement decisions if they are compensated, as most are, with options to purchase shares in the companies that can be sold at a profit only if the share price rises in the short term.

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observer to denote the practice as "legalized blackmail." Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971).

52. The device is explained more fully by Justin Scheck, *The Gritty World of the Reverse Auction Spreads*, NAT'L L.J., July 25, 2005, at 11.

53. See generally Carrie Menkel Meadow, *Ethics of the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995) (arguing that the ethical complications of their settlements demand changes in the legal system beyond professional ethics rules); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiff's Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998) (exploring differences between the rules governing the settlement process for consensual and non-consensual litigation groups); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENV. L. & POL'Y REV. 243 (2001) (attacking "perverse" financial incentives of lawyers in aggregate litigation).

This is so, in part, because global peace facilitates use of an accounting principle that allows separate measurement of “trailing income” against future income. Because accountants have learned this not so subtle distinction, the costs of global settlements can be charged against past income to show that the business was less profitable in the past than was thought by earlier investors, but the future income is more secure as projected. That results in keeping the share prices high. If cases are settled one at a time, the liability remains a drag on future income and share prices fall. This is a consequence directly affecting the personal wealth of corporate managers who are paid with stock options entitling them to buy shares in the not-too-distant future at today’s price, with the gain to be taxed at the lower rates applied to capital gains.

Perhaps for these reasons, Congress has, with a gentle touch of public generosity, added incentives favoring such settlements by their treatment for tax purposes. The Internal Revenue Code permits defendants who make payments into a settlement fund to deduct them at the time of the fund’s establishment rather than when (or if) funds are distributed to claimants.<sup>54</sup> Other provisions assure favorable treatment to those who buy and sell (factor) “structured settlements,” which involve a series of payments rather than a lump sum to an injured party.<sup>55</sup>

To facilitate global settlements bringing the global peace for which managers were willing to pay premium prices while avoiding the complexities of bankruptcy proceedings, creative lawyers and judges fashioned the limited-fund class action.<sup>56</sup> This was primarily a defensive use of a device designed for the benefit of plaintiffs.<sup>57</sup> The corporate defendant reached agreements with plaintiff’s counsel on the size of the fund that it could afford to provide and then

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54. See generally Richard B. Risk, Jr., *A Case for the Urgent Need to Clarify Tax Treatment of a Qualified Settlement Fund Created for a Single Claimant*, 23 VA. TAX REV. 639 (2004) (arguing that Congress did not intend for the judicial doctrine of economic benefit to apply to a designated or qualified settlement fund created for the benefit of a single claimant).

55. See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived* 4 WIS. L. REV. 859, 882 (2002) (“[D]efendants save approximately 20-25% by settling with a structure rather than a lump-sum.”).

56. FED. R. CIV. P. 23(b)(2) was invoked.

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

established a trust similar to that created by the bankruptcy court.<sup>58</sup> Two such schemes reached the Supreme Court of the United States and were set aside for failure to provide adequate protection of individual claimants who did not consent to them, especially future claimants whom the parties sought to bind to a judgment of the court that would afford the defendant “global peace” against future claims.<sup>59</sup> In the latter of these cases, the Court accurately observed that American courts have been besieged by an “elephantine mass of asbestos cases [that] defies customary judicial administration.” That observation was reiterated by the Court in 2003.<sup>60</sup>

When the limited fund class action encountered these obstacles, the experts returned to the law of bankruptcy for solace. Congress had, in 1994, taken action explicitly to authorize the bankruptcy court to protect the reorganized firm from future claimants, provided it made arrangements to treat future claimants on equal terms with prior claimants.<sup>61</sup> To provide equal treatment, the bankruptcy court needed a means of measuring future claims, something the Manville Trust and others had been unable to find, given the enormous diversity in the physical conditions of the claimants.<sup>62</sup> Modern science has simply not been up to that task. Partial payments were made to present claims, but it then appeared that the number of future claims had been grossly underestimated. Perhaps this should not have been surprising, given that at least 27 million Americans had been exposed, and a significant percentage had a physical symptom that might have been associated with exposure at some time past, a symptom that might entitle them to a measure of compensation now, while more accurately assessed compensation would be later barred by the bankruptcy decree.

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58. For an account, see Francis E. McGovern, *Claims Resolution Facilities and the Mass Settlement of Mass Tort*, 52 LAW & CONTEMP. PROBS. 61 (1990).

59. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). A novel approach to the future claims problem was approved by the district court *In re Diet Drugs*; the approach called for conferring on each member of the class a right resembling the “put option” familiar to investment traders and entitled the class member to invoke a right to treatment or compensation at a future time. *In re Diet Drugs*, 2000 U.S. Dist. Lexis 12275 (E.D. Pa. Aug. 28, 2000).

60. *Norfolk & W. Ry. Co.*, 538 U.S. at 166; cf. *Metro N. Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

61. 11 U.S.C. § 524(g) (2000).

62. Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 382-391 (1994).

Notwithstanding these problems, sixteen large corporations had filed bankruptcy petitions by 2000 and scores more followed. Most remain in business and many prosper for the benefit of claimants rather than shareholders.

To protect their members whose claims were threatened with foreclosure before they were ripe, labor unions and some lawyers began engaging in aggressive claim solicitation campaigns designed to multiply the number of filed cases, thereby increasing the pressure on defendants to settle cases wholesale.<sup>63</sup> Once a person was informed of the presence of pleural plaque, a condition that is itself inconsequential, he or she was effectively informed of the injury and was obliged under the law of most states to file a claim or else be barred from filing when and if the injury became consequential. As noted, some states have sought to solve this problem by creating registries on which individuals having such a condition could be listed, with the effect that they would not be barred by the statute of limitations if they were later physically disabled by the condition.<sup>64</sup>

In the 1990s, an increasing percentage of the claims filed were presented by workers who had not been employed in any of the industries in which asbestos exposure was severe.<sup>65</sup> Their exposures to the inhalation of fibers were more limited. For example, some encountered asbestos only as an ingredient in the ceiling tiles at their place of employment, which might have been a local grocery store. Because the severity of the injury is related to the degree of exposure, these claims are even less likely to represent real future injuries, but science cannot say for sure in any individual case. Also, because the law of most states allows plaintiffs to recover for mental anguish associated with physical injury, many plaintiffs with mild cases of asbestosis that are not at all debilitating may be entitled to compensation for the mental anguish resulting from the fear that a cancer may develop at some future time. The Supreme Court has now applied that principle to railroad workers seeking compensation under the federal law governing their rights.<sup>66</sup> The result of these holdings is that thousands of plaintiffs with slight or even non-existent injuries advance claims that compete with the claims of

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63. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL'Y 541, 564 (1992).

64. CARROLL ET AL., *supra* note 26, at 23.

65. CARROLL ET AL., *supra* note 26, at 46.

66. *Norfolk & W. Ry Co.*, 538 U.S. at 166.

plaintiffs having serious injuries in the distribution of the assets of the many firms made insolvent by their liabilities for asbestos injuries.<sup>67</sup> It is this problem that the state laws referred to seek to address.

Indeed, a new industry emerged to advertise its willingness to tell people whether they might have million dollar lungs; litigation-screening companies compete with mobile x-ray vans that offer free chest x-rays to anyone willing to sign an agreement retaining a lawyer with whom the screening company has a relation.<sup>68</sup> If a symptom is detected, the “patient” is informed and a claim is advanced to secure compensation for the emotional injury associated with the non-debilitating condition that might ripen into an illness. Such claims become valuable when they are aggregated in sufficient numbers to intimidate management.

The adjudication of future claims as envisioned by the 1994 revision of the bankruptcy law engages the bankruptcy court, like the class action trustee, in the sublime task of compensating victims for the enlarged chances that they may develop serious illnesses at some indeterminate future time. This is essentially a task of risk assessment of the sort the insurance industry rather than a law court is usually employed to perform. But insurance companies are not lined up in hope of securing that employment.

Can courts reckon the odds as well or better than insurance companies? Of course, many firms have long ago purchased liability insurance to protect them against such future claims. Unfortunately, the risks were seldom if ever accurately assessed. As noted, the number of claims was vastly underestimated. As a result, many firms that used asbestos in one way or another were underinsured. A recent estimate is that insurers will ultimately bear about sixty percent of the loss; that share will be equally divided between American insurers and non-U.S. insurers.<sup>69</sup> And some insurance companies are themselves facing risks of insolvency.

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67. Francis McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002); see also Roger Parloff, *Infinite Liability*, AM. LAW. 178 (Oct. 2002); *Lawyers Catch Asbestosis*, AM. LAW. 170 (April 2002).

68. Robert J. Samuelson, *Asbestos Fraud*, WASH. POST, Nov. 20, 2002, at A25. See WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* 181-208 (2003) (indicting the plaintiffs' lawyers).

