

11-2003

Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis

Mark H. Reeves

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Torts Commons](#)

Recommended Citation

Mark H. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 *Vanderbilt Law Review* 1949 (2019)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol56/iss6/7>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

**MAKES SENSE TO ME:
HOW MODERATE, TARGETED FEDERAL
TORT REFORM LEGISLATION
COULD SOLVE THE NATION'S ASBESTOS
LITIGATION CRISIS**

I.	INTRODUCTION	1950
II.	THE CURRENT STATE OF THE ASBESTOS CRISIS	1956
	A. <i>Defendant Bankruptcies</i>	1956
	B. <i>Unimpaired Plaintiffs</i>	1960
	C. <i>Mass Consolidation</i>	1964
	D. <i>Punitive Damages</i>	1969
	E. <i>Peripheral Defendants and Successor Liability</i>	1970
	F. <i>Inconsistent Treatment in Federal and State Courts</i>	1973
III.	PREVIOUS ATTEMPTS AT A SOLUTION: WHAT HAS GONE WRONG?	1976
	A. <i>Attempts at an Administrative Solution</i>	1976
	B. <i>Calls for a Judicial Solution</i>	1979
	C. <i>Attempts at a Global Settlement</i>	1980
IV.	A TARGETED LEGISLATIVE TORT REFORM PROPOSAL	1984
	A. <i>Why a Federal Tort Reform Statute?</i>	1984
	B. <i>What Should the Statute Do?</i>	1986
	1. Get Asbestos Cases into Federal Court	1986
	2. Implement a Statutory Inactive Docket Program To Stop Claims by the Unimpaired	1988
	3. Stop Unjustified Punitive Damages Awards	1990
	4. Limit Successor Liability and Protect Peripheral Defendants	1993
	C. <i>What About Mass Consolidations?</i>	1995
V.	CONCLUSION	1998

I. INTRODUCTION

During the three decades he spent working as a machinist for the United States Navy, Henry Plummer suffered continuous exposure to the asbestos used in the insulation, gaskets and pipe coverings of warships.¹ In late 1999, a biopsy confirmed that he had developed mesothelioma, a gruesome type of cancer that kills all those who contract it and is caused only by asbestos.² In an effort to combat his cancer, Mr. Plummer embarked on a long, painful course of treatments that included chemotherapy and the removal of his left lung in April 2000.³ In early 2001, however, Mr. Plummer's doctor informed him that new tumors had emerged, this time in his right lung.⁴ He was subsequently placed on a ventilator and died in October 2001.⁵

Before his death, Mr. Plummer retained an attorney and filed a lawsuit against more than twenty makers of asbestos products.⁶ Several defendants settled before trial, and a jury awarded Mr. Plummer a \$3.1 million verdict against one specific defendant, AC&S.⁷ Before Mr. Plummer's widow received any money, however, several of the settling defendants, including Owens-Corning and Fibreboard, filed for bankruptcy protection.⁸ Faced with the threat that AC&S would do the same, Mrs. Plummer agreed to settle her claim confidentially for an amount substantially less than the trial award.⁹ After paying her attorney's thirty-three percent of the award in addition to other expenses associated with the trial and her husband's illness, Mrs. Plummer will be left with less than \$1 million¹⁰—a

1. Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1 (discussing the impact of claims by unimpaired asbestos plaintiffs on the payments received by the seriously ill, and describing several case studies), 2002 WL-WSJ 3392934.

2. See Roger Parloff, *The \$200 Billion Miscarriage of Justice: Asbestos Lawyers Are Pitting Plaintiffs Who Aren't Sick Against Companies That Never Made the Stuff—and Extracting Billions for Themselves*, FORTUNE, Mar. 4, 2002, at 154, available at 2002 WL 2190334; Warren, *supra* note 1.

3. Warren, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (noting that annual medical costs for the treatment of mesothelioma can exceed \$200,000, and that most insurance companies will not pay for all of the necessary treatments because many are still considered to be experimental).

substantial sum of money, but certainly not one commensurate with the injury her husband suffered as a result of his exposure to asbestos.

Unlike Henry Plummer, James Curry was not continually exposed to asbestos over a period of decades.¹¹ Instead, his job only called for him to occasionally handle asbestos-containing products.¹² Also unlike Mr. Plummer, Mr. Curry was not so unfortunate as to contract mesothelioma.¹³ Instead, Mr. Curry and his co-plaintiffs alleged only that they suffered from mild asbestosis, a nonmalignant (although, in particularly severe cases, fatal) respiratory tract condition caused by inhaling asbestos fibers, and resulting lung abnormalities such as “scars, marks, opacities, and other imperfections in the lungs that show up in X-rays.”¹⁴ Rather than losing one lung to asbestos-related cancer and having his other lung infested with tumors that would ultimately claim his life, a 65 year-old Mr. Curry was still able to enjoy a daily three to four mile walk when his suit went to trial.¹⁵ In fact, Mr. Curry’s alleged asbestos injuries were so slight that four different doctors testified at trial that he suffered from “no asbestos-related condition whatsoever.”¹⁶ These facts, however, did not stop a Mississippi jury from awarding \$150 million to Mr. Curry and his five similarly situated co-plaintiffs in October 2001.¹⁷ Ironically, the jury ordered that sixty percent of the award given to Mr. Curry and his co-plaintiffs be paid by AC&S—the same company against which Mrs. Plummer was forced to settle her claim out of fear that the company would file for bankruptcy protection.¹⁸ The jury came to this decision despite the fact that AC&S, which is based in Lancaster, Pennsylvania, “never had offices in Mississippi, never performed contracts at any of the sites where the plaintiffs worked, and sold few asbestos-containing products anywhere.”¹⁹

Unfortunately, the cases of Mr. Plummer and Mr. Curry are not aberrations. Instead, they provide a paradigmatic illustration of some of the tremendous shortcomings of the current asbestos claims resolution process. These shortcomings are the result of a tangled web

11. Parloff, *supra* note 2, at 155.

12. *Id.*

13. *Id.*

14. *Id.*; see also TABER’S CYCLOPEDIA MEDICAL DICTIONARY 157 (Clayton L. Thomas, M.D., M.P.H. et al. eds., 18th ed. 1997) (providing a definition of asbestosis).

15. Parloff, *supra* note 2, at 155.

16. *Id.*

17. *Id.*

18. *Id.* at 166; Warren, *supra* note 1.

19. Parloff, *supra* note 2, at 166.

of interrelated problems. Plaintiffs such as Mr. Curry, who have little if any physical impairment, are now responsible for eighty percent or more of all new and pending asbestos claims.²⁰ The increasing volume of claims filed by unimpaired plaintiffs is clogging the dockets of courts across the country,²¹ especially in certain jurisdictions seen as being particularly hospitable to asbestos plaintiffs.²² In order to deal with these massive numbers of claims, courts are increasingly forced to implement various procedural shortcuts, most notably mass consolidation of asbestos claims.²³ This approach has had the unforeseen and harmful side effect of encouraging more asbestos claims by unimpaired plaintiffs.²⁴ The result is the creation of a vicious cycle: judges feel forced to turn to aggregation to deal with the overwhelming numbers of claims being filed, particularly by unimpaired plaintiffs, but their willingness to aggregate cases only serves to encourage more filings, often by unimpaired plaintiffs.

The mass consolidations often feature plaintiffs with widely varying levels of asbestos exposure and vastly differing injuries (or no injuries at all) having their claims joined for a single trial against a

20. See Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (noting that up to eighty percent of current asbestos settlements are paid to the unimpaired), 2001 WL-WSJ 2850312; Richard O. Faulk, *Asbestos Litigation in State Court: Why the System Is Broken and Some Suggestions for Repair*, 3 CLASS ACTION LITIG. REP. 658, 669 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 6-7 (2001) (stating that "[a]s many as 80% of new cases are brought by plaintiffs who suffer from no physical impairment"); see also *The Baron and His Fiefdom*, WALL ST. J., Sept. 25, 2002, at A14 (reporting that claims by unimpaired plaintiffs actually comprise ninety percent of the current asbestos filings), 2002 WL-WSJ 3407050.

21. See Alex Berenson, *A Surge in Asbestos Suits, Many By Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1 (reporting that the filing of new asbestos claims has increased steadily since 1997, with at least 90,000 filed in 2001, and that as many as 2.5 million suits might be filed before asbestos litigation begins to fade around 2030), 2002 WL 18538000.

22. See Rothstein, *supra* note 20, at 15-16. Mississippi's liberal joinder rules and reputation for awarding large jury verdicts to unimpaired asbestos plaintiffs have caused the state to become a haven for asbestos claims. See MISS. R. CIV. P. 20. One particularly noteworthy illustration is Jefferson County, where the number of asbestos claims filed since 1999 has exceeded the county's population. Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at A1. The shift of cases to Mississippi has been further encouraged by the implementation of tort reform in Texas, an early asbestos litigation battleground. See Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1922 (2002).

23. See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1822, 1873-81 (1992); Rothstein, *supra* note 20, at 14-20.

24. See Rothstein, *supra* note 20, at 2, 8-9; Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 248-51 (2000); *infra* Part II.C.

group of defendants with extremely disparate levels of culpability.²⁵ Despite these differences, however, evidence concerning all plaintiffs' claims against all defendants will be presented to a single jury charged with deciding all of the consolidated claims. The result is that even those defendants facing highly questionable claims are frequently forced to settle rather than take the risk that a jury like the one in Mr. Curry's case will return a huge verdict that forces them into bankruptcy.²⁶ In what asbestos defendants must regard as a particularly cruel twist, the value of questionable claims actually increases as the economics of mass aggregation forces defendants to settle.²⁷

Every time an unimpaired plaintiff such as Mr. Curry receives any settlement or jury award, another asbestos defendant is driven closer to bankruptcy and the pool of funds available for truly injured claimants is further depleted.²⁸ This problem is only exacerbated by the consolidation-fueled increase in the value of such dubious claims. At least fifty-five companies have now been driven into bankruptcy by asbestos liability, and the number is steadily increasing, with at least twenty of those filings coming since January 1, 2000.²⁹

The repeated awarding of punitive damages in asbestos litigation is also forcing defendants into bankruptcy. With claims against many defendants numbering in the thousands, punitive damages awards can quickly drain the assets of even the healthiest corporations. The specter of punitive damages also contributes to the incentive to settle questionable claims.

25. See Hensler, *supra* note 22, at 1912-13 & n.87 (noting that individual work sites often produced some defendants with very serious injuries, others with milder injuries, and still others who showed signs of asbestos exposure but remained unimpaired). A typical mass aggregation would consolidate the claims of all of these plaintiffs for a single trial against all defendants who could in any way be tied to asbestos products used at the plaintiffs' work site.

26. See Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 252 (2001) (noting that "[e]ven if a defendant perceives that it has a substantial likelihood of prevailing, if the number of claims is high enough to constitute a threat to the economic viability of the company, a corporate decision maker . . . will often agree to settle the claims").

27. See Parloff, *supra* note 2, at 164 (discussing the "piggyback effect" that results in overcompensation of the least injured plaintiffs by associating their claims with those of the seriously ill).

28. See Rothstein, *supra* note 20, at 7.

29. Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1931 (2002) (noting that at least fifty-five publicly traded companies have declared bankruptcy as a result of mounting asbestos liability, and that the list of companies to do so since January 1, 2000, includes such notables as Babcock & Wilcox, Federal Mogul, G-1 Holdings, Harbison Walker, Owens Corning Fibreboard, U.S. Gypsum, and W.R. Grace); *Lawyers for Asbestos Reform*, WALL ST. J., Sept. 17, 2002, at A20, 2002 WL-WSJ 3406228.

The problems discussed above are particularly disconcerting when they ensnare corporations that never manufactured asbestos, but instead merely incorporated asbestos into their products or acquired a subsidiary with ties to the industry. The continued extension of liability to these peripheral defendants and corporate successors is another cause for concern. As more and more asbestos manufacturers and their insurers have been driven into bankruptcy, plaintiffs and their attorneys have begun to cast their nets wider, drawing in defendants with increasingly tenuous ties to asbestos.³⁰ Many judges, perhaps sympathetic to the plight of plaintiffs whose injuries may have only developed after the truly responsible companies have been sued into oblivion, have played along. At least half of the current claims name defendants whose connections to asbestos are remote at best, and who almost certainly were not the cause of the injuries for which they now face mounting liability.³¹ In fact, current studies indicate that as much as eighty-five percent of United States industry may soon face some degree of asbestos liability.³² Given the tendency for asbestos liability to bankrupt even financially stable defendants, such numbers are certainly cause for alarm.

Finally, the inconsistent treatment of asbestos cases by the federal and state courts encourages forum shopping and severely hampers any attempts at grassroots reform. Over the last decade, several commentators have urged trial judges to take the lead in addressing the problems of asbestos litigation.³³ However, as long as

30. See Issacharoff, *supra* note 29, at 1931-32 ("Because there are virtually no first-line asbestos manufacturers (and few of their insurers) left standing, asbestos litigation has moved on to find new, solvent defendants whose connection to asbestos, or the likelihood of being the causal agent for asbestos harms, becomes increasingly attenuated over time."); see also STEPHEN J. CARROLL ET AL., RAND, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 41, 47-50 (2002). In the early 1980s, the typical asbestos claimant named twenty defendants. *Id.* at 41. By the mid-1990s, the same typical claimant listed sixty to seventy defendants. *Id.* Asbestos litigation now directly impacts almost every sector of the United States economy, with a growing proportion of claims being filed against nontraditional defendants. *Id.* at 49-50.

31. See *Lawyers for Asbestos Reform*, *supra* note 29 (noting that the list of companies named as defendants in pending asbestos suits includes virtually "[t]he entire auto industry" as well as companies such as Sears, Gerber and Dow Jones).

32. *Id.*; see also *supra* note 30.

33. See, e.g., Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 153-57 (2001) (arguing that courts should implement various procedures to effectively eliminate punitive damages awards in asbestos litigation); Rothstein, *supra* note 20, at 30-33 (providing a laundry list of suggestions for courts to use in attempting to address the asbestos crisis). See generally Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1 (2001) (urging courts to implement inactive docket programs that would postpone trials for claims by unimpaired asbestos plaintiffs); Peter H. Schuck, *The Worst Should Go First: Deferral*

judges in one jurisdiction know that judges in another will hold defendants liable in a given case, there is no incentive for any judge to deny recovery. In fact, there is actually a disincentive, as most judges will not want plaintiffs in their own jurisdiction to go uncompensated while plaintiffs elsewhere are receiving payment.³⁴ The fact that favorable treatment of asbestos claims by a small number of judges can derail any attempted grassroots reform ultimately makes it necessary that any proposed changes be applicable on a global scale.³⁵

Taken in concert, these problems paint a bleak picture of the current state of asbestos litigation, particularly for seriously ill plaintiffs and for those on the rapidly expanding list of asbestos defendants. These problems also sound an ominous warning for future asbestos plaintiffs. Unless some sort of serious reform occurs quickly, even the most creative plaintiffs' attorneys will eventually have difficulty finding solvent defendants that can be linked to asbestos. The ultimate result will be that, in addition to many current plaintiffs not receiving compensation commensurate with their injuries, many, if not all, future claimants will go entirely uncompensated. It is this concern, combined with the ever-increasing number of companies coming into the crosshairs of asbestos plaintiffs and their attorneys, which makes reform imperative.

Part II of this Note offers a more detailed discussion of the problems currently plaguing asbestos litigation. Part III will discuss various prior asbestos reform proposals. It will note the merits of several of these schemes, some of which have been integrated into this Note's proposal, and will also seek to identify the critical shortcomings that prevented their implementation. Part IV presents a new proposal for addressing the asbestos crisis with a federal tort reform statute. It argues that Congress could "fix" the current asbestos litigation process by passing a targeted statute specifically addressing only some of the major problems.

