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An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation

John P. Burns

G. Edward Cassady, III

Kenneth B. Cole, Jr.

Timothy R. Dodson

Philip E. Holladay, Jr.

See next page for additional authors

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An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation

Authors

John P. Burns; G. Edward Cassady, III; Kenneth B. Cole, Jr.; Timothy R. Dodson; Philip E. Holladay, Jr.; Paul C. Ney, Jr.; Drew T. Parobek; Kimberly Payne; D. Blaine Sanders; L. D. Simmons, II; Charles D. Maguire, Jr. Special Project Editor; and Laurin Blumenthal Associate Special Project Editor

SPECIAL PROJECT

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I. INTRODUCTION*

In the last decade the American judicial system has encountered an unprecedented proliferation of asbestos products litigation. The number of American workers who have developed or will develop diseases related to their exposure to asbestos is of unprecedented proportion. These diseased workers, seeking compensation for their occupational disability, have brought thousands of suits against asbestos manufacturers and distributors. This vast

* The *Vanderbilt Law Review* expresses its appreciation to Andrews Publications, Inc. for furnishing issues of the *Asbestos Litigation Reporter*. The availability of the *Asbestos Litigation Reporter* greatly facilitated the preparation of this Special Project.

litigation has produced numerous legal, social, and political issues that may prove too numerous and too complex for the court system to handle adequately.

Asbestos is the name of a group of naturally occurring fibrous minerals¹ known for their properties of relative indestructibility and resistance to heat and fire.² The use of asbestos began in ancient times³ and increased considerably during the industrial revolution of the 1870's.⁴ During the Second World War the protective clothing, insulation, and shipbuilding industries created a dramatic increase in the demand for asbestos.⁵ At that time most producers and researchers considered asbestos to be a virtually harmless, highly valuable ingredient in a variety of products designed to protect property and human life.⁶ Today more than three thousand products commonly found in the home and work environments contain asbestos.⁷ Ironically, experts now regard as-

1. The asbestos family consists of more than 30 different minerals of fibrous structure. The minerals' physical properties vary so that only six varieties are of substantial economic value. These six minerals are chrysotile, crocidolite, amosite, anthophyllite, tremolite, and actinolite. Chrysotile, known for its silky white color, its durability, and its flexibility, is the most widely used asbestos fiber. Manufacturers use it in the production of asbestos textiles, cement products, friction materials, insulation, and paper products. It is the least dangerous of the economically useful fibers. Crocidolite, a harsher, blue fiber, is used in pipes, cement products, textiles, and felts for plastics. Crocidolite, which is resistant to acids and alkalides, is more difficult to process than many of the other fibers and is the most dangerous of the asbestos fibers. Amosite is a harsh, brown fiber. It is extremely heat resistant, and manufacturers use it in cement, pipes, refractory tiles, and plastic reinforcement. It is a moderately dangerous fiber. Anthophyllite is used in cement production and the chemical industry. Tremolite is used for talc filters and in the chemical industry. Actinolite usually is not used commercially. Brief for Defendant, *Aguilar v. Johns-Manville Corp.*, No. 460769 (Cal. Super. Ct. June 11, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 3891, 3896-97 (Sept. 25, 1981).

2. Mehaffy, *Asbestos-Related Lung Disease*, 16 *FORUM* 341, 341-42 (1980); Note, *The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability?*, 15 *IND. L. REV.* 679 (1982).

3. Asbestos was used as a lamp wick as early as the fifth century B.C., and writers such as Pliny the Younger, Herodotus, and Plutarch made reference to it. The ancient Greeks and Romans also knew of its propensities and wove it into clothing. Mehaffy, *supra* note 2, at 342; *ASBESTOS LITIG. REP. (ANDREWS)* 179 (Apr. 27, 1979).

4. During the 19th Century asbestos initially was used in protective clothing for firemen. Later, asbestos was used in insulation for steam engines, protective pipe coverings, and other building materials. By 1904 American manufacturers were producing asbestos cement and asbestos-cement board. *Id.*

5. Mehaffy, *supra* note 2, at 342.

6. *Id.* at 341; Note, *supra* note 2 at 679. *But see infra* notes 114-60 and accompanying text.

7. *ASBESTOS LITIG. REP. (ANDREWS)* 179 (Apr. 27, 1979). Primary uses of asbestos include floor tile; gaskets and packing; friction products; paints; coatings; sealants; plastics; asbestos-cement pipe; asbestos textiles; asbestos paper; and asbestos-cement sheet.

bestos as "one of the most dangerous of all natural materials."⁸

The disabilities associated with the inhalation of asbestos fibers manifest themselves primarily in three diseases:⁹ asbestosis,¹⁰ mesothelioma,¹¹ and pulmonary and bronchogenic carcinoma—more commonly known as lung cancer.¹² Recent studies es-

Secondary uses of asbestos include flooring; valve, flange, and pump sealants; clutch, transmission, and brake components; industrial friction materials; automobile coatings; roof coating and patch; electric motor components; piping; conduits for electric wires; packaging components; gasket components; heat and fireproof clothing; insulation for wiring; theater curtains; fireproof drapery; table pads and heat protective mats; molten glass handling equipment; insulation products; filters for beverages; appliance insulation; hood vents for corrosive materials; electric switchboards; miscellaneous building materials; appliance components; and cooling tower components.

Consumer uses include piping; decorative building panels; plaster and stucco; molded plastics; acoustical products; asphalt paving; caulking; motor armatures; paints; welding materials; drip cloths; fire doors; car components; oven and stove insulation; siding; shingles; floor tiles; chemical tanks; fire hoses; garments; gloves; filter media; boiler insulation; furniture; motion picture screens; roofing; rugs; wallboard; acoustical ceiling materials; insulation; electrical switches; hair dryers; clothes dryers; toasters; humidifiers; and toothbrushes. *Id.* at 7; see Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 861 (1980).

The United States has consumed between 608,000 and 876,000 short tons of asbestos per year in the last decade. The total value of the asbestos and asbestos products used in this country is in excess of one billion dollars. ASBESTOS LITIG. REP. (ANDREWS) 182-83 (Apr. 27, 1979).

8. Mehaffy, *supra* note 2, at 341.

9. Asbestos also has been linked to other diseases as well.

10. Asbestosis, the earliest known and most common asbestos-related disease, is a latent disease that manifests itself 10 to 40 years after exposure to significant quantities of asbestos. Inhalation of asbestos fibers initiates a scarring process that destroys air sacs in healthy lung tissue. The result is a decrease in pulmonary function and lung volume. Symptoms associated with asbestosis include shortness of breath, coughing, chest pains, and clubbing of fingers. Although the disease is not always fatal, it is progressive and incurable. See I. SELIKOFF & D. LEE, ASBESTOS AND DISEASE 143-56 (1978); Ingram, *Insurance Coverage Problems in Latent Disease and Injury Cases*, 12 ENVTL. L. 320-21 (1982); Mansfield, *supra* note 7, at 861-63; Note, *Asbestos Litigation: The Insurance Coverage Question*, 15 IND. L. REV. 833 n.15 (1982).

11. Mesothelioma is a malignant tumor of the membrane lining the lungs, chest cavity, and abdominal cavity. Unlike asbestosis, no relationship between the degree of exposure to asbestos and development of the disease has been established. Mesothelioma, also a latent disease, has developed in individuals exposed to minimal quantities of asbestos. Once considered a rare form of cancer, mesothelioma is occurring with increasing frequency. Mesothelioma is invariably fatal. See I. SELIKOFF & D. LEE, *supra* note 10, at 241-44, 262-66; Ingram, *supra* note 10, at 321; Mansfield, *supra* note 7, at 863-64.

12. Pulmonary and bronchogenic carcinoma, like most cancers, results in an uncontrolled multiplication of cells. Unlike most lung cancer, however, this one appears most often in the lower lobes of the lungs. The incidence of lung cancer among asbestos workers varies depending on the magnitude and duration of exposure and the type of asbestos inhaled. Cigarette smoking greatly increases the likelihood that an individual will develop lung cancer. The disease generally occurs 15 to 35 years after exposure and is incurable. See I. SELIKOFF & D. LEE, *supra* note 10, at 307-21, 326-27; Ingram, *supra* note 10, at 322; Mans-

timate that since the beginning of the Second World War between eleven and thirteen million workers have become exposed to asbestos.¹³ Projections concerning asbestos-related disability and death vary greatly: one study has estimated that 8500 people die each year from asbestos-related disease¹⁴ while another has estimated 67,000.¹⁵ Experts do not expect the number of deaths caused by asbestos to level off until the 1990's.¹⁶

The resulting deluge of asbestos-related claims brought against asbestos manufacturers and the complexity of the legal and factual issues have presented the American court system with "an administrative nightmare."¹⁷ Approximately 30,000 individual plaintiffs have filed suits against asbestos manufacturers since 1973,¹⁸ and industry experts predict that plaintiffs will file an addi-

field, *supra* note 7, at 863.

13. Estimates of the numbers of individuals occupationally exposed to asbestos vary. The United States Department of Health, Education, and Welfare reports: "[B]etween eight and eleven million workers have been exposed to asbestos in the U.S. since the beginning of World War II." NATIONAL CANCER INSTITUTE AND NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS 1-2 (draft summary Sept. 11, 1978) [hereinafter cited as NATIONAL CANCER INSTITUTE ESTIMATES]. Commercial Union Insurance Companies, Inc. estimates that since the 1940's over 13 million workers were exposed to asbestos. *Occupational Health Hazards Compensation Act of 1982: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess.* 132 (1982) (statement of Mr. Harry Martens, executive vice president, Commercial Union Insurance Companies, Inc.) [hereinafter cited as *H.R. 5735 Hearings*].

14. ASBESTOS LITIG. REP. (ANDREWS) 4362 (Jan. 8, 1982) (Dr. Irving J. Selikoff made this estimate in a study for the United States Department of Labor).

15. See Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 *FORDHAM URB. L. J.* 55 (1982) (citing a statement by Mr. Joseph A. Califano, former Secretary of Health, Education, and Welfare, reported in *Hartford Courant*, Sept. 12, 1978, at 1, cols. 7-8).

16. See, e.g., Nicholson, Perkel, Selikoff, & Seidman, *Cancer from Occupational Asbestos Exposure Projections 1980-2000* (Cole Spring Harbor Laboratory 1981), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 4997 (May 2, 1982); Walker, *Projections of Asbestos-Related Disease 1980-2009* (Epidemiology Resources, Inc. Aug. 2, 1982), reprinted in *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 2d Sess.* 23-51 (1982) [hereinafter cited as *Oversight Hearing*]. One study by the United States Department of Health, Education, and Welfare estimates that more than two million workers will die prematurely as a result of asbestos-related cancers. Comment, *supra* note 15, at 55 n.2 (quoting NATIONAL CANCER INSTITUTE ESTIMATES, *supra* note 13).

17. ASBESTOS LITIG. REP. (ANDREWS) 2104 (July 25, 1980). Mr. Harry Martens, first senior vice president of Commercial Union Assurance Companies, Inc. has stated: "Suddenly—almost traumatically—our system is now faced with a plethora of lawsuits of unprecedented dimensions and issues, and we cannot wait for years for our system to gradually develop the capability to accommodate the problem. We must now create methods and procedures to handle the myriad of complex claims and lawsuits." *Id.* at 2501 (Oct. 24, 1980).

18. Mehaffy, *supra* note 2, at 345; Podgers, *Toxic Time Bombs*, 67 *A.B.A. J.* 139

tional 500 suits each month.¹⁹ This massive litigation has congested court dockets and created unprecedented delays in the litigation process. As a result, legal costs have increased for all parties to the litigation and injured claimants cannot obtain timely compensation. The tremendous increase in asbestos-related lawsuits thus poses practical and philosophical problems for the asbestos industry, insurance companies,²⁰ the federal government, and society in general.²¹ Resolution of these important legal and legislative issues must balance, among other concerns, the need to compensate fairly the victims of asbestos-related disabilities with the potential bankruptcy of asbestos manufacturers and the subsequent effects on the economy.²² These issues only partially reflect, however, the scope and magnitude of the asbestos problem that Congress and the courts recently have begun to confront.

This Special Project examines the most important issues of the asbestos problem and advocates a congressional solution (1) to

(1981); Note, *supra* note 2, at 680. According to Mr. William Bailey, chairman of the Task Force on Cumulative Trauma and senior vice president of Commercial Union Assurance Companies, Inc., "[t]hose suits may be 'just the tip of the iceberg compared with the people who may make claims in the 1980's and 1990's.'" Podgers, *supra*, at 139.

19. *H.R. 5735 Hearings, supra* note 13, at 240 (statement of Mr. G. Earl Parker, senior vice president, Manville Corporation).

20. The asbestos litigation poses grave problems for the insurance industry. In a speech to the American Bar Association at its 1980 Annual Meeting, Mr. Bailey of Commercial Union Assurance Companies, Inc. stated: "The insurance industry presently is poised on the edge of a fatal precipice, and not nearly enough of us seem to be even aware of that problem, let alone give a damn if it is pushed over the edge . . ." ASBESTOS LITIG. REP. (ANDREWS) 2501 (Oct. 24, 1980). The incidence and magnitude of insurance recovery in asbestos cases could result in diminished recovery in other types of cases, increased premiums, and greater difficulty in obtaining liability insurance policies. See *infra* part VII.

21. Studies estimate the social cost of the death and disability resulting from asbestos disease will be between \$39 billion and \$74 billion over the next 25 years. New York Academy of Sciences, Report of a Meeting of the Task Force on Economics of the Asbestos Disability Compensation Claims Panel, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 4667-70 (Feb. 26, 1982); see Podgers, *supra* note 18, at 139.

