ASBESTOS: A MULTI-BILLION-DOLLAR CRISIS

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In past issues of the Harvard Journal on Legislation, authors have delved into the persistent problem of asbestos litigation. In Volume 20, Louis Treiger explored legislative proposals before the Ninety-Seventh Congress in his article, Relief for Asbestos Victims: A Legislative Analysis. Bruce H. Nielson's note in Volume 25 explored the potential of class actions to address the needs of victims of asbestos and other mass torts.

In this Article, Harvard Law Professors Edley and Weller revisit the asbestos litigation problem and suggest new solutions. Rejecting traditional legal strategies as unworkable, the authors propose a legislative approach that combines the scope of a class action with the consistency of an administrative system. Their proposal envisions a central fund to which claimants can apply without the need to show fault. Clear medical guidelines are applied, and damage awards and legal fees are strictly controlled. Finally, the authors suggest administrative and judicial alternatives that closely resemble the legislative ideal, should legislation be politically impossible.

Federal and state courts are clogged with 100,000 asbestos suits, and that number is rising every month. These suits pose a series of seemingly intractable policy problems:


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Many victims of asbestos exposure are mortally ill from cancer or severe respiratory diseases but must wait years before their claims are resolved—often after the victims have died.

Tens of thousands of these tort claims have been made, many successfully, by individuals who are understandably worried about their exposure to asbestos but who are not now and never will be afflicted by disease.

The primary early targets of asbestos litigation—the major suppliers of asbestos and asbestos-related products sixty years ago—paid billions of dollars in tort damages. Then, facing many more billions of dollars in prospective tort liability, more than a dozen major American corporations went bankrupt. Others had to cut back severely on their growth and development programs.

Lawyers then cast the litigation net further to find corporate pockets deep enough to satisfy the vast numbers of pending and future tort claims. Judicial legerdemain helped fill that gap with doctrinal innovations that imposed liability on firms (or their insurers) whose “misdeed,” for example, was buying asbestos-related companies in the 1960s and early 1970s—after the human tragedy but before the litigation disaster.

One key constituency has not been a victim of the asbestos tragedy: lawyers. Of the $7 billion already spent on claims, sixty percent—more than $4 billion—has been spent on fees and expenses of the plaintiff and defense bars. This figure does not account for the large amounts expended by our already overburdened civil justice system.

Throughout the 1980s, many state legislatures passed statutory reforms to their common law standards of product liability and medical malpractice. In the 1990s, the battle over tort reform has shifted to Washington, where the American Tort Reform Association and the American Medical Association are locked in a standoff with the American Trial Lawyers Association. During the 1992 presidential election campaign, former President George Bush and former Vice President Dan Quayle—in an unsuccessful effort to divert the public’s attention from our declining economic productivity and spiraling health care costs—continually harped on a “litigation explosion” they attributed to personal injury lawyers wearing “tasseled loafers.”

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We believe that the explanation for the lack of action on Capitol Hill is not simply political gridlock: there are serious intellectual disagreements regarding the nature of the tort problem, and what, if anything, should be done about it.\(^2\) We are law professors, not “lawyer-bashers.” We acknowledge that tort litigation imposes substantial and often unwarranted economic harm on defendants. However, tort litigation also provides indispensable redress for victims and protection for the public.

Despite conflicts about tort reform in general, there is a consensus among scholars and judges on one point: asbestos litigation presents a tort problem with a unique history, present state, and future course. It is a problem that cries out for major reform.

As a result of corporate actions dating back to the 1930s and 1940s, the American legal system spent approximately $7 billion on asbestos litigation in the 1980s and early 1990s. Many billions of dollars more will be spent well into the next century. The early stages of this litigation spiral displayed the tort system’s virtues—hard-working, imaginative lawyers discovering the evidence, and sympathetic, creative judges overcoming a variety of legal obstacles posed by this innovative toxic tort. In the 1970s, tort lawyers identified corporate (and others’) responsibility for the asbestos tragedy, and, in the 1980s, escalated their filings until responsible elements of the business community were ready to endorse and fund a more accessible, equitable, and generous system of relief for asbestos victims.

Currently, however, we know that sixty percent of liability funds continue to be spent not on asbestos victims, but on lawyers, expert witnesses, and others involved in disputes over who will pay and who will be compensated. Some workers who were severely injured by asbestos exposure are unable to document their claims or get their cases resolved before they die. At the same time, much of the money that actually reaches claimants goes to people who do not and will not suffer any physical impairment. Furthermore, the ultimate social cost of asbestos litigation is considerably greater even than direct expenditures on tort claims. In the intensely competitive international economy in which we now live and work, there are no

\(^2\) See generally AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ENTERPRISE RESPONSIBILITY] (Professor Weiler served as Chief Reporter for this report).
true "deep pockets." Economic dislocation from spiraling litigation drives firms to bankruptcy or its brink, and imposes substantial financial burdens on the present shareholders, employees, pensioners, and communities of asbestos defendants.

A drastic overhaul of the current legal approach to asbestos is long overdue. Members of Congress should turn their attention away from the present debate about products liability's impact on small plane manufacturers and the impact of medical malpractice on obstetricians. These are debates involving two distinct, intellectually plausible, and emotionally powerful viewpoints. Far more worthy of congressional attention and action is an asbestos tragedy with human, financial, and legal costs that dwarf those created by other examples of medical and product liability. There is no serious disagreement within the scholarly or judicial arenas that the current asbestos regime is inadequate and in need of reform. Under the current system, remedying the effects of asbestos could cost many billions of dollars. But it need not.

How might Congress reform asbestos litigation? We favor an administrative mechanism, under which compensation of victims would reflect benefit ranges applied through informal adjudication, with access to court preserved only for appellate review of the legality of administrative action. Awards would be financed primarily by asbestos defendants (including their successors and insurers), expenditures on attorneys would be sharply limited, and unimpaired claimants would be the last to be compensated. All pending and future state tort litigation would be preempted.