One of the most important, and perhaps the most controversial, aspects of this proposed legislation is the extension of federal subject matter jurisdiction to cover the vast majority of asbestos claims. A second vital element is a limit on repeated punitive damage awards against a single asbestos defendant. Third, this Note calls on Congress to mandate the implementation of a nationwide inactive docket program that will defer the claims of unimpaired plaintiffs and reduce the number of asbestos cases currently choking the dockets of

Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541 (1992) (advocating deferral registries similar to the inactive docket programs proposed by Behrens and Parham).

34. See Rothstein, *supra* note 20, at 29.

35. *Id.* at 28-30.

the nation's courts. Fourth, the proposed legislation addresses the problems of successor liability and peripheral defendants by implementing a statutory cap on the damages that can be awarded against a corporate successor and exhorting judges to require legitimate proof of actual causation in order to award damages against any asbestos defendant.

Noticeably absent from this proposed legislation is any reform specifically directed towards the problem of mass consolidations. This Note concedes that some degree of consolidation is inevitable in asbestos litigation. Part IV argues, however, that the preceding proposals would minimize the serious detrimental effects of mass consolidations, thus solving the problem without specifically addressing it. In addition to these specific proposals, Part IV will respond to several criticisms likely to be leveled at this Note's proposed tort reform plan.

II. THE CURRENT STATE OF THE ASBESTOS CRISIS

*A. Defendant Bankruptcies*³⁶

Perhaps the most alarming trend in asbestos litigation is the recent increase in the number of defendants seeking bankruptcy protection.³⁷ At least fifty-five publicly traded companies have now filed for bankruptcy citing asbestos liability as a significant cause.³⁸ More of these filings have occurred since 1998 than in the previous

36. This section should not be read as a plea for sympathy for all asbestos defendants. Many of the early, legitimate defendants knowingly produced an extremely dangerous product, and some even engaged in attempts to cover up its harmful effects. See generally David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693 (1986). These defendants have been subjected to massive liability, and rightly so. However, as the following paragraphs illustrate, all asbestos bankruptcies—even those of truly culpable defendants—contribute to a wide array of undesirable developments.

37. See generally JOSEPH E. STIGLITZ ET AL., SEBAGO ASSOCS., *THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS* (2002) (providing a detailed analysis of asbestos related bankruptcies and their detrimental effects on various interested parties).

38. Issacharoff, *supra* note 29, at 1925-26, 1931. Professor Issacharoff notes that the number of bankruptcy filings has increased since the Supreme Court handed down its decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), two decisions rejecting the use of class action settlements as a device for resolving asbestos claims. Issacharoff, *supra* note 29, at 1931. He hypothesizes that the filings will further accelerate as asbestos defendants acclimate themselves to the prepackaged bankruptcy provisions in 11 U.S.C. § 524(g), which Congress made available after the *Amchem* and *Ortiz* decisions. *Id.*; see also STIGLITZ ET AL., *supra* note 37, at 13 (estimating that the number of publicly traded companies that have filed has risen above sixty).

twenty years combined.³⁹ The list of companies that have filed since January 1, 2000 includes such notable names as Armstrong World Industries, Babcock & Wilcox, G-1 Holdings, Harbison Walker, Kaiser Aluminum, Owens Corning Fibreboard, U.S. Gypsum and W.R. Grace.⁴⁰ Other noteworthy companies facing mounting asbestos liability include Disney, Dow Chemical, Dow Jones, Daimler Chrysler, Ford, Gerber, IBM, Sears, and Viacom.⁴¹ The fact that many of these corporations have minimal ties to asbestos is particularly disturbing.⁴² This list illustrates the size and variety of corporations that have already been or could ultimately be forced into bankruptcy due to asbestos liability.

Bankruptcy filings by asbestos defendants are alarming because of their adverse effects on so many disparate groups.⁴³ The employees and shareholders of defendant corporations are the most obvious victims of bankruptcies, as the filings cause jobs to disappear and stock prices to plummet.⁴⁴ Although it is certainly likely that many of these displaced employees will find work elsewhere, even temporary unemployment can result in substantial financial hardship. In addition, "displaced workers tend to earn lower wages at their new jobs, reflecting the loss of human capital associated with the displacement."⁴⁵ Stockholders of companies driven into bankruptcy also suffer substantial losses.⁴⁶ Financial losses caused by declining stock values are obviously bad for all shareholders, but they can be especially calamitous when they impact the pension or retirement funds of the same workers who were displaced because of the bankruptcy.⁴⁷

39. STIGLITZ ET AL., *supra* note 37, at 10-11 (Thirty-five companies have filed since 1998; twenty-six filed in the two preceding decades.).

40. Issacharoff, *supra* note 29, at 1931; *see also* Berenson, *supra* note 21.

41. Issacharoff, *supra* note 29, at 1931; *Lawyers for Asbestos Reform*, *supra* note 29.

42. *See* discussion *infra* Part II.E.

43. *See generally* STIGLITZ ET AL., *supra* note 37.

44. *See id.* at 24-27. It is estimated that as many as 60,000 jobs have been lost as a result of asbestos-related bankruptcies. *Id.* Stiglitz and company arrived at this figure by examining the time series employment data for thirty-one firms that declared bankruptcy prior to September 2002. *Id.* They compared the change in employment levels in each firm in the five years prior to bankruptcy to the change in employment in other firms with the same Standard Industrial Classification (SIC) code. *Id.*

45. *Id.* at 29 (noting that the wages at the new job are generally five to ten percent less than at the old job).

46. *See id.* at 31-39; *see also* Lester Brickman, *The Great Asbestos Swindle*, WALL ST. J., Jan. 6, 2003, at A18 (noting that asbestos litigation "has already cost investors and employees with 401(k) plans more than the Enron debacle"), 2003 WL-WSJ 3955728.

47. A recent survey of several bankrupt companies revealed that the companies' common stock comprised an average of twenty-five percent of their pension plan assets five years prior to the bankruptcy. STIGLITZ ET AL., *supra* note 37, at 32-33. During the years leading up to the

In addition to harming often innocent corporate employees and shareholders, bankruptcy filings by asbestos defendants adversely impact asbestos plaintiffs. Both current and recent plaintiffs suffer, as their compensation is often greatly reduced and delayed.⁴⁸ When a company files for bankruptcy, litigation against it is stayed and claims cease being paid pending reorganization.⁴⁹ The average length of time from the filing of a bankruptcy petition until its confirmation is six years.⁵⁰ This six-year period does not accurately reflect the time that it takes for a bankrupt defendant to begin paying claims, however. After the defendant goes through bankruptcy reorganization, its assets are used to establish a trust to pay asbestos claimants. Establishing such a trust can take several additional years after the confirmation of the reorganization plan.⁵¹ When the trust is organized, each type of injury suffered by a claimant is assigned a specific dollar amount—its “full liquidated value.”⁵² However, due to the trust’s limited assets and the need to pay as many claims as possible, only a fraction of each claim’s full liquidated value will actually be paid.⁵³ The end result is that a plaintiff who presently files a claim against a defendant that subsequently declares bankruptcy is unlikely to receive any compensation for several years, and even then will receive only pennies on the dollar.

Future plaintiffs are perhaps the biggest losers of all, as each bankruptcy filing by an asbestos defendant or its insurer reduces the pool of assets from which they can seek compensation. Although the

companies’ filings, this common stock lost ninety-six percent of its value. *Id.* The result was that many company employees, in addition to losing their jobs, lost twenty-five percent of their retirement savings. *Id.*

This precipitous decline in stock values affected more than just the employees of the bankrupt corporations, of course. Stiglitz cites the examples of the California Public Employees Retirement System (CALPERS), which is the eighth largest institutional investor in W.R. Grace, and the New York State Teachers Retirement Board, which was the twelfth largest institutional investor in the USG Corporation. *Id.* at 37-39.

48. See STIGLITZ ET AL., *supra* note 37, at 10 (“Since bankruptcy reorganization can often take more than five years, bankrupt firms often receive a relatively lengthy reprieve from paying asbestos liabilities. Moreover, as part of the reorganization plan, the bankrupt firm usually wins the right to pay claimants on much less favorable terms.”).

49. See *id.*

50. CARROLL ET AL., *supra* note 30, at 68.

51. See *id.* at 68 (citing the example of the Amatex Trust, which did not begin making payments to claimants until 14 years after the original bankruptcy petition was filed).

52. *Id.* at 67.

53. *Id.* at 67-68, 79-80. The most famous asbestos trust, the Manville Trust, was established in 1988 with instructions to pay one-hundred percent of the full liquidated value of all claims. *Id.* at 79-80. Within three years, it had decreased its payments to ten percent of each claim’s full liquidated value. *Id.* at 80. In 2001, in response to a deluge of unanticipated new claim filings, that figure was further reduced to five percent. *Id.*

trusts are required to account for and compensate future plaintiffs, the trusts' rates of payment are subject to reduction, and their assets are finite. If asbestos defendants continue to be driven into bankruptcy at the current rate, it seems quite possible that many future defendants will be lucky to receive any compensation at all.⁵⁴

Finally, each asbestos-related bankruptcy is harmful to every other company that can be remotely tied to asbestos. Whenever money is "taken off the table" in the form of a defendant bankruptcy, the burden on nonbankrupt defendants increases, as plaintiffs who still expect to be fully compensated insist that they pick up the slack.⁵⁵ This expectation is supported by the application of joint and several liability to asbestos defendants—if only one of sixty defendants named in a plaintiff's suit remains solvent, that defendant can be held liable for one-hundred percent of the plaintiff's injuries, regardless of its relative culpability.⁵⁶ In addition to increasing their demands on the rapidly shrinking number of solvent traditional asbestos defendants, plaintiffs also begin to cast their nets wider, bringing in less culpable defendants in the hopes of finding someone to compensate them for their injuries.⁵⁷ These attempts to expand the defendant pool are evidenced by the fact that the number of defendants named by a typical plaintiff has more than tripled over the last twenty years.⁵⁸ These trends combine to generate a chain reaction where each defendant bankruptcy both increases the strain on the other

54. See, e.g., Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 338 (2002); Behrens & Parham, *supra* note 33, at 1-7; *Judicial Conference Ad Hoc Comm. on Asbestos Litigation, Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, MEALEY'S LITIG. REP.: ASBESTOS, Mar. 15, 1991, at 3 [hereinafter AD HOC COMMITTEE REPORT]; Rothstein, *supra* note 20, at 2, 7-14.

55. See CARROLL ET AL., *supra* note 30, at 68.

56. See Parloff, *supra* note 2, at 157. Parloff notes that in the case of James Curry, see *supra* notes 12-21 and accompanying text, AC&S, one of only two solvent defendants named in the suit, was apportioned sixty percent of the damages despite the fact that it had never had offices in the states where the plaintiff worked, had never performed contracts at any site where the plaintiff worked, and had "sold few asbestos-containing products anywhere." *Id.*

57. See, e.g., PRUDENTIAL FINANCIAL, ASBESTOS LITIGATION—A PROBLEM WITHOUT A SOLUTION (2002), quoted in STIGLITZ ET AL., *supra* note 37 at 18 ("Defendants are increasingly 'peripheral.' This generally means that: They did not manufacture, sell, or install asbestos-containing insulation or materials; Asbestos was more or less 'incidental' in their products or facilities; if it was in their products, it was enclosed [and] therefore, only a minimal number of fibers were released into the air." (quoted in STIGLITZ ET AL., *supra* note 37, at 18)); Behrens, *supra* note 54, at 339-40 (noting that the typical response of the plaintiffs' bar to bankruptcy filings by the traditional defendants is to "cast its litigation net wider and bring in 'peripheral defendants.'"); *supra* note 56; see discussion *infra* Part II.E.

58. CARROLL ET AL., *supra* note 30, at 41.

defendants and drags more companies into the mire, thus ultimately leading to still more bankruptcies and perpetuating the cycle.⁵⁹

The far-reaching negative impact of asbestos-related bankruptcies illustrates why the recent increase in the number of defendants seeking bankruptcy protection is so disturbing. Although there is no way to turn back the clock and save the scores of companies that have already been driven into bankruptcy as a result of asbestos litigation, it is vital to the interests of all concerned that steps be taken to stem the tide of bankruptcy filings among the remaining asbestos defendants.

B. Unimpaired Plaintiffs

One of the most important driving factors behind the recent increase in bankruptcy filings by asbestos defendants, and correspondingly one of the most serious problems with the current asbestos litigation process, is the precipitous surge in new claim filings.⁶⁰ This surge is not fueled by an increase in asbestos exposure or a sizeable increase in the number of asbestos-related diseases. Asbestos exposure has decreased dramatically since the passage of the Occupational Safety and Health Act (OSHA) in 1970,⁶¹ and although the occurrence of asbestos-related diseases has increased slightly, this increase does not begin to account for the number of new claims filed.⁶² Instead, the driving force behind this surge is a drastic

59. See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) ("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.").

60. See, e.g., CARROLL ET AL., *supra* note 30, at 42 (tracking the experience of five major asbestos defendants, four of which saw the number of claims filed against them increase from 15,000 to 20,000 claims per year in the early 1990s to approximately 50,000 claims per year by the year 2000); STIGLITZ ET AL., *supra* note 37, at 7; Behrens & Parham, *supra* note 33, at 3; Warren, *supra* note 1, at A1 (noting that asbestos claim filings doubled in the year 2000 alone, then increased by another fifty-four percent in 2001).

61. CARROLL ET AL., *supra* note 30, at 13-14 (also describing how EPA regulations passed in 1989 have banned certain asbestos-containing products and prohibited any new uses of asbestos); see also James Alleman & Brooke Mossman, *Asbestos Revisited*, SCI. AM., July 1997, at 70-75, cited in CARROLL ET AL., *supra* note 30, at 13 (noting that asbestos consumption in the United States peaked in 1973, then declined rapidly); Behrens & Parham, *supra* note 33, at 4 ("The substantial increase in the number of new asbestos claims does not correlate with either an increase in the number of individuals exposed to products containing asbestos, or with an increased prevalence in asbestos related diseases.").

62. See CARROLL ET AL., *supra* note 30, at 44-45. The number of mesothelioma claims grew throughout the 1990s at a rate of less than five percent per year, and the absolute number of mesothelioma claims is miniscule when compared with the number of nonmalignant claims. *Id.* at 44. In addition, claims filed for cancers other than mesothelioma actually decreased in the second half of the 1990s. *Id.* at 44-45; see also Behrens & Parham, *supra* note 33, at 5;

increase in filings by unimpaired plaintiffs—“people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be.’”⁶³ Claims by these unimpaired claimants now comprise up to ninety percent of the new asbestos filings occurring nationwide.⁶⁴

The original rationale for filings by unimpaired plaintiffs was largely innocent. Many people who were exposed to asbestos in the workplace subsequently learned that their lungs exhibited pleural plaques or other hallmarks of asbestos exposure.⁶⁵ Many of these people were not seriously ill, and felt no detrimental effects from their asbestos exposure.⁶⁶ Unfortunately, due to the long latency period of asbestos-related diseases, they had no way of knowing if they would eventually develop a serious disease.⁶⁷ After learning that they displayed physical signs of asbestos exposure, they feared their claims would be barred by statutes of limitations if they chose to wait until they developed cancer or became impaired in some other way before filing.⁶⁸ However, because their exposure to asbestos had not yet caused any real injury, any claim they filed would be of questionable merit and value. And, because most jurisdictions imposed a one injury rule, plaintiffs who later developed a serious asbestos-related disease would not be able to file a second claim seeking greater compensation.⁶⁹ Faced with the choice of possibly receiving insufficient compensation now or no compensation at all later, many plaintiffs began to file their claims as soon as they learned that they showed physical signs of exposure, regardless of whether they suffered any impairment.

Issacharoff, *supra* note 29, at 1932-33 (stating that data from the Manville Trust reveals a “steady flow” of filings for malignancies over the course of the 1990s).