22. In addition to the approximately 30,000 individual plaintiffs pursuing asbestos claims, more than 165 companies are involved in asbestos litigation as well. ASBESTOS LITIG. REP. (ANDREWS) 1345 (Feb. 15, 1980). The total contribution by all defendants to dispose of each case averages \$70,000; individual dispositional costs are lower. *Id.* at 4678 (Mar. 12, 1982) (Mr. David H. Markusson, assistant corporate counsel for Johns-Manville Corporation). In 1979 Johns-Manville (now Manville Corporation) had to pay an average of \$13,000 to each plaintiff; in 1980 that figure rose to \$21,600; in 1981 Manville Corporation spent \$15,433 per case. These figures do not include attorney's fees. Manville Corporation estimates its total defense costs to be over one million dollars per month. *Id.* at 4422 (Jan. 22, 1982). The United States Department of Labor estimates that total current and future asbestos-related liabilities could reach \$540 billion. *Manville's Costs Could Reach \$5 Billion on Asbestos Lawsuits, Study It Ordered Shows*, Wall. St. J., Sept. 15, 1982, at 4, col. 2 [hereinafter cited as *Manville's Costs*].

relieve the courts of the thousands of present and potential asbestos cases, (2) to protect future claimants' rights to adequate compensation, and (3) to provide for equitable participation by all responsible parties, which, in addition to asbestos manufacturers, include the federal government, insurance companies, and the tobacco industry. The first six parts of the Special Project examine the various issues of asbestos litigation: theories of liability in products liability suits against asbestos manufacturers, causation, defenses, statutory limitations on actions, collateral estoppel, and punitive damages. The Special Project then discusses in parts VIII, IX, and X the methods used by asbestos manufacturers to attempt to spread their liability through asserting insurer liability, the exclusive remedy of workers' compensation, and indemnity and contribution from the United States. Finally, the Special Project evaluates and analyzes recent developments in the asbestos litigation area, including proposals for federal legislative compensation programs and business alternatives available to asbestos manufacturers facing enormous asbestos-related liabilities.

II. THEORIES OF LIABILITY

A person who suffers injury from exposure to asbestos products may sue the manufacturer under three traditional theories of products liability: negligence, breach of warranty, or strict liability.²³ Asbestos litigation, however, presents problems that are unique to mass torts²⁴ and uncommon to most products liability causes of action.²⁵ The plaintiff in an asbestos case, for example, may be unable to identify the manufacturer of the products he en-

23. Although most plaintiffs seek recovery under strict liability, many jurisdictions recognize all three theories and allow plaintiffs to sue on all three simultaneously. See Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551 (1980). For a discussion of these theories of products liability, see J. BEASLEY, *PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT* (1981); W. KEETON, D. OWEN, & J. MONTGOMERY, *CASES AND MATERIALS ON PRODUCTS LIABILITY AND SAFETY* (1980) [hereinafter cited as *CASES AND MATERIALS*].

24. For a discussion of the problems of mass tort litigation see McGovern, *Toxic Substances Litigation in the Fourth Circuit*, 16 U. RICH. L. REV. 247 (1982); Note, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) [hereinafter cited as Note, *Enterprise Liability*]; Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981) [hereinafter cited as Note, *The Causation Problem*]; Comment, *An Examination of Recurring Issues in Asbestos Litigation*, 46 ALB. L. REV. 1307 (1982).

25. Products liability law traditionally has focused on the isolated defective product, not the problems of mass torts. See Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980); see also Comment, *supra* note 24, at 1310.

countered.²⁶ The traditional causes of action, therefore, may not afford a fair and adequate remedy to all parties. This part of the Special Project discusses the three basic theories of liability and their application to asbestos litigation.

A. *The Basic Theories*

1. Negligence

Although most jurisdictions have adopted strict liability in tort for products liability cases, negligence remains an important theory of recovery. Negligence is significant not only because some jurisdictions have not adopted strict liability theory,²⁷ but also because a plaintiff may choose to proceed in negligence for tactical reasons.²⁸ Negligence analysis for a products liability case parallels traditional negligence analysis:²⁹ a manufacturer is liable if it fails to exercise reasonable care to avoid risk of harm to others.³⁰ Specifically, the manufacturer may be negligent by: (1) designing or producing a product that is not reasonably safe for its foreseeable use; (2) failing to test or inspect a product to discover its possible defects or dangerous propensities; or (3) failing to warn or failing to warn adequately of foreseeable dangers.³¹

26. See *infra* notes 184-91 and accompanying text.

27. Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming do not recognize strict liability in tort. 1 PROD. LIAB. REP. (CCH) § 4016 (May 1982).

28. CASES AND MATERIALS, *supra* note 23, at 40.

29. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (4th ed. 1971). Traditionally, courts have required plaintiffs injured by defective products to establish privity of contract with the manufacturer to recover under a negligence theory. *Id.*; see *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). Courts gradually created exceptions to this rule to allow plaintiffs not in privity with the manufacturer to recover. The privity of contract requirement remained until 1916, when Judge Cardozo decided the famous case of *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). In *McPherson* the court held that the purchaser of a product can recover in negligence without showing privity. *Id.* at 389-90, 111 N.E. at 1053. Judge Cardozo recognized that industrial society had developed to the extent that the manufacturer no longer dealt directly with the consumer; instead the manufacturer delivered its product to various intermediaries in the chain of distribution. *Id.* Therefore, the court imposed on manufacturers a duty of due care to produce a safe product. See *Birnbaum*, *supra* note 25, at 593.

30. W. PROSSER, *supra* note 29, § 96.

31. *Id.* Evidence of a manufacturer's negligence is often difficult to obtain because the entire manufacturing process is within his control. See *Wade, On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 825-26 (1973). If the plaintiff cannot prove any specific acts of negligence, he may attempt to proceed under the doctrine of *res ipsa loquitur*, which allows a plaintiff who suffers injury from defective products to recover by an inference of negligence on the part of the defendant. The plaintiff must establish that the defendant had exclusive control over the manufacture of the product causing the injury and that the accident that produced the plaintiff's injury would not have occurred absent negli-

Negligent failure to supply adequate warnings plays a particularly important role in asbestos litigation.³² The basic premise of this negligence theory is that manufacturers must exercise reasonable care "to speak out if the product is capable of harm and does not itself carry a message of danger."³³ Moreover, courts hold manufacturers to a standard of care equal to that of an expert in the field.³⁴ Thus, a manufacturer is negligent for failing to supply adequate warnings if an expert in the field exercising reasonable care would have foreseen the dangers and supplied warnings.³⁵

2. Breach of Warranty

The basis for liability in warranty is the manufacturer's express or implied representations; the plaintiff may recover if the condition of the product does not meet the consumer's reasonable

gence by the defendant. Once the plaintiff establishes these two elements, the court will infer that the defendant was negligent. See *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *Wade, supra*, at 826.

32. See *infra* notes 63-83 and accompanying text.

33. CASES AND MATERIALS, *supra* note 23, at 68 (quoting *Dillard & Hart, Product Liability: Directions for Use and Duty to Warn*, 41 VA. L. REV. 145, 147 (1955)). The *Restatement (Second) of Torts* has adopted the following formulation for a negligent failure to warn:

§ 388. Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS § 388 (1965). For a well-ordered discussion of the negligence analysis for failure to warn, see *Hall v. E. I. DuPont de Nemours*, 345 F. Supp. 353 (E.D.N.Y. 1972). See also *Noel, Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1969).

34. See *Laplant v. E. I. DuPont de Nemours & Co.*, 346 S.W.2d 231, 240 (Mo. App. 1961). The law therefore requires a manufacturer to keep abreast of scientific knowledge and discoveries relating to his product. *Id.*; see *Noel, supra* note 33, at 266.

35. A failure to warn is negligent only if the manufacturer could have foreseen the potential danger. In evaluating foreseeability courts consider first, the likelihood of harm if the manufacturer does not exercise reasonable care, and second, the manufacturer's actual or constructive knowledge of the potential for injury. *Hall v. E. I. DuPont De Nemours*, 345 F. Supp. at 361; see *Noel, Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 830 (1962).

expectations that these representations create.³⁶ To recover under an express warranty theory the plaintiff must prove that the product does not conform to the supplier's express representations, either written or oral.³⁷ Recovery under an implied warranty theory, on the other hand, does not rest on the written or spoken words of the seller. Rather, it rests on the implied warranty of merchantability, which the Uniform Commercial Code has codified.³⁸ This implied warranty requires the manufacturer to produce goods that are of merchantable quality and that are reasonably fit for their intended purpose.³⁹ To recover for breach of implied warranty the plaintiff must prove that: (1) a merchant sold goods; (2) the goods were not merchantable at the time of sale; (3) the plaintiff incurred injury and damages to his person or his property; (4) the defective nature of the goods caused the injury both proximately and in fact; and (5) the seller received notice of the injury.⁴⁰ Most jurisdictions no longer require privity of contract between the plaintiff and supplier.⁴¹

36. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[1] (1982); see W. PROSSER, *supra* note 29, § 97. Breach of warranty actions arose in response to a national movement against the marketing of defective food. Advocates of this form of recovery indicated that injured plaintiffs often had difficulty proving negligence on the part of the manufacturer. Therefore, courts imposed liability on the defendant even though he may have exercised all possible care in the manufacture of the product. *Id.*

37. W. PROSSER, *supra* note 29, § 97. The express warranty theory originated in *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932), in which the court held an automobile manufacturer liable for a shattered windshield. Basing liability on the manufacturer's literature that described the windshield as "shatterproof," *id.* at 459, 12 P.2d at 411, the court allowed recovery without proof of negligence, *id.* at 461-63, 12 P.2d at 412-13.

38. U.C.C. § 2-314 (1977).

39. L. FRUMER & M. FRIEDMAN, *supra* note 36, § 16.01[1] (quoting *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919, 922 (D.C. 1962)).

40. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6, at 343-44 (1980) (citing U.C.C. § 2-314 (1977)).

41. 2 L. FRUMER & M. FRIEDMAN, *supra* note 36, § 16.03[5]. In 1960 the New Jersey Supreme Court eliminated the privity requirement in warranty actions in the leading case of *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960). The court held that the obligation of the manufacturer is grounded in the "demands of social justice." *Id.* at 384, 161 A.2d at 83 (quoting *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913)). Thus, the court determined that manufactured products carry an implied warranty of merchantability for their intended purpose, and that warranty accompanies the product into the hands of the consumer. 32 N.J. at 384, 161 A.2d 84. A few jurisdictions, however, continue to require privity of contract in warranty actions. 2 L. FRUMER & M. FRIEDMAN, *supra* note 36, § 16.03[5].

3. Strict Liability

a. *In General*

Most plaintiffs in products liability actions seek recovery under strict liability in tort⁴² because strict liability eliminates the burden of proving that the defendant acted negligently.⁴³ Under the strict liability theory, "[a] manufacturer is strictly liable in tort when [it places an article] on the market, knowing that it is to be used without inspection for defects, [and the product] proves to have a defect that causes injury to a human being."⁴⁴ Therefore, a plaintiff bringing a strict products liability cause of action must prove that: (1) he purchased a product that the defendant produced or sold; (2) the product reached the plaintiff in substantially the same condition that it was in when it left the defendant's control; (3) the product was defective; and (4) the defective product injured the plaintiff.⁴⁵

Although the plaintiff in a strict products liability case must prove all these elements, the central issue is whether the product is defective,⁴⁶ and courts have adopted several strict products liabil-

42. Wade, *supra* note 31, at 825.

43. *Id.* at 826. In addition, the plaintiff need not establish privity of contract in a strict liability action. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794-800 (1966) (examining the elimination of the privity requirement in products liability actions and the growth of strict products liability).

44. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963). In this landmark case the California Supreme Court established strict liability for manufacturers, independent of both negligence and warranty. This theory of liability shifts the risk of loss caused by the possibility of a defective product from the consumer to the manufacturer. Courts justify this risk allocation on two grounds. First, the manufacturer is in the best position to control the risks arising from the use of his products. Birnbaum, *supra* note 25, at 596. Second, the manufacturer more easily can bear the burden of product-related injuries. *Id.* The manufacturer, for example, can obtain insurance and adjust the price of his products to balance the cost of damage claims, but the consumer may suffer irreparable financial harm if he bears the loss. *Id.*

45. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521, 523 (1982); see, e.g., *Aller v. Rodgers Mach. Mfg.*, 268 N.W.2d 830 (Iowa 1978); *Phillips v. Kimwood Mach. Co.*, 269 Or. 581, 525 P.2d 1030 (1974); *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 542 P.2d 774 (1975); see also Wade, *supra* note 23, at 556-57. The courts refusing to follow this approach argue that it provides no real guidance to juries in design defect or failure to warn cases. *Id.* at 557.

46. See Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973). The focus of a strict liability action is on the condition of the product and not on the conduct of the manufacturer. *Id.* The plaintiff, however, still must prove the existence of the defect in the product. Commentators agree that a manufacturer is not an insurer of his product. See Wade, *Product Liability and the Passage of Time: The Effect of Knowledge Becoming Available Only After the Product Has Been Marketed*, 58 N.Y.U. L. REV. — (1983) (forthcoming); RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

ity tests to determine whether a product is defective.⁴⁷ Most jurisdictions have adopted the *Restatement (Second) of Torts* formula⁴⁸ for determining defectiveness.⁴⁹ According to this formula, a manufacturer is strictly liable to the ultimate user or consumer if it "sells any product in a defective condition unreasonably dangerous to the user."⁵⁰ A manufacturer may be liable even though it "exercised all possible care in the preparation and sale of his product."⁵¹ To determine whether the product is in an unreasonably dangerous and defective condition, the jurisdictions following the *Restatement (Second) of Torts* formula apply a user-oriented test and hold the manufacturer strictly liable if the product does not meet the reasonable expectations of the user.⁵²

Some jurisdictions have modified the basic *Restatement (Second) of Torts* user-oriented test by redefining the concept of "unreasonably dangerous."⁵³ These courts follow a manufacturer-oriented approach advocated by some commentators to determine whether a product is unreasonably dangerous by balancing its util-

47. For a discussion of the concept of a defective product, see J. BEASLEY, *supra* note 23; Keeton, *supra* note 46; Wade, *supra* note 31.

48. Section 402A of the *Restatement (Second) of Torts* provides:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) the rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

49. Jurisdictions applying the *Restatement (Second) of Torts* test include: Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Nevada, New Hampshire, New Mexico, Oklahoma, South Carolina, Utah, and Vermont. See J. BEASLEY, *supra* note 23, at 167-210.

50. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

51. *Id.*

52. The *Restatement (Second) of Torts* defines "unreasonably dangerous" as dangerous "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* § 402A comment i. The courts applying this test reason that strict products liability developed out of liability for breach of an implied warranty of merchantability. Since breach of warranty implies the loss of a bargain or failure to receive what is bargained for, a consumer-oriented standard is appropriate. See Wade, *supra* note 23, at 555.