If, however, our new President and Congress cannot be galvanized, our courts must continue to fill the void. Judges must remake traditional doctrines to deal with the costs of second-generation asbestos litigation just as boldly as they did in the 1970s and 1980s, when they first fashioned tort remedies for asbestos exposure.

The judicial approach we favor involves the use of class action techniques to emulate the key features of a sound administrative solution. A group of plaintiff and defendant attorneys recently negotiated an initiative along these lines. It involves a settlement class action of all future asbestos claims against a group of defendant companies operating under the umbrella of the Center for Claims Resolution, a non-profit entity formed specifically to pursue negotiated alternatives to protracted litigation. The pro-
posed settlement, now pending in the Eastern District of Pennsylvania, is an effort to resolve most claims through a streamlined, non-tort procedure. Impaired claimants would be paid promptly, and the claims of the unimpaired would be deferred unless and until an impairment develops. "Evergreen" funding by the participating companies would ensure eventual payment of all claims by impaired claimants, but total payments for a given year are limited (based on historical claims resolution rates) to make the resulting economic burden manageable. Attorneys' fees would be capped. A right of eventual recourse to litigation is preserved for at least some claimants, but only after full effort to resolve the case through less contentious and costly alternatives.

I. Asbestos: The Human Tragedy

A. Asbestos Use

When asbestos first appeared on the market in the late nineteenth century, it was touted as a miracle substance—able to withstand punishing forces of fire, corrosion, and acid, while also versatile enough to weave into textiles, line automobile brakes, retard shipboard fires, and bind rockets together. As United States District Court Judge Jack B. Weinstein remarked, "[t]heatrical audiences were once comforted by the thought that huge asbestos curtains between the audience and stage protected against the spread of fire." In its most important use, asbestos was the designated substance incorporated in Navy warships to protect American seamen from fires caused by enemy bombers and submarines in World War II.

Early in the twentieth century, however, evidence began to emerge that these benefits from asbestos use were secured at the price of serious dangers to workers. Those who mined asbestos and manufactured asbestos products for use as insulation in ships, factories, and the like were at risk. Because asbestos-produced disease has a lengthy latency period—anywhere from


\footnote{Although certain hazards were becoming known, the full extent of the hazards and the type of response necessary were less clear.}
ten to forty years—it took decades to generate epidemiological evidence of the risks this substance poses to human beings. Gradually, medical scientists documented the fact that asbestos exposure can produce a number of respiratory disorders: asbestosis, mesothelioma (a rare malignant cancer), and lung cancer (particularly in combination with smoking).

Evidence of at least some of these risks—in particular, of asbestosis, suffered by asbestos workers exposed to high concentrations of this substance—was beginning to emerge in the scientific literature by the 1930s. From the point of view of the plaintiffs’ bar, the true disgrace of the asbestos story is their belief that senior executives of some of the country’s leading producers—particularly Johns-Manville—were not only aware of these risks, but took active steps to suppress knowledge of the danger in order to protect the sales of their product.

It is by no means clear that a substantial drop in sales was an inevitable outcome of disclosure. There were employers who took some steps to reduce exposure risks. Asbestos was a life-saving as well as a life-threatening substance, and there was no substitute readily available, especially for ships in the nation’s war effort. But if all those who were aware of the risks (including United States Government officials) had heeded the warnings in the medical literature, many protective devices and techniques could have been adopted to reduce occupational hazard levels drastically.

Instead, from the 1940s through the 1960s, millions of American workers were exposed to asbestos with little or no precautions. As a consequence, several hundred thousand Americans

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6 Brodeur, supra note 5, at 12-13.


8 Brodeur, supra note 5, at 66; Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1884 (1992); Lilienfeld, supra note 7.

9 Although the government caused shipyard workers to be exposed to asbestos during the World War II era, recently the government has regulated workplace and environmental exposure. These efforts, together with the development of alternative materials
were fated to suffer asbestos-related diseases, and many thousands to die, beginning in the 1960s and continuing well into the next century.\textsuperscript{10}

B. An Out-of-Date Morality Play

It is important to remember this oft-told tale of the "outrageous misconduct" on the part of many companies and the government.\textsuperscript{11} Some plaintiffs' lawyers continue to pound the

for use in the building trades and other applications, have reduced the proportion of the work force at risk from the effects of excess current exposure to asbestos. For a brief description of the variety of such federal regulatory efforts, see Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991) (reversing an EPA rule that would have eliminated all domestic uses of asbestos).

Researchers at the Rand Corporation have documented the use of asbestos in the United States. During the World War II period, 1935–1950, annual asbestos consumption grew from less than 150,000 metric tons in 1935 to more than 700,000 metric tons. However, though increased asbestos use is often attributed to the wartime effort, United States consumption never dipped below 600,000 metric tons until after its peak in 1974, when it reached 800,000 metric tons. Immediately thereafter, greater awareness of health risks combined with increased government regulation led to a sharp drop in consumption. By 1985 the annual figure was only 200,000 metric tons. See DEBORAH HENSLER, ASBESTOS LITIGATION IN THE UNITED STATES: A BRIEF OVERVIEW 5–6 (1992).

Still, asbestos needs continue in a few key industrial areas. See Corrosion Proof Fittings, 947 F.2d at 1220–28 (listing current uses, including rocket engines, battery separators, automobile drum and disc brakes, asbestos-cement pipe products, gaskets, roofing, shingles, and paper products).

