

## BREAKING ASBESTOS LITIGATION'S CHOKEHOLD ON THE AMERICAN JUDICIARY

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*Asbestos, flame-retardant and insulating fibrous minerals once used and still found in many buildings, is known to cause cancer, asbestosis, and other serious illnesses. The large number of claims against asbestos manufacturers has produced a unique period of litigation in the United States courts system, characterized by hundreds of thousands of individual claimants and insolvent or near-insolvent defendants. According to some, asbestos litigation is an impending disaster and crisis situation due to the vast judicial resources consumed by it as well as the uncertainty underlying diagnoses of asbestos-related diseases. Even though exposure to asbestos dramatically decreased many years ago, it is estimated that between 500,000 and 2.4 million more asbestos-related claims may be filed in the future. After a brief survey of the history of asbestos litigation, the author explores the status of the litigation in U.S. courts today and analyzes a range of diverse proposals that strive to improve the efficiency and fairness of future proceedings. The author recommends implementing an administrative scheme modeled after the Black Lung Benefits Act and drawing upon the FAIR Act of 2005 as the fairest way to compensate claimants with asbestos-related diseases while ensuring timely processing of claims and stability for asbestos manufacturers facing bankruptcy.*

### I. INTRODUCTION

Asbestos, naturally occurring fibrous minerals that “have extraordinary tensile strength, conduct heat poorly, and are relatively resistant to chemical attack,”<sup>1</sup> flew under the radar until fairly recently. Heralded as a miracle product since the turn of the twentieth century for its fire retardant characteristics,<sup>2</sup> asbestos had various beneficial uses. The widespread use of asbestos, for example, contributed to the lowest fire death

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1. WORLD HEALTH ORG., AIR QUALITY GUIDELINES FOR EUROPE 128 (2d ed. 2000), available at <http://www.euro.who.int/document/e71922.pdf>.

2. See MICH. DEP'T OF LABOR & ECON. GROWTH, ASBESTOS: SHOULD I BE CONCERNED? 2 (1997).

rate in U.S. history, 3.3 fire deaths per 100,000 people in 1970.<sup>3</sup> Moreover, asbestos was considered a “strategic and critical mineral essential to the war effort during World War II.”<sup>4</sup> Even today, many products continue to utilize asbestos, including materials used in heat and acoustic insulation, fire proofing, roofing, and flooring.<sup>5</sup>

However, despite the beneficial uses of asbestos, “[e]xtensive exposure to asbestos . . . has resulted in more than 100,000 deaths from cancer and asbestosis,”<sup>6</sup> a scarring of lung tissue. Beginning in the 1960s, research showed that asbestos miners and insulation workers suffered from increasing rates of mesothelioma, a cancer of the lining of the lung.<sup>7</sup> That finding ushered in a period of unique litigation in United States courts, as

[n]o litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants’ bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an “impending disaster”—a crisis situation.<sup>8</sup>

The lawsuits continue to this day, and one report estimates that 500,000 to 2.4 million asbestos claims still may be looming,<sup>9</sup> despite the fact that asbestos exposures ceased many years ago.<sup>10</sup>

This Note explores the state of asbestos litigation in the United States and suggests methods to improve upon the current system. Part II details some of the health risks that asbestos poses. Part III surveys the history and present state of asbestos litigation. Part IV analyzes various proposals that aim to make asbestos litigation more fair and efficient for all parties, while Part V suggests that implementing an administrative scheme to handle claims is the best way to improve upon the current system of litigating asbestos-related disputes.

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3. RACHEL MAINES, ASBESTOS AND FIRE: TECHNOLOGICAL TRADE-OFFS AND THE BODY AT RISK 19 (2005) (noting that the lowest fire death rate coincided with a time when 1.5 billion pounds of asbestos were used in the United States).

4. Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 996 (2005) [hereinafter Brickman, *Financial Impact*].

5. Env'tl. Prot. Agency, *Where Can Asbestos Be Found?*, <http://epa.gov/asbestos/pubs/asbuses.pdf> (last visited Jan. 20, 2008).

6. Brickman, *Financial Impact*, *supra* note 4.

7. *Id.* at 996–97.

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

9. Martha Neil, *Backing Away from the ABYSS: Courts May Be Starting to Get a Grip on Asbestos Litigation*, 92 A.B.A. J., Sept. 2006, at 26, 28.

10. *Id.*

## II. BACKGROUND

### A. *Health Risks of Asbestos*

In the 1960s, discoveries about the medical consequences of asbestos exposure suddenly eroded the “miracle product” status enjoyed by asbestos since the turn of the twentieth century. Three major categories of asbestos-related injuries exist: malignancies, asbestosis, and pleural plaques.<sup>11</sup> Malignancies include mesothelioma, lung cancer, and other cancers.<sup>12</sup> Such illnesses are the most severe of the asbestos-related injuries and result from substantial and prolonged exposures to asbestos dust.<sup>13</sup> Mesothelioma is a disease that afflicts the protective layers surrounding the body’s internal organs.<sup>14</sup> The cells of these protective layers become abnormal and divide without control or order.<sup>15</sup> In asbestos-related mesothelioma cases, the protective layers surrounding the lungs and the chest cavity usually become afflicted first, but the cancer can spread to other parts of the body.<sup>16</sup>

Doctors diagnose approximately 2000 mesothelioma cases each year, and they cite asbestos exposure as the most common cause for those diagnoses.<sup>17</sup> Studies have shown that while a high correlation exists between asbestos exposure and mesothelioma, “asbestos does not cause or enhance an individual’s risk for [other] cancer[s].”<sup>18</sup> Although the medical profession does not maintain data on the number of annual lung cancer deaths associated with asbestos exposure, survivors of victims filed about 1200 new asbestos-related lung cancer claims annually in the 1990s.<sup>19</sup> Similar to other asbestos-related injuries, mesothelioma has a long latency period, which is defined as the time from first exposure to asbestos and ultimate diagnosis of the disease. In most cases, mesothelioma occurs twenty to forty years after the first exposure to asbestos, although some cases can have a shorter latency period, such as ten to fifteen years.<sup>20</sup>

Asbestosis refers to a type of fibrosis, or scarring of lung tissue, that asbestos exposure causes.<sup>21</sup> Prolonged exposure to asbestos can lead to

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11. Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 44 (2003) [hereinafter Brickman, *Disconnect*].

12. *Id.*

13. *Id.*

14. Nat’l Cancer Inst., *Mesothelioma: Questions and Answers*, May 13, 2002, <http://www.cancer.gov/cancertopics/factsheet/Sites-Types/mesothelioma> (last visited Jan. 20, 2007).

15. *See id.*

16. *See id.*

17. Brickman, *Disconnect*, *supra* note 11, at 45.

18. S. REP. NO. 108-118, at 103 (2003) (S. Judiciary Comm. Rep. on S.1125, The Fairness in Asbestos Injury Resolution Act of 2003; citing a letter from Dr. E.B. Ilgren).

19. *See* Brickman, *Disconnect*, *supra* note 11, at 45.

20. *See* Mesothelioma.org, Mesothelioma Information, <http://www.mesothelioma.org> (last visited Jan. 20, 2008).