63. Behrens & Parham, *supra* note 33, at 5 (quoting *Fairness in Asbestos Compensation Act of 1999: Hearing Before the House Comm. On H.R. 1283*, 106th Cong. 29 (1999) (testimony of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Edley Statement]).

64. See CARROLL ET AL., *supra* note 30, at 20 (citing various studies estimating the percentage of unimpaired claimants at anywhere from two-thirds to 90 percent of all current claimants); see also Behrens & Parham, *supra* note 33, at 5 (citing a study estimating the figure at eighty percent); *Lawyers for Asbestos Reform*, *supra* note 29 (estimating the figure at ninety percent).

65. See CARROLL ET AL., *supra* note 30, at 22; 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, 819-20 (2002).

66. See CARROLL ET AL., *supra* note 30, at 22.

67. See *id.*; Henderson & Twerski, *supra* note 65, at 819-20.

68. See CARROLL ET AL., *supra* note 30, at 22 (noting that most jurisdictions require a victim to file within a short period of time after learning of pleural plaques or else risk losing out on compensation altogether).

69. *Id.* at 23.

While the strictures imposed by statutes of limitations and the one injury rule made it reasonable for unimpaired plaintiffs to file their claims immediately, they still faced one problem: in tort law, there can be no recovery without injury. Understanding the difficult situation of unimpaired plaintiffs who showed physical signs of exposure, and wanting to ensure that all those who were harmed by exposure to asbestos received some opportunity to be compensated, many judges began searching for reasons to allow the unimpaired plaintiffs' claims to go forward.⁷⁰ The most common means of accomplishing this goal was by simply relaxing the injury requirement, allowing it to be satisfied even by "internal changes in a plaintiff that in some cases can only be seen on an x-ray and may never impair the claimant's health."⁷¹ This relaxed standard allowed unimpaired plaintiffs to proceed with their claims in exactly the same manner as those suffering from mesothelioma, asbestosis, or any other physically disabling disease caused by asbestos exposure. Some courts also sought to help the unimpaired plaintiffs by recognizing a new cause of action for medical monitoring.⁷² Although this cause of action was squarely rejected by the United States Supreme Court in *Metro North Commuter Railroad Company v. Buckley*,⁷³ it is still recognized in a minority of states as a viable way for unimpaired asbestos plaintiffs to bring their claims.⁷⁴

While the innovations of the relaxed injury requirement and the medical monitoring cause of action allowed many unimpaired

70. See John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1011 (1985) ("[P]erhaps anticipating the impact of statutes of limitations and the single judgment rule on [asbestos] claims should harm materialize in the future, or perhaps bewitched by the idea of recovery for the mere fear of future illness, courts left the gate open and the caseloads surged."), quoted in Behrens & Parham, *supra* note 33, at 6 n.31.

71. Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 539 (2001).

72. *Id.* at 540-41. This cause of action allowed a healthy plaintiff who had been exposed to asbestos to recover the cost of medical surveillance aimed at providing an early diagnosis of any health problems that might eventually develop. See generally Henderson & Twerski, *supra* note 65 (providing a scathing condemnation of the practice of awarding damages for medical monitoring, increased risk, or fear of illness in asbestos litigation).

73. 521 U.S. 424, 427 (1997), discussed in Schwartz & Tedesco, *supra* note 71, at 540-41. Essentially, the Court concluded that the sheer volume of potential medical monitoring claims would lead to expenditures that would cripple asbestos defendants and siphon off resources needed to compensate those who were truly injured. *Id.*

74. See Schwartz & Tedesco, *supra* note 71, at 541. The *Metro-North* decision was rendered under the Federal Employers' Liability Act (FELA), a federal worker's compensation statute. 521 U.S. at 426-27. State courts therefore remain free to recognize medical monitoring claims, although most have followed the Supreme Court in rejecting them. Schwartz & Tedesco, *supra* note 71, at 541.

plaintiffs to file their claims before they became barred by statutes of limitations, they did little to alleviate the effects of the one injury rule. An unimpaired individual with pleural plaques or other physical evidence of asbestos exposure could file a claim and either settle or get to trial. However, the compensation this individual received for his current injury might be insufficient if he should later develop a more severe disease, and the one injury rule would prevent him from bringing another action seeking more compensation. In an effort to ensure that those injured by asbestos were adequately compensated, courts again responded. Their answer to this dilemma was to abandon the one injury rule, thereby recognizing a second, separate cause of action when a serious asbestos-related disease developed.⁷⁵ With these concessions from the courts, unimpaired plaintiffs had every incentive to file their claims as soon as they discovered any physical evidence of asbestos exposure.

What ostensibly started as a good faith attempt by judges and plaintiffs to ensure that culpable asbestos defendants could not avoid liability by hiding behind statutes of limitations has mushroomed into one of the most significant elements of the current asbestos crisis. Court dockets are now choked with huge numbers of claims filed by unimpaired plaintiffs.⁷⁶ These claims cause delays for plaintiffs with extremely serious, often fatal injuries, as they are forced to wait in line while unimpaired plaintiffs who filed before them have their day in court.⁷⁷ In addition, funds given to unimpaired plaintiffs as a result of jury awards or settlements deplete the pool of assets available to compensate the seriously ill; indeed, awards to unimpaired defendants are the driving force behind many defendant bankruptcies. These are just some of the most serious costs of the judicial maneuvering that has allowed courts to hear "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."⁷⁸

75. See Henderson & Twerski, *supra* note 65, at 821 n.22 (providing an extensive list of decisions from various jurisdictions in which courts allowed a second claim by a previously compensated plaintiff who had developed a serious asbestos-related disease since his first claim).

76. See *supra* note 22 and accompanying text.

77. For a general criticism of the "first in, first out" (FIFO) treatment of asbestos plaintiffs regardless of their level of injury or potentially reduced life expectancy, see Schuck, *supra* note 33, at 560-68.

78. *Id.* at 555.

C. Mass Consolidation

The detrimental effects of claims brought by unimpaired claimants are exacerbated by the mass consolidation of claims for trial, a common practice in many courts that are forced to deal with a high volume of asbestos litigation. Again, the original impetus behind the decision to use mass consolidations in asbestos litigation was largely innocent. Judges who were overwhelmed with asbestos claims sought some way to allow each plaintiff to have his or her day in court, but quickly realized that the sheer volume of claims being filed would prevent them from ever being heard individually.⁷⁹ Their solution was to join several claims that had common issues into a single trial in an effort to resolve them efficiently.⁸⁰ Typically, a mass consolidation featured a mini-trial (known as a "bouquet trial") for a small group of representative plaintiffs selected by the judge.⁸¹ The hope was that the results of this bouquet trial could then be extrapolated to the entire group of plaintiffs, thereby facilitating settlement.

Initially, consolidations seemed like an easy way to dispose of dozens of asbestos claims quickly, efficiently, and fairly. Early on, judges allowed only "small scale consolidations in which there were 'very similar liability issues . . . [and] careful attention [was paid] to the precise claims raised by each plaintiff against each defendant.'"⁸² The procedure quickly became problematic, however, as early successes encouraged judges to become increasingly reliant upon it.⁸³ As mass consolidations grew larger and more prevalent, they began to create new problems, thus adding fuel to the very fire they were meant to help extinguish.

79. The Honorable Conrad L. Mallett, Jr., former Chief Justice of the Michigan Supreme Court, made the following observation: "Think about a county circuit judge who has dropped on her 5,000 [asbestos] cases all at the same time. . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is 'How do I handle these cases quickly and efficiently?' The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation" *Fairness in Asbestos Compensation Act of 1999: Hearings Before the House Comm. on the Judiciary on H.R. 1283*, 106th Cong. 155 (1999) (statement of the Hon. Conrad L. Mallett, Jr.), quoted in Schwartz & Lorber, *supra* note 24, at 249-50.

80. See Schwartz & Lorber, *supra* note 24, at 249-50, 256-57.

81. See Parloff, *supra* note 2, at 164.

82. Schwartz & Tedesco, *supra* note 71, at 542-43 (quoting *Fairness in Asbestos Compensation Act of 1999: Hearings Before the House Comm. on the Judiciary on H.R. 1283*, 106th Cong. 91 (1999) (statement of William N. Eskridge, Jr., Professor, Yale Law School)).

83. See *id.* at 543; Parloff, *supra* note 2, at 162 ("Within just two years after one federal appeals court in 1985 very cautiously okayed the joinder of four plaintiffs into one case—explaining that all four had served on the same work crew and that two were brothers—a federal trial judge consolidated 3,031 plaintiffs into a single case in Beaumont, Tex.").

Many problems have been created by mass consolidations. The first and most ironic is that, instead of helping judges to clear their dockets of asbestos cases, mass consolidations have actually encouraged more claim filings. As Professor McGovern explained, judges who succeed in moving “large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.”⁸⁴ As more and more cases moved through the courts with relative ease, a sort of vacuum was created. In response, plaintiffs’ attorneys, already eager to bring more cases, stepped up recruiting efforts to locate new prospective claimants.⁸⁵ Ultimately, mass consolidations encouraged more new claims than they disposed of, and therefore only added to the problem they were supposed to correct.

In addition to encouraging the filing of what are likely to be more questionable claims, mass consolidations create a significant risk of jury confusion and prejudice if and when those claims go to trial. Recent consolidations in asbestos hotbeds such as West Virginia, Texas, and Mississippi have seen claims by as many as 11,000 plaintiffs against up to two-hundred and fifty defendants consolidated for trial before a single jury.⁸⁶ Typically the plaintiffs’ injuries run the gamut, ranging from mesothelioma and other cancers to asbestosis to

84. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997), quoted in Rothstein, *supra* note 20, at 9 and Schwartz and Lorber, *supra* note 24, at 250; see also Parloff, *supra* note 2, at 164 (“You think you’re clearing your docket, but what you’re doing is you’re widening the pipeline to the courthouse.” (quoting David Bernick, a litigator who represents three bankrupt asbestos defendants)).

85. See, e.g., Parloff, *supra* note 2, at 158 (describing the mass screenings engaged in by plaintiffs’ attorneys in search of new clients). Beginning in the mid-1980s, around the same time as mass consolidations, plaintiffs’ attorneys began working in concert with labor unions to uncover new asbestos claimants. *Id.* Typically, attorneys would send an “examobile,” a van containing radiographic equipment, to a worksite. *Id.* Workers over a certain age (those most likely to have suffered asbestos exposure before it was strictly regulated in the early 1970s) were invited to visit the van for a free chest X-ray, conditioned upon their signing a retainer agreement to be represented by the firm sponsoring the examobile if the X-ray should reveal any asbestos-related disease. *Id.* After the X-rays were collected, the plaintiffs’ attorney would hire a specialist to “sift through them, assembly-line style, looking for arguable cases of asbestos, pleural plaques, or cancer.” *Id.*; see also Brickman, *supra* note 23, at 1854 n.144 (citing cases involving mass screenings through trucks brought to work sites, and quoting an Ohio newspaper advertisement seeking potential plaintiffs); Brickman, *supra* note 26, at 272-84 (discussing the claimant recruitment process, beginning with the employment of a union intermediary and continuing through the administration of a “script memo” telling the claimant how to testify at a deposition).

86. *Lawyers for Asbestos Reform*, *supra* note 29; Parloff, *supra* note 2, at 162, 164.

no impairment whatsoever.⁸⁷ Common sense dictates that the levels of culpability are bound to vary widely when a case involves literally hundreds of defendants. The inevitable effects of asking a jury that has heard evidence pertaining to such disparate levels of injury and culpability to properly differentiate the claims were noted by United States District Court Judge Charles Butler. When granting the defendants' motion for a new trial in a case involving *thirteen* consolidated asbestos claims, he lamented that, despite his best efforts at precautionary measures, the joint trial of "*such a large number* of differing cases both confused and prejudiced the jury."⁸⁸ Supporting his conclusion that the jury was confused and prejudiced, Judge Butler noted that identical damages were awarded to plaintiffs with and without cancer, and that the damage awards were "inflated" and often not supported by the evidence.⁸⁹ If the consolidation of thirteen claims for trial produced the prejudicial effect noted by Judge Butler, one can only imagine how that effect is magnified in trials featuring thousands of asbestos claims.

The tendency of mass consolidations to prejudice and confuse the jury often deprives defendants of a fair trial in another way: by forcing them to settle out of court.⁹⁰ Joining thousands of claims for a single trial essentially forces a defendant to settle as a refusal to do so creates what has been termed a "bet-the-company risk."⁹¹ As Professor Brickman explains:

87. See, e.g., Schwartz & Lorber, *supra* note 24, at 256-57 & n.37 (citing a number of mass consolidations and listing the myriad injuries of the plaintiffs). Schwartz and Lorber also comment on the peculiarity of allowing such disparate claims to be consolidated for trial, noting that judges have "unanimously rejected such consolidation even for purposes of discovery and pre-trial handling" in the repetitive stress injury arena. *Id.* at 256-57. This rejection is supported on the grounds that, while all of the plaintiffs' claims could be properly characterized as repetitive stress injuries, they were nevertheless distinct injuries. *Id.* at 257. Schwartz and Lorber conclude that "[j]udges adhered to the rule of law in repetitive stress injury cases. They should in asbestos cases as well." *Id.* at 257 & nn.38-39.

88. *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992), *quoted in* Brickman, *supra* note 23, at 1876 (emphasis added).

89. Brickman, *supra* note 23, at 1876 ("This confusion and prejudice is manifest in the identical damages awarded in the noncancer personal injury cases and in the cancer personal injury cases, the relatively short deliberation time as well as in the inflated amount of many of the damage awards and the lack of evidence supporting some of the damages in several cases.").

90. Of course, there is nothing inherently objectionable about settling a case out of court, even on a massive scale. This is often the preferred result of litigation for all parties. The problem arises when unimpaired plaintiffs are able to "piggy back" their claims on those of the legitimately injured, thereby extorting a settlement figure that bears no cognizable relationship to the substantive merits of the unimpaired plaintiffs' claims. See *infra* notes 94-96 and accompanying text.

91. Edley Statement, *supra* note 63, at 33, *quoted in* Schwartz & Tedesco, *supra* note 71, at 544; Brickman, *supra* note 26, at 253.

Even if a defendant perceives that it has a substantial likelihood of prevailing, if the number of claims is high enough to constitute a threat to the economic viability of the company, a corporate decision maker, motivated by the short-term consideration of fear of losing the company on his or her watch, will often agree to settle the claims even if the long-term interests of the corporation are to litigate the claims fully. This is so because the aggregated claims . . . potentially exceed the combined assets of the corporations and any available insurance.⁹²

By forcing a defendant to choose between settling all pending claims—including those of dubious merit—and facing a potentially bankrupting verdict at the hands of a prejudiced jury, mass consolidations effectively deprive asbestos defendants of their right to a trial. The problem is further exacerbated by the fact that some judges intentionally abuse the consolidation process in an effort to force defendants to settle claims out of court.⁹³

In addition to further clogging court dockets and limiting the due process rights of defendants, mass consolidations have produced another unanticipated side effect: driving up the value of claims by unimpaired plaintiffs. As common sense would suggest (and Judge Butler observed),⁹⁴ bouquet trials result in overcompensation of unimpaired plaintiffs by allowing them to benefit from sympathy by association.⁹⁵ Likewise, in settlement negotiations, the unimpaired

92. Brickman, *supra* note 26, at 252-53; *see also* Faulk, *supra* note 20, at 660 (“One questionable claim can be tried, but a thousand questionable joined-together claims present a gigantic risk, and many defendants would rather settle questionable claims than face that risk.”).