\textsuperscript{10} A decade ago, expert projections were considerably higher than those noted in the text. In 1982, Doctors William J. Nicholson, George Perkel, and Irving J. Selikoff predicted more than 80,000 excess deaths from asbestos-related cancers alone during the period 1967–2027. See William J. Nicholson et al., Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980–2030, 3 AM. J. INDUS. MED. 259 (1982). Recent projections by many of the same scholars, using better data about actual levels of worker exposure, are more conservative. See Herbert Seidman & Irving J. Selikoff, Decline in Death Rates Among Asbestos Workers 1967–1987 Associated with Diminution of Work Exposure to Asbestos, 609 ANN. N.Y. ACAD. SCI. 300 (1990); David E. Lilienfeld et al., Projection of Asbestos-Related Disease in the United States, 1985–2009, 45 BRIT. J. INDUS. MED. 283 (1988). On the other hand, the great bulk of present claims are by unimpaired individuals who will never become ill, and it is to these individuals—and their lawyers—that the bulk of resources currently flow. See HENSLER, supra note 9, at 6. As we will observe later in the Article, the question of whether and when a physiological condition caused by asbestos exposure amounts to a "disease" is a matter of intense legal debate. Some physiological changes, such as diffuse "plaque," or fibrous spotting of the pleural membrane, cannot be detected without clinical testing and produce no impairment of the person's ability to function in daily life. At the other end of the scale are the asbestos-related cancers which cause death several decades after the fatal exposure.

table in courtrooms and legislative hearing rooms. They tell their listeners that too much blood has been spilled by corporate misconduct for us ever to deprive plaintiffs of the full force of tort retribution by substituting an administrative compensation program, however socially “efficient” the latter might seem.

Whatever those lawyers say about the events that took place in the 1930s and 1940s, this country and its economy need a more analytical perspective about what reforms are appropriate in the 1990s. It was not tort litigation that discovered the asbestos tragedy, it was medical science. The true hero of that story is not the plaintiffs’ bar, but Dr. Irving Selikoff. And the first legal response came not via tort litigation, but through workers’ compensation and occupational safety and health regulation: two administrative programs that largely removed asbestos from the workplace by the early 1970s—well before the first major jury verdicts were announced.

The importance of tort litigation was its role, beginning in the mid-1970s, in revealing the failure of a number of major corporations to warn workers of the severe risks to which they were exposed. Also crucial was tort’s role in meting out the kinds of legal sanctions—approximately $7 billion in claims expenditures and sixteen corporate bankruptcies so far—that should make business executives think twice before following the same path as their asbestos manufacturing predecessors. The tort system, surely, has succeeded in delivering society’s punitive response to the events of the 1930s and 1940s.

In any case, the original responsible executives have left their firms—in fact, most are dead. Also, many of the firms most involved—Johns-Manville for example—have themselves gone through bankruptcy proceedings (at severe financial loss to their shareholders) and are thus protected from further tort litigation. The firms now paying the price of the 100,000 suits pending,

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13 The companies that so far have filed for bankruptcy because of asbestos litigation are Amatex, Carey-Canada, Celotex, Eagle-Picher Industries, Forty-Eight Insulations, Johns-Manville, National Gypsum, Raymark Industries, Standard Insulation, UNARCO, and UNR Industries (the parent of UNARCO), see Judicial Conf. Ad Hoc Comm. on Asbestos Litig., Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States 51 n.33 (Mar. 1991) (unpublished manuscript, on file with the Harvard Journal on Legislation) [hereinafter Judicial Conf.], Pacor and North American Asbestos, see Brickman, supra note 8, at 1819 n.2, and H. K. Porter, Nicolet, Brunswick Fabricators, and Hillsborough, see Hensler, supra note 5, at 1972 n.23.
which will pay for the further 100,000 suits predicted for the future, have only peripheral connections to the original disaster—often just as insurers of or successors to the firms initially involved.

Moreover, it is not corporations, but rather real people, who pay the price of tort litigation—specifically, the present stakeholders in defendant firms such as employees, shareholders, pensioners, and surrounding communities. And the people with the most compelling stake in reform are the victims of asbestos-related disease. Many of these victims will not be able to recover (at least while they are alive) the kind of compensation they need and deserve precisely because of tort litigation’s preoccupation with retelling, and retaliating for, a tale of corporate “misconduct” that took place almost sixty years ago.

The asbestos crisis is more than a story of decades-old corporate failures and a contemporary public health tragedy. It is a Dickensian tale about the limitations of the traditional legal process and a general portrait of governance in this country. The picture thus far is discouraging. Judge Weinstein, the preeminent mass tort adjudicator, and Eileen Hershenov put it well:

To many, particularly those in other countries, it may seem strange that in the United States we leave it to individual courts to provide essentially ad hoc solutions to modern day disasters with their national, social and economic repercussions. In this country, however, three factors have, by default, left the state and federal courts to their own devices: (1) the lack to date of an effective national administrative regulatory scheme capable of controlling undesirable conduct by manufacturers; (2) the absence of a comprehensive social welfare-medical scheme for compensating victims of mass torts, and (3) the lack of adequate state or federal legislation controlling these cases.14

II. THE INADEQUACIES OF TORT RELIEF

Asbestos presents a distressing picture of the inadequacies of tort litigation as a vehicle for delivering society’s resources to needy and deserving claimants. The following features of the asbestos litigation system make these flaws inescapable.

A. Number of Claims

More than 100,000 asbestos claims are now pending in court, and the number grows steadily. Approximately two-thirds of these suits are filed in state courts, the other third in federal courts. In the last half of the 1970s there were 1000 asbestos suits filed in federal courts; in the first half of the 1980s, 10,000 claims; and in the last half of the 1980s, 37,000 claims. In 1990 alone there were nearly 14,000 new federal asbestos suits, three times the fewer than 5000 federal suits filed that year for every other type of product liability case. Yet in recent years, both Congress and the states have concentrated their reform efforts on the product liability “tail,” rather than the asbestos liability “dog.”