21. *See* Brickman, *Disconnect*, *supra* note 11, at 46.

inhalation of the various fibers present in asbestos.<sup>22</sup> When the fibers enter the lungs, the body tries to fight off the foreign substances. However, the defense mechanisms of the lungs cannot destroy asbestos fibers. Therefore, the fibers remain in the lungs and cause inflammation and scarring.<sup>23</sup> Over time, as the scarring inside the lung grows, breathing becomes less efficient because the scar tissue prevents oxygen from entering the blood stream.<sup>24</sup> In mild cases, asbestosis causes no breathing impairment and is detectable only by X-ray.<sup>25</sup> In more severe cases, lung capacity and oxygen exchange diminish, and asbestosis patients increasingly may feel shortness of breath<sup>26</sup> because significant asbestosis may “decrease the elasticity of the lungs and interfere with the lung’s ability to oxygenate the blood.”<sup>27</sup> In the harshest cases, “asbestosis is progressive and debilitating and can lead to death.”<sup>28</sup> Similar to mesothelioma, asbestosis has a long latency period, usually twenty to forty years.<sup>29</sup> For purposes of litigation, however, the critical date is often prior to the onset of the illness: “state court rules . . . toll the statute of limitations when a worker learns he or she was exposed, not when an actual illness develops.”<sup>30</sup>

It is worth noting that most adults in the general population have significant numbers of asbestos fibers in their lungs, in part because cars still spew thousands of asbestos fibers into the air each time a driver applies the brakes.<sup>31</sup> Amazingly, however, exposure to ambient concentrations of asbestos fibers virtually never causes adverse health effects to those in the general population.<sup>32</sup> Such exposure nonetheless causes the presence of millions of asbestos fibers in the lungs of the general population, including the lungs of occupationally exposed workers, and has led to misdiagnoses of asbestosis.<sup>33</sup> Most likely, those patients suffer from silicosis, or scarring of lung tissue unrelated to asbestos exposure.<sup>34</sup> The main significance of this misdiagnosis is that a diagnosis of asbestosis allows the patient to recover in tort, while a diagnosis of other types of fibrosis, even with identical symptoms, does not. This result occurs because courts recognize a products liability cause of action when asbestos

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22. *Id.*

23. *Id.*

24. *Id.* at 47.

25. *Id.*

26. *See id.* at 47 n.30.

27. *Id.* at 47 (citation and quotation omitted).

28. *Id.*

29. Susan Kostal, *Asbestos They Can?*, 91 A.B.A. J., June 2005, at 20, 20.

30. *Id.*

31. Brickman, *Disconnect*, *supra* note 11, at 49.

32. *Id.*

33. *See* W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 529, 532 (3d ed. 1994) (noting that “[a]sbestos fibers and bodies are present in the lungs of occupationally exposed persons who do not have asbestosis as well as in the lungs of those who do,” contributing to misdiagnosis of asbestosis based upon the fiber’s presence).

34. *See id.*

causes fibrosis, but do not recognize a cause of action when other materials cause fibrosis.<sup>35</sup> Therefore, occupationally exposed workers, who may have the same levels of asbestos fibers in their lungs as members of the general population, have an incentive to convert symptoms consistent with silicosis into a diagnosis of asbestosis, even though that same exposure does not cause asbestosis to those in the general population.

The third major asbestos-related illness, pleural plaques, differs from asbestosis because pleural plaques are not found in lung tissue.<sup>36</sup> Pleural plaques “are deposits of collagen fibers, detectable only by X-rays, that are visible fifteen to twenty or more years after initial and substantial exposure to asbestos, as thickenings of the lining (pleura) of the lungs.”<sup>37</sup> Most individuals with pleural plaques experience no lung impairment, no restrictions on movement, and usually do not experience any symptoms at all.<sup>38</sup> For most pleural plaques patients, the condition is totally benign.<sup>39</sup> Additionally, pleural plaques have not led to other, more serious conditions:

[T]here is no scientifically credible evidence that those diagnosed with pleural plaques have any greater likelihood of contracting an asbestos-related disease than if no pleural plaques were found. Indeed, someone diagnosed with pleural plaques who has not by then developed asbestosis has a lower likelihood of thereafter contracting asbestosis than a similarly exposed individual who does not have pleural plaques. Moreover, there is no credible evidence relating the existence of pleural plaques to malignancy.<sup>40</sup>

Therefore, pleural plaques typically are benign and usually do not degenerate into more serious conditions.

Despite the relative harmlessness of pleural plaques, some state courts consider the condition a disease.<sup>41</sup> In some jurisdictions, courts deny recovery for pleural plaques that are present but unaccompanied by

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35. See Brickman, *Disconnect*, *supra* note 11, at 46 (noting that “the principal difference [between a diagnosis of asbestosis or some other fibrosis] does not lie in the medical realm . . . . Whereas a diagnosis of one cause . . . may yield no compensable claim, a clinical diagnosis of asbestosis enables the subject to be eligible for compensation”).

36. *Id.* at 51.

37. *Id.*

38. See H. CORWIN HINSHAW & JOHN F. MURRAY, *DISEASES OF THE CHEST* 727 (4th ed. 1980) (“Ordinarily, pleural plaques do not produce symptoms and no significant functional impairment can be attributed to them.”); see also PARKES, *supra* note 33, at 455 (“[P]leural plaques alone are symptomless; dyspnoea, chest pain, abnormal physical signs, and impairment of lung function are absent.”).

39. See Brickman, *Disconnect*, *supra* note 11, at 52.

40. *Id.* at 52–53.

41. See *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 317 (E.D.N.Y. 2002) (“[S]tate tort law governs whether individuals showing clinical evidence of such asbestos-related conditions as pleural plaques or pleural thickening have actionable claims in the absence of functional impairment . . . . Jurisdictions vary significantly on whether any or all of these types of claims are cognizable.”).

functional impairment or harm.<sup>42</sup> Other jurisdictions differ. One has held that

asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action. We reach this conclusion not only because we find that no physical injury has been established that necessitates the awarding of damages, but also because . . . [a]ppellants are not precluded from subsequently commencing an action for an asbestos related injury when symptoms develop and physiological impairment begins.<sup>43</sup>

Some states also recognize a “fear of cancer” cause of action based upon pleural plaques for negligent infliction of emotional distress and medical monitoring, but many believe that allowing such claims represents “radical departures from longstanding norms of tort law.”<sup>44</sup> Although pleural plaques was a significant issue in asbestos litigation between 1985 and 1995,<sup>45</sup> claims based upon pleural plaques have significantly declined since the mid-1990s.<sup>46</sup>

### B. History and State of Asbestos Litigation

#### 1. Borel v. Fibreboard Paper Products Corp.: Expansion of Liability

Mass litigation involving asbestos began in the late 1960s and early 1970s after people began suffering medical consequences from asbestos exposure.<sup>47</sup> The first cases, such as *Borel v. Fibreboard Paper Products Corp.*,<sup>48</sup> held manufacturers of products containing asbestos strictly liable to employees injured by asbestos exposure for failure to warn of an unreasonably dangerous product.<sup>49</sup> The discovery of evidence that the Johns-Manville Corporation had known of the health hazards posed by asbestos exposure, and had conspired with other companies that manufactured products containing asbestos to suppress the information motivated the *Borel* court to find for the employees.<sup>50</sup> The *Borel* decision caused a significant change in asbestos litigation because, for the first

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42. See, e.g., *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30–31 (Ariz. Ct. App. 1987); *Owens-Ill. v. Armstrong*, 591 A.2d 544, 561 (Md. Ct. Spec. App. 1991), *aff'd in part and rev'd on other grounds*, 604 A.2d 47 (Md. 1992). *But see* *Berbryke v. Owens-Corning Fiberglas Corp.*, 616 N.E.2d 1162, 1167 (Ohio Ct. App. 1992) (“[E]ven if [the worker’s] disease [was] asymptomatic it [did] not necessarily mean that he [was] unharmed in the sense of the traditional negligence action.”).