93. *See* Parloff, *supra* note 2, at 164. Parloff describes a graphic example of such abuse occurring in the Jefferson County, Mississippi case of *Cosey v. E.D. Bullard Co.*, Civ. No. 95-0069 (Miss. Cir. Ct., Jefferson County, June 12, 1998). In a consolidation of 1,700 plaintiffs, the jury returned a verdict of \$48.5 million in the bouquet trial of twelve individuals (including \$2 million each for five unimpaired claimants). Parloff, *supra* note 2, at 166. While the same jury deliberated as to whether to impose additional punitive damages, most defendants settled. *Id.* at 168. The judge, Lamar Pickard, then personally telephoned the representatives of each of the nonsettling defendants, giving them thirty days to settle the claims of all 1,700 plaintiffs. *Id.* If they did not do so, he threatened to reconvene the same jury to set damages for all the plaintiffs. *Id.* He added that they could not appeal this decision, as Mississippi law required an the posting of an appeal bond in the amount of one-hundred and twenty-five percent of the total judgment. *Id.* After the Mississippi Supreme Court refused an emergency petition to remove Judge Pickard for bias, the defendants were forced to settle all 1,700 plaintiffs’ claims. *Id.* Stories such as this one likely explain why Jefferson County, Mississippi, has more asbestos plaintiffs than residents. *See supra* note 22; *see also* Behrens, *supra* note 54, at 350-52. Behrens comments on the *Cosey* case and also notes that in 1999 the West Virginia Supreme Court established a Mass Litigation Panel and instructed it to use mass trials to resolve more than 25,000 pending asbestos claims in the state by July of 2002. Behrens, *supra* note 54, at 351. This prompted a federal lawsuit by several defendants alleging violation of their due process rights because they were effectively prevented from interviewing all of the plaintiffs or having them submit to medical examinations. *Id.* (citing Michelle Saxton, *Railroads File Lawsuit Against W. Va. Supreme Court*, ASSOCIATED PRESS NEWSWIRE Nov. 29, 2001).

94. *See supra* note 88 and accompanying text.

95. *See* Parloff, *supra* note 2, at 164.

plaintiffs and their counsel are able to use the value of the impaired plaintiffs' claims as leverage to artificially inflate the value of their own claims.⁹⁶ In addition to providing an undeserved windfall for unimpaired plaintiffs, this increased claim value harms all other parties to asbestos litigation. Defendants and future claimants are injured as the increased settlement or judgment values push already weakened defendants closer to bankruptcy, thus reducing the pool of assets available to compensate future claimants. Furthermore, current impaired plaintiffs see their compensation decrease as funds that should have gone to them are spread to their unimpaired co-plaintiffs.⁹⁷

Finally, there is some evidence that mass consolidations deprive plaintiffs of adequate representation. It seems self-evident that a group of attorneys would have a difficult time adequately representing the interests of all of their clients in a suit involving thousands of claimants with differing backgrounds and injury levels. This conclusion is implied by the decreased compensation that impaired plaintiffs receive in settlements resulting from mass consolidations, and is supported more concretely by cases in which settlement distributions have not corresponded to the injuries sustained by the plaintiffs.⁹⁸

In sum, mass consolidations have been a spectacular failure, solving very few problems while creating many. Originally intended as a way to decrease the asbestos caseload of judges, they have had exactly the opposite effect. In addition, the procedure substantially abridges the due process rights of defendants by prejudicing and confusing juries and by frequently forcing settlements that preclude jury trials altogether. Furthermore, mass consolidations likely prevent many plaintiffs from receiving adequate representation. Finally, by inflating the value of claims by unimpaired plaintiffs, mass consolidations push more defendants closer to bankruptcy, siphon off the resources available to current and future impaired claimants, and encourage the filing of still more claims by unimpaired plaintiffs, thus perpetuating the cycle.

96. See Behrens, *supra* note 54, at 349-50; Schwartz & Tedesco, *supra* note 71, at 544-45.

97. Edley Statement, *supra* note 63 at 33 ("In the settlement . . . the higher potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims."); see also Behrens, *supra* note 54, at 349-50.

98. See Stephen Labaton, *Settlement Reached in Huge Asbestos Case; But Unequal Awards to Victims Inspire Talk of Legislation to Fix System*, MILWAUKEE J. SENTINEL, Jan. 23, 2000, at 13A, cited in Schwartz & Tedesco, *supra* note 71, at 545 (detailing a case in which the settlement disbursements to similarly injured plaintiffs were directly proportional to their geographic proximity to the district in which the case was filed), available at 2000 WL 3847459.

D. Punitive Damages

Repeated awards of punitive damages are another key element of the asbestos litigation crisis. Almost every asbestos claim filed includes a request for punitive damages, requests that trial juries have proven all too willing to grant.⁹⁹ In addition to the direct cost of paying the awards whenever they occur, the specter of being forced to pay millions of dollars in punitive damages for each plaintiff increases the pressure on defendants to settle, as well as the cost of doing so.¹⁰⁰ These tendencies make punitive damages awards, in addition to problems associated with unimpaired plaintiffs and mass consolidations, integral to “speeding corporate defendants down the path to bankruptcy.”¹⁰¹ The practical effect of punitive damage awards is to take money out of the hands of future claimants in order to give extra awards to current plaintiffs.¹⁰² In addition to jeopardizing future plaintiffs’ ability to recover, the practice of repeatedly awarding punitive damages in asbestos litigation raises serious ethical and possibly even constitutional issues with regard to its effect on defendants.

The two justifications commonly cited for awarding punitive damages are deterrence and punishment.¹⁰³ However, in the asbestos context, deterrence is a moot point. Asbestos use in the United States is largely a relic of the past; there is no conduct left to deter.¹⁰⁴ Without deterrence as a goal, the only purpose punitive damages serve is to punish defendants. This is problematic for two reasons.

99. See Behrens, *supra* note 54, at 352-53 (listing several large punitive damages awards given in Texas during 2001); Behrens & Parsons, *supra* note 33, at 141-43.

100. See George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996) (“(T)he availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation.”); see also *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting) (“[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement that would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.”); Behrens, *supra* note 54, at 353 (noting “the leveraging effect punitive damages have at the settlement table”).

101. Behrens & Parsons, *supra* note 33, at 141.

102. *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (noting that punitive damages are a windfall to recipients and deplete the funds available to compensate future asbestos victims).

103. See Brickman, *supra* note 23, at 1862-63; Rothstein, *supra* note 20, at 26 (“When the threat of large punitive damage awards is used to increase settlement amounts, punitive damages become a means of extortion rather than the corrective and deterrent they are intended to be.”).

104. See Brickman, *supra* note 23, at 1863.

First, as noted by Professor Rothstein, in addition to the fact that twenty years of punitive damages awards almost certainly constitutes adequate punishment under any circumstances, the passage of two decades also means that corporations are being punished today for decisions made by managers and other personnel whom they no longer employ.¹⁰⁵ The idea that asbestos defendants have simply been punished enough highlights the ethical problem with continuing to grant punitive damage awards in asbestos litigation. To continue punishing defendants at this point seems unfair, and to do so when it clearly places at risk the ability of future plaintiffs to be compensated is perplexing.

Likewise, repeatedly subjecting defendants to punitive damages for the same conduct, particularly after the deterrence motive is removed, raises serious constitutional issues. Many courts and scholars alike have objected to the practice on due process grounds.¹⁰⁶ While an in-depth analysis of the constitutional issues implicated is beyond the scope of this Note, the very existence of such issues casts further doubt on a practice that has only served to exacerbate the problems facing defendants and future claimants in asbestos litigation.

E. Peripheral Defendants and Successor Liability

Yet another troublesome feature of asbestos litigation is the ever-expanding pool of defendants. As the major asbestos manufacturers and other popular early defendants have been forced into bankruptcy by asbestos claims, plaintiffs have continually managed to produce new defendants who are allegedly just as

105. Rothstein, *supra* note 20, at 26 ("It would be difficult to argue that punitive damages awards in asbestos cases over the past twenty years have not adequately punished asbestos manufacturers. Moreover, individuals responsible for decisions relating to asbestos products no longer work at these corporations and in most cases are dead. Punishing corporations for decisions made years before the present management was in power does not serve the purpose of punitive damages.")

106. See *Dunn v. Hovic*, 1 F.3d 1371, 1387 (3d Cir. 1993) ("We do not disagree with the concerns that have been expressed about punitive damages awards, particularly in the asbestos cases. We differ instead with those who would have the judiciary resolve the conflicting policy arguments.") (upholding a lower court's decision to award punitive damages, but decreasing the amount awarded); Behrens & Parsons, *supra* note 33, at 145-46 & nn.47-48 (citing a litany of cases and articles where such concerns were voiced); Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 436-38 & nn.7-9 (1994) (same). Professor Phillips argues that "(i)nsofar as a defendant feels oppressed by multiple punitive damage awards arising out of the same course of conduct, it always has the option of bankruptcy, which is far from unattractive in the case of corporate defendants." Phillips, *supra*, at 453. While his conclusion with regard to corporate defendants is debatable, it is clear that defendant bankruptcies are an unattractive course of conduct for current and future asbestos plaintiffs. See *supra* Part II.A.

culpable. However, common sense seems to lead to the conclusion that, were these new defendants truly culpable, they would have been sued from the beginning along with the front line defendants. Numerous studies and scholars confirm that most of these newer defendants have, at best, "only attenuated connections to asbestos."¹⁰⁷ Examples of just how far plaintiffs have convinced juries to extend liability would be laughable if not for their serious impact on both the peripheral defendants themselves and the viability of future asbestos claims. For instance, a New York jury recently compensated a plaintiff for cancer that he claimed was caused by asbestos-containing products that he purchased over fifty years ago.¹⁰⁸ Likewise, a small, San Francisco-based company that sells wooden doors has become a target because, during the 1960s and 1970s, it sold wooden fire barrier doors, made by another company, which allegedly contained encapsulated asbestos "in [their] mineral core."¹⁰⁹ If defendants such as these can be found liable, it should come as little surprise that asbestos litigation now touches almost every sector of the United States economy.¹¹⁰

While injured plaintiffs should not be faulted for "look[ing] under every stone"¹¹¹ in an effort to find someone with the resources to compensate them for their injuries, the fact that most parties actually responsible for asbestos injuries have been driven into bankruptcy does not make these peripheral defendants any more culpable than they were when the front line defendants were still solvent.¹¹² Moreover, as noted above, claims by injured plaintiffs comprise only a small percentage of the total number of annual asbestos claims filed; most are filed by the unimpaired.¹¹³ Therefore, nonculpable

107. Schwartz & Lorber, *supra* note 24, at 262; *see, e.g.*, PRUDENTIAL FINANCIAL, *supra* note 57 ("Defendants are increasingly 'peripheral.' This generally means that: They did not manufacture, sell, or install asbestos-containing insulation or materials; Asbestos was more or less 'incidental' in their products or facilities."), *quoted in* STIGLITZ ET AL., *supra* note 37, at 18; Behrens, *supra* note 54, at 333 ("These peripheral companies only have attenuated connections to asbestos, but they provide fresh 'deep pockets,' and that is why they have become targets of litigation.").

108. *N.Y. Jury Finds Sears/GE Liable for Exposure; Awards \$1.5 Million to Meso Victim*, MEALEY'S LITIG. REP.: ASBESTOS, Oct. 6, 2000; *see also* Schwartz & Lorber, *supra* note 24, at 263.

109. Schwartz & Lorber, *supra* note 24, at 264. Also note the example of James Curry discussed *supra* notes 12-21 and accompanying text.

110. *See* STIGLITZ ET AL., *supra* note 37, at 49 ("At least one company in nearly every U.S. industry [is] now involved in [asbestos] litigation.").

111. Schwartz & Lorber, *supra* note 24, at 262 (quoting James Early, a New York plaintiffs' attorney whose firm specializes in asbestos litigation).

112. *See* Parloff, *supra* note 2, at 166 (noting that many juries apparently fail to comprehend this point, as plaintiffs have been remarkably successful at convincing them that "these afterthought defendants, who never used to be sued at all, were actually the guiltiest parties").

113. *See supra* Part II.B.

defendants are being driven into bankruptcy by being forced not just to pay, but to *overpay* uninjured claimants. This is the paradigmatic statement of the problems with the current asbestos litigation process.

Similar problems inhere from the continued enforcement of successor liability in asbestos litigation.¹¹⁴ As noted by Professor Rothstein, most of the corporations responsible for manufacturing asbestos have long since declared bankruptcy, and the present managers and personnel of the surviving corporations had no part in the decisions that ultimately exposed so many workers to asbestos.¹¹⁵ Furthermore, most of the remaining corporations that do have any concrete ties to asbestos acquired them only by virtue of acquisitions of smaller companies that engaged in the manufacture or sale of asbestos-related products, often on a very low level.¹¹⁶

The doctrine of successor liability has enabled the acquisitions of small asbestos producers by much larger, wealthier corporations to create a windfall for asbestos plaintiffs and their attorneys. Professor Brickman explains:

Under this doctrine, successor companies are held liable not only for acts they did not commit, but also for the consequences of the acts of their acquired companies that they were not aware of at the time of the acquisition and of which they could not have been aware. In theory however, successor liability is not predicated on punishing the acquiring company for its acquisition of a bad actor but rather on punishing the acquired company for its bad acts. . . . However, as applied in the asbestos context, the reality belies the theory.¹¹⁷

While the theory underlying the doctrine of successor liability may be to punish only the acquired company, the reality, at least in the context of asbestos litigation, has been to punish the shareholders and employees of corporations whose only misdeed was lacking the foresight to avoid purchasing any company with ties to asbestos.

In theory, successor liability punishes the acquired company by causing its market value to decrease by the amount of liability that its past acts should create.¹¹⁸ However, in asbestos litigation, courts have cast aside the theory behind the doctrine. Instead of limiting the successor corporation's liability to the market value of the acquired

114. The term "successor liability" refers to the practice of holding an acquiring corporate entity liable for the pre-acquisition acts of an acquired entity. For example, assume that Chris's Cords, a small company that produces corduroy jackets, is acquired by RosenCorp, a multinational business conglomerate. It is subsequently discovered that, prior to its acquisition by RosenCorp, Chris's Cords produced jackets that burst into flames when placed in direct sunlight. The doctrine of successor liability would allow individuals injured by those jackets to pursue tort claims against RosenCorp.

115. See *supra* note 105 and accompanying text.

116. See Brickman, *supra* note 23, at 1881.

117. *Id.* at 1882-83.

118. See *id.* at 1883.

corporation, or even to that value plus any profits generated by the acquisition, courts have allowed successors to be subjected to limitless liability.¹¹⁹

Runaway application of the successor liability doctrine is another way in which parties bearing tenuous legal culpability and no moral culpability are being destroyed by asbestos litigation. It often results in considerable awards that are nothing more than an undeserved windfall for asbestos plaintiffs.¹²⁰ While the bankruptcies spurred on by misapplication of the doctrine arguably do not impact the ability of future claimants to recover, they do considerably broaden the negative impact of asbestos litigation on the economy at large.¹²¹ The fact that punitive damages are often included in cases based completely on successor liability only serves to exacerbate the doctrine's detrimental effects.¹²²

F. Inconsistent Treatment in Federal and State Courts

A final troublesome aspect of the current asbestos litigation process is the inconsistent manner in which various state and federal courts have responded to it.¹²³ This disparate treatment is largely the result of differences in procedural rules and jury tendencies in different jurisdictions.¹²⁴ While the state-based nature of tort law means that courts will not deal with asbestos cases in exactly the

119. For instance, in the 1960s, Crown, Cork & Seal bought a bottle cap manufacturer for \$7 million. *Lawyers for Asbestos Reform*, *supra* note 29. Three months later it sold off a small insulation business that it had also acquired in the deal. *Id.* To date, that three month ownership of the insulation business has cost Crown \$350 million in asbestos claims. *Id.*

120. *See* Brickman, *supra* note 23, at 1882-84.

121. It cannot fairly be claimed that future plaintiffs are injured by misapplication of the doctrine of successor liability, as they would likely remain unable to recover against corporate successors if the doctrine were correctly applied or not applied at all.

122. *See* Brickman, *supra* note 23, at 1884 ("Simply stated punitive damage awards based upon successor liability are unabashed windfalls.").