B. Size of Expenditures

Billions of dollars have already been spent on asbestos litigation: the most recent estimate puts the figure at $7 billion. Though inevitably speculative, estimates have also been made of the total costs of the asbestos litigation crisis. For example, Judge Weinstein estimated that the total cost for current and future personal injury claims would be $26 to $28 billion. Given that there has been no abatement in the flow of and payment for asbestos-related tort claims, it is safe to say that many billions of dollars more will be needed to resolve this human and legal tragedy.

Bankruptcies among asbestos defendants, together with the doctrine of joint and several liability, mean mounting and cumulative financial pressure on the remaining defendants, whose resources are limited. The money spent on unimpaired asbestos claimants and lawyers creates genuine economic risks to workers and pensioners with stakes in the surviving companies. While it is impossible to quantify the magnitude of those risks, the sixteen asbestos-related bankruptcies to date constitute more than one-half of the original twenty-five major asbestos defendants.

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15 See generally Hensler, supra note 5, at 1970–72.
16 Oliver & Spencer, supra note 12, at 79.
C. Unimpaired Claimants\textsuperscript{19}

Unfortunately, though, it appears that up to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired. The cases involve pleural plaques—"freckles on the lungs"—or pleural thickening—forms of physical change that are attributable to asbestos exposure. These plaques may or may not be followed by asbestosis or cancers that would disable or kill the asbestos claimants.

While there are understandable legal and emotional reasons why these premature suits are being filed in huge numbers, their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now.

D. Legal Costs

For both severely and potentially impaired litigants, of every dollar paid by defendants, over sixty cents goes to the lawyers. Adding the overhead costs of both the judicial and insurance systems, asbestos litigation consumes two dollars of society's resources in order to deliver a single dollar to people who were exposed.\textsuperscript{20}

E. Contingent Fees

The usual target of popular concern about legal costs is the contingent percentage fee paid to the plaintiff's lawyer, which usually ranges from thirty to forty percent of the total settlement or award, sometimes reaching fifty percent. We believe that the contingent fee is generally an attractive feature of our tort system because it is an effective mechanism for making justice available to victims of personal injury.\textsuperscript{21} In the early stages of

\textsuperscript{20} See Hensler, supra note 9, at 21 (citing James S. Kakalik & Nicholas M. Pace, Costs & Compensation Paid in Tort Litigation 74 (1986)).
\textsuperscript{21} See Enterprise Responsibility, supra note 2, at 274.
asbestos litigation, lawyers who took their chances with these scientifically uncertain and legally difficult cases fully deserved the sizable rewards they won. However, now that the basic legal and scientific issues that figure in asbestos litigation are long since resolved, and huge numbers of new asbestos cases can be processed by paralegals on a largely assembly-line basis, the key plaintiffs’ lawyers are earning several thousand dollars per hour of work done on these files. That money would be far better spent on asbestos victims themselves, as well as on investment in better jobs for present-day workers.

F. Delay

It is unfair, though, to paint plaintiffs’ attorneys as the villains in the picture. While legal fees do make up sixty percent of claims expenditures, half of that amount goes to defense attorneys. The underlying problem escalating legal costs is that the current system still creates too many opportunities and incentives for both sides to litigate aggressively in individual cases, even though the aggregate pattern of asbestos claims disposition has largely stabilized. The unhappy consequence is that asbestos litigation uses up a lot of time as well as money. The average time taken to dispose of an asbestos claim is thirty-one months, about twice the length of the typical civil claim. Indeed, a side effect of the asbestos litigation explosion is that its huge case-load causes delay not only for asbestos claimants, but also for people bringing other types of legal claims to our already overburdened court system. Delay causes special tragedy for asbestos victims: because their exposures occurred so long ago, justice delayed can truly be justice denied. Too often the claimant is dead before payments are finally made to his or her estate.

G. Searching for Deep Pockets

The individual actors—the corporate and governmental employees who made those fateful decisions about asbestos use decades ago—have long since departed the scene. Their corporate and government successors, conglomerate affiliates, and

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22 See Brickman, supra note 8, at 1834–40 (reviewing attorneys’ fees).
23 Judicial Conf., supra note 13, at 10–11.
insurers are now left with the legal bills. While an abstract economic argument can be made about undoing the unjust enrichment of these entities, the situation actually involves a search for deep pockets to finance needed (and unneeded) compensation for asbestos claims. This is a worthy social policy objective, but tort is not the ideal mechanism with which to achieve it. Nor is it the historical function of judges and juries to act as roving revenue commissioners to fund social insurance programs.

H. Erratic Damage Awards

The most important source of litigation, controversy and delay is legal uncertainty. The most significant source of uncertainty in all forms of tort litigation, including asbestos, is the assessment of damages, especially for the inherently subjective, non-financial damage categories of pain and suffering and punitive awards. The absence of any meaningful guidelines for jury assessment of the value of pain and suffering has produced huge inequities. Similarly-situated asbestos victims may receive payments that vary by a factor of ten or more. The fact that juries are still invited to levy huge punitive awards constitutes equally unfair treatment of defendants faced with the arbitrary prospect of multiple punishment for misconduct that took place long ago.

III. Reforming the System

The previous pages synopsize the pathological nature of present-day asbestos litigation. To reform the system, we must lay to rest several myths about tort law.

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25 Indeed, in another context the Supreme Court has written that cumulative punitive damages awards raise important questions of constitutional due process. See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1038–40 (1991). As the Court stated, "[o]ne must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Id. at 1043.
Myth #1. Tort law must continue to exact society's revenge on corporate malefactors. This is the most important and distorting myth about asbestos litigation. Seven billion dollars of tort punishment meted out in the past decade is more than enough to express society's outrage about any misdeeds that may have taken place a half century ago and to create a powerful deterrent against similar misdeeds in the future. In the future, we must divert the remaining billions of liability dollars to redress the present-day needs of asbestos victims and their families.