53. Jurisdictions applying this modified test include: Alabama, Kentucky, Louisiana, Mississippi, New Jersey, Oregon, Texas, Washington, West Virginia and Wisconsin. See J. BEASLEY, *supra* note 23, at 211-72.

ity against the magnitude of danger inherent in its use.⁵⁴ These courts maintain that since tort law is the foundation of strict products liability, they should determine defectiveness by asking whether a reasonable supplier would have placed the product into the market if it had known of the product's defective condition.⁵⁵ The most important feature of this test is its imputation to the manufacturer of knowledge⁵⁶ about the dangers of the product.⁵⁷ Based on this imputed knowledge the court then determines whether the seller was negligent to market the product in its defective condition.⁵⁸

Although the majority of jurisdictions follow either the *Restatement (Second) of Torts* approach or the imputed knowledge approach, other jurisdictions have created different theories to evaluate defectiveness. Some courts combine the user-oriented test and the manufacturer-oriented test to determine if a product is defective.⁵⁹ In these jurisdictions the plaintiff may prevail by showing either that the product does not meet the reasonable expectations of the consumer or that a reasonable supplier would not have placed the product into the market if it had known of the product's defective condition.⁶⁰ Other courts have attempted to elimi-

54. See *id.* at 211. The jurisdictions applying this theory rely on Dean Wade's articles including: Wade, *supra* note 31; and Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965). Dean Wade has advocated the use of the term "unreasonably dangerous" as the test for the manufacturer's liability because juries have difficulty understanding the term "defective." See *id.* at 14-15; Wade, *supra* note 46, at _____. For a criticism of this approach, see J. BEASLEY, *supra* note 23, at 77-84.

55. See Wade, *supra* note 23, at 556. Dean Wade has proposed the following test: "A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonably prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was not duly safe." Wade, *supra* note 31, at 839-40.

56. See Wade, *supra* note 23, at 556. This imputation of "knowledge" to the defendant differentiates negligence from strict liability. *Id.*

57. Both Deans Wade and Keeton have advocated this approach, but they have differed on the time at which knowledge of the danger is imputed to the manufacturer. *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492 n.6, 525 P.2d 1033, 1036 n.6 (1974). Dean Wade has imputed the knowledge that existed at the time the product entered the consumer's hands. See Wade, *supra* note 46. Dean Keeton, on the other hand, has imputed all the knowledge available at the time of trial. See Keeton, *supra* note 46. The Keeton approach places a much greater burden on the defendant and may result in "absolute liability."

58. *Phillips Kinwood Mach. Co.*, 269 Or. at 492, 525 P.2d at 1036.

59. See Wade, *supra* note 23, at 556.

60. *Id.*; see, e.g., *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973). In *Hagans v. Oliver Mach. Co.*, 576 F.2d 97 (5th Cir. 1978), however, the court suggested that a product must be defective under both tests for the plaintiff to recover. *Id.* at 100. The user may consider the product to be unreasonably dangerous only because it injured him,

nate altogether the unreasonably dangerous requirement from strict products liability actions on the grounds that it "rings of negligence."⁶¹ Commentators vigorously have attacked this approach, and most courts have rejected it.⁶²

b. Strict Liability for Failure to Warn

The defect in a product may arise in one of several stages of the production process, including design, manufacturing, or marketing and sales,⁶³ but most reported asbestos decisions focus on marketing defects. Marketing defects include the seller's or manufacturer's failure to provide adequate warnings of the risks inherent in using its product and failure to provide adequate instructions for the safe and appropriate use of its product.⁶⁴ Thus, a court may find a product defective because the manufacturer failed to provide adequate warnings regarding the product's use.⁶⁵

The duty to warn of a product's dangers arises when the absence or inadequacy of a warning makes the product unreasonably dangerous.⁶⁶ This situation exists when a product is "unavoidably unsafe" or "incapable of being made safe for [its] intended use."⁶⁷

the court noted, and the manufacturer's profit motive may interfere with its objective evaluation of the product's dangers. *Id.* Thus, the court must consider both sides and remain cognizant both that the user is entitled to expect that the manufacturer has designed the product to meet the demands of its proper use, and that the manufacturer is not an insurer who must guarantee that no harm will result from using its product. *Id.*

61. Jurisdictions eliminating the unreasonably dangerous requirement include: Alaska, California, Colorado, Delaware, Hawaii, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, and Pennsylvania. See J. BEASLEY, *supra* note 23, at 101-66.

62. Wade, *supra* note 23, at 556.

63. Sales, *supra* note 45, at 523. Design defects arise in the creation of the idea for a product and prior to the manufacturing process. Products with design defects leave the assembly line exactly as the manufacturer intended. See J. BEASLEY, *supra* note 23, at 69. Manufacturing defects arise during the manufacturing process from an unintended malfunction or error. *Id.* Marketing and sales defects arise from the manufacturer's failure to provide adequate directions or warnings regarding the use of the product. *Id.* at 71.

64. Sales, *supra* note 45, at 523-24.

65. *Id.*

66. *Id.* at 525.

67. See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965). This comment provides:

Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary uses. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it *unreasonably* dangerous. . . . The seller of such products . . . is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

In this case the court first must determine whether the utility of the product outweighs the risk of harm caused by its use.⁶⁸ If the benefits of the product exceed the risks, then the product is not unreasonably dangerous per se and the manufacturer may market it if he provides adequate warnings.⁶⁹

Foreseeability of harm is the primary issue in failure-to-warn cases.⁷⁰ Most jurisdictions require the manufacturer to warn of only those dangers about which it knows or reasonably can foresee at the time the product leaves the seller's hands.⁷¹ When evaluat-

Id.

68. *Sales*, *supra* note 45, at 540. "Asbestos-related cases provide the courts with a classic utility versus danger evaluation." *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1355 (E.D. Tex. 1981), *rev'd in part*, 681 F.2d 334 (5th Cir. 1982). Asbestos products have great utility in society as heat resistant insulation and pipe covering. *See supra* note 7.

Most asbestos decisions bypass discussion of whether asbestos products are so dangerous that the manufacturers should not have placed them on the market, and they go directly to the duty to warn question. *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Indeed, the balancing of risks and utility is rarely at issue in failure to warn cases. *See Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 242-44, 432 A.2d 925, 932 (1981). The courts focus instead on the adequacy of the manufacturer's efforts to warn users of the dangers in its products, because "regardless of the utility and risk of a product without warnings, a warning can generally be added without diminishing utility." *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 201 n.5, 447 A.2d 539, 545 n.5 (1982).

69. *See supra* note 67. Even if the court considers the product to be unavoidably unsafe, it may be unreasonably dangerous in the absence of adequate warnings. *See RESTATEMENT (SECOND) OF TORTS* § 402A comment j (1965). This comment provides:

Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

.....

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

Id.

70. *Sales*, *supra* note 45, at 543.

71. *Id.*; *Hulsen, Design Liability and State of the Art: The United States and Europe at a Cross Roads*, 55 ST. JOHN'S L. REV. 450, 474 n.83 (1981); *see, e.g., Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975)(applying Minnesota law); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1088 (applying Texas law); *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); *Peterson v. B/W Controls, Inc.*, 50 Ill.

ing whether the manufacturer should have foreseen a particular danger, these courts attribute to the manufacturer the knowledge of an expert in the field.⁷² They thus impute to the manufacturer all information about its product that was available when the product entered the stream of commerce.⁷³

Some courts, however, eliminate the foreseeability requirement and impute to the manufacturer knowledge of its product's dangerous propensities even though the danger was scientifically undiscoverable when it sold the product.⁷⁴ These courts effectively impute to the manufacturer all information about its product that exists *at the time of trial*.⁷⁵ "A major concern of strict liability," these courts reason, "is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them."⁷⁶ These courts thus would impose liability without regard to whether the manufacturer knew, should have known, or reasonably could have known about the danger.⁷⁷

Many courts address the foreseeability issue in terms of a "state-of-the-art" defense.⁷⁸ The issue is the same in both instances: whether the manufacturer can be liable even though the dangers of its product were scientifically undiscoverable when it

App. 3d 1026, 366 N.E.2d 144 (1977); *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. App. 1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976).

72. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1089; *see supra* authorities cited note 34.

73. This imputation is the only distinction between strict liability for failure to warn and negligence. *See Sales, supra* note 24, at 545. Some courts and commentators have suggested that the failure to warn analysis is identical under strict liability and negligence. *See J. BEASLEY, supra* note 23, at 423-24; *Wade, supra* note 46, at —; *see also Basko v. Sterling Drug, Inc.*, 416 F.2d 417 (2d Cir. 1969).

74. *See, e.g., Hamilton v. Hardy*, 37 Colo. App. 375, 385-86, 549 P.2d 1099, 1108-09 (1976); *Prentice v. Acme Mach. & Supply Co.*, 226 Kan. 406, 601 P.2d 1093 (1979); *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974); *Little v. PPG Indus., Inc.*, 19 Wash. App. 812, 579 P.2d 940 (1978), *aff'd as modified*, 92 Wash. 2d 118, 594 P.2d 911 (1979); *Haugen v. Minnesota Mining & Mfg. Co.*, 15 Wash. App. 379, 550 P.2d 71 (1976).

75. *See Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978). Critics of this approach have argued that it effectively imposes absolute liability. *See Birnbaum and Wrubel, N.J. High Court Blazes New Path in Holding a Manufacturer Liable*, Nat'l L.J., Jan. 24, 1983, at 24, col. 1; *Sales, supra* note 45, at 545-46; *supra* notes 61-62.

76. *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. at 204, 447 A.2d at 546.

77. *See id.*; *Keeton, Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 407-08 (1970).

78. *See, e.g., Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. at 196, 447 A.2d at 542.

marketed the product. The term "defense," however, may be a misnomer in those jurisdictions that require a manufacturer to warn only of foreseeable dangers. The plaintiff in those jurisdictions apparently must prove by a preponderance of the evidence that the defendant knew or should have known of the dangers inherent in the use of its product.⁷⁹ Some commentators, on the other hand, suggest that the defendant should have the burden of proving that the dangers of his product were not foreseeable.⁸⁰ Of course jurisdictions that have eliminated the foreseeability requirement hold manufacturers liable regardless of whether they knew, should have known, or reasonably could have known of a product's dangers.⁸¹ Thus, these courts refuse to admit state-of-the-art evidence at all.⁸²

Despite these differences, courts generally require plaintiffs to establish five basic elements to recover in strict liability for a failure to warn. First, the intended use of the product must carry an inherent risk of harm to the consumer. Second, the manufacturer must have actual or constructive knowledge of the risk of harm. Third, the manufacturer must fail to warn or fail to warn adequately of the product's dangers. Fourth, the lack of warning must make the product unreasonably dangerous to the consumer. Last, this failure to warn must proximately cause the plaintiff's injuries.⁸³

B. *Application of Theories of Liability to Asbestos Cases*

Although asbestos plaintiffs may sue in negligence, breach of warranty, or strict tort liability,⁸⁴ most reported asbestos decisions

79. See *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 104 (1980); Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 Nw. U.L. REV. 1, 12 (1982).

80. Professor Spradley has suggested that defendants should have the burden of producing evidence showing that a danger was undetectable or unsolvable at the time of marketing, but he would not make the state of the art an actual affirmative defense. Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability*, 67 MINN. L. REV. 343, 348, 439 (1982). Some commentators have argued that the burden of persuasion should be on the defendant to show that the dangers of his product were undetectable when the manufacturer marketed the product. See Wade, *supra* note 46, at ____.

81. See Robb, *supra* note 79, at 13; Wade, *supra* note 46, at ____.

82. See Robb, *supra* note 79, at 14-16.

83. Sales, *supra* note 24, at 524. Both courts that require foreseeability and those that do not require foreseeability apply these same basic elements. These courts differ only about whether a particular manufacturer has constructive knowledge of its product's dangers.

84. *Id.* at 523-24. Victims of asbestos also may seek damages from asbestos manufacturers on the basis of fraud, although no reported decision has allowed recovery on that ground. The elements of a cause of action for fraud are: (1) a false representation of an

apply either negligence or strict liability. Moreover, most of these cases focus on the asbestos manufacturer's failure to warn the consumer of the dangers inherent in using asbestos products.⁸⁵ In most jurisdictions—those that hold manufacturers liable only for foreseeable dangers—the failure to warn analysis is identical under either negligence or strict liability.⁸⁶ A few courts, however, recently have rejected this approach and have distinguished between negligence and strict liability in failure to warn cases.⁸⁷

1. Strict Products Liability and the Foreseeability Requirement in Asbestos Litigation

a. Asbestos Decisions Applying the Foreseeability Requirement

The leading asbestos products decision applying a failure to warn analysis is *Borel v. Fibreboard Paper Products Corp.*⁸⁸ In *Bo-*

existing fact; (2) the speaker's knowledge of the statement's falsity; (3) the speaker's intent for the plaintiff to act upon the statement; (4) the plaintiff's reliance on the statement; and (5) damage to the plaintiff. See W. PROSSER, *supra* note 8, § 105. See also *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. at 192. The plaintiff does not have to establish privity of contract to recover under fraud. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. at 192-93. Courts have recognized, however, that fraud requires clear and convincing proof, rather than the preponderance of the evidence standard of strict liability. See Comment, *supra* note 24, at 1318-20.

An asbestos plaintiff offered this theory in *Starling v. Seaboard Coast Line R.R.* in which plaintiffs alleged that manufacturers of asbestos insulation products had made false representations about the dangers of these products. 533 F. Supp. at 192. Further, plaintiffs claimed that the manufacturers intended to induce the workers to continue to use the products and that plaintiffs relied on these representations. *Id.* The court held that if plaintiffs could prove that they had suffered harm and that the manufacturers had engaged in this fraudulent conduct, they could recover. *Id.* Based on *Starling*, asbestos plaintiffs may be able to recover under this theory if they can prove that the defendants knew of the danger and concealed this information. See Comment, *supra* note 24, at 1317.

85. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

86. E.g., *Basko v. Sterling Drug, Inc.*, 416 F.2d 417 (2d Cir. 1969); see J. BEASLEY, *supra* note 23, at 423-24. For unavoidably unsafe products § 402A follows the negligence concept in duty to warn cases, and, therefore, "the two theories are virtually identical." *Id.* at 427.

87. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *infra* notes 160-78 and accompanying text.

88. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In a strict liability action, plaintiffs in asbestos litigation must prove the following elements:

1. Defendants manufactured, marketed, sold, distributed, or placed in the stream of commerce products containing asbestos.
2. Products containing asbestos are unreasonably dangerous.
3. Asbestos dust is a component producing cause of mesothelioma [or asbestosis].
4. Decedent was exposed to defendant's products.
5. The exposure was sufficient to be a producing cause of mesothelioma [or asbestosis].

rel plaintiff,⁸⁹ an insulation installer, brought an action against eleven manufacturers of asbestos insulation materials.⁹⁰ Plaintiff had contracted asbestosis⁹¹ and sued defendants for negligence, gross negligence, breach of warranty, and strict liability.⁹² Plaintiff based the strict liability claim on the manufacturers' failure to provide adequate warnings of the foreseeable dangers associated with the use of asbestos products.⁹³ The jury found for plaintiff on the negligence count,⁹⁴ but it did not award damages because it also found plaintiff contributorily negligent.⁹⁵ On the strict liability count the jury awarded damages against all defendants.⁹⁶

Applying the standard failure to warn analysis,⁹⁷ the United States Court of Appeals for the Fifth Circuit upheld the jury's findings relating to strict liability. First, the court found that the manufacturer could have foreseen that insulation workers might suffer harm from inhaling asbestos dust.⁹⁸ The court observed that

6. Decedent contracted mesothelioma [or asbestosis].

7. Plaintiffs suffered damages.

Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 838 (E.D. Tex. 1980).