43. *Simmons v. Pacor Inc.*, 674 A.2d 232, 237 (Pa. 1996).

44. See 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, 817–18 (2002).

45. See Brickman, *Disconnect*, *supra* note 11, at 54.

46. *Id.*

47. See Brickman, *Financial Impact*, *supra* note 4, at 996–97.

48. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

49. See *id.* at 1091–92.

50. See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* 73–74 (1985); Brickman, *Disconnect*, *supra* note 11, at 54.

time, workers injured by asbestos could file product liability lawsuits against their employers.<sup>51</sup> Prior to the Fifth Circuit's ruling, employees had to rely upon workers' compensation claims against their employers to recover for asbestos-related injuries.<sup>52</sup> Therefore, the *Borel* court "expand[ed] the scope of liability from employers to suppliers and installers of building materials."<sup>53</sup> After *Borel*, Johns-Manville became the primary target of asbestos-related lawsuits because it mined most of the asbestos used in the United States and was the leading manufacturer of products containing asbestos.<sup>54</sup>

In 1982, faced with approximately 11,000 pending claims related to asbestos exposure, Johns-Manville filed for bankruptcy.<sup>55</sup> This move surprised many observers and also "posed a severe problem for plaintiff attorneys, setting off a concerted effort to find other deep pockets to supplant and supplement [Johns-]Manville, a process which inures to this day as seventy companies have joined Manville in entering bankruptcy."<sup>56</sup>

## 2. Keene Corp. v. Insurance Company of North America: *Creating Insurance Coverage for Asbestos Liability*

Before the Manville bankruptcy, a ruling by the U.S. Court of Appeals for the District of Columbia had a large impact on asbestos litigation and probably significantly contributed to Manville's decision to declare bankruptcy. In *Keene Corp. v. Insurance Co. of North America*,<sup>57</sup> the D.C. Circuit held that insurance companies that had issued liability policies to asbestos defendants at any time between workers' initial exposures to asbestos and the actual disease manifestation were liable up to policy limits for each policy issued in each year in that time frame.<sup>58</sup> Due to the long latency periods of the asbestos-related illnesses, the *Keene* decision made insurance companies liable for a time period encompassing approximately forty to fifty years. The ruling essentially "create[d] . . . tens of billions of dollars in insurance coverage" for defendant manufacturing companies.<sup>59</sup> Because many insurance companies had issued comprehensive general liability policies that did not set aggregate policy limits for the manufacturers of products that contained asbestos, *Keene* "expos[ed] these insurers to virtually unlimited liability, in the bil-

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51. See Brickman, *Financial Impact*, *supra* note 4, at 997.

52. See *id.*

53. Brickman, *Disconnect*, *supra* note 11, at 54.

54. See *id.*; Christine Biederman, *Toxic Justice*, DALLAS OBSERVER, Aug. 13, 1998, at 12, available at <http://dallasobserver.com/1998-08-13/news/toxic-justice/>.

55. See *In re Johns-Manville Corp.*, 26 B.R. 420, 422 (Bankr. S.D.N.Y. 1983).

56. Brickman, *Disconnect*, *supra* note 11, at 55.

57. 667 F.2d 1034 (D.C. Cir. 1981).

58. *Id.* at 1041.

59. Brickman, *Disconnect*, *supra* note 11, at 55.

lions of dollars.”<sup>60</sup> By expanding the amount of insurance assets available to plaintiffs, asbestos litigation continued to grow,<sup>61</sup> perhaps because plaintiffs knew that defendant manufacturers would not give all claims close scrutiny, preferring to pass settlement agreements or default judgments to their insurance companies for payment after *Keene*.<sup>62</sup>

### 3. *Special Asbestos Law Spurs More Litigation*

During this time, courts also lowered many legal standards, making recovery on claims for asbestos-related injuries easier for plaintiffs. Characterized as “special asbestos law” by some legal scholars,<sup>63</sup> courts adopted many procedural and substantive rules to deal with the unique aspects of asbestos litigation. For example, courts allowed plaintiffs to recover with no medically cognizable asbestos-related injury<sup>64</sup> and created a relaxed proximate cause standard for proving that exposure to a particular manufacturing company’s products caused an injury.<sup>65</sup> Additionally, courts created procedural rules that allow for consolidation of claims that resulted in massive “bet-the-company scenarios that forced defendants to settle cases that they often would have won had they been tried and cases that would never have been filed but for the aggregations.”<sup>66</sup> In fact, one case filed in West Virginia had over 8000 plaintiffs who had worked in different jobs for different time periods in many different locations across the country, and who were even arguing different legal theories in order to recover for various different alleged injuries.<sup>67</sup> One scholar noted that “[f]or the most part, what [the over 8000 plaintiffs] share in common was they all filed complaints containing the word ‘asbestos.’”<sup>68</sup>

Although the courts may have created “special asbestos laws” to accommodate the exigencies of those truly injured by asbestos exposure, such laws and procedures have led to an increase in baseless asbestos claims. However, an unintended consequence of “special asbestos laws” was the creation of an atmosphere that promoted meritless claiming. Plaintiff lawyers took advantage of the situation, and began to actively

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60. *Id.*

61. See Brickman, *Financial Impact*, *supra* note 4, at 997.

62. See Brickman, *Disconnect*, *supra* note 11, at 55–56 (“In exchange for not putting them into bankruptcy, asbestos defendants entered into arrangements with plaintiff lawyers to not contest claims; instead, they would simply agree to settle them *en masse* or not contest them in court and accept default judgments and then tender these liabilities to the insurance companies . . .”).

63. See, e.g., Brickman, *Administrative Alternative*, *supra* note 8, at 1825.

64. See Brickman, *Financial Impact*, *supra* note 4, at 997.

65. See, e.g., *Lockwood v. AC & S, Inc.*, 722 P.2d 826, 839–40 (Wash. Ct. App. 1986) (holding that a plaintiff does not need to specifically identify the defendant’s products as the ones that caused the injury in order for the products to be considered the proximate cause of the injury).

66. Brickman, *Disconnect*, *supra* note 11, at 57.

67. See *Petition for Writ of Certiorari at 13, Mobil Corp. v. Adkins*, 537 U.S. 944 (2002) (No. 02-132).

68. Brickman, *Disconnect*, *supra* note 11, at 39–40 n.17.



recruit large numbers of new claimants, even though the injuries involved were not serious, or were even pretextual.<sup>69</sup> This atmosphere marked the beginning of an entrepreneurial model of representation, where “lawyers recruit plaintiffs, who are usually unaware of any injury and lack any symptoms or lung impairment, and send them to a small number of doctors chosen because they reliably produce diagnoses of and X-ray readings consistent with asbestos-related injury.”<sup>70</sup>

For example, due to the nature of some asbestos-related illnesses, a person with pleural plaques or mild asbestosis may show no symptoms and suffer no impairment of his or her daily life.<sup>71</sup> However, under the “special asbestos law,” claims of unimpaired persons reach a jury if there is a doctor’s statement that the X-ray is “consistent with asbestosis” even though that is not a diagnosis of illness or injury.<sup>72</sup> Having such a standard for recovery in asbestos cases has led to attorneys pursuing large-scale recruitment drives, screening as many as one million former industrial workers and generating at least ninety percent of the claims of non-malignant asbestos cases, even though most of the recruited plaintiffs have no medically cognizable asbestos-related injury and they cannot demonstrate any statistically significant increased likelihood of contracting an asbestos-related disease.<sup>73</sup> In fact, “the crux of the asbestos litigation crisis is the unimpaired claimant.”<sup>74</sup> Although “special asbestos laws” may help those plaintiffs truly in need by lowering standards for recovery in asbestos cases, courts have allowed many plaintiffs to bring frivolous claims and even recover on those claims.