If we can put tort retribution behind us, there is reason to hope for a consensus about the ingredients of a fair compensation program. Most leaders of the major defendants have clearly stated their willingness to pay for a fair compensation system, among other reasons to protect their businesses from the devastating effects of litigation. Such a system would provide timely and generous benefits to those with significant asbestos-related impairments, even using the existing pattern of tort payments as the basis for calculating benefit amounts. The defendants seek to remove the specter of runaway punitive and pain and suffering verdicts in individual cases and to fund guaranteed and accessible compensation with the revenues now being spent on unimpaired claimants and unnecessary legal services for both sides. This program benefits those who need financial relief for tangible asbestos impairments. It also will preserve the economic resources of defendants for the benefit of future victims of asbestos disease, as well as for the workers, pensioners, and communities that rely on the economic viability of the defendant businesses. History's tragedies cannot be undone. It is wrong to let the memory of them stand in the way of fair redress today.

Myth #2. Asbestos-related injuries are torts, which can only be resolved fairly through individualized, full-blown court proceedings. In fact, legal business-as-usual has wasted billions of dollars, delaying and short-changing deserving claims while attorneys and experts prosper.

26 See Andrew Blum, Playing Asbestos Hardball, NAT'L L.J., May 18, 1992, at I (noting that most companies are willing to settle, but Keene Corp. is an exception); Keene Corporation's Glenn Bailey Calls Judge Weinstein's Asbestos Proposal "A Step in the Right Direction", PR Newswire, May 22, 1992, available in LEXIS, Nexis Library, Current File; Todd Woody, As Stemple Sued, Defendants Retreated, RECORDER, Sept. 12, 1991, at 1 (reporting that defendants were ready to settle).
Myth #3. Courts can handle the problem using massive trials and gigantic batch settlements of hundreds, occasionally thousands, of claims. Actually, this approach inevitably wastes resources on less deserving, unimpaired claimants, threatens further bankruptcies, and does nothing to provide equity among deserving claimants. Experience proves that muddling through simply cannot keep pace with the volume of claims.

Myth #4. Judges lack legal authority to address the crisis now—only Congress and state legislatures can save the day. This, too, is incorrect. Rather than wait for a political solution that may never come, judges can and must act now.

What is to be done? The answer requires consideration of the elements of an ideal solution and appraisal of the institutional capacity of legislatures and courts to approximate that ideal. We briefly describe an administrative compensation mechanism that Congress could enact that would treat claimants fairly and provide economic stability to defendants and their stakeholders. Because political gridlock makes enactment of such legislation highly unlikely, we detail the way courts can and should adopt most of these substantive measures by imaginative use of the variety of judicial powers that have been deployed for other mass tort crises.

IV. A LEGISLATIVE APPROACH

Congress should stop relying primarily on court-centered resolution of claims for asbestos compensation. The ideal solution is an administrative alternative to the current litigation morass.

By combining the better features of workers' compensation, the Black Lung program, the national Childhood Vaccine Injury Act, and Social Security Disability Insurance, Congress could replace costly and inequitable tort adjudication in federal and state courts with a simpler, fairer administrative mechanism incorporating the following elements:

1. **Deferral registries for the unimpaired.** Claimants without any present disability (for example, just a clinical diagnosis of pleural plaque) would have their claims put on hold until some tangible physical impairment manifests itself. These claimants would not have to fear that the claim would be barred by the statute of limitations or other procedural obstacles.
2. No proof of fault. Claimants would not need to prove the legal fault of any defendant or exposure to any particular company's product, as is required by tort law. Past asbestos exposure combined with present impairments of the type associated with asbestos would establish eligibility for compensation.

3. Clear, objective medical criteria. Instead of repeated individual trials involving complex medical evidence, an administrative agency would, through rulemaking, establish clear guidelines to define degrees of impairment based on objective clinical tests. As with the "grid" used in social security disability insurance, there could be a safety valve procedure for truly exceptional cases.  

4. A schedule of compensatory payments. Instead of repetitive, individualized proceedings to establish the amount of each damage award, a schedule of benefit payments would be created by legislation or public rulemaking. This schedule would build upon the typical experience in asbestos settlements and awards, but would specify a range of appropriate compensation that took into account the financial and non-financial losses of victims of different ages, impairments, and family circumstances.

5. No punitive damages. By removing the threat of cumulative and arbitrary punitive damages awards, an administrative system would equalize treatment of similarly situated plaintiffs and conserve the resources of defendants for compensating impaired claimants.

6. Arbitration of disputes, with meaningful opportunity for appeal. Claimants dissatisfied with administrative disposition of their eligibility or the amount of their benefit award would have prompt arbitration of their objection, in which they could argue that some exceptional circumstance in their case warrants a departure from the medical eligibility criteria or the benefit schedule. The arbitrator's decision would be subject to review by a neutral administrative tribunal, with limited further appellate review in court for clear legal error.

7. Rationalized legal fees. This administrative system would virtually eliminate the contingency element in asbestos claims and greatly simplify calculation of benefits payable. Payment for legal services could thus be set far lower than the present

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thirty-three to fifty percent of the unconstrained damage verdicts won under tort law. In view of the compensatory focus of a benefit system, the program should either reimburse legal fees reasonably incurred by successful claimants (as is now done in a number of workers' compensation regimes) or provide professional and semi-professional representation of claimants (as under the National Labor Relations Act).