123. Paul Rothstein goes so far as to argue that "(t)he lack of a coordinated approach results in compensation based on forum rather than merit." Rothstein, *supra* note 20, at 30.

124. Handling of punitive damages provides one particularly important example of the divergent treatment of asbestos claims in state and federal courts. In federal courts, all asbestos cases are transferred to MDL No. 875 (MDL Panel) for pre-trial proceedings. *See In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422-24 (J.P.M.L. 1991); Behrens & Parham, *supra* note 33, at 15-16. The MDL Panel has decided to sever all punitive damages claims in asbestos litigation before remanding the compensatory claims for trial. *See In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (approving the MDL Panel's decision). For a detailed discussion of *Collins*, see Behrens & Parsons, *supra* note 33, at 149-54, 156. While a few state judges have taken a similar approach, punitive damages awards are still very much alive and well in many states. *See id.* at 154-55 (noting that judges in Maryland and Pennsylvania have severed claims for punitive damages in asbestos litigation); Behrens, *supra* note 54, at 352-53 (providing a list of sizeable punitive damages awards recently handed down by juries in Texas).

same manner, the degree of inconsistency in asbestos litigation has two unfortunate side effects.

One problem with the inconsistent treatment afforded asbestos litigation in various state and federal courts is that it has encouraged wide scale forum shopping. This forum shopping is made possible by some states' extremely liberal rules allowing claim filings by out of state plaintiffs.¹²⁵ Two distinct trends illustrate the extent to which forum shopping has impacted asbestos litigation. First, asbestos filings have dramatically shifted from federal to state courts.¹²⁶ This trend likely reflects plaintiffs' dissatisfaction with the federal Multi-District Litigation Panel's [MDL Panel] decision to sever claims for punitive damages and institute other reforms in all asbestos cases pending before federal courts.¹²⁷ Similarly, the last two decades have seen a substantial shift in the number of asbestos claims filed in particular states.¹²⁸ Not surprisingly, the states that now account for the lion's share of asbestos claim filings are those whose judges, juries, and procedural rules are most favorable to asbestos plaintiffs.¹²⁹ Easy access to forum shopping allows asbestos plaintiffs, regardless of their place of residence or injury, to file their claims in jurisdictions that tend to award the highest damages. Defending more claims in these

125. For instance, Mississippi law does not recognize class actions, but it does allow for the joinder of thousands of claimants regardless of their state of residence, provided that at least one plaintiff is a Mississippi resident who is suing at least one out-of-state defendant. See Rothstein, *supra* note 20, at 15.

126. See CARROLL ET AL., *supra* note 30, at 29. Forty-one percent of all asbestos claims were filed in federal court prior to 1988. *Id.* That figure had fallen to less than twenty percent by 1998. *Id.*

127. See *supra* note 124; discussion *infra* Part IV.B.3.

128. See CARROLL ET AL., *supra* note 30, at 32. From 1970-1987, sixty percent of asbestos claims were filed in California, Pennsylvania, New Jersey, and Illinois. *Id.* From 1998 to 2000, those states accounted for only seven percent of the total claims filed. *Id.* The percentage of cases filed in Mississippi, New York, West Virginia, Ohio, and Texas rose from nine to sixty-six over the same period. *Id.*

129. See, e.g., Behrens, *supra* note 54, at 352-53 ("Plaintiffs' lawyers seek punitive damages in virtually every asbestos case they file. It is not uncommon for them to hit the jackpot at trial, particularly in Texas."); Rothstein, *supra* note 20, at 15-19 (noting Mississippi's liberal rules regarding claim filings by out of state plaintiffs and that Mississippi and West Virginia frequently resort to extremely large consolidations in asbestos litigation); Stephen Labaton, *Top Asbestos Makers Agree to Settle 2 Large Lawsuits*, N.Y. TIMES, Jan. 23, 2000, at 22 ("It's no secret that there are state courtrooms in Mississippi which have become notorious for awarding outlandish verdicts to asbestos claimants who are not sick and as a result, asbestos cases from all over the country tend to migrate there." (quoting Richard Weinberg, General Counsel for GAF Corp.)), cited in Rothstein, *supra* note 20, at 16; *supra* note 22 and accompanying text. Also note that Pennsylvania, where asbestos claim filings have drastically decreased, is one of the states where judges have begun to sever claims for punitive damages. See Behrens & Parsons, *supra* note 33, at 155.

jurisdictions increases the already intense financial pressures that ultimately force many asbestos defendants into bankruptcy.

A second and related problem resulting from the inconsistent treatment of asbestos litigation in different jurisdictions is that it substantially impairs any attempts at grassroots reform. Reforms implemented by one judge or jurisdiction will have little to no effect if plaintiffs can simply file their claims elsewhere, in a jurisdiction unwilling to implement similar measures.¹³⁰ If such reforms have any impact whatsoever, it will only be to prevent plaintiffs who are in the reform-minded judge's jurisdiction and for some reason cannot file elsewhere from enjoying the same largesse as plaintiffs who are not so restricted.¹³¹ Judges are likely to recognize this dilemma and conclude that, if asbestos defendants are likely to be sued into financial ruin and future claimants are to go uncompensated regardless of the judges' attempted reforms, then the current plaintiffs in their jurisdiction might as well be allowed to seek the highest possible damages.¹³² As a result, the disparate treatment of asbestos litigation in different jurisdictions combines with the easy and extensive access to forum shopping both to discourage any attempts at grass roots reform and to ensure that any attempts that are undertaken will prove ineffectual. The inability of trial judges to implement meaningful reforms helps to explain why the asbestos litigation crisis has grown to its present magnitude.

130. See *Dunn v. Hovic*, 1 F.3d 1371, 1386 (3d Cir. 1993) (“[B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.”); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) (“At the state court level we are powerless to implement solutions to the nation-wide problems created by asbestos exposure and litigation arising from that exposure.”), quoted in *Dunn*, 1 F.3d at 1386; see also *Faulk*, *supra* note 20, at 660 (“State legislatures have created a patchwork quilt of legislation that is conflicting and actually impedes the efficient settlement of asbestos cases.”) (arguing that it is the responsibility of the federal government to take steps to regulate asbestos litigation).

131. See *Rothstein*, *supra* note 20, at 28-29 (“Imagine the frustration of one judge, coping with the impact of depleted funds and mounting bankruptcies by setting for trial only the cases of those who are sick or have died from an asbestos disease, watching a judge in another state allow unimpaired claimants to achieve compensation as part of a mass consolidated trial.”).

132. See *id.* at 29 (noting that “courts are often hesitant to take a global view of the problem at the expense of the citizens of their state”). *Rothstein* points to the reluctance of most courts to prevent punitive damages awards as a prime example of such behavior. *Id.* (“A state otherwise willing to impose such self-denying limits might be disinclined to do so until assured that others would follow suit.” (citing *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967))).

III. PREVIOUS ATTEMPTS AT A SOLUTION: WHAT HAS GONE WRONG?

Prior proposals for alleviating the asbestos crisis have taken various forms. Although a few attempts at reform have met with limited success, the current state of the asbestos litigation crisis is a testament to their general ineffectiveness. The following section of this Note attempts to discern and delineate the reasons behind the poor track record of previous attempts at asbestos reform.

A. *Attempts at an Administrative Solution*

Proposals for a legislative resolution of the asbestos crisis have generally called for an administrative compensation scheme that would displace traditional tort law in asbestos cases.¹³³ Early proposals for an administrative alternative to asbestos litigation typically supported a no-fault regime similar to workers' compensation or the Black Lung Act.¹³⁴ Other common features included: abolition of punitive damages, the imposition of strict, clearly defined medical impairment criteria, structured payments to plaintiffs based on degree of disability, some form of administrative appeals process, and financial support from the government as well as statutory definitions of eligible defendants.¹³⁵ The general goal of these proposals was to remove asbestos litigation from the courts entirely, thereby allowing the federal government to regulate the asbestos compensation process to ensure that sick plaintiffs received adequate compensation without undue prejudice to defendants.

Despite their noble intentions, no-fault administrative compensation regimes had numerous problems. First among these was a general congressional uncertainty about administrative compensation regimes.¹³⁶ This distrust was born of experience. While

133. See, e.g., Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. (1999); Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891, 1891-93 (1992); Edley & Weiler, *supra* note 59, at 397-401 (arguing that an administrative compensation scheme would be the "ideal solution" to the asbestos crisis). See generally Joseph P. Helm, III, Comment, *Asbestos Litigation and the Proposed Administrative Remedy: Between the Values of Individualism and Distributive Justice*, 50 EMORY L.J. 631 (2001) (discussing the Fairness in Asbestos Compensation Act of 1999).

134. See Patrick M. Hanlon, *Asbestos Litigation*, SHO43 ALI-ABA 119, 126 (2002) ("The asbestos bills of the 1980s sought to replace the tort system with an administrative compensation scheme, based on workers' compensation or disability models."); see also Brickman, *The Asbestos Claims Management Act of 1991*, *supra* note 133, at 1891-1902; Edley & Weiler, *supra* note 59, at 397.

135. See, e.g., Brickman, *supra* note 133, at 1905-15; Edley & Weiler, *supra* note 59, at 397-99.

136. See Edley & Weiler, *supra* note 59, at 400.

“(w)orkers compensation programs are an important source of support for injured workers in the United States,” they are also frequently “criticized both by the employers who fund them and by the workers who are supposed to benefit from them.”¹³⁷ The Black Lung Act, arguably more comparable to a proposed administrative alternative to asbestos litigation because of the similar problem that it was meant to address, “is regarded by many as a lesson in how compensation schemes can go awry.”¹³⁸ The costs of an administrative alternative to asbestos litigation and its ability to fairly compensate both current and future claimants were also causes for concern.¹³⁹ Finally, none of the proposed administrative programs managed to effectively address the problem of liability allocation.¹⁴⁰ By failing to define the role that the various defendants and the federal government were expected to play in contributing to the compensation fund, early proposals for an administrative alternative to asbestos litigation sounded their own political death knell.¹⁴¹

The recent expansion of asbestos litigation to include many peripheral defendants would serve to make the implementation of a no-fault administrative compensation regime even more difficult.¹⁴² Some early administrative proposals called for payments into the compensation fund to be triggered when a certain number of claims were filed against a given defendant.¹⁴³ Such claims-based triggers were not a problem while asbestos manufacturers and other front line defendants remained the primary targets of litigation, as it was clear that the corporations being sued on such a large scale were responsible for many asbestos-related injuries. However, as the focus of litigation has shifted to peripheral defendants with more tenuous ties to asbestos, questions of fault and causation have become less

137. Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1985 (1992).

138. *Id.*; see also Helm, *supra* note 133, at 657-58 (noting that “hopes for the Black Lung program . . . have not been realized” and predicting that an administrative alternative to asbestos litigation would likely be subject to many of the same problems that have plagued the Black Lung program).

139. See Hensler, *supra* note 137, at 1985 (listing a myriad of concerns that led various groups to oppose plans for an administrative solution).

140. Patrick M. Hanlon, *Asbestos Litigation: A Pragmatic Approach*, in *Asbestos Law and Litigation: ALI-ABA Course of Study Materials* 321, 330-31 (2001), WL SG057 ALI-ABA 321.

141. See *id.*; see also Helm, *supra* note 133, at 656 (noting a similar failure in the more recently proposed Fairness in Asbestos Compensation Act of 1999).

142. See *supra* Part II.E for a discussion of the increase in claims against peripheral defendants.

143. See, e.g., Brickman, *supra* note 133, at 1911 (proposing that a defendant would be obligated to make payments into the compensation fund once 1500 plaintiffs had filed suit against it in federal and state courts).

clear.¹⁴⁴ The idea that a defendant with questionable ties to asbestos injuries could be deprived of the opportunity to prove its innocence merely because it was one of scores of defendants mentioned in a large number of suits raises serious equity concerns. Such concerns further reduce the likelihood that a no-fault administrative alternative to asbestos litigation could be implemented.

In the late 1990s, after realizing that the wholesale replacement of tort law by a no-fault asbestos injury compensation scheme might be unworkable, Congress considered other administrative alternatives. The Fairness in Asbestos Compensation Act of 1999 (FACA) provides a good example.¹⁴⁵ FACA proposed impairment criteria that prospective plaintiffs would have to meet in order to be eligible for compensation, as well as a mediation procedure to which all claims would be subject.¹⁴⁶ If the mediation failed to produce a settlement, the plaintiff could opt for adjudication by an administrative law judge.¹⁴⁷ The key differences between FACA and other administrative alternatives to asbestos litigation were the retention of fault-based liability and the fact that a medically certified plaintiff could simply opt out of the administrative process either before or after mediation and instead file a civil action in state or federal court.¹⁴⁸ FACA could thus be characterized as creating an administrative prerequisite to a civil action in addition to an optional administrative claims resolution process.

Like its no-fault administrative predecessors, FACA was subject to widespread criticism. Its medical criteria and bar on punitive damages were attacked by the plaintiffs' bar.¹⁴⁹ Some defendants attacked it as an unnecessary restriction on their ability to reach settlements through the tort system.¹⁵⁰ Many observers alleged that "instead of creating a comprehensive system for compensating asbestos victims, it merely add[ed] layers of bureaucratic procedure (and most likely longer delays) to an already complicated and often

144. See *supra* Part II.E.

145. Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. (1999). For a concise summary of the FACA, see Jody L. Gallegos, Note, *Three Decades of Frustration: Finally, a Solution to the Asbestos Problem*, 15 ST. JOHN'S J. LEGAL COMMENT. 61, 74-78 (2000).

146. H.R. 1283 §§ 102-103.

147. *Id.* § 104(e).

148. *Id.* §§ 102(f), 104(e).

149. Hanlon, *supra* note 134, at 332.

150. Owens Corning was the most outspoken of these critics, having recently reached a series of global settlements with the majority of asbestos plaintiffs' attorneys. *Id.* While the settlements reached by Owens Corning proved incapable of saving the company from bankruptcy, its opposition to FACA played a key role in the bill's ultimate demise. *Id.*

protracted process.”¹⁵¹ By allowing any plaintiff to access the tort system after the administrative resolution process, FACA threatened to make the current asbestos litigation process even more complex and inefficient, and it did so without the guaranteed claim resolution of an administrative compensation scheme.¹⁵²

Despite its shortcomings, FACA’s establishment of medical criteria would likely have reduced the national asbestos caseload considerably, and its optional administrative claims resolution process might have resulted in faster resolution of at least some claims.¹⁵³ Nevertheless, FACA was ultimately unable to obtain enough support to pass either house of Congress.¹⁵⁴ The sound rejection of FACA, a proposal far less sweeping than the no-fault compensation schemes discussed earlier, again underscored Congress’ general disinclination to create an administrative regime to deal with the asbestos crisis.

B. Calls for a Judicial Solution

Recognizing congressional reticence to pass extensive asbestos reform legislation, many would-be reformers have shifted their focus to the judiciary.¹⁵⁵ These individuals typically admit that federal legislation would be the ideal means to achieve reform, but argue that the nation’s trial judges can also take steps to fix the problems that they have helped create.¹⁵⁶ In this context, many scholars have suggested meaningful reforms to alleviate the asbestos litigation crisis and preserve assets for future claimants.¹⁵⁷ Some judges have even

151. Helm, *supra* note 133, at 656.

152. *See id.*

153. *Id.*

154. Hanlon, *supra* note 140, at 332.

155. *See, e.g.,* Behrens, *supra* note 54, at 344-45; Behrens & Parsons, *supra* note 33, at 153-56; Faulk, *supra* note 20, at 661; Rothstein, *supra* note 20, at 28-31. *See generally* Schwartz & Lorber, *supra* note 24.