#### 4. *The Georgine Settlement: Shifting from Pleural Plaques Claims to Asbestosis Claims*

Because the condition does not cause impairment,<sup>75</sup> pleural plaques provided such an opportunity for frivolous asbestos claims. After the Johns-Manville bankruptcy in 1982, “pleural plaque claims amounted to approximately 45–60% of case volumes whereas mild asbestosis claims accounted for 15–25%.”<sup>76</sup> However, in the mid-1990s, 70% of claims filed were asbestosis claims,<sup>77</sup> even though data showed that among those exposed to asbestos, pleural plaques is more common than asbestosis.<sup>78</sup> One possible explanation for this strange result is the global class action

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69. *See id.* at 59.

70. Brickman, *Financial Impact*, *supra* note 4, at 997.

71. *See, e.g., In re Joint E. and S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 307 (E.D.N.Y. 2002).

72. *Id.* at 309.

73. Brickman, *Financial Impact*, *supra* note 4, at 997.

74. Brickman, *Disconnect*, *supra* note 11, at 59.

75. *See id.* at 51–54.

76. *Id.* at 108.

77. *Id.* at 109.

78. *See id.* at 108.

settlement agreement for the *Georgine* asbestos litigation.<sup>79</sup> The *Georgine* settlement included most of the major plaintiff attorneys active in asbestos litigation and most of the major asbestos defendants who were solvent.<sup>80</sup> In that agreement, plaintiff attorneys settled all of their current 45,000 claims, including pleural plaque claims, for \$750 million.<sup>81</sup> In exchange for the settlement, the parties agreed to value future pleural plaque claims at \$0 and to inform potential asbestos claimants that they would not seek compensation for workers for unimpaired illnesses, such as pleural plaques.<sup>82</sup> In response, many plaintiff lawyers began reclassifying new pleural plaque claims as asbestosis claims to get around the *Georgine* settlement's limitations.<sup>83</sup> Because of the "special asbestos law" that allowed statements that injuries were "consistent with asbestosis," doctors could transform X-ray results showing a harmless case of pleural plaques into now-actionable injury "consistent with mild asbestosis."<sup>84</sup>

##### 5. *The Ad Hoc Committee's Recommendations*

As the focus of asbestos litigation shifted from pleural plaques to asbestosis claims, "special asbestos laws" continued to foster an environment where asbestos litigation could strengthen the hold that it had on the American judiciary. With asbestos-related claim filings "overwhelming" U.S. courts,<sup>85</sup> United States Supreme Court Chief Justice William Rehnquist appointed an Ad Hoc Committee on Asbestos Litigation (the Committee) to explore all issues and possible solutions to the problem of asbestos litigation.<sup>86</sup> Describing the state of asbestos litigation at the time he formed the Ad Hoc Committee, the Chief Justice stated:

[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and be-

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79. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 636 (3d Cir. 1996). See generally *G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 248–49 (S.D.N.Y. 2001) (discussing \$750 million *Georgine* settlement).

80. See *Georgine*, 83 F.3d at 617.

81. See *G-I Holdings*, 179 F. Supp. 2d at 248–49.

82. See *Georgine*, 83 F.3d at 620, 636; *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 272–73 (E.D. Pa. 1994).

83. See Amicus Curiae Memorandum of the Babcock & Wilcox Company Regarding Allocation of Settlement Trust Funds for Asbestos Claimants at 34, *Findley v. Trustees (In re Joint E. & S. Dist. Asbestos Litig.)*, 237 F. Supp. 2d 297 (E.D.N.Y. 2001) (Nos. 82B 11656 (BRL)–82B 11676 (BRL)) [hereinafter *Babcock & Wilcox Memorandum*].

84. See Brickman, *Disconnect*, *supra* note 11, at 108–10.

85. Brickman, *Financial Impact*, *supra* note 4, at 1001.

86. JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE AD HOC COMMITTEE 1 (1991) [hereinafter *AD HOC REPORT*] (stating that the purpose of the Ad Hoc Committee was to "address . . . the massive and complex issues involved with asbestos litigation [and to] consider all necessary administrative steps that may be taken under existing law . . . [as well as] legislative remedies or amendments to the federal rules of practice and procedures").

cause of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of . . . as many as 265,000 [asbestos-related deaths] by the year 2015.

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction 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>87</sup>

After studying the issues facing asbestos litigation, the Committee found that the sheer volume of the litigation had caused the situation to develop into "a disaster of major proportions . . . which the courts are ill-equipped to meet effectively."<sup>88</sup> The Committee then stated that "[t]he ultimate solution should be legislation recognizing the national proportions of the problem . . . and creating a national asbestos dispute resolution scheme."<sup>89</sup> Specifically, the Committee recommended that Congress enact a national legislative scheme to resolve disputes involving asbestos-related injuries, with the dual objectives of achieving timely, appropriate compensation of present and future victims of asbestos-related illnesses, while also maximizing the prospects of the economic survival of the defendant product manufacturers.<sup>90</sup> The Supreme Court agreed with the Committee, referring to "the elephantine mass of asbestos cases . . . [that] defies customary judicial administration and calls for national legislation."<sup>91</sup> Recognizing that the judiciary had lost control over asbestos litigation, the Committee recommended an administrative remedy for asbestos-related injuries that would unburden the judiciary of these claims, while also providing appropriate and timely compensation to those victims who have suffered actual, legally cognizable injuries.<sup>92</sup>

#### 6. *The Aftermath of the Committee: Costly Inaction*

Despite the recommendations of the Committee and the requests from the Supreme Court, Congress has not been able to enact legislation to deal with asbestos litigation on a nationwide scale. Congress has made numerous efforts to enact such legislation, however. For example, in

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87. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997); AD HOC REPORT, *supra* note 86, at 2–3.

88. AD HOC REPORT, *supra* note 86, at 2; *see also In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 418 (J.P.M.L. 1991).

89. AD HOC REPORT, *supra* note 86, at 3.

90. *See id.* at 27.

91. *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 821 (1999) (holding that Rule 23 of the Federal Rules of Civil Procedures could not be used as a mechanism for creating a global settlement of asbestos litigation).

92. *See* AD HOC REPORT, *supra* note 86, at 27–28.

1977, a New Jersey Congressman introduced the first asbestos-specific compensation bill, proposing to create a fund that would compensate asbestos-related diseases.<sup>93</sup>

Other proposals before Congress attempting to address the asbestos litigation situation have included (1) reforming the tort system to restrict a plaintiff's ability to forum shop, (2) promulgating a threshold "medical/exposure" criteria that claimants must meet before being eligible to pursue compensation using the courts, and (3) creating a fund to compensate victims to keep the claims outside of the court system.<sup>94</sup> These legislative proposals have intended to "provide fairness and efficiency for claimants, relief for overburdened courts, financial certainty for the businesses funding any trust fund, and economic stability for companies pressed to the brink of bankruptcy by present and future asbestos exposure claims."<sup>95</sup>

To date, Congress has not been able to enact legislation dealing with the asbestos litigation situation, causing commentators to note that "[t]he Ad Hoc Committee's dire predictions as to what would occur in the absence of a legislative resolution not only came to fruition, but in fact came to be greatly exceeded."<sup>96</sup> In fact, from the early 1970s to the present, there have been more than 850,000 asbestos-related claims filed against over 8400 manufacturers, distributors, installers, and sellers of asbestos-containing products, as well as against owners of buildings in which asbestos is present.<sup>97</sup> Currently, approximately 200,000 of those claims are pending in state and federal courts nationwide.<sup>98</sup> Furthermore, predictions from industry analysts forecast that approximately 500,000 to 2.4 million claims could still be out there, waiting to be filed at a future date.<sup>99</sup> More specifically, some estimates predict that approximately one million new claimants will emerge over the next forty-five years.<sup>100</sup> Asbestos litigation has also imposed almost \$80 billion in costs on defendants and their insurers<sup>101</sup> and has pushed seventy companies into bankruptcy.<sup>102</sup>

On top of those direct costs, asbestos litigation has imposed indirect costs on defendant manufacturers and society. One report asserts that

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93. See Brickman, *Financial Impact*, *supra* note 4, at 1002.