8. Financing the program. The bulk of funding would come from defendant companies and their insurers. Assessments would be paid periodically, in accordance with projected and actual claims experience, rather than in up-front lump sum payments that would unduly strain defendants' present resources. Distribution of the financial burden among different firms would be based on projections of future liability derived from litigation experience and other factors that reflect differences in asbestos risk creation (thereby recognizing firm differences in responsibility for asbestos risk). Because of the documented interaction of smoking and asbestos exposure, a truly fair compensation program would require contribution from tobacco companies (perhaps through an increase in cigarette manufacturer taxes). For the same reason, the significant role of the federal government in promoting the use of asbestos (especially in wartime shipbuilding) would be recognized by a governmental contribution—for example, by absorbing all administrative costs.

There are many advantages to such a legislated administrative solution to the asbestos crisis. It would be comprehensive and national in scope, rather than piecemeal and subject to the uncertainties and inconsistencies of our federal court system. Most importantly, it would be democratic, reflecting public deliberation about fair resource allocation.

Needless to say, this outline omits a host of subsidiary details about legislative design and administrative implementation.

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29 Id. at 192-96.
30 Legislative treatment of Johns-Manville and other bankrupts poses a difficult question. Considerations of legal repose suggest that already-litigated arrangements for future payments—including not only classic tort actions but also those tort claims resolved through a bankruptcy remedy—should not be disturbed. On the other hand, it can be argued that where a legislative remedy promises procedurally or financially better results for all other future claimants, Congress might well want those future claims against bankruptcy funds folded into the global administrative solution. In such a design, the statute would claim whatever assets and income had been set aside for payment of the
For example, it is not clear if asbestos defendants should be coercively taxed to fund the scheme, or if they should pay a quasi-voluntary “fee” in exchange for legislatively eliminating their potential tort liabilities. Furthermore, it may be necessary to draw upon insurer resources that would be available to satisfy court settlements and tort awards to finance an administrative alternative. We must decide whether almost all claimants could be treated fairly in a matrix or grid system, or whether it is necessary to risk the complexity and disputes of a broad residual discretion to handle “exceptional” cases. Reformers must choose among benefits paid in a lump sum, in installments, or through an actuarially-equivalent annuity. We believe that the experience in other administrative programs can be drawn upon to supply these and many other details. They can be resolved, and the resulting program would be vastly preferable to the current litigation crisis.

The significant problem with a legislative solution has less to do with policy design or legal conundrums than with politics. It is sobering to contemplate the array of interests clamoring to promote, influence, and derail a legislative proposal. Some of these interests, notably the trial bar, are among the most politically powerful lobbies in Washington. The enactment of any piece of controversial legislation, however meritorious, is uncertain at best. In the face of a massive budget deficit and congressional misgivings about the Black Lung and Social Security Disability administrative schemes, enactment of a sound asbestos compensation mechanism is unlikely. The complex legislative agenda announced by President Bill Clinton, much of bankrupt’s asbestos liabilities and add those to the pool of resources for all asbestos claims payments under the new, legislated scheme.


As to the feasibility of constructing a benefit schedule and medical criteria, the extensive experience with litigation and settlements over the past two decades provides hope. For example, the fact that defendants’ and plaintiffs’ lawyers can often negotiate large batch settlements suggests that it is possible to agree on the value of asbestos tort claims, at least in the aggregate. For a more scientific reading, legislative or rulemaking processes could develop detailed analysis of jury awards and settlement amounts. This might clarify the distortions in the data created by the mystery surrounding most settlements, the details of which are never made public.

which will involve the same congressional committees as any asbestos proposal, likely puts the legislative ideal beyond the realm of the politically possible.

V. A JUDICIAL APPROACH

The fact that the legislative ideal is probably unattainable only reinforces the responsibility of courts to address the crisis with imagination and urgency. Courts must work creatively with current substantive and procedural doctrine to devise a mass resolution of the asbestos crisis. An effective judicial solution should include the key elements of the legislative ideal we have described:

- Determination of entitlement based not on company fault, but on victim exposure and impairment.
- Development of objective medical criteria for determining degree of impairment.
- Scheduling of compensatory ranges to allow some flexibility for unusually serious cases.
- Elimination of future punitive damages.
- Arbitration of disputes instead of jury resolution, with meaningful opportunity for appeal.
- Rationalization and reduction of legal fees; simplification of procedures to assure adequate but low-cost representation.
- Financing the scheme through contributions from a large number of asbestos companies and their insurers.

Judges have shown such creative vision in a number of mass tort cases, especially the tort-driven bankruptcy proceedings involving A.H. Robins (the Dalkon Shield) and Johns-Manville (asbestos), the latter led masterfully by Judge Weinstein. These proceedings have adopted several elements of the solution sketched above, including simplified administrative procedures for assessing impairment and calculating benefits, and mechanisms for channeling scarce resources toward current and future claims of a more serious nature. The extraordinary circumstances of bankruptcy forced the judges’ hands, but desperate damage control in such a financial crisis is hardly the ideal

setting for a comprehensive solution. We must protect the economic viability of solvent enterprises, enabling them to meet their obligations to both claimants and other stakeholders. Solving the problem for individual bankrupts such as Manville by circumscribing their liabilities only adds to the financial pressure on surviving defendants.34

Instead, courts should certify broad settlement class actions for purposes of resolving all pending and future asbestos claims against broad groupings of solvent defendants.35 The recently approved Pfizer heart valve settlement36 demonstrates how this procedure can produce the various components of a rational compensation scheme that we have emphasized: providing as much as $200 million to settle potential claims from tens of thousands of heart valve recipients; simplifying eligibility; scheduling different categories of benefits; giving priority in payments to those with severe injuries and needs, as opposed to those with only potential health problems; simplifying claims procedures with corresponding reductions in legal costs; and eliminating multiple punitive damages awards.