89. Plaintiff died before trial, and his wife substituted as plaintiff. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d at 1086.

90. *Id.* Plaintiff settled with four defendants and the court instructed a verdict in favor of the fifth because plaintiff could not prove exposure to any of that company's products. *Id.* at 1086 n.17. The remaining defendants were: Fibreboard Paper Products Corp., Johns-Manville Products Corp., Pittsburgh Corning Corp., Phillip Carey Corp., Armstrong Cork Corp., and Rubberoid Corp. *Id.* at 1086.

91. For a discussion of asbestosis and other related diseases see *supra* notes 9-16 and accompanying text. Mr. Borel testified in deposition that at the end of a day dust from the insulation materials covered his clothes and that he blew "dust out of his nostrils by the handfuls." 493 F.2d at 1082.

92. Mr. Borel alleged that defendants: (1) failed to take reasonable precautions or to exercise reasonable care to warn him of the danger to which he was exposed as an insulation worker; (2) failed to warn him about proper wearing apparel and protective equipment and appliances or method of handling the various products; (3) failed to test the asbestos products to determine the dangers associated with their use; and (4) failed to remove the products from the market once they determined that the products would cause asbestosis. 493 F.2d at 1086.

93. *Id.*

94. The jury found that all defendants except two were negligent and none were grossly negligent. *Id.*

95. *Id.*

96. *Id.*

97. See *supra* notes 63-83 and accompanying text. Texas law controlled the case, and the Texas Supreme Court had adopted the theory of strict liability in tort as expressed in the *Restatement (Second) of Torts*. 493 F.2d at 1087.

98. *Id.* at 1083-86. The court emphasized that the danger must be foreseeable for the manufacturer to be liable. The foreseeability requirement, the court stated, coincides with the standard of due care in negligence cases, *id.* at 1088, except that the manufacturer is held to possess the knowledge and skill of an expert in the field, *id.* at 1089. See *supra* notes

several studies published in the 1930's and 1940's provided defendants with sufficient information to conclude that asbestos exposure could be dangerous.⁹⁹ Second, the court held that once the danger became foreseeable defendants had a duty to warn of this danger.¹⁰⁰ Third, the court affirmed the jury's finding that defendants failed to provide any warnings and that this failure to warn made the product unreasonably dangerous.¹⁰¹ Last, the court upheld the finding that the unreasonably dangerous condition of defendant's product was the proximate cause of plaintiff's injury.¹⁰²

The United States Court of Appeals for the Eighth Circuit applied a similar analysis in *Karjala v. Johns-Manville Products Corp.*¹⁰³ In *Karjala* plaintiff, an insulation worker, had become exposed to asbestos dust and had contracted asbestosis; consequently, he brought an action alleging that defendant failed to warn him of the products' dangers.¹⁰⁴ The trial court awarded damages to plaintiff and the court of appeals affirmed the trial court's findings on the strict liability claim.¹⁰⁵ Citing *Borel* the Eighth Circuit stated that an asbestos manufacturer may be subject to strict liability in tort if it fails to provide adequate warnings regarding the use of its product.¹⁰⁶ Applying the standard of an expert in the field, the court determined that the manufacturer's duty to warn users about the product's potential danger depends on the manufacturer's knowledge, whether actual or constructive, of the risks associated with the product's use.¹⁰⁷ Moreover, the court affirmed the jury's finding that defendant should have known of these risks.¹⁰⁸

70-73 and accompanying text.

99. The court discussed at length the extent of defendants' knowledge of the dangers associated with insulation products containing asbestos. *Id.* at 1083-86. The court concluded that ample evidence in the record indicated recognition of the danger from inhaling asbestos at least as early as the 1930's. *Id.* at 1092. See *infra* notes 114-59 and accompanying text for a discussion of the research on asbestos diseases. The court also noted that none of the defendants ever tested the product to determine its effect on industrial insulation workers. *Id.*

100. The court rejected defendants' argument that the danger of inhaling asbestos was so obvious to insulation workers that defendants had no duty to warn. *Id.* at 1093, 1105.

101. *Id.* at 1093.

102. This conclusion implies that had the manufacturers provided adequate warnings, plaintiff would have chosen to avoid the danger. *Id.*

103. 523 F.2d 155 (8th Cir. 1975).

104. *Id.*

105. *Id.*

106. *Id.* at 158-59.

107. *Id.*

108. *Id.* at 159. The court noted that plaintiff was an insulation worker, not a factory

The United States Court of Appeals for the Sixth Circuit in *Moran v. Johns-Manville Sales Corp.*¹⁰⁹ recently adopted the *Borel* analysis. In *Moran* plaintiff, an asbestos insulation installer, brought a strict liability action against the asbestos manufacturer.¹¹⁰ The trial court applied Ohio products liability law, which follows the *Restatement (Second) of Torts*, and held defendant strictly liable for failing to place warnings on its insulation products.¹¹¹ The court of appeals cited *Borel* and noted that a duty to warn attaches "whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it."¹¹² Evaluating plaintiff's evidence that defendant should have known of the significant health hazards to insulation installers, the court concluded that the jury did not err in holding defendant strictly liable for a failure to warn.¹¹³

b. Proving Foreseeability Against Asbestos Manufacturers

The evidence regarding whether asbestos manufacturers foresaw or reasonably should have foreseen the dangers resulting from the use of their products is contradictory and, to an extent, inconclusive. The first reported cases of asbestos-related disease occurred in 1906 and 1907.¹¹⁴ These reports received little attention

worker. This distinction between insulation installers and asbestos factory workers is important because the danger to asbestos mill workers became apparent before the danger to insulation installers. *Id.* at 157-58; *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 197, 447 A.2d 539, 542-43 (1982). Thus, at some point the danger of asbestos to factory workers may have been foreseeable while the danger to installers was not. Indeed, asbestos manufacturers usually settle before trial cases brought by mill workers. *Id.*

Defendant in *Karjala* contended at trial that it could not have foreseen the dangers to insulation installers. To support this contention, defendant introduced the Fleischer-Drinker report and the Selikoff report. For a discussion of these reports, see *infra* notes 137-43 and accompanying text. Defendant alleged that it could not have known of the hazard to insulation workers until the publication of the second report. *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 157 (8th Cir. 1975).

109. 691 F.2d 811 (6th Cir. 1982).

110. *Id.* at 813.

111. *Id.* at 813-14.

112. *Id.* at 814 (quoting *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1089).

113. 691 F.2d at 814-16. The court rejected defendant's argument that the Fleischer-Drinker study, which concluded that plaintiff's occupation was not dangerous, excused defendant's failure to place warnings on its insulation products. *Id.*

114. The first reported cases of asbestos-related disease were in textile workers. Pliny the Younger commented as early as the first century A.D. on the sickness of slaves who wove asbestos cloth. Mansfield, *supra* note 7, at 864. In 1906 Mr. M. Auribault, an inspector for the French Department of Labor, suggested that exposure to asbestos caused the deaths of 50 textile mill employees. This conclusion was not verified by scientific data. In 1907 Dr. H. Montagu-Murry reported the first case of asbestosis. ASBESTOS LITIG. REP. (ANDREWS) 2,

outside the scientific community. Although six states between 1913 and 1919 enacted workers' compensation laws that covered asbestosis,¹¹⁵ asbestos research received little attention until 1924¹¹⁶ when British scientist W.E. Cooke reported the first verifiable death caused by asbestos exposure. The Cooke report's conclusive link between exposure to asbestos and lung disease¹¹⁷ stimulated European and American research into the relation between asbestos and respiratory diseases.¹¹⁸

In 1927 the American medical community reported the first official claims in the United States for compensation associated with asbestos,¹¹⁹ and in 1932 and 1933 American asbestos manufacturers settled the first lawsuits brought by asbestosis victims.¹²⁰ By that time the leading producers of asbestos were aware of a potential health problem in the industry and provided funds to Dr. Anthony J. Lanza to conduct a study.¹²¹ Dr. Roscoe Gray, surgical director for Aetna Life Insurance Company, released further evidence of the harmful nature of asbestos exposure in 1934. Dr. Gray concluded:

9 (Feb. 7, 1979).

115. The states were Iowa (1913), Illinois (1913), Hawaii (1915), California (1917), Wisconsin (1919), and Connecticut (1919). ASBESTOS LITIG. REP. (ANDREWS) 9 (Feb. 7, 1979).

116. In 1917 an English researcher noted that X-ray changes similar to those caused by pneumoconiosis in 15 individuals who had suffered exposure to asbestos. In 1918 the United States Department of Labor reported that American and Canadian insurance companies generally did not issue life insurance policies to asbestos workers because of their increased health risks. *Id.* at 2, 9; see Mehaffey, *supra* note 2, at 343 n.3; Note, *supra* note 2, at 698.

117. Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, 2 BRIT. MED. J. 147 (1924); Cooke, *Pulmonary Asbestosis*, 2 BRIT. MED. J. 1024 (1927); ASBESTOS LITIG. REP. (ANDREWS) 3, 9 (Feb. 7, 1979). Dr. W. E. Cooke based his study on the autopsy of a 33-year old woman who had worked for 20 years in a British asbestos factory. He found a large amount of asbestos dust in the woman's lungs. Ironically, Mr. Henry Ward Johns, the founder of Johns-Manville, died from "dust phthisis pneumonitis" in 1898. ASBESTOS LITIG. REP. (ANDREWS) 9 (Feb. 7, 1979).

118. In 1930 Drs. Merewether and Price reported to Parliament that "the inhalation of asbestos dust over a period of years results in the development of a serious type of fibrosis of the lungs." The report concluded that improved ventilation and dust suppression would guard against the ill effects of exposure. The International Labor Office in Geneva also recognized the urgency of the problem. Mansfield, *supra* note 7, at 864-65; Note, *supra* note 2, at 698 n.100; ASBESTOS LITIG. REP. (ANDREWS) 9-38 (Feb. 7, 1979).

119. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (citing Lanza, *Asbestosis*, 106 J.A.M.A. 368 (1936)).

120. ASBESTOS LITIG. REP. (ANDREWS) 3 (Feb. 7, 1979). In 1932 Raybestos-Manhattan Co., Hartford Accident and Indemnity Co., and the American Surety Co. paid \$2,500 to settle a suit initiated by Addie M. Platt. Johns-Manville Corp. paid \$35,000 to settle 11 asbestosis claims the following year. *Id.*

121. Johns-Manville Corp. and Raybestos-Manhattan Co. originally provided funding to Dr. Lanza in 1929. Note, *supra* note 2, at 698.

Asbestos products inhaled into the lung produce an exceedingly severe and perhaps fatal inflammation. This condition, called asbestosis, is not so important as many other forms of mineral irritation of lung tissue, because of its infrequency. However, it will become more prevalent as the industry grows. . . . Since asbestosis is incurable, and usually results in total permanent disability followed by death, care and caution should be used before a claim is assumed. This is a very serious disease. . . . Particles once ingested continue their slow, insidious tissue destruction through the years, even though exposure may long have terminated. Death usually occurs within a year after the patient can no longer work.¹²²

Some of the most damaging evidence against asbestos manufacturers are the Sumner Simpson papers, highly publicized correspondence written in late 1934 and early 1935 between members of the asbestos manufacturing community.¹²³ These papers establish that the major asbestos manufacturers either knew, should have known, or were at least very concerned about the potential dangers caused by exposure to their asbestos products.

In one of the first of these letters, Johns-Manville Corporation attorney Mr. Vandiver Brown wrote to Dr. Lanza: "All we ask is that all of the favorable aspects of the survey be included and that none of the unfavorable be unintentionally pictured in darker tones than the circumstances justify. I feel confident we can depend on you and Dr. McConnell to give us this 'break.'"¹²⁴ The results of the Lanza study showed that over half of the workers examined had some form of lung damage, although the study reported no evidence of marked disability.¹²⁵

In May 1935 Dr. K.A. Lynch published the first report linking asbestos exposure to carcinoma of the lung.¹²⁶ The newly created *Asbestos Magazine* sought to publish much of this damning information about asbestos. Concerning the magazine's request for information, Mr. Brown wrote Mr. Simpson: "I quite agree with you that our interests are best served by having asbestos receive the minimum of publicity."¹²⁷ In 1936 Mr. Simpson responded to a

122. ASBESTOS LITIG. REP. (ANDREWS) 3 (Feb. 7, 1979).

123. Mr. Sumner Simpson was the president of Raybestos-Manhattan Co. from 1929 through 1948. See ASBESTOS LITIG. REP. 3-5 (ANDREWS) (FEB. 7, 1979); *id.* at 529-91 (July 31, 1979).

124. Letter from Mr. Vandiver Brown to Dr. Anthony Lanza (Dec. 21, 1934), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 538 (July 31, 1979).

125. Lanza, McConnell, & Fehnel, *Effects of Inhalation of Asbestos Dust on the Lungs of Asbestos Workers*, 50 PUB. HEALTH REP. 1, 7-8 (1935); Note, *supra* note 2, at 699; ASBESTOS LITIG. REP. (ANDREWS) 3 (Feb. 7, 1979).

126. Lynch & Smith, *Pulmonary Asbestosis III: Carcinoma of the Lung in Asbestos-Silicosis*, AM. J. CANCER 24, 56 (1935); Mansfield, *supra* note 7, at 865.

127. Letter from Mr. Vandiver Brown to Mr. Sumner Simpson (Oct. 3, 1935), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 550 (July 31, 1979).

proposed United States Public Health Service X-ray survey that he did not want the results disclosed to "shyster lawyers and doctors in the country" because of a fear of extensive litigation.¹²⁸ In 1937 ten of the nation's largest asbestos manufacturers¹²⁹ provided financing for the Saranac Laboratory studies, conducted by Dr. Leroy V. Gardner; these manufacturers, however, greatly circumscribed the research.¹³⁰ Although the studies continued for the next twenty-five years, the researchers never published conclusive results.¹³¹ Finally, in 1938 the United States Public Health Service's Dreessen report discussed the health risks facing asbestos textile workers.¹³² The report advocated the elimination of hazardous exposure and the increased use of safety measures.¹³³

While the research of this period established that exposure to asbestos could be dangerous, this research had limited scope. First, most researchers believed that asbestos was harmful only if the dust concentration was high or the exposure extended over a long period of time. Second, few studies, except for the Lynch report, recognized the carcinogenic properties of asbestos. Last, the

128. Letter from Mr. Sumner Simpson to United States Public Health Service (1936), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4 (Feb. 2, 1979).