94. See *id.*

95. *Id.*

96. *Id.* at 1001–02.

97. *Id.* at 992.

98. Neil, *supra* note 9, at 28.

99. See *id.*

100. See Letter from Robert A. Falise, Chairman & Managing Trustee of the Manville Pers. Injury Settlement Trust, to the Hon. Jack B. Weinstein and the Hon. Burton R. Lifland (July 29, 2005) (on file with author), available at [http://www.mantrust.org/filings/Q2\\_05/000457B4.pdf](http://www.mantrust.org/filings/Q2_05/000457B4.pdf) (describing actuarial analysis of future claim filings against the trust).

101. See Brickman, *Financial Impact*, *supra* note 4, at 993.

102. See Brickman, *Disconnect*, *supra* note 11, at 55.

the number of jobs not created because asbestos defendants spent \$10 billion less on investment up to the year 2000 would be approximately 128,000. Also, the number of jobs that defendants would have created if they had not had to reduce their capital investments by \$33 billion is estimated to be 423,000.<sup>103</sup>

Employees also suffered financial losses, independent from the loss of their jobs. On account of the bankruptcies, approximately 52,000 to 60,000 employees lost their jobs and an average of twenty-five percent of the value of their company-sponsored retirement savings.<sup>104</sup>

Employees of manufacturer defendants were not the only ones to suffer financially as a result of asbestos litigation. Shareholders also incurred economic losses in the wake of asbestos litigation and bankruptcies.<sup>105</sup> After filing for bankruptcy, the market capitalization of five major asbestos producing companies fell dramatically. For example, Federal Mogul's market capitalization declined 99% from \$4 billion in January, 1999 to \$49 million after filing for bankruptcy in October, 2001.<sup>106</sup> Owens Corning's market capitalization fell from \$1.8 billion to \$75 million, a drop of 96%.<sup>107</sup> Other notable decreases in market capitalization included USG (92%), W.R. Grace (90%), and Armstrong (92%).<sup>108</sup> Furthermore, asbestos litigation has created an economic environment of uncertainty, costing employees and shareholders even more than the direct and indirect costs already mentioned. Chief Justice Rehnquist's Ad Hoc Committee observed that "[t]he large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole."<sup>109</sup>

Although Congress has not created legislation to handle the influx of asbestos litigation crowding the dockets of the judiciary, the same issues and problems that originally caused the Ad Hoc Committee to recommend an administrative solution remain today. Asbestos litigation has been costly for plaintiffs, defendants, and insurance companies, and has imposed indirect costs on the economy and society as a whole. Moreover, asbestos litigation will continue along the same path for at least another forty years if left unchecked.<sup>110</sup> The analysis below consid-

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103. STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 74 (2002) [hereinafter RAND REPORT], available at [http://www.rand.org/pubs/documented\\_briefings/DB397/DB397.pdf](http://www.rand.org/pubs/documented_briefings/DB397/DB397.pdf).

104. See JOSEPH E. STIGLITZ ET AL., THE AM. INS. ASS'N, THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS 3 (2002), available at [http://asbestossolution.org/stiglitz\\_report.pdf](http://asbestossolution.org/stiglitz_report.pdf).

105. See generally RAND REPORT, *supra* note 103, at 72 (explaining the costs bankruptcy imposes on various parties, including shareholders).

106. See Babcock & Wilcox Memorandum, *supra* note 83, at 25.

107. See *id.*

108. See *id.*

109. S. REP. NO. 108-118, at 25 (2003) (quoting Goldman Sachs Managing Director Scott Kapnick).

110. See *supra* note 100 and accompanying text.

ers whether the time may finally be ripe to break asbestos litigation's chokehold on the economy and the judiciary.

### III. ANALYSIS

Even though Congress has not created legislation to handle the large amounts of asbestos litigation before courts, numerous proposals exist that purport to do so in a fair and efficient manner. This Part introduces the proposals and weighs the relative strengths and weaknesses of each plan.

#### A. *Problems with the Status Quo and Cries for Legislative Intervention*

Despite the expensive, drawn-out nature of asbestos litigation, some believe that litigation remains the best method of resolving the cases. The American Bar Association, for example, has made various proposals that would keep asbestos cases in the courts, while changing some aspects of asbestos litigation.<sup>111</sup> While acknowledging the high transaction costs to asbestos litigation, Seton Hall University law professor Howard Erichson states:

I just don't have a lot of confidence that Congress is well-positioned to resolve the tricky and nuanced issues of trying to handle mass tort liability fairly . . . . Not that I think the litigation process has worked well. It hasn't. But right now I don't have much faith Congress will do better.<sup>112</sup>

The American Bar Association's Tort Trial and Insurance Practice Section's Asbestos Task Force has suggested numerous recommendations, such as a case management order that would create a uniform method for judges to deal with asbestos cases,<sup>113</sup> a model statute of limitations to prevent forum shopping,<sup>114</sup> and a medical-criteria recovery model that would only allow cases to proceed if the plaintiff has an actual injury.<sup>115</sup>

Such recommendations may fall on deaf ears, however. Asbestos plaintiffs advance tort theories of recovery, and each state has developed slightly different ways of handling asbestos litigation based on the individual state's unique situation.<sup>116</sup> Some states have found ways to deal with the influx of asbestos litigation efficiently. For example, "[i]n Illinois and other nearby states . . . there's never been a problem getting [asbestos] cases resolved."<sup>117</sup> In those jurisdictions, "the court system is

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111. See AM. BAR ASS'N COMM'N ON ASBESTOS LITIG., REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES (2003), available at [http://abanet.org/leadership/full\\_report.pdf](http://abanet.org/leadership/full_report.pdf).

112. Kostal, *supra* note 29, at 22.

113. See *id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Neil, *supra* note 9, at 29.

doing a fine job.”<sup>118</sup> In states where the judiciary has historically dealt with asbestos litigation in an effective manner, state legislatures would likely hesitate to enact the recommendations of the ABA Asbestos Task Force. If some states do not currently have a problem dealing with asbestos litigation, those states will have no incentive to adopt substantive changes to their tort laws. However, if the remaining states do adopt the Task Force’s recommendations in an attempt to solve their own problems, such law changes could provide plaintiffs an incentive to engage in forum shopping with their asbestos claims.