69. Bob Van Voris, *Asbestos Suits: No End in Sight*, NAT'L L.J., Aug. 27, 2001.

Another troubling question raised by Peter Schuck is whether, when a bankrupt estate is not adequate to meet all claims, funds should be paid to those not injured, but who might be, at the expense of those who have been gravely injured.<sup>70</sup> The Act under consideration in 2005 would assure those gravely injured of compensation, but those whose injuries are not yet consequential may be at risk if \$140 billion is spent before his or her claim ripens.

#### IV. SOME LESSONS TO BE DERIVED

There are several lessons to be learned from this tragic tale. First, it is unlikely that many readers could disagree with the observation of the Supreme Court that the asbestos problem cried out for a legislated solution. Such a solution should have been forthcoming in 1970, and the United States should have borne much or all of the cost. The American policy of making business pay for the consequences of its innate indifference to the welfare of workers and consumers, may be a good idea in general—as a means of encouraging safer practices—but it was not a policy that could be usefully pursued with respect to asbestos. By the time the courts were involved, the use of asbestos was already in decline and did not need to be discouraged. Moreover, the alleged transgressions of business were in this instance motivated by the competing purpose to prevent harms caused by fire. And many of the users of asbestos were substantially innocent of full knowledge of the risks for which they are asked to pay. The responsibility was a public responsibility, not one rightly imposed on business. Both Congress and the Executive Branch flunked that test.

Second, we ought to agree that premature adjudication is not a satisfactory form of litigation. As has long been understood, there is a time to decide a case. A court established to apply law to facts cannot consistently with that mission measure and compensate harms before they have matured into real injuries with symptoms that can be examined and resulting disabilities that can be reasonably evaluated as to their extent and cause. Courts engaging in that practice are just guessing and hence failing to protect their integrity as institutions of law. Although a claim for compensation for the

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70. Schuck, *supra* note 63, at 560-67.

anxiety caused by knowledge of increased risk of future harm can be said to present a case or controversy within the meaning of Article III of the Constitution of the United States,<sup>71</sup> the longstanding judicial reluctance to resolve hypothetical cases<sup>72</sup> is rooted in considerations that are not irrelevant to cases in which courts are asked to guess about future cases. It follows that global peace in many, and perhaps most, mass tort cases of the asbestos sort is not a goal that can be prudently pursued by a court of law, however attractive that objective may be to accountants and executives. Whatever its limitations, the insurance industry, not the courthouse, is the place to look for global peace.

Third, we might learn from this experience the risks of the fashion presently prevalent in the federal courts that treats dispositions of disputes on their merits as professional failures by the judges. In asbestos cases, case management has diminished the threat that an imminent trial on the merits poses to parties with weak claims or defenses and thereby has encouraged their assertion. The evidence thus supports Judith Resnik's insistence that it is not the work of a judge to coerce parties either by imposing endless delay on the plaintiff or unmanageable aggregation on the defendant.<sup>73</sup> While it does appear that there are now too many asbestos claims to resolve each on its merits in a court of law, this was far from apparent at the time that extraordinary measures were being taken to avoid trying the cases on the merits. One is left to wonder how the march of events might have differed if each asbestos claim advanced in the 1980s had been given a prompt hearing and decision on the merits as each of them reached the top of its calendar. Most of the cases would have been timely, if expensively, settled as the parties squarely faced the risks and costs of having to prove their claims or defenses. Also we cannot know how many claims would not have been pursued by lawyers or clients if they were given reason to foresee a risk that their allegations would be rigorously tested on the merits. Those decrying the willingness of trial lawyers to represent

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71. See also *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (upholding the Declaratory Judgment Act).

72. E.g., *Hayburn's Case*, 2 U.S. 409 (1792).

73. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RES. 155 (2002).



claimants speculating that their lungs might prove to be worth a million dollars seldom observe the relation between those claims and the inaccessibility of a trial on the merits.

Fourth, we might fairly conclude that individual claims arising from exposure to asbestos, however ripe for adjudication, are simply too complex to be suited to adjudication by law courts. Institutions committed to making decisions that are “just, speedy, and inexpensive”<sup>74</sup> should not, if there is an alternative, be employed to resolve very complex scientific issues, nor asked to reconstruct decade-old events that seemed insignificant at the time to those who experienced them. The costs and the secondary consequences of such litigation are excessive. American courts do such things but only when there is no alternative and the enforcement of the law requires them. In the asbestos cases, they were called on to decide a superabundance of such matters. As noted, a special tribunal more like the industrial accident boards established in the early years of the 20<sup>th</sup> century existed as an alternative. While such institutions have their faults, they are a means of reducing costs and delay in these complex cases, and of assuring a greater measure of even-handedness. This is so because administrators deciding such matters acquire a measure of expertise reducing their need to be educated repeatedly and at length on the complex issues of medical science. They would, therefore, have a much better shot of achieving the appropriate aims of civil litigation than judges and juries.