129. These manufacturers were: Johns-Manville Corp., Thermoid Rubber and Southern Asbestos, Keasbey & Mattison (predecessor of Nicolet Industries, Inc.), Asbestos Manufacturing, Russell Manufacturing, Raybestos-Manhattan, Inc., American Brake Block Corp., Gatke Corp., United Asbestos & Rubber Co. (Unarco), and United States Gypsum Co. Note, *supra* note 2, at 699 n.106.

130. Mr. Brown wrote the Saranac Laboratories regarding conditions of the funding agreement. In the letter, he stated,

It is our further understanding that the results obtained will be considered property of those who are advancing the required funds, who will determine to what extent and in what manner they shall be made public. In the event it is deemed desirable that the results be made public the manuscript of your study will be submitted to us for approval prior to publication.

Letter from Mr. Vandiver Brown to Dr. Leroy U. Gardner (Nov. 20, 1936), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 557-58 (July 31, 1979). Mr. Simpson reiterated this sentiment in a letter to Mr. Brown: "The reports may be so favorable to us that they would cause us no trouble but they might be just the opposite which could be very embarrassing." *ASBESTOS LITIG. REP. (ANDREWS)* 4 (July 31, 1979) (quoting letter from Mr. Simpson to Mr. Brown (1939)).

131. In fact, the early Saranac studies tended to conflict with the results of the other research. In one early report Dr. Gardner stated that short fiber asbestos was inactive and that asbestosis "quite definitely" does not progress after cessation of exposure. Letter from Dr. Leroy U. Gardner to Mr. Vandiver Brown (Nov. 5, 1941), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 1266 (Jan. 11, 1980).

132. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1084; Dreessen, Dallavalle, Edwards, Miller, & Sayers, *A Study of Asbestosis in the Asbestos Textile Industry*, *PUB. HEALTH BULL.* No. 241 (1938).

133. *Id.*

researchers confined most of their work to the effects of asbestos exposure on mine workers, milling workers, carding operators, and textile workers; none of the studies examined insulation workers, shipyard workers, consumers, bystanders, or persons exposed to asbestos in the household.¹³⁴

A series of reports published in the 1940's indicated that asbestos was not dangerous in every work environment. In 1943 Elliot DeForest, Secretary of the Northwest Magnesia Association, wrote:

In our entire practice of handling asbestos in the State of Washington, and our Association members have been in this business over 40 years, we have no knowledge of anyone who is even acquainted with the coined word "Asbestosis" much less ever having contracted the disease. . . . [T]he recorded singular case of Asbestosis as noted in the medical journals occurred in England some forty or fifty years ago under must [sic] unsanitary and inhuman working conditions. Since this foreign disease has not come to our attention, we feel it should be left in Europe where it belongs and not brought to our local communities and create hysteria and fear amongst the families of our contented workmen who are now enjoying good health and living to a ripe old age, which is significant of the Pipe Coverers Union as compared with other trades.¹³⁵

In 1944 Dr. Gardner reported the low incidence of asbestosis among mine workers at the huge mining operation in Asbestos, Quebec.¹³⁶ The most important—and most misleading—report of the 1940's was the Fleischer-Drinker report, published in 1945.¹³⁷ The researchers examined 1,074 insulation workers in various Navy shipyards, and, finding only three cases of asbestosis, they concluded that "asbestos covering of naval vessels is a relatively safe operation."¹³⁸ Nonetheless, in 1947 the American Conference of Governmental Industrial Hygienists recommended limiting as-

134. Mansfield, *supra* note 7, at 865; Note, *The Causation Problem*, *supra* note 2, at 699; ASBESTOS LITIG. REP. (ANDREWS) 3 (Feb. 7, 1979).

135. Letter from Mr. Elliot DeForest to Mr. John E. Morgan, supervisor of safety, State of Washington Department of Labor and Industries (June 14, 1943), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 579-80 (July 31, 1979).

136. In 1944 Dr. Gardner reviewed the files of 200 to 300 workers at the Quebec mine. He reported only two cases of asbestosis. This result was corroborated by Drs. Robert and Vestal of the North Carolina State Industrial Commission. Letter from Dr. Leroy U. Gardner to Mr. Vandiver Brown (July 15, 1944), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 1322-23 (Jan. 25, 1980).

137. Fleischer, Viles, Gage, & Drinker, *A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels*, 28 J. INDUS. HYGIENE TOXICOLOGY 9 (1945).

138. *Id.* "Significantly, ninety-five percent of those examined had worked at the trade for less than ten years. Since asbestosis is usually not diagnosable until ten to twenty years after initial exposure, the authors' conclusion has been criticized as misleading." *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1084. Ironically, these workers are primarily responsible for the current asbestos litigation explosion.

bestos exposure to five million parts per cubic foot of air.¹³⁹

Although researchers conducted further studies throughout the 1950's, the Fleischer-Drinker report generally was accepted until the publication of the Selikoff studies in 1965. In this report Dr. Irving J. Selikoff and the Mount Sinai School of Medicine presented conclusive evidence that exposure to asbestos insulation was extremely hazardous to insulation workers.¹⁴⁰ The Selikoff report notified all asbestos insulation manufacturers of the associated health hazards and "set the stage for the present asbestos related litigation nightmares."¹⁴¹ By 1967 asbestos manufacturers placed warnings on virtually all asbestos products. The Conference of Governmental Industrial Hygienists by 1968 reduced the safety level of atmospheric concentration of asbestos dust to two million parts per cubic foot. Legislative and judicial activity concerning asbestos increased.¹⁴² Before the 1960's ended, medical researchers revealed another startling discovery: asbestos exposure causes mesothelioma.¹⁴³

Despite the ambiguity of the studies before 1965, evidence of the dialogue within the asbestos manufacturing community demonstrates that the manufacturers had some knowledge of asbestos'

139. *Id.* at 1084. Other reports published in the 1940's were less optimistic. Chief Inspector of British Factories A.W. Garrett cautioned: "I would, however, emphasize that, while asbestos dust may not have any apparent effects at first, experience shows that, particularly if the workers are exposed to dust in substantial concentrations, serious results are apt to develop later." Letter from Mr. A.W. Garrett to Mr. Sumner Simpson (August 1945), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 585-86 (July 31, 1979).

Asbestos plaintiffs also have proffered evidence that Dr. Kenneth W. Smith, chief Canadian medical officer for Johns-Manville Corporation, recognized the harmful nature of asbestos exposure by this time. See *infra* notes 145-47 and accompanying text.

140. Dr. Selikoff and his coauthors examined 1522 members of an insulation workers union. The research team found evidence of asbestosis in over 50% of the workers examined. Over 90% of the workers with more than 40 years experience had abnormalities in their lung tissue. The authors concluded that "asbestosis and its complications are significant hazards among insulation workers." Selikoff, Churg, & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139, 152 (1965). Other reports are in agreement. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1085 n.16; ASBESTOS LITIG. REP. (ANDREWS) 5-6 (Feb. 7, 1979). Studies reveal a high incidence of asbestosis among shipboard-trade workers, pipe insulators, floor installers, automobile repairmen, asbestos-cement manufacturers, and family members living in the same household with an asbestos worker. *Id.* at 5-6; see Note, *supra* note 2, at 700-01.

141. Mansfield, *supra* note 7, at 865.

142. The federal courts reduced the government standard for permissible levels of asbestos dust in work areas in 1974. Note, *supra* note 2, at 701.

143. Mehaffey, *supra* note 2, at 344; see I. SELIKOFF & D. LEE, *supra*, note 10; Wagner, Sleggs, & Marchand, *Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province*, 17 BR. J. IND. MED. 260 (1960).

dangers.¹⁴⁴ Moreover, Dr. Kenneth W. Smith, the medical director for Johns-Manville Corporation's Canadian operations from the mid-1940's until 1951, has said that he informed certain senior vice presidents and the corporate legal department about the dangers of asbestos as early as the early 1950's.¹⁴⁵ Dr. Smith advised the company that instances of asbestos disease extended beyond its own employees to other workers using Johns-Manville products.¹⁴⁶ This warning must have included the insulation trade. According to Dr. Smith, Johns-Manville officials responded to his warnings by saying, " 'Yes, we recognize the hazard. What is it going to cost us to do this and what are the potential hazards of assuming a label in workman's compensation or public liability or such things as that.' "¹⁴⁷ Therefore, by this time significant evidence suggests that asbestos manufacturers actually knew or at least should have known about the dangers of their products. Indeed, knowledge of asbestos' dangers increased almost continuously throughout this century, and at some point manufacturers should have begun to warn consumers of the dangers of asbestos.

Presenting evidence of this knowledge at trial, however, presents significant problems. A variety of evidentiary issues concerning the admissibility of certain medical research reports and various other documents have arisen. The Sumner Simpson papers and the deposition of Johns-Manville's Dr. Smith form the focus of this controversy. These documents establish that specific members of the asbestos manufacturing community were aware of hazards attending the manufacturing process as early as the 1930's and 1940's.¹⁴⁸

Asbestos defendants, therefore, have sought to preclude the admission of these items under a variety of evidentiary theories. Defendants typically argue that the Sumner Simpson papers are inadmissible because: (1) they lack proper authentication; (2) the papers are hearsay and do not fall within any exception to the hearsay rule; (3) the papers do not constitute admissions; (4) the

144. Some juries, at any rate, have found that the manufacturers during this period reasonably should have foreseen the dangers of asbestos even to insulation workers. See *infra* notes 157-60 and accompanying text.

145. Transcript of deposition of Dr. Kenneth W. Smith (Jan. 13, 1976), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 1031, 1047 (Oct. 26, 1979). Dr. Smith was chief medical officer for the entire corporation during this period and remained in that capacity until his retirement in 1966.

146. *Id.*

147. *Id.*

148. See *supra* notes 123-33 and accompanying text.

documents specifically discuss the effects of asbestos exposure on manufacturing workers and hence are irrelevant to the insulation industry; and (5) the documents are confusing, misleading, and prejudicial.¹⁴⁹ Courts disagree on the admissibility of these documents, although the apparent trend is to admit them.¹⁵⁰

The Smith deposition raises other evidentiary questions. Plaintiffs first used this deposition in Pennsylvania and Kentucky lawsuits.¹⁵¹ Attempts to admit the deposition testimony in subsequent cases have not been entirely successful. Courts have admitted the deposition on the basis of relevancy and reliability.¹⁵² The courts that have denied admissibility have cited lack of privity between the parties, dissimilarity of issues, and undue prejudice as reasons.¹⁵³ While the bulk of the evidentiary litigation has comprised issues related to these documents, new and complex problems certainly will arise.¹⁵⁴

149. Brief for Defendant, *Wilkerson v. Raymark Indus., Inc.*, No. C79-2036A (N.D. Ga. Aug. 16, 1982). Courts have deemed the documents admissible in cases in which relevancy is established or when an exception to the hearsay rule applies. The ancient documents exception and the business records rule have been applied successfully in a number of cases. See *infra* authorities cited note 150.

150. For a discussion of the issues surrounding the admissibility of the Sumner Simpson letters, see *Parsons v. Celotex Corp.*, CV 478-319 (S.D. Ga. order issued Aug. 27, 1980), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 2556 (Nov. 14, 1980) (admitting the Sumner Simpson documents). For a discussion of the admissibility of the Smith deposition, see *In re Johns-Manville/Asbestosis Cases*, 93 F.R.D. 853 (1982) (following *Adkins v. Combustion Eng'g, Inc.*, No. 77-3032 (S.D.W. Va. Jan. 5, 1981) (admitting the deposition testimony)).

Defendants in *Wilkerson v. Raymark Indus., Inc.*, No. C79-2036A (N.D. Ga. 1982), argued that a majority of courts have refused to admit this evidence. Supplemental Brief for Defendant at 1-3, *Wilkerson v. Raymark Indus., Inc.*, No. C79-2036A (N.D. Ga. 1982). Defendant's only authority for that argument, however, was a list of unreported cases barring the evidence. *Id.* These cases include *McGrath v. Johns-Manville*, CV 76-2417 (D.N.J. Oct. 22, 1979), and *Oman v. Raybestos-Manhattan*, CV 76-178 (E.D. Va. Aug., 1982).

151. *Louisville Trust Co. v. Johns-Manville Corp.*, No. 174-922 (Ky. Cir. Ct. 1976); *DeRocco v. Forty-Eight Insulators, Inc.*, Nos. 7880 & 2281 (Pa. C. P. Allegheny County 1974).

152. *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1146-48 (N.D. Cal. 1982) (considerations in admitting the deposition include: (1) the unavailability of the deponent; (2) whether the deposition was taken in compliance with the law; (3) the motive, opportunity, and interest in developing the deponent's testimony; (4) the relevancy of the deposition of testimony; and, (5) whether admission will cause prejudice or confusion).

153. *Daniels v. Combustion Eng'g, Inc.*, 583 S.W.2d 768, 771 (Tenn. Ct. App. 1978) (tests for inadmissibility include: (1) same parties or parties in privity; (2) same issues or questions in controversy; (3) prejudice of the testimony; (4) judgment and verdict in one case would be evidence in another case; and (5) the legal existence of the first suit).

154. See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347-48 (5th Cir. 1982) (judicial notice); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1102-03 (5th Cir. 1973) (refreshing witness memory), *cert. denied*, 419 U.S. 869 (1974); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1155-56 (N.D. Cal. 1982) (incriminating minutes of As-

This history of asbestos disease research and industry correspondence demonstrates with reasonable certainty that asbestos manufacturers had sufficient knowledge of asbestos' dangers to millworkers to create as early as 1935 a duty to warn those workers. The record, however, does not establish conclusively that asbestos manufacturers knew or should have known that exposure to asbestos products would be hazardous to insulation workers. The early medical tests did not indicate that exposure to low concentrations of asbestos dust or exposure for short periods of time could cause asbestosis or mesothelioma. More importantly, the early reports did not consider the effects of asbestos exposure on insulation workers, and the initial studies of the insulation industry indicated that these workers were not in danger.¹⁵⁵ Only in 1965, when Dr. Selikoff released his study, did the asbestos manufacturers have conclusive proof that insulation workers were in danger.¹⁵⁶

Despite the lack of specific evidence prior to 1965 describing the dangers to insulation workers, many asbestos decisions have held that manufacturers had a duty to warn insulation workers long before the release of the Selikoff report.¹⁵⁷ Noting that none of the manufacturers had tested the product for dangers to insulation workers, the *Borel* court concluded that defendant manufacturer had sufficient knowledge in the 1930's to create a duty to warn insulation workers of the dangers of asbestos exposure.¹⁵⁸ Moreover, in *Karjala* the trial judge specifically instructed the jury on the distinction between factory workers and insulation workers,¹⁵⁹ and the jury found that Johns-Manville Corporation had

bestos Textile Institute meeting deemed admissible because authenticated and relevant; judicial notice); *id.* at 1149-50 (expert testimony); ASBESTOS LITIG. REP. (ANDREWS) 3562-3579 (July 10, 1981) (current efforts to depose Mr. Vandiver Brown fail); *id.* at 3628 (July 10, 1981) (same).