For example, assume that several states follow the Task Force’s recommendation and adopt a medical-criteria model, which only allows asbestos plaintiffs to recover after showing that asbestos exposure caused an actual injury.<sup>119</sup> However, states that currently handle asbestos claims effectively, such as Illinois, would not adopt that model because state legislators would see no reason to disrupt the state’s current tort system. Asbestos plaintiffs with pleural plaques, a benign condition,<sup>120</sup> would aggressively forum shop in Illinois, thereby crowding Illinois’ dockets, because the lack of an actual injury would bar their claim in states that had enacted the reform. Other states would thus effectively force Illinois to either adopt the Task Force’s recommendations or cope with an influx of asbestos litigation from plaintiffs who cannot prove an actual injury. Such a system would essentially punish states that have been able to handle asbestos claims in an efficient manner unless they adopt the Task Force’s recommendations.

Casting further doubt on the viability of relying on the judiciary to resolve asbestos claims, the Supreme Court struck down two large asbestos settlement agreements negotiated by a consortium of asbestos defendants known as the Center for Claims Resolution (CCR).<sup>121</sup> In *Amchem Products, Inc. v. Windsor*,<sup>122</sup> the Court reviewed the class-action settlement that arose from *Georgine v. Amchem Products, Inc.*<sup>123</sup> This large class-action settlement attempted to

achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompassed hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies.<sup>124</sup>

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118. *Id.* at 30.

119. *See supra* text accompanying note 115.

120. *See supra* text accompanying note 39.

121. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

122. 521 U.S. 591 (1997).

123. 157 F.R.D. 246, 334 (E.D. Pa. 1994).

124. *Amchem*, 521 U.S. at 597.

This settlement would have settled all future asbestos personal injury claims.<sup>125</sup> Similarly, in *Ortiz v. Fibreboard Corp.*,<sup>126</sup> the proposed settlement “would have settled virtually all future asbestos personal injury claims against the defendant Fibreboard on a mandatory . . . basis.”<sup>127</sup>

Chief Justice Rehnquist went as far as to characterize the settlement attempts as “near-heroic efforts . . . to make the best of a bad situation.”<sup>128</sup> However, in both cases, the Court found that Rule 23 of the Federal Rules of Civil Procedure did not permit the settlements that the parties had negotiated because the classes had been improperly certified.<sup>129</sup> In setting aside the settlement agreements, the Court noted that “[t]he 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,”<sup>130</sup> and that “[asbestos] litigation defies customary judicial administration and calls for national legislation.”<sup>131</sup> Furthermore, Chief Justice Rehnquist wrote a short concurring opinion seemingly for the sole purpose of pointing out that “[u]nless and until the Federal Rules of Civil Procedure are revised . . . the ‘elephantine mass of asbestos cases’ cries out for a legislative solution.”<sup>132</sup>

In both *Amchem* and *Ortiz*, the Supreme Court, while practically begging for Congressional action, conceded that the judiciary is not equipped to handle the massive amounts of asbestos cases. The settlement agreements in *Amchem* and *Ortiz* would have essentially slowed the endless volumes of asbestos litigation to a mere trickle. However, bound by the Federal Rules of Civil Procedure, the judiciary had to intervene and strike down those agreements, illustrating that the current model of litigating asbestos claims does not provide an efficient or effective means of dispute resolution. Therefore, calls to allow the courts to continue to hear these cases do not take past experiences such as these into account.

Indeed, after *Amchem* and *Ortiz*, the trends in asbestos litigation continued to prove that litigation does not resolve these claims in a manner fair to plaintiffs or defendants. Following the Court’s *Amchem* decision, five of the CCR companies petitioned for bankruptcy protection, including Armstrong World Industries, E.J. Bartells, Federal Mogul, GAF Corporation, and USG Corporation.<sup>133</sup> Since *Achem* and *Ortiz*, at least seventeen other companies have filed for bankruptcy protection,

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125. Deborah R. Hensler, *As Time Goes By: Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1904 (2002).

126. 527 U.S. 815 (1999).

127. Hensler, *supra* note 125, at 1904.

128. *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring).

129. *See id.* at 830; *Amchem*, 521 U.S. at 629.

130. *Amchem*, 521 U.S. at 628–29.

131. *Ortiz*, 527 U.S. at 821.

132. *Id.* at 865 (Rehnquist, C.J., concurring) (citation omitted).

133. Hensler, *supra* note 125, at 1906–07.



citing asbestos liability as a reason for the bankruptcies,<sup>134</sup> Capital markets lost confidence in many of these manufacturers, as demonstrated by their dropping stock prices and decreasing access to capital.<sup>135</sup> triggering decisions to file for bankruptcy. To some executives, the Court's *Amchem* holding was "the key determinant" in the decision to file for bankruptcy protection.<sup>136</sup> In fact, when Michael Lockhart, CEO of Armstrong Holdings, announced Armstrong's decision to file for bankruptcy, he told reporters that "[t]he genius—and by that I mean clairvoyant—would've filed for Chapter 11 on that day when *Amchem* was handed down."<sup>137</sup>

The bankruptcies affect more than the corporation's employees and shareholders. The filings caused litigation against some CCR members to be stayed,<sup>138</sup> thereby delaying compensation to victims, with a disproportionate impact on those with more serious injuries because "those with serious injuries have large medical bills to pay and lose income from work."<sup>139</sup> Further, "those with less serious injuries and those who mainly fear future injuries have proportionately lower losses and therefore may suffer lesser consequences of delay."<sup>140</sup>

In addition to imposing further hardship on those claimants with more severe injuries, historical claims data tends to show that filing for bankruptcy can significantly affect the values of claims. For example, the Manville Bankruptcy Trust revised its payment plan in order to pay claimants ten percent of the liquidated value of their claims, and then revised it again to pay claimants five percent.<sup>141</sup> Furthermore, scholars note that as more companies file for bankruptcy, these effects may continue to snowball because

[w]ith more bankruptcies, more litigation is stayed, and as a consequence more money is "off the table." Remaining nonbankrupt firms, finding the stakes of the litigation against them higher, may adopt new defensive strategies, refusing to pay certain kinds of claims that they had paid before or forcing plaintiffs' attorneys to invest more time and money in litigation against them.<sup>142</sup>

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134. *See id.* at 1908.

135. *See id.* at 1909.

136. *Id.*

137. *Id.*

138. *Id.* at 1918.

139. *Id.* at 1919.

140. *Id.*

141. *See In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473 (E. & S.D.N.Y. 1995), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996) (approving a revised payment plan for the Manville Bankruptcy Trust, whereby the Trust would pay claims at ten percent of their liquidated value); DEBORAH R. HENSLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE 2, 35 (2001), *available at* [http://www.rand.org/pubs/documented\\_briefings/DB362.0/DB362.0.pdf](http://www.rand.org/pubs/documented_briefings/DB362.0/DB362.0.pdf) (noting a further reduction in the Manville Bankruptcy Trust from ten percent to five percent of the liquidated value of claims).

142. Hensler, *supra* note 125, at 1920.

Therefore, with the effects of inefficient asbestos litigation magnified over time, these problems with the current scheme of resolving asbestos claims will become even more exaggerated.

In short, resorting to traditional litigation for asbestos claims has imposed extreme costs in the number of bankruptcies of manufacturers, the time and effort of the judiciary spent hearing these claims, and the uncompensated costs for claimants. *Amchem* and *Ortiz* illustrated that even the “near-heroic efforts”<sup>143</sup> of litigants were not enough to make the judiciary an appropriate vehicle for resolving claims and compensating claimants. The bankruptcies that followed those Supreme Court decisions have further revealed that resorting to the courts for resolution of asbestos injuries simply will not work.