Indeed, the presence of asbestos claims has likely contributed to a regrettable decline in the willingness and ability of American courts to address the merits of claims by providing a paradigm of cases in which addressing the merits is obviously a waste of scarce judicial resources. At least in federal courts, it is hard to get any case to trial, or to get a hearing on appeal.<sup>75</sup> Our courts are increasingly conducted as bureaucracies striving to avoid personal responsibility for decisions on the merits. There are, of course, other causes contributing to this unfortunate result, but the asbestos crisis is among them.

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74. As promised by FED. R. CIV. P. 1.

<sup>75</sup> See, e.g. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts*, 1 *J. Empirical Legal Stud.* 459 (2004) (“The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline.”)

V. THE LARGER QUESTION: IS LITIGATION THE RIGHT WAY TO ALLOCATE THE COSTS OF HEALTH CARE AND PHYSICAL DISABILITIES?

Although the asbestos crisis is extraordinary, none of the problems identified in this article are unique to that form of litigation. The crisis is, however, a stunning revelation of shortcomings in American government having deep roots and widely radiating consequences. The shortcomings are associated with two broad and exceptional policies whose connection is infrequently observed. One exceptional policy is America's unique reliance on the "blame game" of tort law as a primary method of regulating business to protect the safety of workers and consumers by imposing *ex post* liability sufficient to deter heedlessness of risks. The other exceptional policy is America's extraordinary refusal to redistribute any of the costs and consequences of most personal injuries.

Those who have been most alert to the pertinent shortcomings of the "blame game" have been the advocates of so-called "tort reform" intended to shield business from claims of diverse sorts. Tort reform advocates seldom acknowledge a need for alternative methods of regulating business to correct the innate indifference of large business management to the health and safety of remote workers and consumers, an indifference noted in the 18<sup>th</sup> century by no less an observer than Adam Smith.<sup>76</sup> I have had several occasions in recent years to debate tort reformers. It has been my habit to ask whether they were willing to submit to more vigorous *ex ante* administrative regulation of business decisions to prevent heedless risk-taking, regulation such as business is likely to experience in some other "developed" nations.<sup>77</sup> I have never heard

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76. After reflecting on accidents befalling distant others, "he would pursue his business or his pleasure, take his repose or his diversion, with the same ease and tranquility as if no such accident had happened." ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 157 (Oxford ed. 1976) (1759).

77. Of course, some risks are regulated *ex ante* by the Food and Drug Administration and by a few other agencies of government. This has recently led to the effort of tort reformers to invoke the doctrine of federal preemption against state tort law, thereby precluding the allegedly redundant regulation *ex post* provided by tort law. Robert Pear, *In a Shift, Bush Moves to Block Medical Suits*, N. Y. TIMES, July 26, 2005, at A1. The American Law Institute recently reconsidered the issue and supports the contrary provision. RESTATEMENT

an affirmative answer to that question. Tort reformers seek freedom to take risks with the consequence that persons other than themselves will be harmed.

Nor does it seem that most tort reformers are much concerned about the unavailability of health care to accident victims who may be able to acquire it, if at all, only by blaming someone with a deeper pocket. The asbestos crisis ought to suggest to them the possible wisdom of seeking health care reform as a means of achieving a tort reform objective.<sup>78</sup> Although the effects of the asbestos problem on the insurance industry are transnational, the courts of no other nation have experienced a similar asbestos crisis. This is not only because no other “developed” nation relies so heavily on tort law to provide *ex post* regulation of business risk taking, but it is also surely in part because other developed nations more freely redistribute the cost of accidents through public health care and disability programs, thus relieving the social and political pressures that produced the tort law of the United States.