156. *See, e.g.,* Behrens, *supra* note 54, at 335 (“Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism.” (quoting *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993))); Rothstein, *supra* note 20, at 30, 33-34 (“In the absence of federal legislation, judges must look outside their own ‘asbestos fiefdoms’ and make decisions that will help resolve the problem at a national level.”); Schwartz & Lorber, *supra* note 24, at 249, 267-68 (arguing that actions by trial judges have contributed to the current asbestos litigation crisis, and that only those same trial judges can “restore the rule of law in asbestos cases”); Schwartz & Tedesco, *supra* note 71, at 548-49 (“While additional measures may be introduced in Congress, until Congress acts, the solution to the problem lies with the state judges before whom most asbestos cases are brought.”).

157. *See, e.g.,* Behrens, *supra* note 54, at 346-57 (calling for inactive docket programs, a bar on punitive damages and the end of mass consolidations); Rothstein, *supra* note 20, at 26-32 (proposing an end to punitive damages, strict joinder rules to prohibit forum shopping, and

responded to these calls, taking the initiative by barring claims by unimpaired plaintiffs or taking steps to end punitive damages.¹⁵⁸ While these judges are to be commended for their efforts, even the most cursory survey of the current asbestos litigation landscape reveals that their actions have not had a tremendous impact on the asbestos morass as a whole.¹⁵⁹

The claim that grass roots judicial action will ever fully resolve the asbestos litigation crisis is dubious at best. Global reforms are necessary to affect a global solution.¹⁶⁰ It is highly unlikely that such global reforms will or even can be implemented by judges.¹⁶¹ Asbestos plaintiffs have responded to reforms implemented by some judges by simply taking their claims before other judges who are not so reform-minded, a scenario which is made possible by the liberal joinder rules applied in some state courts.¹⁶² As long as there is one such judge in one such state court, judicial reforms alone cannot bring an end to the asbestos litigation crisis.

This is not to say that such judicial reforms are useless. Quite the contrary, they can be helpful in certain situations, and might serve as a valuable stopgap measure to stem the tide of defendant bankruptcies until a better solution can be implemented. However, if the national asbestos litigation debacle is to be finally and effectively resolved, something other than piecemeal judicial reforms will be necessary.

C. Attempts at a Global Settlement

For a brief time during the 1990s, it appeared that the asbestos crisis might be resolved without the help of Congress or the judiciary. During that period, asbestos litigants agreed to two separate proposed class action settlements, either of which might have paved the way for global resolution of all asbestos claims.¹⁶³ Unfortunately, the United

transfer procedures allowing more cases to be heard by fewer judges); Schuck, *supra* note 33, at 568-81 (offering a detailed proposal for inactive docket programs); Schwartz & Lorber, *supra* note 24, at 269-71 (arguing that courts should require plaintiffs to prove actual causation against particular defendants and that severe limitations on discovery should be abandoned).

158. See, e.g., *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (upholding the MDL Panel's decision to sever claims for punitive damages in all asbestos suits filed in federal courts, and urging state courts to do the same); Behrens & Parsons, *supra* note 33, at 149-53 (discussing the *Collins* decision); Schwartz & Tedesco, *supra* note 71, at 552 (noting that courts in Massachusetts, Chicago, and Baltimore have implemented some form of inactive docket system).

159. See *supra* Part II.

160. See Rothstein, *supra* note 20, at 28-34 ("A global view is needed.").

161. See *supra* notes 130-132 and accompanying text.

162. See *supra* notes 125-129 and accompanying text.

163. See Hensler, *supra* note 22, at 1904-06.

States Supreme Court determined that class certification was not appropriate in either case.¹⁶⁴ In the process, the Court effectively ended any hope for a privately negotiated global settlement¹⁶⁵ and strongly underscored the need for legislative intervention.¹⁶⁶

The proposed settlement in *Amchem Prod., Inc. v. Windsor*, the first asbestos class action case, was the result of prolonged negotiations between leading asbestos plaintiffs' attorneys and the representatives of twenty primary asbestos defendants who comprised the Center for Claims Resolution (CCR).¹⁶⁷ These negotiations produced a tentative settlement that would have resolved all pending and future asbestos claims against the CCR's membership.¹⁶⁸ A complaint filed against the CCR on January 15, 1993, identified nine plaintiffs who purported to represent a class of all persons who had not filed an asbestos-related lawsuit against a CCR member, but who had been exposed to asbestos or had a family member so exposed.¹⁶⁹ On the same day the complaint was filed, the parties presented the District Court with a one hundred plus page settlement stipulation detailing a complex schedule of payments to class members who satisfied designated medical criteria.¹⁷⁰ The stipulation required the CCR to pay specified sums to any claimants with mesothelioma, other asbestos-related cancers, or asbestosis.¹⁷¹ Claims by unimpaired plaintiffs were noncompensable.¹⁷² In exchange for these concessions, CCR members agreed to forego any defenses to liability, including waiving any otherwise applicable statutes of limitations.¹⁷³ While a limited number of plaintiffs were allowed to opt out of the settlement each year in order to pursue traditional tort claims, they were barred from seeking punitive damages.¹⁷⁴ After reviewing and approving this proposed settlement, the District Court issued a preliminary

164. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864-65 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).

165. See *Amchem*, 521 U.S. at 628 ("[W]e recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.").

166. See *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring) ("[W]e are not free to devise an ideal system for adjudicating these claims. . . . [T]he 'elephantine mass of asbestos cases' cries out for a legislative solution." (citation omitted)).

167. *Amchem*, 521 U.S. at 599-602.

168. *Id.* at 601-02.

169. *Id.* at 602.

170. *Id.* at 601-03.

171. *Id.* at 603-04.

172. *Id.* at 604.

173. *Id.*

174. *Id.* at 605.

injunction against all class members, stopping them from filing any asbestos related claims against CCR members.¹⁷⁵

The proposed settlement did not fare as well at the appellate court level. Expressing concerns about the potential divergence of interest among and lack of notice to class members, the United States Court of Appeals for the Third Circuit (Third Circuit) ordered the class decertified and vacated the District Court's injunction.¹⁷⁶ The Supreme Court affirmed the Third Circuit's decision on the grounds that the proposed class failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.¹⁷⁷ Essentially, the Court concluded that the class action vehicle, as outlined in the Federal Rules, was incapable of addressing the asbestos crisis.¹⁷⁸

Another attempt at a global asbestos settlement met a similar fate two years after *Amchem*.¹⁷⁹ The *Ortiz* case revolved around an attempt by Fibreboard Corporation and its insurers to reach a global asbestos settlement under a limited fund theory.¹⁸⁰ The parties agreed to put aside \$1.535 billion to settle the claims of a mandatory class consisting of (1) any person with an asbestos-based personal injury claim against Fibreboard who had not yet filed their claim by August 27, 1992, (2) any person who had dismissed such a claim but reserved the right to bring a future action against Fibreboard, and (3) the relatives of class members exposed to Fibreboard asbestos.¹⁸¹ The proposed class excluded anyone with currently pending claims against Fibreboard, as well as anyone who had previously negotiated to dismiss a claim against Fibreboard and retained the right to file another only upon developing an asbestos-related cancer.¹⁸² The would be class representatives justified their attempt at certification

175. *Id.* at 608.

176. *Id.* at 609-11.

177. *Id.* at 622-29. The Court found the class lacking in three separate ways. First, it failed to satisfy Rule 23(b)(3)'s requirement that "[common] questions of law or fact . . . predominate over any questions affecting only individual members." *Id.* at 622 (quoting FED. R. CIV. P. 23(b)(3)). Second, the Court ruled that divergent interests of the currently injured (who sought to maximize immediate payouts) and the unimpaired (who sought to preserve CCR assets for future payments) prevented the named parties from fairly and adequately protecting the interests of the class as required by Rule 23(a)(4). *Id.* at 625-28. Finally, the Court held that not all members of the proposed class had received adequate notice of its formation. *Id.* at 628.

178. *See id.* at 629 ("Rule 23 . . . cannot carry the large load CCR, class counsel, and the District Court heaped upon it."); *see also* Hensler, *supra* note 22, at 1906 ("The Court's decisions [in *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)] placed large and seemingly insurmountable barriers along the pathways to the resolution of asbestos litigation.").

179. *Ortiz*, 527 U.S. at 815.

180. *Id.* at 821-30.

181. *Id.* at 824-26.

182. *Id.* at 826.

by arguing that it was necessary in order to ensure that sufficient insurance funds would be available to compensate all class members.¹⁸³

As in *Amchem*, the Supreme Court was not convinced that class certification was proper.¹⁸⁴ The Court expressed "serious constitutional concerns . . . with any attempt to aggregate individual tort claims on a limited fund rationale."¹⁸⁵ Initially, the Court noted that the mandatory nature of the class in combination with the settlement agreement would likely violate the Seventh Amendment's right to a jury trial for absent class members.¹⁸⁶ The Court also noted that the due process rights of absent class members could be violated if they were forced to comply with a judgment in a case where they were neither designated as parties nor served with process.¹⁸⁷ Finally, the Court expressed concerns over the manner in which the fund's limit had been determined, the fact that some parties with unsettled claims were excluded, and the potential for intraclass conflicts.¹⁸⁸ After considering all of these issues, the Supreme Court rejected the proposed class, claiming that it failed to satisfy Rules 23(a) and 23(b)(1)(B).¹⁸⁹

Amchem and *Ortiz* make it clear that a global resolution of the asbestos crisis cannot be achieved through class action settlements.¹⁹⁰ While the holdings in both cases were based on "rules formalism," it is clear that the Court's decisions were motivated by its concerns about conflicts of interests between differently situated and current and future class members.¹⁹¹ Because these conflicts would exist in any global class of asbestos plaintiffs, it is apparent that the class action vehicle is incapable of resolving the asbestos crisis.¹⁹²

In determining that class action settlements were not the answer to the asbestos problem, the Supreme Court underscored the need for a legislative solution. The Justices themselves noted that the problem had grown beyond their control and implored Congress to

183. *Id.* at 827.

184. *Id.* at 864-65.

185. *Id.* at 845.

186. *Id.* at 845-46.

187. *Id.* at 846-48.

188. *Id.* at 848.

189. *Id.* at 864.

190. *See supra* note 178.

191. Hensler, *supra* note 22, at 1905-06.

192. *See id.* at 1906 ("The Court's decisions placed large and seemingly insurmountable barriers along the pathways to the resolution of asbestos litigation . . .").

take action.¹⁹³ The fourth section of this Note proposes a plan for Congress to follow in responding to the Supreme Court's plea.

IV. A TARGETED LEGISLATIVE TORT REFORM PROPOSAL

A. *Why a Federal Tort Reform Statute?*

Tort reform is the only remaining option. Given Congress's steadfast opposition to an administrative alternative and the apparent impossibility of global settlement through class actions, tort reform seems to be the only available avenue to address the asbestos morass.¹⁹⁴

Even if an administrative alternative were a viable solution, however, tort reform would remain the preferable means of dealing with the asbestos problem. The superiority of tort reform is illustrated by the relatively recent extension of asbestos litigation to encompass peripheral defendants with more tenuous ties to asbestos and more questionable culpability.¹⁹⁵ The tort system is much better suited to respond and adapt to this and other changes in the course of asbestos litigation. Additionally, more idealistic concerns regarding the right of both plaintiff and defendant to have their day in court also favor the continued use of the tort system for asbestos claims resolution.

Given that tort reform is both more realistic and more desirable than an administrative compensation regime, the fundamental realities of asbestos litigation mandate that such reform be achieved by a federal statute as opposed to judicial intervention or state legislation. Due to the inconsistent treatment of asbestos cases in different jurisdictions and the wide-scale forum shopping discussed above, the prospects for effectively resolving the asbestos crisis through judicially imposed reforms are grim.¹⁹⁶ In addition, relying upon state legislatures to enact tort reforms would likely result in a patchwork approach, with asbestos litigation continuing to migrate to

193. *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring) (noting that "the 'elephantine mass of asbestos cases' cries out for a legislative solution" (citation omitted)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 587-99 (1997) (recounting and reiterating calls for Congress to intervene in the asbestos crisis).

194. See *supra* Part III.A, C; see also Hanlon, *supra* note 140, at 339 ("Experience shows . . . that to have any chance of success legislation must work with the tort system not against it.").

195. See *supra* notes 142-144 and accompanying text.

196. See *supra* Parts II.F, III.B.

the states that provided plaintiffs with the most favorable forum.¹⁹⁷ Therefore, federal implementation of global tort reform legislation is the only means by which the problems plaguing asbestos litigation can be effectively addressed.¹⁹⁸

There are certainly those who will criticize any proposal for a federal asbestos tort reform statute on the grounds that it is unrealistic. It is admittedly true that Congress has long proven either unable or unwilling to take significant steps to alleviate the asbestos problem.¹⁹⁹ It is equally true that this inaction has persisted despite pleas for legislative action from numerous commentators, committees, and even the Supreme Court.²⁰⁰ Congress' longstanding refusal to intervene has led many to conclude that resolution of the asbestos crisis through federal legislation is a lost cause.²⁰¹

While acknowledging Congress's history of unwillingness to enact an asbestos reform statute, this Note contends that several recent developments portend a change in that attitude. The acceleration in the rate of defendant bankruptcies and the expansion of the litigation to include businesses in almost every sector of the American economy has led to increased national media attention for asbestos litigation.²⁰² These trends are likely to increase public pressure on Congress to address the asbestos issue. The increasingly wide-ranging coalition of parties supporting asbestos reform is also encouraging, as a lack of consensus has derailed proposed reform

197. See *supra* notes 125-129 and accompanying text (describing the migration of asbestos litigation in response to the implementation of asbestos reforms and to favorable verdicts in particular jurisdictions).

198. *But see* Schwartz & Tedesco, *supra* note 71, at 548 ("The solution to the asbestos problem, if there is to be one, will most likely have to come from the states, particularly the state courts.").

199. The lone contribution of Congress to date has been 11 U.S.C. § 524(g) (2000), a simplified bankruptcy provision available to asbestos defendants, which, at least with regards to protecting the interests of future plaintiffs, has done more harm than good. See Issacharoff, *supra* note 29, at 1931, 1938-39. For an overview of various asbestos reform statutes considered and rejected by Congress, see Hanlon, *supra* note 140, at 329-32.

200. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring) ("[T]he 'elephantine mass of asbestos cases,' cries out for a legislative solution." (citation omitted)); see also AD HOC COMMITTEE REPORT, *supra* note 54, at 27 (calling on Congress to enact "a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes"); Hanlon, *supra* note 140, at 333-39 (arguing that only federal legislation can balance the interests of current and future plaintiffs and defendants, and calling on Congress to adopt such legislation).

201. See *supra* note 156.

202. See, e.g., Faulk, *supra* note 20, at 658-59; Berenson, *supra* note 21; Brickman, *supra* note 46; *Lawyers for Asbestos Reform*, *supra* note 29; Parloff, *supra* note 2, at 170 (describing the "palpable sense that the wheels are simply coming off the asbestos wagon"); Warren, *supra* note 1.

legislation in the past.²⁰³ In perhaps the most hopeful sign of all, the Senate Judiciary Committee held informational hearings on asbestos on September 25, 2002, with the goal of “laying the groundwork for attention to the issue in the 108th Congress.”²⁰⁴ The fact that the 2002 elections placed the Republican Party in control of Congress increases the likelihood that these hearings will ultimately result in some sort of asbestos reform legislation.²⁰⁵ In short, the momentum for an asbestos reform statute is mounting.²⁰⁶ While Congress might still be hesitant to enact a sweeping tort reform statute or administrative compensation program, all signs indicate that it would seize the opportunity to enact “a pragmatic bill that focuses on the unique problem of asbestos litigation and checks wider agendas at the door.”²⁰⁷ This Note proposes such a bill.