### B. *Administrative Lessons from the Black Lung Benefits Act*

Congress and the judiciary faced many of the same problems that asbestos litigation presents when coal mine workers began to develop black lung disease. “Prolonged exposure to coal dust has caused hundreds of thousands of coal miners to develop pneumoconiosis, a chronic respiratory and pulmonary disease commonly referred to as ‘black lung.’”<sup>144</sup> To respond to a growing number of black lung related disabilities and deaths, Congress created an administrative scheme to provide coal miners with compensation for their injuries<sup>145</sup> with the stated purpose of providing “fair, industry-funded workers’ compensation benefits for total disability due to coal workers’ pneumoconiosis.”<sup>146</sup> Despite the drawbacks of the federal black lung program, any administrative scheme intended to handle asbestos-related claims could learn from what the black lung program has and has not done well.

Among other things, the Black Lung Benefits Act provides coal miners with benefits funded through the coal mining industry if the miners have become totally disabled from pneumoconiosis.<sup>147</sup> To aid workers in proving that pneumoconiosis caused their disability, the Black Lung Benefits Act creates a presumption of eligibility for benefits if a coal miner can prove length of service in the coal industry and medical evidence consistent with pneumoconiosis.<sup>148</sup>

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143. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring).

144. Rita A. Massie, *Modification of Benefits for Claimants Under the Federal Black Lung Benefits Program*, 97 W. VA. L. REV. 1023, 1023–24 (1995).

145. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 792–98 (1969) (codified as amended at 30 U.S.C. § § 901–945 (2000)); Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).

146. Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 666 (1989); see also 30 U.S.C. § 901(a) (2000).

147. See 26 U.S.C. § 9501; 30 U.S.C. § 922.

148. See Elinor P. Schroeder, *Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease*, 49 LAW & CONTEMP. PROBS., at 151, 169 (Autumn 1986).

Although the program was originally intended as temporary relief to provide emergency compensation to coal miners disabled by pneumoconiosis,<sup>149</sup> over one million mine workers made claims during the first twenty years of the federal black lung program, with claim payouts totaling over thirty billion dollars.<sup>150</sup> Characterized as the “most comprehensive and detailed legislative attempt to treat disease compensation,”<sup>151</sup> the black lung program has been the subject of much controversy, and its high costs have led some to deride it as a “runaway program.”<sup>152</sup>

The black lung program illustrates the importance of creating well-defined eligibility criteria with respect to medical conditions eligible for a mass compensation system. Unfortunately, “Congress did not anticipate [that] potential dilemma[] . . . when it first enacted the law.”<sup>153</sup> Congress had originally intended for the black lung program to provide temporary compensation for retired miners, but a late conference committee meeting changed it to a prospective system for compensating current mine workers suffering from pneumoconiosis.<sup>154</sup> Due to a difference in medical and scientific opinions at the time of enactment regarding pneumoconiosis,<sup>155</sup> the medical condition eligibility standards of the black lung program led to confusion, creating less coverage than Congress intended,<sup>156</sup> and prompted more revisions to the Black Lung Benefits Act.<sup>157</sup> Unfortunately, the loose definitions of eligible medical conditions could be responsible for the high costs of the program. Fortunately, however, drafters of an administrative system designed to handle asbestos claims can learn from the mistakes associated with the Black Lung Benefits Act, and use advances in medicine to appropriately define the eligibility criteria for any such system.<sup>158</sup>

Although the Black Lung Benefits Act and the Federal Coal Mine Health and Safety Act struggled to actually define appropriate eligibility standards, they can provide guidance, particularly through the presumptions of eligibility that they employed, to any administrative program for handling asbestos claims. Although some complain that presumptions of eligibility may allow the undeserving to recover benefits,<sup>159</sup> “presumptions shift the burden and costs of proving noneligibility, as well as the risk that noneligibility cannot be proven, to the party that is best able to

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149. Prunty & Solomons, *supra* note 146, at 673.

150. *Id.* at 666 n.1.

151. Schroeder, *supra* note 148, at 168.

152. *See id.* at 169–70.

153. *Id.* at 170.

154. *See* H.R. REP. NO. 91-761, at 1–2 (1969) (Conf. Rep.), *reprinted in* 1969 U.S.C.A.N. 2578, 2578–79.

155. *See* Schroeder, *supra* note 148, at 170–71.

156. *Id.* at 169.

157. *See* Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, Title III, 95 Stat. 1643 (1981) (codified as amended in scattered sections of 30 U.S.C. (2000)).

158. *See, e.g.,* Schroeder, *supra* note 148, at 170–71.

159. *Id.* at 171.

bear the risks. . . . Where there is persuasive epidemiological proof of disease causation, a properly drafted presumption should do justice in most cases.”<sup>160</sup> Thus, presumptions of eligibility, can lower the administrative costs of programs and make it easier for those who need the benefits to get them in a timely manner.

Even if presumptions of eligibility would include some claimants who may not meet the eligibility criteria, “available evidence indicates that the current tort . . . system[] exclude[s] claimants who should receive payment.”<sup>161</sup> If the goal of the administrative system is to provide benefits to claimants in a fair and efficient manner, the presumptions of eligibility would create a system where an administrative agency could handle claims more fairly and efficiently than the present tort system.

Congress enacted the Black Lung Benefits Act to deal with problems similar to the ones presented by the current state of asbestos litigation. Although the black lung program has its drawbacks, Congress could learn from the mistakes that caused the expenses. Congress could create an administrative system for handling asbestos claims that builds on the strengths of the Black Lung Benefits Act, such as creating presumptions for personal medical eligibility, while using advances in medicine to appropriately define the medical eligibility criteria. To strengthen the program even further, Congress could create a statutory mechanism to revise eligibility standards to keep pace with advances in medical knowledge and treatment.<sup>162</sup> The lessons from the Black Lung Benefits Act show that Congress can create an effective administrative scheme to remove mass tort claims from the judiciary when appropriate.

### *C. The Fairness in Asbestos Injury Resolution (FAIR) Act of 2005*

#### *1. Strike One: The FAIR Act of 2003*

Congress has attempted several times to create an administrative process that would replace civil suits, while providing fair compensation to individuals with asbestos-related injuries. In 2003, Senator Orrin Hatch introduced Senate Bill 1125, the Fairness in Asbestos Injury Resolution Act (FAIR Act) of 2003.<sup>163</sup> The Act created a \$108 billion Asbestos Injury Claims Resolution Fund to resolve the asbestos litigation crisis, incorporating “medical/exposure criteria” eligibility elements.<sup>164</sup> Although the FAIR Act of 2003 purported to “bring an end to asbestos litigation, as we know it,”<sup>165</sup> representatives of asbestos companies, plain-

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160. *Id.*

161. *Id.*

162. *See id.*

163. Brickman, *Financial Impact*, *supra* note 4, at 1103.

164. *See id.*

165. Linda Martin Barber & Mary Lyman, *The Fairness in Asbestos Reform Act—What Will it Do, Where is it Now?*, 19-5 MEALEY'S LITIG. REP. ASB. 28, 28 (2004).

tiffs' firms, and a bipartisan group of senators were not able to come to a final resolution that was acceptable to all parties, and Congress adjourned for the year without voting on the FAIR Act of 2003.<sup>166</sup>