155. See *supra* notes 137-38 and accompanying text.

156. See *supra* notes 140-41 and accompanying text.

157. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 814-16 (6th Cir. 1982); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d at 158-59; *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1092-93.

158. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1092-93. The court discussed at length the various studies of the dangers asbestos presents to man. *Id.* at 1083-86. Based on this information the court of appeals determined that plaintiffs had produced ample evidence to show that the danger of asbestos "was widely recognized at least as early as the 1930s." *Id.* at 1092. The court, however, did not appear to make the important distinction between textile-mill workers and other workers who encountered the product farther down the production chain.

159. *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d at 156-58. The trial judge instructed the jury to "consider the knowledge which Johns-Manville had relative to factory

sufficient knowledge prior to plaintiff's exposure as an insulation worker in 1948 to create a duty to warn him.¹⁶⁰ Although these decisions indicate that asbestos manufacturers knew of the dangers to insulation workers, each asbestos case will turn on its own facts. No court has held as a matter of law that all asbestos manufacturers should have warned insulation workers as of a certain date. As a result, juries probably will continue to determine the issue of foreseeability.

2. Asbestos Decisions Eliminating the Foreseeability Requirement

A minority of jurisdictions have rejected the *Borel* approach and have held manufacturers liable even for unforeseeable dangers.¹⁶¹ These courts contend that the concept of foreseeability has no role in a strict liability action.¹⁶² The New Jersey Supreme Court recently used this strict approach in *Beshada v. Johns-Manville Products Corp.*,¹⁶³ in which asbestos workers and survivors of other workers brought suit against manufacturers and distributors of asbestos products for injuries caused by exposure to asbestos. Plaintiffs claimed that defendants were strictly liable for failing to warn of asbestos' dangers. Defendants asserted the state-of-the-art defense, under which manufacturers are liable only for injuries resulting from dangers scientifically discoverable at the time the product entered the stream of commerce.¹⁶⁴ The trial court denied plaintiffs' motion to strike the state-of-the-art defense and the supreme court granted leave to appeal.¹⁶⁵ The court, relying on its earlier decision in *Freund v. Cellofilm Properties, Inc.*,¹⁶⁶ rejected the state-of-the-art defense. Initially, the court

workers and whether or not this knowledge would put Johns-Manville on notice of the danger to Mr. Karjala as an installation worker." *Id.* at 158. Johns-Manville admitted that it knew as early as 1942 that asbestos would cause asbestosis in factory workers. *Id.*

160. Mr. Karjala began working as an asbestos installer in 1948. *Id.* at 156.

161. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *supra* notes 74-82 and accompanying text.

162. See J. BEASLEY, *supra* note 23, at 423.

163. 90 N.J. 191, 447 A.2d 539 (1982). This case was a consolidation of six actions for wrongful death and personal injury. *Id.* at 196, 447 A.2d at 542.

164. *Id.* at 197, 202, 447 A.2d at 542, 545; see *supra* notes 78-81 and accompanying text.

165. *Id.* The trial court in *Beshada* concluded that *Freund v. Cellofilm Prods., Inc.*, 87 N.J. 229, 432 A.2d 925 (1981), merely created a rebuttable presumption that a defendant had knowledge of the dangers of his products. *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. at 198-99, 447 A.2d at 543.

166. 87 N.J. 229, 432 A.2d 925 (1981).

noted that negligence and strict liability differ in failure to warn cases, because negligence is conduct-oriented and focuses on the actions of the manufacturer while strict liability is product-oriented and focuses on whether the product was reasonably safe for its intended use.¹⁶⁷ Further, the court stated that in failure to warn cases the issue is whether the manufacturer had reduced to the greatest extent possible the risks of using the product, not whether the utility of the product outweighed the risks of its use.¹⁶⁸ Rejecting defendant's argument that the court should impute only knowledge that existed at the time of manufacture or distribution,¹⁶⁹ the court imputed to the manufacturer the knowledge of the dangerous propensities of the product that was available at the time of trial.¹⁷⁰ Thus, New Jersey will impose strict liability whenever the product is unsafe, regardless of culpability or the state of technology at the time of manufacture.¹⁷¹

Commentators have criticized the few decisions that eliminate the foreseeability requirement in failure to warn cases.¹⁷² Specifically, they have argued that the *Beshada* decision incorrectly applied Dean Wade's analysis.¹⁷³ The New Jersey Supreme Court implied that Dean Wade would impute to the manufacturer all knowledge available at the time of trial.¹⁷⁴ The Wade test for strict liability, however, imputes to the manufacturer only that knowledge of the product's dangerous condition that was available when the product entered the stream of commerce.¹⁷⁵ Thus, applying the Wade test, the *Beshada* court should have allowed defendants to present evidence that when they sold the asbestos products, they could not have foreseen the dangers to insulation workers. Commentators also have accused courts that eliminate the foreseeability requirement of judicially transforming "the product supplier

167. 90 N.J. at 202, 447 A.2d at 545.

168. *Id.* at 199-200, 447 A.2d at 544. The court noted that this imputation of knowledge is a legal fiction: "It is another way of saying that for purposes of strict liability the defendant's knowledge of the danger is irrelevant." *Id.* at 200 n.3, 447 A.2d at 544 n.3.

169. *Id.* at 203-04, 447 A.2d at 546.

170. *Id.*

171. *Id.*

172. See Birnbaum & Wrubel, *supra* note 75, at 24-25; Sales, *supra* note 45, at 546.

173. The New Jersey Supreme Court has indicated its adoption of Dean Wade's strict liability analysis. *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. at 200, 447 A.2d at 544 (citing Wade, *supra* note 31, at 834-35). For a discussion of the Wade approach, see *supra* notes 53-58 and accompanying text.

174. 90 N.J. at 200, 447 A.2d at 544.

175. See Phillips v. Kimwood Mach. Co., 269 Or. 485, 492 n.6, 525 P.2d 1033, 1036 n.6 (1974).

into an insurer against product related accidents."¹⁷⁶ Further, these courts impose a standard of care greater than that of an expert in the field, because the manufacturer will be liable for failing to discover an undiscoverable danger.¹⁷⁷ In addition, the elimination of the foreseeability requirement may result in a disincentive to research. If the manufacturer will be liable for all knowledge available at the time of trial, he may avoid the discovery of product hazards and the development of new and safer products.¹⁷⁸ In view of these criticisms, other jurisdictions may not follow the New Jersey approach in failure to warn cases.

C. Summary

If a plaintiff can prove that he has an asbestos-related disease and can identify the asbestos products he encountered, strong authority supports his ability to recover. Several cases have determined that asbestos manufacturers negligently failed to warn insulation workers of the dangers of asbestos. Other courts have refused to admit evidence regarding the asbestos defendant's conduct and have held the defendant manufacturers strictly liable even though they could not have foreseen the dangers of asbestos. If the asbestos plaintiff cannot identify the manufacturer of the products he encountered, however, his route will be much more difficult. Therefore, to ensure recovery for an asbestos-related disease the plaintiff should be able to prove that a particular defendant's products caused the plaintiff's injuries.

III. CAUSATION

Causation in fact is a principal component of the chain of causation¹⁷⁹ in products liability actions. The purposes of the causa-

176. Sales, *supra* note 45, at 546.

177. Birnbaum & Wrubel, *supra* note 75, at 25.

178. *Id.*

179. While both causation in fact and medical causation are essential links in the chain of causation that a plaintiff must establish, they are distinguishable. In asbestos product litigation, causation in fact concerns whether a particular product actually caused plaintiff's injury. Medical causation, on the other hand, concerns the effects of asbestos inhalation on the human body and the medical capability of asbestos' causing a particular disease. See Comment, *supra* note 24, at 1336-37 n.138. In *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980), the court listed seven elements of the plaintiff's case in an asbestos products action. The following four elements represented the chain of causation: (1) Asbestos dust is a competent producing cause of the plaintiff's disease; (2) the plaintiff was exposed to the defendant's products; (3) the exposure was sufficient to be a producing cause of the plaintiff's disease; and (4) the plaintiff contracted the disease. *Id.* at 838. The first issue represents the medical causation requirement in the plaintiff's case. The other

tion in fact requirement are to delineate the scope of potential liability for an injury¹⁸⁰ and to assess moral blame and responsibility for the harm caused.¹⁸¹ Traditional tort principles place the burden of proving causation in fact on the plaintiff.¹⁸² Should the plaintiff fail to meet this burden, the court will deny his recovery of damages even though he demonstrates that he was injured and that the defendant committed a tortious act. Thus, courts have refused to impose liability on a defendant product manufacturer when the plaintiff could not trace his injury to the defendant's products.¹⁸³

Because of the long latency periods associated with asbestos-induced diseases,¹⁸⁴ the plaintiffs in asbestos products cases often find this burden of proving causation in fact extremely difficult to

three issues relate to causation in fact. In *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), the court described the distinction as a matter of "can it" cause the disease (medical causation) versus "did it" cause the plaintiff's disease (causation in fact). *Id.* at 1362. Because the causation in fact issue depends on the circumstances of the case, the parties will litigate it in each case. Medical causation, however, usually will not depend on the circumstances of a particular injury. Thus, the plaintiff may rely on collateral estoppel to prove medical causation with respect to diseases such as asbestosis and mesothelioma, for which the medical causation issue is well-established. *See infra* part VI. Medical experts, however, disagree about whether asbestos inhalation causes some other diseases such as gastrointestinal cancer. *See In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909 (J.P.M.D.L. 1977); Comment, *supra* note 24, at 1337 n.140. Consequently, the plaintiff will find medical causation more difficult to prove in cases concerning those diseases.

180. W. PROSSER, *supra* note 29, § 41, at 237; Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1629 (1981).

181. Fischer, *supra* note 180, at 1629-30.

182. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1965). The requirement that the plaintiff prove causation exists irrespective of the theory of liability on which he relies—negligence, breach of warranty, or strict liability. W. PROSSER, *supra* note 29, § 103, at 671-72; *see* Annot., 51 A.L.R.3d 1344, 1351-52 (1973).

183. *See, e.g.*, *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (court denied recovery to DES plaintiff who could not identify the manufacturer of the injury causing drug); *Wetzel v. Eaton Corp.*, 62 F.R.D. 22, 28 (D. Minn. 1973) (plaintiff must advance evidence to establish which of two manufacturers produced defective product); *Davis v. Yearwood*, 612 S.W.2d 917, 920 (Tenn. App. 1980) (court denied recovery to plaintiffs who could not identify the particular product that caused a fire in the padded cell of a jail). For a discussion of the identification problem in asbestos litigation, *see* Note, *supra* note 2; Comment, *Texas Asbestos Claims and Market Share Liability: New Remedy for an Old Tort*, 13 ST. MARY'S L.J. 957 (1982).

184. Asbestos-induced diseases may manifest themselves within 10 years after exposure, but the more common latency period is 25 to 30 years. The duration of latency may vary as the result of the asbestos type, the duration and intensity of exposure, and individual body chemistries. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). For a more thorough discussion about the latency periods of asbestos diseases, *see infra* notes 9-16 and accompanying text; *see also* Selikoff, Hammond, & Seidman, *Latency of Asbestos Disease among Insulation Workers in the United States and Canada*, ASBESTOS LITIG. REP. (ANDREWS) 3078 (Mar. 13, 1981).

meet. To prove causation in fact, the plaintiff customarily must identify both the product that injured him and that product's manufacturer.¹⁸⁵ This requirement, however, has many evidentiary problems. For example, a plaintiff whose asbestos-caused disease becomes diagnosable only after a twenty-year latency period may not recall accurately the brands of asbestos products to which he was exposed.¹⁸⁶ If the plaintiff's coworkers also cannot identify the manufacturer of the alleged injury-causing product, the employer's and the asbestos manufacturer's documents may enable the plaintiff to identify the proper defendants.¹⁸⁷ During the long latency period, however, sales receipts, records, invoices, purchase orders, and other pertinent documents may have been discarded, lost, or destroyed.¹⁸⁸ A plaintiff's exposure to several different asbestos products may complicate further the identification of the responsible manufacturer.¹⁸⁹ Proving which product and which exposure caused the plaintiff's injury often will be virtually impossible.¹⁹⁰ Furthermore, plaintiffs whose diseases arise not from working directly with an asbestos product but from working or living in the

185. In *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980), the California Supreme Court stated that "as a general rule, the imposition of liability depends upon a showing by the plaintiff that his . . . injuries were caused by the act of the defendant . . ." *Id.* at 597, 607 P.2d at 928, 163 Cal. Rptr. at 136.

186. See Note, *supra* note 2, at 681; Comment, *supra* note 15, at 83.

187. Henderson, *Product Liability Disease Litigation: Blueprint for Occupational Safety and Health*, TRIAL, Apr. 1980, at 25, 26.

188. See Note, *supra* note 2, at 681.

189. A plaintiff's exposure to numerous asbestos products is not unusual because many workers moved from jobsite to jobsite, and many employers obtained asbestos products from more than one manufacturer. *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.D.L. 1977); Henderson, *supra* note 187, at 26; Note, *supra* note 2, at 681; Comment, *supra* note 8, at 83.

190. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1083. Before addressing the issue of which exposure caused the plaintiff's injury, a court must make a more fundamental determination: did asbestos cause the plaintiff's disease? This determination comprises both the medical causation and the causation in fact issues: (1) is asbestos a competent producing cause of the disease suffered by the plaintiff; and (2) are any other substances competent producing causes of the plaintiff's disease, and are they in fact the cause of the plaintiff's injury? This issue frequently surfaces in asbestos product litigation because the most common plaintiff's diseases—*asbestosis*, *mesothelioma*, and *lung cancer*—may be caused by exposure to substances other than asbestos. Lung cancer is a common disease resulting from exposure to a variety of carcinogens including chromates, nickel, coke oven emissions, cigarette smoke, uranium, arsenic, auto emissions, and other pollutants. See Note, *supra* note 2, at 694 n.75. Likewise, medical research indicates that the inhalation of numerous other types of fibrous substances may trigger *mesothelioma* or cause scarring of the lung tissue identical to the symptoms of *asbestosis*. *Id.*

vicinity of asbestos products¹⁹¹ or asbestos dust will have even greater difficulty identifying the responsible manufacturer. These plaintiffs often must rely on others to identify the injury-causing product and its manufacturer because they have little or no first-hand knowledge regarding the source of the disease-causing asbestos.