B. What Should the Statute Do?

1. Get Asbestos Cases into Federal Court

A core component of this Note’s proposed asbestos reform statute is a relaxed federal subject matter jurisdiction requirement for asbestos litigation. Currently, federal law allows a state law tort claim to be removed to federal court only when there is complete diversity among the parties and the amount in controversy exceeds

203. See Hanlon, *supra* note 134, at 129 (arguing that legislation is unlikely to succeed unless it has “the support of at least some of the plaintiffs’ trial bar, claimants, and organized labor” in addition to that of the asbestos defendants). Groups supporting asbestos reform legislation now include, in addition to obvious choices such as the Asbestos Alliance and the National Association of Manufacturers, the American Bar Association and a portion of the plaintiffs’ bar. See *Lawyers for Asbestos Reform*, *supra* note 29; Parloff, *supra* note 2 at 170; see also AM. BAR ASS’N, COMM’N ON ASBESTOS LITIG. REPORT TO THE HOUSE OF DELEGATES (Feb. 2003) [hereinafter ABA COMMISSION REPORT], (recommending that Congress adopt provisions that would bar claims by unimpaired plaintiffs), http://www.abanet.org/leadership/full_report.pdf.

204. ABA COMMISSION REPORT, *supra* note 203, at 18. The text of these hearings is available on the Senate Judiciary Committee website.

205. See, e.g., *Mayhem in Madison County*, WALL ST. J., Dec. 6, 2002, at A14 (noting that Republican control of the Senate is likely to “rein in” abuses in asbestos litigation), 2002 WL-WSj 103128087. But see Parloff, *supra* note 2, at 170 (arguing that any asbestos reform statute under discussion while President George W. Bush is in office is likely to be derided as a bailout for Halliburton, the former firm of Vice President Dick Cheney).

206. This point is further borne out by the fact that the Senate Judiciary Committee is currently considering a sweeping asbestos reform bill that was introduced by Orrin Hatch after the completion of this Note but before its scheduled publication.

207. Hanlon, *supra* note 134, at 129; see also Parloff, *supra* note 2, at 170 (noting that many proponents of asbestos reform have concluded that only a narrowly tailored piece of legislation could obtain the necessary support).

\$75,000.²⁰⁸ While the amount in controversy requirement is certainly met in the vast majority of asbestos cases, the large numbers of defendants named by a typical plaintiff decreases the chances that complete diversity will exist.²⁰⁹ Common sense dictates that complete diversity will be a particularly difficult standard to meet in cases involving mass consolidation of thousands of plaintiffs, many of whom often hail from different states.²¹⁰ The difficulty of establishing diversity jurisdiction in asbestos litigation likely plays a large role in explaining why less than twenty percent of asbestos litigation currently takes place in federal courts.²¹¹

In order to get more asbestos litigation into federal court, a tort reform statute should relax the diversity arm of the federal subject matter jurisdiction requirement to its constitutional minimum. This would allow a suit to be removed from state to federal court whenever *any* plaintiff and *any* defendant were domiciliaries of different states.²¹² Given the large numbers of defendants named in the typical complaint and the large number of plaintiffs whose claims are often consolidated for a single trial, it is likely that this relaxed standard will be satisfied in the overwhelming majority of asbestos personal injury cases.²¹³ Moving asbestos litigation into federal courts would immediately begin to address the problems of forum shopping and inconsistent treatment that currently plague asbestos litigation.²¹⁴

Knowing that their cases will almost certainly end up in federal court regardless of the state in which they are filed, plaintiffs will lose their motivation to forum shop among various state jurisdictions.²¹⁵ Removing asbestos claims to federal court would

208. 28 U.S.C. § 1332 (2000). Note that complete diversity means that no plaintiff is from the same state as any defendant.

209. See *supra* note 58 and accompanying text.

210. See, e.g., *supra* note 125 and accompanying text.

211. See *supra* note 126 and accompanying text.

212. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."). Relaxing the diversity requirement to its constitutional minimum is an idea that has previously been discussed in the wider, more general mass tort context. See, e.g., Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiparty Jurisdiction*, 135 U. PA. L. REV. 7 (1986).

213. See *supra* notes 58, 125 and accompanying text.

214. See *supra* Part II.F.

215. It is true that differences in state substantive law will still govern the cases in federal court absent any controlling federal law on the issue. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that, in the absence of controlling federal law, federal courts are to apply state substantive law in diversity cases). This Note takes this into account, however, proposing that controlling federal law be implemented where necessary. See *infra* Part IV.C. Furthermore, differences in state substantive law, to the extent that they may exist, do not appear to be the primary motivating factor behind forum shopping in asbestos litigation.

negate the influence of state judges and juries, as they would no longer be hearing the cases. Enactment of other statutory provisions proposed in this Note would have the same effect with regard to relevant state procedural rules.²¹⁶ Upon realizing that these factors would no longer have any impact, plaintiffs would lose their primary incentive for forum shopping.

Relaxing the diversity requirement would also ensure the consistent treatment of the vast majority of asbestos cases, at least at the critical pretrial stage.²¹⁷ Once in federal court, all asbestos cases will be sent to the MDL Panel for pretrial proceedings before Judge Charles R. Weiner.²¹⁸ Obviously, having all cases handled by a single judge is the best way to ensure consistent treatment. In addition, Judge Weiner has considerable experience dealing with asbestos litigation and has demonstrated a remarkable ability to facilitate settlements.²¹⁹ The value of this ability would only be enhanced by enabling him to oversee more cases.

2. Implement a Statutory Inactive Docket Program To Stop Claims by the Unimpaired

Any judge, even one as experienced in dealing with asbestos litigation as Judge Weiner, would be overwhelmed if he was suddenly asked to schedule for trial all of the country's pending and future asbestos claims. However, if Congress took no action other than relaxing the federal subject matter jurisdiction requirement in asbestos litigation, it would essentially be asking Judge Weiner to do just that. Fortunately, there is a way for Congress to avoid this problem while simultaneously helping to ensure that current and

Instead, this wide-scale forum shopping has resulted from asbestos plaintiffs' recognition that the procedural rules, judges, and juries in certain jurisdictions tend to result in higher verdicts for plaintiffs. See *supra* notes 123-129 and accompanying text.

216. State procedural rules must give way to federal statutes so long as the latter are "rationally capable of classification as either" substantive or procedural. See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). In other words, a federal statute that is even arguably procedural will trump a state procedural rule.

217. See *Behrens & Parsons*, *supra* note 33, at 144 ("95% to 98% of [asbestos] cases . . . settle out of court prior to trial."). The fact that such a small percentage of asbestos cases actually go to trial underscores the importance of pretrial proceedings in the field.

218. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422-24 (J.P.M.L. 1991); *Behrens & Parham*, *supra* note 33, at 16.

219. See *Trudy Y. Hartzog & Wade H. Logan, III, The Nuts and Bolts of Multidistrict Litigation*, S.C. LAW., July-Aug. 1996, at 20, 22 (explaining that Judge Weiner was chosen to oversee the MDL Panel because of his experience with asbestos litigation); *J. Stratton Shartel, Litigators Split on Fairness of Proposed Asbestos Settlements*, INSIDE LITIG., June 1992, at 1, 27 (noting that Judge Weiner encourages defendants to enter into settlement of present cases).

future sick plaintiffs receive timely and adequate compensation for their injuries.

Preventing claims by unimpaired plaintiffs would address many of the problems plaguing asbestos litigation. It would help stop the defendant bankruptcies that negatively impact wide sectors of the economy, aid in preserving assets to compensate those truly injured by asbestos, and greatly reduce Judge Weiner's newly enhanced caseload.²²⁰ Congress could achieve this feat by implementing an inactive docket program for asbestos litigation.²²¹ Because such programs have been discussed at length elsewhere, this Note only undertakes to recount the essential features.²²² Initially, all claimants are put onto an inactive docket, where they remain until an independent medical evaluation certifies that they meet designated, clearly defined impairment criteria.²²³ When such certification is obtained, the claimant is removed from the inactive docket and placed on the active docket.²²⁴ Finally, as long as claimants remain on the inactive docket, the statutes of limitations for their claims are tolled, and discovery is not permitted.²²⁵ By implementing an inactive docket program that adheres to these basic guidelines, Congress could help to ensure that current and future sick claimants are compensated while also reducing the number of asbestos cases clogging the nation's court dockets by as much as ninety percent.²²⁶

Because inactive docket programs would solve the massive problems posed by unimpaired asbestos plaintiffs, Congress should pass a generally applicable law mandating that they be implemented for all asbestos litigation nationwide.²²⁷ Such a reform has long been

220. See generally *supra* Part II.B.

221. For an overview of inactive docket programs and the arguments favoring their adoption, see Behrens & Parham, *supra* note 33, at 6-8; Schuck, *supra* note 33, at 542, 594. The idea of inactive docket programs for unimpaired asbestos plaintiffs has its roots in Professor Schuck's article.

222. See, e.g., Behrens & Parham, *supra* note 33, at 9-11.

223. *Id.* at 8.

224. *Id.*

225. *Id.*

226. See *supra* note 64 and accompanying text.

227. Despite the fact that the subject matter jurisdiction relaxation will result in essentially all asbestos litigation taking place in federal court, it is important that the statute mandating inactive dockets apply to cases in state courts as well. As noted previously, state substantive law controls litigation that takes place in federal court under diversity jurisdiction. See *supra* note 215. Because inactive docket programs would effectively strip an unimpaired plaintiff of a cause of action that might have been recognized under state law, they are most likely correctly classified as substantive rather than procedural. It is therefore vital that Congress make it clear that this provision of the asbestos reform statute is controlling in any courtroom in the United States. The Commerce Clause of the United States Constitution clearly gives Congress the power to implement such a law in the context of asbestos litigation. See Gallegos, *supra* note

advocated by many scholars, has recently been endorsed by the American Bar Association, and is rumored to be under serious discussion in Congress.²²⁸ It was also an accepted part of the attempted global settlement overturned by the Supreme Court in *Amchem*.²²⁹ While implementation of such a program would not single-handedly solve all of the problems plaguing asbestos litigation, it would constitute a substantial step in the right direction.

3. Stop Unjustified Punitive Damages Awards

Ending punitive damages awards in asbestos litigation is another important step towards assuring that sufficient resources are available to compensate future asbestos victims. As discussed above, punitive damages have long since ceased to fulfill their intended purpose in the asbestos context.²³⁰ They now serve as little more than a windfall that current claimants receive at the expense of future plaintiffs and as a means of exacerbating the other problems plaguing asbestos litigation.²³¹ Any attempt at comprehensive asbestos reform must therefore address the issue of punitive damages.

There are at least three ways in which Congress could address concerns about punitive damages. A federal statute barring punitive

145, at 75-76 (noting that barring claims by unimpaired plaintiffs in asbestos cases infringes on state tort law, but that the Commerce Clause gives the federal government the power to do so); Pamela M. Madas, Note, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 SETON HALL L. REV. 540, 565 (1997) (arguing for the adoption of federal substantive law to deal with all mass torts).

The author contends that state tort law should generally be left untouched to the extent practicable; this is the very reason for merely extending federal subject matter jurisdiction over asbestos cases instead of passing a statute creating federal substantive law to govern every aspect of every asbestos claim. Effectively and uniformly addressing the problems posed by unimpaired claimants in asbestos litigation is so vital to reforming the asbestos litigation process and protecting the interests of future impaired claimants that this limited inroad into state tort law seems justified. This justification is further underscored by the fact that, due to the current prevalence of forum shopping in asbestos litigation, the claims heard in many state courts are not brought by residents of those states. See, e.g., *supra* note 125. When states are not hearing the claims of their own citizens, their traditional interest in overseeing state tort law causes of action is substantially undercut.

228. See, e.g., ABA COMMISSION REPORT, *supra* note 203 (advocating the adoption of a medical criteria bill applicable to state and federal courts, and discussing reports that several members of Congress are currently pondering introducing such a bill); Behrens & Parham, *supra* note 33; Schuck, *supra* note 33.

229. See *supra* notes 169-173 and accompanying text.

230. See *supra* Part II.D.

231. See *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (arguing against punitive damage awards in asbestos cases). See generally Behrens & Parsons, *supra* note 33 (discussing the disadvantages of imposing punitive damages in asbestos cases); Rothstein, *supra* note 20, at 26-28; *supra* Part II.D.

damages in asbestos litigation is the most obvious and desirable.²³² Proposals advocating such bans have proven extremely controversial in the past, however, and the inclusion of such a provision in the asbestos reform bill would be unwise if it meant jeopardizing that bill's passage.²³³ If a complete bar on punitive damages proves politically unrealistic, Congress should include a provision requiring that all claims for punitive damages be severed prior to trial, to be heard only after all compensatory awards have been determined and paid.²³⁴ The MDL Panel adopted such a policy years ago in an effort to preserve funds for future claimants without venturing into the uncertain ground of striking claims for punitive damages altogether.²³⁵ Receiving a statutory sanction from Congress would bolster the procedure's credibility, delivering what would be a needed shot in the arm in light of the expanded diversity jurisdiction.²³⁶ Finally, if even statutorily adopting the MDL Panel's severance policy for punitive damages proved too politically volatile, Congress could choose to leave the matter in the hands of the MDL Panel absent any statutory modification. This would certainly be the path of least resistance, but it is also the course of action with the least chance of adequately addressing the punitive damages problem.²³⁷

232. While completely barring claims for punitive damages would likely be considered substantive, it is clearly within the scope of the federal government's Commerce Clause power to take this action. See *supra* note 222.

233. See Hanlon, *supra* note 140, at 332-33. Hanlon notes that provisions for limiting punitive damages and attorney's fees have ensured the defeat of asbestos reform bills in the past, as they ensured opposition not only from the asbestos plaintiffs' bar, but from plaintiffs' lawyers generally. *Id.* He argues that an asbestos reform statute should avoid such "polarizing issues" as limitations on punitive damages. *Id.* But see Helm, *supra* note 133, at 644-46 (noting that the attempted global class action settlement of asbestos cases struck down by the Supreme Court in *Ortiz* after being accepted by the plaintiff class contained a bar in punitive damages and also placed a cap on each claimant's possible recovery).

234. See Behrens & Parsons, *supra* note 33, at 156 (urging that state courts adopt this practice if they are uncomfortable with severing claims for punitive damages outright). Again, authority for such a statute could be drawn from the Commerce Clause of the United States Constitution. See *supra* note 222.

235. In *Dunn v. Hovic*, the Third Circuit held that while punitive damage awards in asbestos cases were a cause of concern, it was not the role of the courts to resolve the conflicting policy arguments. 1 F.3d 1371, 1387 (3d Cir. 1993) (refusing to bar all punitive damage awards in asbestos litigation). However, seven years later the Third Circuit specifically condoned the MDL Panel's practice of severing claims for punitive damages. *Collins*, 233 F.3d at 812 (noting that the policy would help to ensure that "the sick and dying, their widows and survivors . . . have their claims addressed first" (quoting *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 2000))).

236. By embodying the process in a federal statute, Congress would ensure that it continued to withstand any legal challenges, as the process certainly satisfies the "arguably classifiable as procedural" test established in *Hanna*. See *supra* notes 210, 227.