The major advantage of public health care and disability insurance is that a single payer of all costs is unconcerned with causation or blame. Victims must prove their injuries to the satisfaction of a bureaucracy, but they need not pursue the intricate and subtle issues of cause and blame that have produced the asbestos crisis. With a fully developed single-payer system in the United States, most injured persons would have no need for legal services to secure conventional health care or replacement for modest lost earnings. Damages to be assessed in courts would as a result be

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(THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b) (1997). A plausible case can be made for preemption if the regulatory agency has been fully informed of the risks, leaving it to private lawyers representing tort claimants to investigate whether full disclosure has been made. *See, e.g.*, Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167 (2000) (summarizing and discussing the American Law Institute Reporter’s Study on Enterprise Responsibility for Personal Injury). Even if full disclosure is made, however, there is the serious problem that the regulatory agency itself may knowingly have concurred in allowing a risk to some citizens in order to diminish a greater risk to others; Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000) (discussing “the proper role of regulatory compliance as a strategy for constraining the traditional functions of tort law.”).

78. Perhaps the issue is especially pertinent to the regulated risk-taking that deliberately incurs small risks to diminish larger ones. Those spared the larger risks should compensate those on whom the smaller risks are imposed, but that is not the way regulation works in America.

greatly reduced.<sup>79</sup> As in other developed nations, only those plaintiffs with substantial lost earnings or extraordinary health care needs would have claims worth pursuing in court. It seems almost certain that compensation for pain and suffering would decline when triers of fact have no concern for assuring that the special damages are fully paid without need to share the proceeds with a lawyer.<sup>80</sup> Although more injured persons would receive care and support, few would have to share their compensation with lawyers. With fewer tort claimants seeking less compensation, defendants would also experience reduced legal expenses. Whereas it may now cost a total of \$3.38 to put \$1.00 in the hands of an asbestos victim,<sup>81</sup> it would be reasonable to expect that such cost could be greatly reduced.<sup>82</sup>

Independent of the legal costs saved by a single-payer system, one might also reasonably expect to reduce noticeably the cost of delivery of health care services. Much of the costly health care and accident insurance industries could be expected to disappear as their services would be needed only by persons desiring extraordinary health care or insurance against the loss of substantial incomes. Most businesses might expect to cease providing health care as a fringe benefit, thereby simplifying personnel management.

These savings might be offset, possibly more than offset, by the cost of providing health care and disability insurance to citizens to whom such benefits are not presently available. Persons with respiratory disorders would receive care even if they had no one to blame for their condition and no health insurance. Businesses and individuals able to do so might have to pay higher taxes to enable government to bear that cost. Whether the added tax burden would

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79. At least this would be so if the collateral source rule on damages were made inapplicable, as seems entirely appropriate if the injured plaintiff had acquired the right to the benefits received without sacrifice on his or her part.

80. Indeed, the availability of single-payer health care might justify legislative reconsideration of the measures of damages in personal injury cases.

81. If the calculation of the National Association of Manufacturers is correct. See Statement of Engler, *supra* note 22.

82. For comparison, the overhead cost of the Social Security Administration is less than three percent. See Social Security Budget-2005 Budget Request, <http://www.ssa.gov/budget/2005bud.html>. Overhead on Medicare is only marginally higher. A single payer system would have responsibility for quality and cost controls that make none of the available comparisons apposite. But a single payer system's tasks would be infinitely simpler than those being performed by health care providers and insurers who are competing in a market of uninformed consumers and striving to avoid as many obligations as possible.

exceed the numerous savings incurred is not a prediction I am prepared to make. Would it be seriously objectionable to redistribute the cost of health care for those to whom it is presently unavailable, as many nations do? I leave the reader to answer that question with no more help than to say that the question is ripe for reconsideration.<sup>83</sup>

Those reformers who are inclined to dismantle our system of *ex post* business regulation should at least acknowledge not only the deregulatory implications of tort reform, but its secondary consequences in placing added reliance on a health care system that already fails to attend the needs of millions of citizens.

## VI. CONCLUSION

America's experience with asbestos litigation should teach us to appreciate both the merits and the limits of our system of *ex post* regulation of business. The civil trial is an important social and political institution on which the public depends for the protection of consumers, workers, and the environment. Even Corporate America cannot long do without it. But civil courts are not a system and cannot be made into a system fit to deal with individual matters as monstrously complex as the scientific issues to be resolved in asbestos cases. Nor can courts usefully try cases before they arise; premature resolution invites the filing of dubious claims. If legislatures insist on leaving such proliferations of complex disputes for the courts, they should be expected to provide enough judges, courtrooms, and juries to timely resolve disputes on their merits for the parties involved. Finally, it is long past the time to reconsider a health care system that is heavily dependent on litigation as the path to medical treatment of sickness and injury.

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83. BERTRAND DE JOUVENAL, *THE ETHICS OF REDISTRIBUTION* (1952) (providing an elegant modern statement of the case against redistribution).