Because such class action certification would be used only for purposes of settlement, it would avoid the casino-like “bet the company” risks of certification for litigation and trial, with billions of dollars riding on a single jury verdict. Defendants can choose to accept or reject the terms of a negotiated settlement. Rule 23 of the Federal Rules of Civil Procedure requires court approval of the “fairness, adequacy, and reasonableness” of the settlement.37 Judges can thereby block “sweetheart deals” negotiated between defendants, who want to achieve relief from potentially massive long-term liability with a modest up-front payment, and plaintiffs’ lawyers, who want to ensure not only their clients’ recovery but their own lavish fees. Judges should

34 This specific feature of Judge Weinstein’s restructuring of the Manville Trust has just produced a partial reversal of his ruling by a divided Second Circuit panel. See In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 982 F.2d 721 (2d Cir. 1992).

35 For development of the arguments in favor of mass tort settlements (as well as mass tort actions), see 2 ENTERPRISE RESPONSIBILITY, supra note 2, at 383–439; David Rosenberg, Class Actions for Mass Tort: Doing Individual Justice by Collective Means, 62 IND. L.J. 561 (1987).

36 The details of the heart valve litigation and class action settlement are set out in the judicial decision approving the terms of the settlement, Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992).

37 FED. R. Civ. P. 23(e); see, e.g., Stoetzner v. United States Steel Corp., 897 F.2d 115, 117 (3d Cir. 1990); Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
not, however, transform the fairness hearing on a proposed settlement into a full-scale trial on the merits. Instead, judges should decide only whether the proposed settlement falls within the parameters of a reasonably negotiated outcome. A complex fairness inquiry is unnecessary if claimants have a meaningful opportunity to opt out of the settlement. Such an opportunity enables plaintiffs to compare the value of the settlement with the value of the tort alternative and to choose accordingly.\(^{38}\) The opportunity for plaintiffs to opt out, combined with the right typically reserved by defendants to nullify the settlement if too many claimants opt out, provides the appropriate incentives for plaintiffs and defendants alike to fashion a mutually beneficial and final resolution.

Several months after we began this Article, certain asbestos defendants represented by the Center for Claims Resolution ("CCR") negotiated with counsel representing asbestos claimants and reached a class action settlement along the lines suggested above. It was motivated by the Multi-District Litigation Panel’s pretrial consolidation of the 30,000 pending federal asbestos claims. The settlement, which governs only future federal and state claims (all claims not filed as of January 15, 1993, the filing date of the class action), contains the following key components:

- Instead of litigating all the arguably relevant features of defendant liability, claimants will be entitled to compensation if they satisfy specified criteria regarding exposure to the defendant’s asbestos, latency periods, and medical conditions that are typically associated with asbestos.
- Expert medical panels will resolve disputes about whether particular claimants satisfy the criteria. These panels will also determine whether “exceptional” cases that claim to be “substantially comparable” to the standard asbestos diagnoses satisfy the criteria.
- Claims of current medical impairment will be paid promptly. Claims of present indicia of future impairment are not allowed, but when such claims are resubmitted for actual impairment, they will not be time-barred. In addition, claimants who develop asbestosis can collect compensation immediately for that im-

\(^{38}\) This “market test” is not perfect, however. See infra note 41.
pairment, but if a malignancy later develops, can refile for the award established for this more severe disease.

- A schedule consisting of minimum and maximum figures of compensation and an average value range are established, all derived from historical settlement and award payments made by CCR members in tort litigation. For example, for mesothelioma the compensation range runs from a minimum of $20,000 to a maximum of $200,000, with the negotiated average value in the range of $37,000 to $60,000.39

- Individual victims may claim “extraordinary” damages, depending on a combination of age, number of dependents, economic factors, and the degree of exposure to the products of CCR members.40

- In light of the reduced difficulties and contingencies in representing claimants under this settlement, the maximum attorney fee is held to twenty-five and twenty percent of the compensation received for ordinary and extraordinary compensation claims, respectively.

- On the basis of prior CCR experience, the parties developed annual case-flow caps for “ordinary” claims, “exceptional” diagnostic claims, and “extraordinary” compensation claims. If in any one year the number of claims in a category exceeds that category’s cap, the excess claims will be processed in the next year and count against that next year’s cap. Because the CCR members are obligated by the settlement to pay all qualifying claims, these case flow ceilings affect only the timing of, not entitlement to, payment. Moreover, if the aggregate settlement amount paid to claimants in any one year falls below the average value range, CCR will make up the difference by paying more claims in subsequent years.

- In addition to the front-end opt-out right under the class action settlement procedure, any claimant who meets the exposure and impairment criteria and is dissatisfied with the amount of compensation offered has the option of suing in court for tort damages in lieu of accepting the CCR offer. In such a suit, the defendant waives any issues relating to its legal fault, 

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40 The negotiated average value for extraordinary mesothelioma claims is set at $300,000, but payments in individual cases can range well beyond that figure. Id.
with the only predicates to recovery being claimant exposure and disease. In return, successful plaintiffs are entitled to collect only compensatory, not punitive, damages. A maximum of one percent of claimants can assert this back-end opt-out right in any one year, and any damages award greater than 150 percent of CCR’s last offer is paid over a period of five years.

The negotiators appear to have addressed the major pathologies of the present system and adopted a significantly improved method for delivering compensation to future victims of asbestos exposure. Their success, however, will depend on the court’s assessment of the proposed settlement’s fairness.

There are several reasons to believe that this settlement secures important gains for both sides. For the benefit of plaintiffs, the settlement guarantees compensation for all impaired claimants through “evergreen funding.” It also overcomes several obstacles traditionally imposed by tort doctrine by using medically-defined entitlement criteria. In doing so, it both simplifies adjudication and reduces uncertainty and costs for claimants. Prompt administrative processing also significantly ameliorates current litigation delays. In addition, the savings resulting from the cap on legal fees, together with any further savings from competitive pressure on fees, will benefit claimants rather than defendants. The compensation schedule specifies a range of payments within each medical category, permitting some individualization. By also specifying an annual average for the range—based on the current pattern of tort awards—the schedule removes the defendant's incentive to offer an unreasonably low or high award to any particular claimant. The front-end opt-out right allows potential claimants who are dissatisfied with the proposed compensation scheme to avoid the settlement. It thus provides an immediate substantive test of the fairness of the proposal. Finally, the back-end opt-out right for claimants who are dissatisfied with the compensation offered through the administrative mechanism provides a gradual market test as to whether settlement benefits remain preferable to the tort litigation alternative.