237. It is likely that the statute authorizing the transfer to the MDL Panel already provides sufficient statutory justification for the severance to qualify for the lenient *Hanna* test described *supra* notes 216 and 227. See 28 U.S.C. § 1407(a) (2000) ("[T]he panel may separate any claim,

Any restriction on punitive damages in asbestos litigation, regardless of how it is pursued by Congress, will be subject to criticism on the grounds that it is unfair to future plaintiffs. It is true that limiting, delaying, or barring punitive damages will necessarily result in some future plaintiffs not receiving the same level of compensation as some previous plaintiffs. However, this argument fails to consider the fact that many future plaintiffs are likely to recover nothing at all if punitive damage awards continue to go unchecked.²³⁸ There is no point in taking measures to reserve future plaintiffs' rights to the highest possible recovery when the practical effect of those measures will be to prohibit any recovery at all.²³⁹ In this instance, it is also important to remember that "[p]unitive damages are a windfall to the recipients over and above compensatory damages to which they are entitled."²⁴⁰ Quite simply, the interest of future plaintiffs in retaining the right to receive this windfall fails to outweigh the clear need to limit "the hemorrhaging effect of punitive damages in asbestos cases."²⁴¹ The argument that limiting punitive damages is unfair to future plaintiffs, therefore, is not a strong one.

cross claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded."); see also *Collins*, 233 F.3d at 811 (quoting 28 U.S.C. § 1407(a), and upholding the MDL Panel's right to sever claims for punitive damages in asbestos litigation). However, if this is determined not to be the case, then the MDL Panel's severance practice will be subject to stricter scrutiny. Joseph Glannon explains that conflicts between a federal judicial practice and state law are also resolved under *Hanna* but are subject to a different test. See JOSEPH W. GLANNON, CIVIL PROCEDURE EXAMPLES & EXPLANATIONS 195 (4th ed. 2001). In such cases, the proper test is whether the federal practice would prove outcome determinative in that it would lead to forum shopping or inequitable administration of the law. *Id.* Whether severing punitive damages claims would be considered outcome determinative after the passage of the statute expanding federal subject matter diversity jurisdiction is a question whose definitive answer lies beyond the scope of this Note. However, it is at least arguable that the practice would not prove outcome determinative, as virtually all claims will go to federal court (hence no forum shopping) and would all be subject to this practice (no inequitable administration of the law).

238. See *Collins*, 233 F.3d at 812 ("The resources available to persons injured by asbestos are steadily being depleted. . . . It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls . . ."). See generally *supra* Parts II.A, D.

239. The author is reminded of Reg's perplexity at Francis' proposal that the PFJ fight the oppressors for Stan's right to have babies. MONTY PYTHON'S LIFE OF BRIAN (Home Vision Entertainment 1979) ("What's the point of fighting for his right to have babies when he can't have babies?!").

240. *Collins*, 233 F.3d at 812.

241. Behrens & Parsons, *supra* note 33, at 137.

4. Limit Successor Liability and Protect Peripheral Defendants

Awards based on successor liability in asbestos litigation have long since outgrown the doctrine's theoretical underpinnings.²⁴² The doctrine is useful in theory, however, as it prevents a guilty party from avoiding liability by simply being absorbed into a larger corporate entity.²⁴³ Congress should therefore implement a cap on the amount of damages that can be awarded against any asbestos defendant under a theory of successor liability.²⁴⁴ Professor Brickman has proffered two formulations for such a cap, and this Note proposes that Congress adopt the calculation producing the higher yield for truly sick plaintiffs.²⁴⁵ Therefore, the proposed asbestos reform statute should include a provision limiting successor liability to "the price of the acquisition (of the offending company) adjusted for any profits or losses sustained since the acquisition in addition to whatever insurance coverage of the acquired company was in force [when the acquired company was purchased]."²⁴⁶ This formulation is consistent with the rationale supporting the successor liability doctrine, and strikes a fair balance between compensating injured plaintiffs and protecting nonculpable defendants whose only ties to asbestos resulted from a corporate acquisition.²⁴⁷

242. See *supra* notes 115-122 and accompanying text.

243. See *supra* notes 117-118 and accompanying text; see also Brickman, *supra* note 23, at 1883 (noting that successor liability as applied in asbestos cases creates an undeserved windfall for plaintiffs, but that its total elimination would create a shortfall).

244. Again, this will require some incursion into state tort law. Also again, the author feels that this incursion is justified by the scope and seriousness of the nation's asbestos problem. The use of successor liability is one of the key factors in allowing asbestos litigation to expand to its current unmanageable dimensions, and is therefore a justifiable target of federal intervention in state tort law. See Brickman, *supra* note 23, at 1881-82.

245. See *id.* at 1883. The author believes that adoption of the formula more favorable to plaintiffs is proper for two reasons. First, after the creation of the national inactive docket program, there are no more worries that funds justly due sick plaintiffs will be usurped by the unimpaired. Second, choosing the formulation that will result in more money available to plaintiffs should also make the cap more palatable to asbestos plaintiffs and their attorneys.

246. *Id.* Although this formula may sound arcane, Professor Brickman argues that "[c]ourts which have devised the procedurally complex mass consolidations or bankruptcy trust funds which are becoming the hallmark of asbestos litigation, would not regard the task of sequestering the assets of the acquired corporation within the acquiror as an unduly burdensome task." *Id.* at 1883-84.

247. For a recap of the theories justifying the successor liability doctrine, see *supra* notes 115-118 and accompanying text. It is important to stress that, when calculated in this manner, the cap on successor liability damages does not deprive plaintiffs of any compensation to which they are justly entitled. If not for the fortuitous acquisition of the tortfeasor by another entity, those injured by the tortfeasor would never have had access to any resources greater than the value of that company and its insurance. Such an acquisition should not entitle plaintiffs to compensation in the form of access to the acquiring company's assets; such awards are "unabashed windfalls." Brickman, *supra* note 23, at 1884.

Like runaway application of the successor liability doctrine, the expansion of liability to peripheral defendants has greatly increased the scope of asbestos litigation as well as its financial impact on nonculpable parties.²⁴⁸ Unlike successor liability, however, the problems posed by peripheral defendant liability cannot be easily addressed by direct congressional action. The primary cause of peripheral defendant liability is the willingness of judges to relax existing proof of causation requirements and evidentiary standards to insure that injured plaintiffs receive compensation despite culpable defendants' bankruptcies.²⁴⁹

Even after moving asbestos litigation to federal courts, Congress would still be unable to police every courtroom and review every finding of liability in order to ensure that the law was strictly applied. Ultimately, the closest Congress could come to directly addressing the problems surrounding peripheral defendant liability would be to refer to such problems in the findings and purpose section of the tort reform statute. Language that indicates congressional awareness of the problem and emphasizes its seriousness would at least give judges pause before they allow the imposition of liability based on speculative proof of causation or questionable scientific evidence.²⁵⁰ The rest must be left to the federal trial judges who will be hearing asbestos cases.²⁵¹

While the ways in which Congress can directly address the problems associated with peripheral defendant liability are limited, the proposals discussed above may provide some relief in this area. The implementation of a national inactive docket program combined with the suspension of punitive damages should do a great deal to stem the tide of asbestos-related bankruptcies. This, in turn, should alleviate the pressure on plaintiffs to "cast their nets wider" in the hopes of ensnaring at least some solvent defendants.²⁵² Hopefully, the truly impaired claimants who are still allowed to bring claims will focus on bringing their strongest cases against culpable defendants, thereby relieving the pressure that asbestos liability currently imposes on peripheral defendants. Just as the problems currently plaguing asbestos litigation serve to exacerbate each other, solving some of them should likewise serve to ameliorate the others.

248. See *supra* Part II.E.

249. See Schwartz & Lorber, *supra* note 24, at 262-64, 269-72 (describing the nation's trial judges' unwillingness to follow "the rule of law" with respect to peripheral defendants).

250. See *id.* at 269-71 (citing "junk science" and alternative liability theories as two significant problems).

251. See *id.* at 270-71 (urging trial judges to act as "responsible gatekeepers").

252. See *supra* Part II.E.

C. What About Mass Consolidations?

Noticeably absent from this Note is any proposal for a ban on or reform of the mass consolidation of asbestos claims. This absence is all the more glaring in light of the fact that condemnation of mass consolidations has traditionally been a unifying theme among otherwise divergent proposals for asbestos litigation reform.²⁵³ Rather than join the chorus calling for a ban on mass consolidations, this Note proposes that such a ban is both impractical and, after the implementation of the proposals contained herein, unnecessary.

The impracticality of a ban on mass consolidations is partially due to the nature of asbestos litigation. A distinguishing characteristic of asbestos litigation is the fact that "some 85% of the claims on file are represented by only 55 law firms."²⁵⁴ Due to the concentration of cases among such a small number of firms, "individual treatment of asbestos cases . . . (is) largely a myth."²⁵⁵ Even if Congress were to enact legislation banning mass consolidations, asbestos plaintiffs' firms could still continue to simultaneously negotiate settlements on behalf of their entire stable of plaintiffs. Plaintiffs' attorneys could therefore continue threatening to discourage settlement of all claims if a given defendant insisted on taking any claims to court. While defendants could obtain individual adjudication of cases if they chose to ignore this threat, it is unlikely that they would choose to do so if it cost them the opportunity to settle huge numbers of claims out of court. A ban on mass consolidations would therefore leave the settlement negotiation process effectively untouched, and would provide minimal relief to most asbestos defendants.

The sheer volume of asbestos claims also serves to make a ban on mass consolidations impracticable. There are currently some 600,000 asbestos claimants, and even conservative estimates predict that that number will rise above one million before the litigation concludes.²⁵⁶ Assuming no change in the ninety-five to ninety-eight percent rate of out of court settlements in asbestos litigation, these estimates would result in an absolute minimum of 20,000 asbestos cases going to trial.²⁵⁷ Even this number of individual trials would constitute an extremely heavy burden on the nation's courts, and the

253. See, e.g., Behrens, *supra* note 54, at 349-52; Faulk, *supra* note 20, at 660-61; Hanlon, *supra* note 140, at 338; Schwartz & Lorber, *supra* note 24, at 268-69.

254. Issacharoff, *supra* note 29, at 1930 & n.21.

255. Hensler, *supra* note 22, at 1913.

256. CARROLL ET AL., *supra* note 30, at 75, 77.

257. See *supra* note 100.

actual number of cases would likely be higher.²⁵⁸ Quite simply, asbestos litigation has grown beyond the point where courts can hope to resolve all claims on an individual, case-by-case basis.

In addition to being impractical, a ban on mass consolidations would be unnecessary if the reforms outlined in this Note were implemented. As discussed above, mass consolidations cause or contribute to five distinct problems in asbestos litigation: (1) by enabling courts to process claims quickly and cheaply, they encourage the filing of more claims than they resolve; (2) they lead to jury confusion and prejudice by combining evidence of plaintiffs with a wide range of injuries and defendants with a wide range of culpability; (3) they force defendants to settle claims of questionable merit or risk being bankrupted by massive jury verdicts; (4) they increase the value of claims by unimpaired plaintiffs; and (5) they impair the quality of representation received by plaintiffs with varying levels of injury.²⁵⁹ All of these concerns are addressed by the tort reform statute proposed above.²⁶⁰

Implementation of a nationwide inactive docket program will have the most significant impact on mass consolidations. By allowing only impaired plaintiffs to bring their claims to court, the inactive docket program will effectively cap the number of new claims that can be filed. Likewise, by ensuring that juries only hear evidence regarding truly injured plaintiffs, the inactive docket program reduces the risk of jury confusion and sympathetic awards to undeserving plaintiffs. While there will still be plaintiffs with varying levels of impairment, the substantial reduction in pending claims caused by the inactive docket should allow judges to be more selective in consolidating their cases, preferably joining only those plaintiffs whose medical evaluations evince similar injuries. The inactive docket program will also relieve the pressure that defendants currently feel to settle claims of questionable merit, as most of those claims will be placed on the inactive docket.²⁶¹ The inactive docket program will also prevent inflation in the value of claims by the unimpaired, as those claims will have marginal, if any, value so long

258. See *supra* note 79.

259. See *supra* Part II.C.

260. See *supra* Parts IV.B-C.

261. While the claims of impaired individuals may still present questions of causation with regard to any particular defendant, there will at least be no doubt that such plaintiffs have been injured and deserve compensation.

as they cannot be brought to court.²⁶² Finally, by returning the focus of attorneys to the relatively small number of impaired claimants, the inactive docket program will help to ensure that those plaintiffs receive adequate representation in settlement negotiations.

Other aspects of this Note's proposed tort reform statute will also help to reduce the harmful effects of mass consolidations. The statutory language urging federal district courts to strictly require proof of actual causation should alleviate the pressure for defendants to settle claims for which they do not believe they are liable.²⁶³ Concerns about jury confusion should also be ameliorated, as judges should prove more willing to dismiss cases on summary judgment or directed verdict when a plaintiff fails to establish that a given defendant caused his or her injuries. Severing punitive damages claims also will reduce the pressure on defendants to settle cases of questionable merit, as the likelihood of facing a "bet-the-company risk" will substantially decrease when only compensatory damages are at stake.²⁶⁴ Finally, getting asbestos litigation into federal courts and under uniform procedural rules should reduce that likelihood that the mass consolidation procedure will be subject to judicial abuse.²⁶⁵

With their harmful side effects addressed by this Note's proposed federal tort reform statute, mass consolidations could actually become the asset to asbestos litigation envisioned by the first judges to employ them. As noted, one of the chief problems with current consolidations is that their fast, efficient adjudication of large numbers of asbestos claims encourages more filings than they resolve.²⁶⁶ Once the inactive docket program reduces the volume of available claims and the various prejudicial effects of current mass consolidations are remedied, their ability to efficiently resolve large numbers of cases should benefit all parties.²⁶⁷ Finally, if mass consolidations, the independent medical evaluations mandated by the inactive docket programs, and the consistent treatment of asbestos

262. Contrast this to the current situation, in which the threat of bringing claims by the unimpaired to court is used as leverage by plaintiffs' attorneys engaging in settlement negotiations. See *supra* notes 95-97 and accompanying text.

263. See *supra* note 250 and accompanying text.

264. See *supra* notes 91-92 and accompanying text.

265. See *supra* note 93 (describing how some state trial judges have intentionally used mass consolidation to force defendants to settle claims in an effort to clear the judge's docket).

266. See *supra* notes 82-85 and accompanying text.

267. See, e.g., CARROLL ET AL., *supra* note 30, at 60 (noting that more than half of the money spent on asbestos litigation has gone to cover transaction costs and predicting that, absent some reform, this percentage is likely to increase in the next decade). Reducing defendant concerns over claims by the unimpaired and moving legitimate claims through the tort system quickly and efficiently should help to reduce the percentage of litigation expenses that go to cover transaction costs, thus benefiting all concerned.

cases that should occur in federal courts can combine to quickly establish a relatively narrow range of values for claims based on certain impairments, it is quite possible that even more cases can be settled out of court, thus reducing the transaction costs for all parties and perhaps ultimately alleviating the need for mass consolidations.²⁶⁸

V. CONCLUSION

The problems with the current asbestos litigation process are well documented and almost universally acknowledged. As the quagmire continues to expand and its economic impact grows, these problems will only become more pronounced. Although the nation's trial judges have had a hand in creating many of these problems, they have proven woefully incapable of solving them.²⁶⁹ It is therefore time for Congress to step in and take decisive action to remedy the nation's growing asbestos crisis.

In implementing asbestos reform, Congress should take advantage of the unique nature of the asbestos morass. Just as each of the problems caused by asbestos litigation exacerbates and magnifies the others, reforms targeted at some of the problems would ameliorate the others. It is under this theory that this Note proposes tort reforms that are narrowly and specifically targeted to eradicate the asbestos crisis with the least possible congressional effort. It now falls to Congress to make that effort.

*Mark H. Reeves**

268. See Issacharoff, *supra* note 29, at 1928 (noting the tendency of asbestos litigation and other high volume mass torts to yield "a highly evolved valuation of claims"). It seems likely that, once defendants ceased worrying about being blackmailed into settling claims by the unimpaired, they would be happy to save litigation costs by settling the claims of the truly impaired at or near their clearly established value. See Warren, *supra* note 1 (noting that major asbestos defendants are often sensitive to the dilemma of the truly impaired, and are quite open to reaching settlements in such cases); *supra* note 267.

269. See generally Schwartz & Lorber, *supra* note 24.

* The author wishes to thank the following individuals for their contributions to this Note: Eric Reeves and Professor Richard Nagareda, for providing invaluable information, advice, and feedback throughout the writing process; Ken, Brenda, Eric (again) and Gretchen Reeves, Howard Harrison, and the rest of my family, for a lifetime of support and encouragement; Julie Ordelt, for patience and understanding when I talked about asbestos for weeks on end; and Dan Judy, for the steady stream of asbestos editorials. The author would also like to dedicate this Note to the memory of Clay Moore, whose name deserves to be in a Law Review.