### 2. *Strike Two: The FAIR Act of 2004*

When Congress reconvened in 2004, Senator Hatch introduced Senate Bill 2290, the FAIR Act of 2004, which reiterated the objectives of the FAIR Act of 2003.<sup>167</sup> Some changes to the new bill included an increase in claim values, a streamlined administrative structure, and a new funding proposal to make funds available within months of the bill's enactment for people with asbestos injuries.<sup>168</sup> This version of the Act funded the trust by requiring defendants to make annual payments of \$2.5 billion for twenty-three years, while insurers had to pay \$46.025 billion over a twenty-seven year period.<sup>169</sup> Once again, various stakeholders haggled over the bill, which delayed voting on the bill as they tried to resolve various issues,<sup>170</sup> and the FAIR Act of 2004 suffered a similar fate to that of the FAIR Act of 2003, as the 108th Congress came to an end without a floor vote on the bill.<sup>171</sup>

### 3. *Strike Three: The FAIR Act of 2005*

After the 109th Congress convened in January, 2005, Senator Arlen Specter introduced Senate Bill 852, the FAIR Act of 2005.<sup>172</sup> On May 26, 2005, after six Judiciary Committee markup sessions, the Committee approved the FAIR Act of 2005.<sup>173</sup> The Act would have created a \$140 billion privately funded trust fund to resolve personal injury asbestos claims.<sup>174</sup> Similar to its predecessor FAIR Acts, the 2005 Act would remove all asbestos claims from the courts, including pending cases, by implementing a no-fault administrative claims handling system administered by a newly created Office of Asbestos Disease Compensation (OADC), which would report to the U.S. Department of Labor.<sup>175</sup> The OADC would resolve claims promptly, issuing written decisions within ninety days of the filing of a complete claim,<sup>176</sup> and the OADC would begin payment of claims immediately upon the issuance of the written deci-

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166. See Brickman, *Financial Impact*, *supra* note 4, at 1104.

167. See *id.*

168. STAFF OF S. COMM. ON THE JUDICIARY, 108TH CONG., THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2004, SUMMARY OF CHANGES FROM S. 1125 AS REPORTED 6 (Comm. Print 2004), reprinted in 150 CONG. REC. S4107 (2004).

169. See Brickman, *Financial Impact*, *supra* note 4, at 1104.

170. S. REP. NO. 109-97, at 5-6 (2004).

171. See Brickman, *Financial Impact*, *supra* note 4, at 1104-05.

172. See *id.* at 1005.

173. See *id.*

174. Fairness in Asbestos Injury Resolution Act of 2005, H.R. 1360, 109th Cong. § 221 (2005).

175. *Id.* § 101.

176. *Id.* § 114(b).

sion, making all payments within four years.<sup>177</sup> The Act also includes special expedited procedures for claimants with less than one year to live.<sup>178</sup>

Most importantly, the FAIR Act creates bright-line standards for eligibility. To be eligible for compensation, a claimant would have to satisfy enumerated medical and exposure requirements for one of nine disease levels, each of which has a predetermined award.<sup>179</sup> Levels I to V encompass nonmalignant conditions such as pleural plaques and asbestosis, and the awards range from medical monitoring to \$850,000.<sup>180</sup> Levels VI to IX represent malignant conditions, including non-lung cancer if asbestos was a substantial contributing factor, lung cancer, and mesothelioma, with awards ranging from \$200,000 to \$1.1 million and lower award levels for smokers and former smokers.<sup>181</sup>

The FAIR Act of 2005 would solve many of the problems that asbestos litigation presents to the judiciary. Most importantly, it creates a uniform, national standard to handle claims for asbestos-related injuries. Such legislation would remove any concerns about forum shopping, for all claimants would be subject to the same requirements when it comes to proving eligibility and compensable awards. The “special asbestos laws” that created incentives for forum shopping would disappear if Congress enacted a national administrative alternative to litigating asbestos claims.

Additionally, the Act provides for prompt and fair payment of any compensation that the OADC awards.<sup>182</sup> Under the current system of litigating claims, the full resolution of cases can take years, leaving disabled claimants unable to earn income to support their families or pay medical bills. While resolving asbestos claims in the courts can take a long time, if defendants file for bankruptcy protection, courts will grant stays in the litigation, dragging the process on for even longer. The strength of the Act is that it makes a quick determination of a claimant’s eligibility, begins payment upon the agency’s final decision, and fully pays any monetary awards within four years.<sup>183</sup>

Furthermore, the standardized awards represent presumptions of eligibility for those with provable medical conditions. Rather than having to prove medical damages, lost wages, and a basis for punitive damages in court, claimants would only need to provide competent medical proof showing that they suffer from one of the nine asbestos-related conditions. Once the claimant has made that showing, the FAIR Act of 2005 presumes that the claimant is entitled to the level of benefits provided for by the statute.

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177. *Id.* § § 114(d), 133(a)(1).

178. *Id.* § 106(c).

179. *Id.* § § 121(d), 131(b).

180. *See id.*

181. *See id.*

182. *See id.* § 133.

183. *See id.* § § 114(d), 133(a)(1).

Although the FAIR Act of 2005 would have eliminated the need for judicial resolution of the asbestos cases, the 109th Congress adjourned without passing the bill, meaning that the FAIR Act of 2005 suffered a fate similar to the predecessor FAIR Acts of 2003 and 2004. As of right now, the only way for claimants to recover monetary damages is to sue in state or federal court under a products liability theory.

#### IV. RESOLUTION

The judiciary has repeatedly shown that it is not the best branch of government to deal with the large numbers of asbestos cases currently pending. Relying on the courts to settle asbestos-related claims is a slow, expensive process, with many damaging collateral effects. Claimants are denied speedy access to financial awards they need to support their families and pay their medical bills.

The uncertainty surrounding the claims affects manufacturer-defendants, as well. Without knowing the dollar value of pending claims, these manufacturers must operate in an environment of uncertainty, preventing them from undertaking projects that may prove to be beneficial in the long run. Furthermore, asbestos litigation has driven many companies into bankruptcy, creating negative effects for the companies, their employees, and the economy as a whole.

The judiciary has proven, and will readily admit, that it is not the appropriate governmental branch to deal with these claims. The courts do not have the time or resources to hear all the claims, and they often apply inconsistent rules. Even when the parties to the claims would create efficient deals to settle all claims, the judiciary's rules bar many of these settlements. Therefore, any efficient solution to the asbestos litigation problem will have to come from outside of the judiciary.

In proposing the numerous FAIR Acts, Congress has shown that it is willing to draw upon the Black Lung Benefits Act, while strengthening that administrative regime's key weaknesses. The Black Lung Benefits Act demonstrates that an administrative solution is a feasible way to remove mass tort litigation from the courts. The FAIR Act of 2005 provides solid medical criteria for determining eligibility, and it would provide standardized awards to claimants in a timely manner. Moreover, it would provide certainty to manufacturer-defendants by clearly specifying the annual contribution that companies would be responsible for funding. Once the defendants have budgeted for their contributions to the trust fund that the FAIR Act creates, they would be free to undertake other, more profitable, projects, with the knowledge that they have already paid for any asbestos-related injuries for which they may be responsible.

Despite the many benefits of an administrative solution to asbestos litigation, and despite several attempts, Congress has not been able to

enact such legislation. In order to close the books on asbestos litigation, and to allow all parties to move on, legislators should reintroduce legislation very similar to the FAIR Act of 2005 during this session of Congress, and pass it. Like the FAIR Act of 2005, the legislation should include specifically enumerated medical criteria required to establish eligibility, provisions to ensure the timely processing of claims, and presumptions of eligibility to allow for smoother administration of the program. Until Congress passes such an administrative program for handling asbestos-related claims, asbestos claimants will not receive timely compensation, manufacturers will operate in uncertainty, and the judiciary will remain bogged down in a morass of duplicative claims that it is ill-equipped to resolve.



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