41 The front-end opt-out is not a perfect market test of the settlement proposal because some proportion of future claimants, many of whom are currently unimpaired, may be unlikely to exercise the opt-out choice at this time. The back-end opt-out is also flawed to some extent, because the limited number of such tort claims permitted in any one year may make this option less attractive to many claimants than the present unrestricted right to sue if and when they want.
For defendants, the settlement eliminates unimpaired pleural plaque claims, saving both the compensation these claims have usually garnered and the associated defense costs. The use of tangible medical criteria not only simplifies eligibility determinations but also helps screen out some lung cancer and respiratory cases that are not asbestos-related. The combination of objective medical criteria, exclusion of unimpaired claims, and the elimination of statute of limitations problems reduces the incentives for plaintiffs' counsel to search for marginal claims. Finally, the settlement will provide a very important measure of financial certainty for defendants, by specifying a compensation range and average for each impairment category, by eliminating punitive damages awards, and by capping both the annual volume of cases that will receive exceptional compensation and the number of cases that will be handled through the back-end opt-out each year.

There are some important differences between the legislative ideal we sketched earlier and the approach negotiated by the parties to this class action settlement:

- The settlement permits more generous attorneys' fees, although the percentage figures are consistent with those used in the Manville reorganization. But these freely-negotiated caps on attorneys' fees do not preclude competitive pressures generating lower fees if members of the private bar are prepared to bid with smaller percentage rates for the right to represent asbestos victims with less contingent claims under the new system.

- The settlement extinguishes, rather than defers, unimpaired pleural plaque claims until more serious asbestos disease cases are resolved. In effect, the settlement adopts the substantive position that "cancerphobia" actions should be barred. Those claimants, however, will no longer be forced by the statute of limitations in "single-claim" states to bring actions when they are not actually sick and thereby forfeit any recourse to larger compensation when and if serious impairment develops.

- More importantly, a legislated solution would cover current as well as future claims, subject only to minor due process limits. It would also cover more than the subset of companies

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42 With a fixed compensation schedule, defendants are further protected from unexpected real increases in awards. Conversely, future claimants are protected from reductions in tort awards that may result from legislated tort reform.
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and insurers participating in the settlement, avoiding the complex problem of rationalizing the indemnification from, and joint and several liability of, the companies and insurers not participating in the settlement.

• A legislated solution would create an administrative rule-making process that would permit adjustments to the medical and compensation parameters if future circumstances demand it. Such adjustments could be regulated to provide reasonable certainty to claimants and defendants, and they would be much easier to accomplish as administrative matters rather than as modifications of an already approved settlement.  

• Finally, a class action settlement involves the prospect of undesirable delay. Although a trial court deems a proposed settlement reasonable, an overly cautious appeals panel with limited time may not see the wisdom of swift and bold action. This danger was demonstrated in the recent reversal of the negotiated reorganization of the Manville Trust. Even an eminently reasonable settlement may take years to work its way through the courts and win final appellate approval. Fortunately, this settlement does provide that it becomes operational—in the sense that CCR will begin processing claims under it—at the conclusion of the front-end opt-out. And CCR defendants have undertaken to resolve more quickly all pending tort claims once they receive assurance about their future liability through approval of the class action settlement.

Notwithstanding these considerations, we firmly endorse the fairness and adequacy of this settlement of future asbestos claims. We also hope that this will be the first step towards comparable relief for every one of the more than 100,000 asbestos claims now pending in federal and state courts.

VI. CONCLUSION

The asbestos crisis can be solved in a way that assures substantial recovery for the sick without bankrupting the businesses that must pay the bill. Whether the solution is administered by

43 The stipulation includes a procedure for agreed-to adjustment in compensation amounts and ranges. Stipulation, Carlough, CA No. 93-CV 0215, at 51–52.
a court or an administrative agency, it must involve certain key elements: reduction in legal costs, limitation of compensation to claimants who are actually impaired, different but fair levels of benefits for people with different losses, and elimination of excessive and redundant financial punishment for defendants.

There are many good reasons to favor an administrative solution formulated by Congress rather than some scheme created by federal or state judges. Most importantly, the administrative state has demonstrated that it can serve as an excellent alternative to traditional forms of legislation and adjudication. Its strength lies in harnessing the ability of bureaucratic organizations to integrate scientific expertise, individual fairness, and public purpose.\textsuperscript{45}

At the same time, however, even those most enthusiastic about a solution that would take the asbestos crisis out of the judicial system must feel reluctant to ask Congress to enact a new administrative scheme. Passage of any piece of controversial legislation is uncertain at best. With the budget deficit and a host of other social and economic priorities, enactment of a sound administrative scheme for asbestos compensation is unlikely.

The judicial solutions we have discussed are a feasible method of resolving the crisis. This is especially true if, as we believe, resolution by settlement class action of pending and future claims can be fashioned to integrate the compensation priorities and case-handling features of a pure administrative approach.

We have had several goals in mind in analyzing the asbestos problem. Most importantly, we have sought to contribute a legal solution to a social and economic problem that has involved enormous human suffering. As students of governance generally, and of administrative systems, tort litigation, and the law of the workplace specifically, we realize that the solution to the asbestos crisis demands the integration of several conceptual frameworks. We hope that judges, legislators, and the involved parties will find our analysis constructive. Without reform, the present system will only lead to deepening crisis in the courts and further injustice to asbestos victims.