Despite these potential obstacles, some plaintiffs in asbestos products cases can meet the burden of proving causation in fact.¹⁹² In *Borel v. Fibreboard Paper Products Corp.*¹⁹³ plaintiff carried his burden by offering persuasive circumstantial evidence to prove his exposure to defendants' products.¹⁹⁴ Although many asbestos victims, through no fault of their own, cannot identify the manufacturer of the disease-causing product, courts that apply traditional tort principles of causation nonetheless would deny recovery of damages.¹⁹⁵ Consequently, the plaintiffs in asbestos products cases have asserted alternative theories of recovery that relax the plaintiff's burden of proving causation. These theories eliminate the identification requirement or shift the burden of identifying the party responsible for the injury to the defendant manufacturers.¹⁹⁶ This part of the Special Project, therefore, reviews the prevalent alternative theories of recovery in tort law: alternative liability, concert of action, enterprise liability, and market share liability.

191. Among this class of plaintiffs are workers who worked near workers using asbestos products and demolition workers who may be exposed to asbestos dust while demolishing a building. See Note, *supra* note 2, at 681 nn.17-18. Consumers and wives of asbestos workers also contract asbestos-induced diseases as the result of their secondary exposure to asbestos. *Id.*

192. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

193. *Id.*

194. 493 F.2d at 1094. The *Borel* court resolved the problem of determining which exposure caused the disease by upholding the jury's finding that each exposure was a cause in fact of some injury to plaintiff. The court stated that when "tortious acts of two or more wrongdoers join to produce an indivisible injury, . . . all of the wrongdoers will be held jointly and severally liable for the entire damages." *Id.* at 1095 (quoting *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 255, 248 S.W.2d 731, 734 (1952)). The *Borel* court noted that the *Landers* rule applies equally well to cases in which the tortious acts did not occur simultaneously. 493 F.2d at 1095-96. In asbestos litigation this rule is particularly beneficial to plaintiffs because the successive acts of two or more defendants often combine to produce the plaintiff's injury. See, e.g., *id.* at 1095.

195. See *supra* authorities cited note 183.

196. For a discussion of these theories, see Fischer, *supra* note 180; LaMarca, *Market Share Liability, Industry-Wide Liability, Alternative Liability and Concert of Action: Modern Legal Concepts Preserving Liability for Defective But Unidentifiable Products*, 31 *DRAKE L. REV.* 61 (1982); Note, *supra* note 2; Comment, *supra* note 24; Comment, *supra* note 183.

Each section describes and critiques the theory of recovery, its policy basis, and its actual and potential application to asbestos product litigation.

A. *Alternative Liability*

The alternative liability theory, which the California Supreme Court adopted in *Summers v. Tice*,¹⁹⁷ eases the plaintiff's burden of identifying the actual wrongdoer and, thus, may permit the plaintiff to recover damages when the traditional rules of causation would deny recovery. In *Summers* two hunters, aiming at a covey of quail, negligently fired their rifles in the direction of plaintiff. One of the shots struck plaintiff in the eye, but because defendants fired simultaneously, plaintiff could not identify which defendant actually was responsible for the injury. Ordinarily, the plaintiff has the burden of showing that one of the defendants was more likely than not the cause of the plaintiff's injury.¹⁹⁸ Because *Summers* concerned two defendants who independently acted negligently, the court instead required the defendants to bear the burden of exculpating themselves.¹⁹⁹

Under the theory created in *Summers*, a plaintiff must join as defendants all of the actors who might have caused the harm.²⁰⁰ The court then will impose joint and several liability for the full amount of the plaintiff's damages on any defendant who the plaintiff shows to have acted tortiously but who fails to prove that he did not actually cause the plaintiff's harm.²⁰¹ One commentator

197. 33 Cal. 2d 80, 199 P.2d 1 (1948).

198. RESTATEMENT (SECOND) OF TORTS § 433B(3) comment a (1965).

199. 33 Cal. 2d at 86, 199 P.2d at 4. RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965) subsequently incorporated this theory of alternative liability:

Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon such actor to prove that he has not caused the harm.

200. Fischer, *supra* note 180, at 1631 & n.50. The tortious conduct may be simple negligence, intentional behavior, or a strict liability tort. *Id.* at 1631.

201. *Summers v. Tice*, 33 Cal. 2d at 86, 199 P.2d at 4. Unlike the justification for shifting the burden of proof of causation to defendants under the doctrine of *res ipsa loquitur*, see, e.g., *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), superior knowledge of or better access to information concerning the cause of the plaintiff's injury may not be a prerequisite to invoking the alternative liability theory. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 600, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 138, cert. denied, 449 U.S. 912 (1980). The *Sindell* position, however, may contravene the requirements originally set forth in *Summers v. Tice*, 33 Cal. 2d at 88, 199 P.2d at 5. See *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1017 (D.S.C. 1981); cf. RESTATEMENT (SECOND) OF TORTS § 433B(3) comment f (1965) (suggesting that burden of proof may not shift under alternative liability theory un-

has identified two principal justifications for shifting the burden of proof and imposing liability under this theory.²⁰² First, because the theory imposes liability only upon defendants proved to have acted tortiously, the defendants are morally blameworthy and, therefore, justifiably held liable.²⁰³ Second, courts would treat plaintiffs unfairly by denying an innocent plaintiff a remedy while permitting proven wrongdoers to escape liability.²⁰⁴ Application of the theory is particularly appropriate when the number of defendants is small, because the probability that any one of them caused the harm is significant enough to assess moral blame.²⁰⁵

Courts have been reluctant to embrace the alternative liability theory in industry-wide products liability litigation when a larger number of product manufacturers may have caused the plaintiff's injury.²⁰⁶ In *Sindell v. Abbott Laboratories*,²⁰⁷ for example, plaintiffs brought a class action suit against five²⁰⁸ of approximately two hundred manufacturers of diethylstilbestrol (DES), a cancer-causing drug. Plaintiffs, alleging several causes of action including negligence, breach of warranty, and strict liability,²⁰⁹ sought damages for their injuries resulting from their mothers' ingestion of DES.²¹⁰ Plaintiffs established that all defendants were equally culpable for manufacturing the drug from the same formula, sharing test data, and simultaneously marketing DES as a safe, effective product.²¹¹ The California Supreme Court, however, refused to apply the alternative liability theory to hold defendants jointly and severally liable.²¹² Distinguishing the case from *Summers*, the court noted that plaintiffs failed to join all possible tortfeasors. Therefore, the court could not be absolutely certain that plaintiffs had joined the

less the defendants are responsible for the plaintiff's inability to prove causation).

202. Fischer, *supra* note 180, at 1632-33.

203. *Id.* at 1632; see RESTATEMENT (SECOND) OF TORTS § 433B comment f (1965); *Summers v. Tice*, 33 Cal. 2d 80, 86, 199 P.2d 1, 4 (1948).

204. Fischer, *supra* note 180, at 1632.

205. *Id.* at 1633-34; cf. RESTATEMENT (SECOND) OF TORTS § 433B comment h (1965) (alternative liability is useful and equitable only when the number of potential defendants is limited and all potential defendants can be joined).

206. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

207. *Id.*

208. Plaintiffs originally named 11 defendant manufacturers, but the court dismissed the claims against all but five of them. *Id.*

209. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

210. *Id.* at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133.

211. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

212. *Id.* at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

actual wrongdoer.²¹³ The *Sindell* court also focused on the remoteness of the possibility that any of the five defendants in an industry of 200 manufacturers actually supplied the injury-causing DES.²¹⁴ Contrasting the situation in *Summers*, in which each defendant had a fifty percent chance of causing the harm, the court concluded that shifting the burden of proving causation to defendants and imposing joint liability would be unfair.²¹⁵

For reasons identical to those expressed by the *Sindell* court, asbestos victims probably will be unsuccessful in persuading courts to apply the alternative liability theory in asbestos litigation. Initially, whether the plaintiff may have difficulty joining all possible defendant manufacturers is questionable.²¹⁶ In addition to the obvious jurisdictional problems,²¹⁷ the plaintiff may encounter the impossible task of joining a bankrupt corporation²¹⁸ or one that has gone out of business. Even if the plaintiff successfully joins all possible tortfeasors, however, two considerations still militate against the use of the alternative liability theory in asbestos products litigation. First, the justification for applying the theory diminishes as the number of potential wrongdoers increases.²¹⁹ While each defendant in *Summers* had a fifty percent likelihood of causing the harm, if an asbestos victim joins twenty manufacturers as defendants, the likelihood that any given defendant actually caused the harm may be as low as five percent.²²⁰ At some point, the reduced likelihood that a particular defendant caused the harm no longer will support the imputation of causal blame and liability to all defendants. Fairness to the defendants will outweigh the importance of the plaintiff's recovering damages without first identifying the direct cause of his injury. Second, the *Restatement (Sec-*

213. *Id.* at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139.

214. *Id.* at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139.

215. *Id.* at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

216. More than 300 companies manufactured or marketed asbestos and asbestos-containing products. See Comment, *supra* note 2, at 1327 n.87 (citing Hoenig, *Recent Development*, N.Y.L.J., March 27, 1981, at 2, col. 4).

217. Joinder of all possible tortfeasors may destroy the diversity jurisdiction of federal courts or may be impossible because of the personal jurisdiction requirements of state or federal courts. Note, *supra* note 2, at 683-84 n.28.

218. See *infra* XII.

219. Note, *supra* note 2, at 683-84 n.28.

220. See Fischer, *supra* note 180, at 1633-35. The likelihood that any given defendant actually caused the harm is inversely proportional to the number of defendants. The probability is not precisely five percent because the plaintiff's injury in asbestos products cases may be the result of exposure to numerous asbestos products. Thus, unlike *Summers*, more than one defendant may be directly responsible for the harm.

ond) of Torts notes that in all cases applying the theory of alternative liability the conduct of each of the defendants created the same risk of harm.²²¹ While the manufacture and distribution of a generic drug such as DES may²²² create the same risk of harm, the manufacture of numerous asbestos products arguably does not meet this standard. These considerations, therefore, will limit the use of the alternative liability theory in asbestos litigation.

B. Concert of Action

Concert of action is another theory that eliminates the plaintiff's burden of identifying the manufacturer of the injury-causing product. The *Restatement (Second) of Torts* describes the concert of action theory as follows:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.²²³

A popular illustration of this theory is the illegal drag racing case in which one of the drivers injures a bystander.²²⁴ Although only one participant actually inflicted the plaintiff's injury, the plaintiff may sue any or all of the drivers under the concert of action theory. If the plaintiff demonstrates that the defendants aided or facilitated the illegal race,²²⁵ that their participation in the race was tortious, and that the illegal race caused the plaintiff's injury, then each defendant will be jointly and severally liable for the plaintiff's injury.²²⁶ Under the concert of action theory, the basis of the defendant's liability is the joint activity rather than the conduct of

221. RESTATEMENT (SECOND) OF TORTS § 433B comment h (1965).

222. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 610-11, 607 P.2d at 936-37, 163 Cal. Rptr. at 145. The *Sindell* court noted that DES is a fungible product produced by all manufacturers according to a mutually agreed upon formula, which doctors prescribe by a generic name. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

223. RESTATEMENT (SECOND) OF TORTS § 876 (1965).

224. See, e.g., *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968); see also W. PROSSER, *supra* note 29, § 46.

225. The participants need not have an express agreement; the plaintiff must establish only that a tacit understanding existed between the participants. See W. PROSSER, *supra* note 29, § 46. The court may infer this understanding from the participants' conduct. Note, *supra* note 2, at 685 & n.35.

226. See, e.g., *Bierczynski v. Rogers*, 239 A.2d 218, 221 (Del. 1968).

any particular participant.²²⁷ Accordingly, each participant may be liable for the plaintiff's damages. In addition, the plaintiff need not identify the particular actor who caused the injury, and no proven participant may escape liability by showing that his conduct was not the actual cause of the plaintiff's harm.²²⁸

The concert of action theory appeals to plaintiffs bringing latent disease products liability suits because it allows them to proceed against any one of many manufacturers. It also allows the plaintiffs to recover from a defendant even if the defendant proves that his product did not injure the plaintiff.²²⁹ The courts, however, disagree about the propriety of using the theory in latent disease products liability litigation, which implicates numerous manufacturers. The *Sindell*²³⁰ court, for example, refused to apply the concert of action theory to DES cases.²³¹ Plaintiffs in *Sindell* argued that the concert of action theory was applicable because defendants failed to test the product adequately, failed to warn consumers of the drug's hazards, relied on other manufacturers' safety tests, and took advantage of other manufacturers' promotional and marketing techniques; the court, however, rejected each of these arguments.²³² The court held that defendants' conduct did not constitute a common plan or tacit agreement to test inadequately or to give insufficient warnings. Moreover, the court recognized that sharing test results and marketing techniques was an acceptable practice. Thus, the court suggested that concert of action requires more than ordinary communication and cooperation among the members of an industry.²³³ Determining that the "[a]pplication . . . of concert of action to this situation would expand the doctrine far beyond its intended scope,"²³⁴ the court demonstrated its

227. *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 72, 289 N.W. 2d 20, 25 (1979); *LaMarca*, *supra* note 196, at 68.

228. *LaMarca*, *supra* note 196, at 67; Note, *supra* note 2, at 685.

229. *See, e.g.*, *Abel v. Eli Lilly & Co.*, 94 Mich. App. at 72, 289 N.W.2d at 24.

230. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

231. *Id.* at 605-06, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.

232. *Id.* at 604-06, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.

233. *See LaMarca*, *supra* note 196, at 66. *But see Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625, *aff'd*, 53 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1981).

234. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141. The court stated that this application of the concert of action theory "would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by defendant." *Id.*; *see Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1016 (D.S.C. 1981) (court also denied recovery under concert of action theory and held that plaintiff failed to establish even a tacit agreement among the manufacturers not to list or to warn adequately of

concerns that the concert of action theory's distribution of losses may be inequitable.²³⁵

Notwithstanding the *Sindell* court's reservations, other courts have allowed recovery on the concert of action theory in industry-wide products liability cases. In *Bichler v. Eli Lilly & Co.*²³⁶ the Appellate Division of the New York Supreme Court affirmed a DES plaintiff's award premised on a modified version of the concert of action theory.²³⁷ The trial court had incorporated this "limited expansion"²³⁸ of the doctrine in the jury charge, which stated that a manufacturer who "consciously paralleled" a deficient industry-wide standard could be liable under concert of action.²³⁹ In upholding the jury instruction, the appellate division thus equated conscious parallelism with the theory's tacit understanding requirement.²⁴⁰ The court justified its liberalizing the agreement element of concert of action by stating that it could not permit some manufacturers "to escape their liability altogether by means of [a] shroud of anonymity."²⁴¹ The *Bichler* court, however, may have relaxed the concert of action requirements too much. Given the po-

dangers).

235. See Comment, *supra* note 24, at 1324-25.

236. 79 A.D.2d 317, 436 N.Y.S.2d 625, *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1981).

237. 79 A.D.2d at 329, 436 N.Y.S.2d at 632; see *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979) (court held defendants jointly and severally liable under a concert of action theory even though defendant proved that it did not produce the DES that harmed plaintiff).

238. 79 A.D.2d at 329, 436 N.Y.S.2d at 632.

239. The trial court gave the following charge to the jury:

[I]f you find that defendant and the other drug companies either consciously paralleled each other in failing to test D.E.S. . . . as a result of some implied understanding, or that they acted independently . . . [and] that such independent actions had the effect of substantially aiding or encouraging the failure to test by the others, then you should find that the defendant wrongfully acted in concert with the other drug manufacturers. . . .

Id. at 326, 436 N.Y.S.2d at 631.

The court's jury charge in *Bichler* is perhaps even more interesting because it instructed the jury to find a concert of action if the independent actions of defendant aided the failure to test by other manufacturers. Arguably, the court created a situation in which defendant could not win: if defendant actively engaged in cooperative testing and the standards were found deficient, defendant could be found liable; if defendant merely abided by industry standards that are found to be deficient, he could be found liable; and if the jury were to find that by acting independently, rather than encouraging industry-wide testing, defendant aided the failure to test by others, defendant would be found liable.

240. *Id.* at 326, 436 N.Y.S.2d at 631.

241. *Id.* at 328-29, 436 N.Y.S.2d at 632. The Court of Appeals of New York affirmed this decision but refused to review the trial court's charge relating to concert of action because defendant did not pursue adequately that issue for appeal. See *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 583, 436 N.E.2d 182, 187, 450 N.Y.S.2d 776, 781 (1982).

tentially burdensome liability a court may impose on one defendant under concert of action, the traditional formulation of the doctrine is fairer to the defendant because it requires the plaintiff to prove with greater certainty that the defendant actually engaged in a blameworthy concert of action.

Commentators who oppose the application of this theory to market-wide products liability cases have argued that the plaintiff's ability to select any manufacturer as a defendant will create pronounced inequities in the amounts that each manufacturer must pay to the plaintiffs. Naturally, the plaintiffs will sue the most solvent manufacturers.²⁴² Because the defendants cannot exculpate themselves by showing that their products did not cause the harm,²⁴³ the wealthiest manufacturers ultimately will pay for the injuries caused by other manufacturers' products.²⁴⁴ Concerns that such inequities would arise may have played a role in Johns-Manville Corporation's decision to file for bankruptcy, notwithstanding its current state of solvency.²⁴⁵ The manufacturers' ability to seek contribution from the other participants in the concert of action partially may alleviate this unfairness.²⁴⁶ Reimbursement is not assured, however, and the consequent proliferation of asbestos-related lawsuits would crowd further the dockets.

Concert of action may be particularly unsuitable to asbestos products cases because the plaintiff will find it difficult to establish the requisite express agreement or tacit understanding among asbestos products manufacturers. The Sumner Simpson papers, correspondence between representatives of two manufacturers in the 1930's, contain the most damaging evidence of an agreement regarding the industry's knowledge of asbestos dangers.²⁴⁷ Although

242. See Comment, *supra* note 24, at 1324-25. The *Bichler* court stated that plaintiff had the option of proceeding against any tortfeasor. 79 A.D.2d at 331, 436 N.Y.S.2d at 634.

243. See Comment, *supra* note 24, at 1324. The *Bichler* court imposed joint and several liability on defendant even though plaintiff could not establish that defendant had caused the injury. 79 A.D.2d at 331, 456 N.Y.S.2d at 634.

244. See Comment, *supra* note 24, at 1324-25.

245. For a more extensive discussion of Johns-Manville Corporation's filing for bankruptcy, see *infra* part XII.

246. See LaMarca, *supra* note 196, at 67. Courts have not addressed the question of whether a defendant who proves he did not manufacture the injury-producing product must identify its actual manufacturer, or whether he can proceed against any asbestos manufacturer. *Id.*; see Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 427-30 (1937).

247. For a discussion of the correspondence between Mr. Sumner Simpson, president of Raybestos-Manhattan, Inc., and Mr. Vandiver Brown, executive secretary of Johns-Manville Corp., see *supra* notes 123-28 and accompanying text.

these documents suggest that two manufacturers attempted to suppress information about the potential hazards of asbestos, the letters implicate no other manufacturers.²⁴⁸ Thus, plaintiffs could not use the letters to prove the participation of any other manufacturers in a concert of action. The only other evidence suggesting a tacit agreement among asbestos product manufacturers is the membership of some industry members in a trade association²⁴⁹ and the entire industry's failure to provide adequate warnings on asbestos products.²⁵⁰ While this evidence may be sufficient to demonstrate a concert of action in courts applying the *Bichler* court's modified theory, it should not result in liability in courts applying the better-reasoned, traditional theory outlined in *Sindell*.

C. Enterprise Liability

The theory of enterprise liability is similar to concert of action because both theories relieve the plaintiff's burden of proving identification by recognizing the defendants' joint activity as the proximate cause of the plaintiff's injury.²⁵¹ Under both doctrines, courts may impose joint and several liability on the participants of the wrongful concerted conduct.²⁵² Enterprise liability, however, permits the defendants to exculpate themselves by proving that their products were not the actual cause of the plaintiff's injury.²⁵³ Con-

248. *See id.*

249. Several leading asbestos manufacturers, including Raybestos-Manhattan, Inc., Johns-Manville Corp., Amatec Corp., H.K. Porter, Inc., Southern Textile, and UNARCO, participated in the Asbestos Textile Institute, a trade association. *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1155 (N.D. Cal. 1982). A leading asbestos plaintiffs' attorney has alleged that courts may infer cooperation among asbestos manufacturers from the manufacturers' membership in the trade association. *See Note, supra* note 2, at 687 n.44 (citing Motley, *The Lid Comes Off*, TRIAL, Apr. 1980, at 23).

250. *See Note, supra* note 2, at 687.

251. In *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), the court, drawing from an 18th century concert of action case, stated that "the issue of who 'caused' the injury is distinctly secondary to the fact that the group [of defendant manufacturers] engaged in joint hazardous conduct." *Id.* at 372. Courts and commentators also refer to this theory as "industry-wide" liability. *See Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607, 607 P.2d 924, 933, 164 Cal. Rptr. 132, 141, *cert. denied*, 449 U.S. 912 (1980).

252. Compare *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 608, 607 P.2d at 934, 163 Cal. Rptr. at 142 and *Bierczynski v. Rogers*, 239 A.2d 218, 221 (Del. 1968).

253. *See Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. at 378-80. The concert of action theory effectively eliminates the traditional identification requirement because the identity of the specific manufacturer of the injury-causing product is totally inconsequential under that theory. In enterprise liability, on the other hand, the court shifts the burden of proof to the defendants. The validity of the identification requirement is implicit in the theory insofar as the defendants capable of proving that they were not the cause of harm

sequently, enterprise liability may be much less costly to defendants who can show that their products did not cause a particular plaintiff's injury.

The enterprise liability theory originated in *Hall v. E. I. DuPont de Nemours & Co.*,²⁵⁴ in which plaintiffs could not identify the specific manufacturer of blasting caps that exploded and injured several children. Plaintiffs thus joined all six American blasting cap manufacturers and their industry trade association.²⁵⁵ Asserting a right to recover under concert of action, plaintiffs could demonstrate that industry-wide standards govern the manufacture and sale of blasting caps and that defendants had delegated some of the safety research and design matters to their trade association.²⁵⁶ The *Hall* court held that plaintiff must prove by a preponderance of the evidence that a named defendant manufactured the injury-causing product.²⁵⁷ Then, if plaintiffs could demonstrate "defendants' joint awareness of the risks at issue"²⁵⁸ and defendants' "joint capacity to reduce or affect those risks," the *Hall* court would hold defendants liable on enterprise liability grounds.²⁵⁹

After the plaintiff establishes that each defendant breached a duty of care owed to the plaintiff by virtue of its membership in the industry, the burden of causation shifts to each defendant to prove that its product did not cause the plaintiff's harm.²⁶⁰ The *Hall* court expressly noted, however, that the application of enterprise liability to an industry comprising more than five or ten members may be "manifestly unreasonable."²⁶¹ This limitation comports with the court's emphasis on the manufacturer's joint control of the risk. Each firm's control over risks likely will dissipate as the number of firms in an industry increases. The court's caution against the application of enterprise liability to industries composed of many manufacturers also may reflect the court's rec-

escape liability.

254. 345 F. Supp. 353 (E.D.N.Y. 1972). Scholarly commentary on the theory of enterprise liability appears more widespread than its acceptance by the courts. Fischer, *supra* note 180, at 1627 n.32.

255. 345 F. Supp. at 359.

256. *Id.* at 371-78.

257. *Id.* at 379. The court emphasized that plaintiffs did not have to link each injury-causing blasting cap to a particular defendant. *Id.*

258. *Id.* at 378.

259. *Id.*

260. *Id.* at 379. *But see* LaMarca, *supra* note 196, at 72 (defendants cannot exculpate themselves under enterprise liability theories).

261. 345 F. Supp. at 378.

ognition that the joinder of all defendant manufacturers becomes more difficult as the size of the industry increases; yet unless the plaintiff joins a very high percentage of industry members, he may not meet the requirement that one of the named defendants actually produced the injury-causing product.²⁶²

Since the *Sindell* court refused to impose enterprise liability in a DES case,²⁶³ courts for similar reasons likely will refuse to apply enterprise liability in asbestos products cases. Concern for fairness to defendants led the *Hall* court to limit the theory's application to industries with a small number of members. Similarly, the existence of more than 200 DES producers influenced the *Sindell* court's decision not to apply enterprise liability.²⁶⁴ Since at least 300 companies manufactured asbestos products during the past fifty years,²⁶⁵ the potential unfairness of applying this doctrine, whose philosophical integrity may depend upon the joinder of the entire industry, is even greater in asbestos litigation than in the DES litigation. Moreover, asbestos plaintiffs have not been able to muster sufficiently convincing evidence of any industry-wide manufacturing standard or delegation of risk control to a trade association.²⁶⁶

D. Market Share Liability

A final theory under which courts may shift the burden of proving causation to the defendant manufacturers in products lia-

262. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 608 n.24, 607 P.2d at 935 n.24, 163 Cal. Rptr. at 143 n.24. The court listed one of the elements of enterprise liability as follows: "There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury." *Id.* (citing Note, *Enterprise Liability*, *supra* note 24, at 995).

263. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 588, 607 P.2d at 924, 163 Cal. Rptr. at 132.

264. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

265. See *supra* note 216.

266. A review of the leading asbestos decisions reveals no cases in which the plaintiff has carried burden of proof on this issue. *But see* Motley, *supra* note 249, at 23. The plaintiff's proof requirements under enterprise liability are similar to those under the concert of action theory. See *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. at 378. A plaintiff may demonstrate joint control of risk in several ways. First, a plaintiff can prove the traditional concert of action by showing an express or tacit agreement by the defendant. Second, a plaintiff can establish that the defendant consciously paralleled the behavior of other defendants. Third, a plaintiff can show adherence to an industry-wide standard. *Id.* at 373-74. The variety of asbestos products seems to refute the notion that asbestos products manufacturers could have developed an industry-wide standard comparable to that in *Hall*.

bility cases is market share liability.²⁶⁷ The California Supreme Court in *Sindell v. Abbott Laboratories*²⁶⁸ introduced the market share theory of liability, which draws heavily from the alternative liability theory of *Summers v. Tice*.²⁶⁹ Market share liability requires that the plaintiff join as defendants a "substantial share"²⁷⁰ of the manufacturers of the relevant market.²⁷¹ The plaintiff also must establish that: (1) the product which injured the plaintiff is of a type manufactured by the defendants;²⁷² (2) the product was defective; and (3) the defendant manufacturers knew or should have known of the dangers associated with their products.²⁷³ The theory then shifts the burden of proving causation to the defendants. The defendants may exculpate themselves by demonstrating that they did not produce the injury-causing product.²⁷⁴ The court will apportion liability for the plaintiff's damages among those defendants who cannot exculpate themselves. In contrast to the other theories of recovery under which the defendants are jointly and severally liable for the entire amount of the plaintiff's damages, market share liability attempts to assess liability in proportion to

267. See Fischer, *supra* note 180; Note, *supra* note 2; Comment, *supra* note 24.

268. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 588, 607 P.2d at 924, 163 Cal. Rptr. at 132.

269. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 134; see *supra* notes 197-223 and accompanying text. The court stated, "[W]e hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them . . . bears to the entire production of the drug sold" 26 Cal. 3d at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145. In *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183 (S.D. Ga. 1982), the federal district court rejected the application of market share liability on the ground that Georgia had not developed the theoretical foundation for the theory. Georgia did not recognize the theory of alternative liability. *Id.* at 186-87.

270. The *Sindell* court did not set a fixed percentage of the market that plaintiffs must join, but it rejected the suggestion that plaintiffs must join 75% to 80% of the relevant market. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The percentage of the market that a court requires the plaintiff to join may be a crucial determinant of how closely the liability apportioned among the defendants corresponds to the probability that each defendant actually caused the plaintiff's injury. Fischer, *supra* note 180, at 1639-40.

271. The *Sindell* court also did not provide guidelines for determining the relevant market. Commentators have suggested that courts define the relevant market in terms of the locality in which the plaintiff was injured, the injury-causing product, and the time at which the plaintiff sustained the injury. See, e.g., Fischer, *supra* note 180, at 1642-45, 1649; Note, *supra* note 2, at 693-94. The court's definition of the relevant market can affect significantly a defendant's share of liability. Fischer, *supra* note 180, at 1642.

272. See Note, *supra* note 24, at 669. If a defendant can prove that he did not produce DES for use during pregnancy, the court usually dismisses his case. *Id.* at 669 n.11. Similarly, an asbestos manufacturer should be able to escape liability with proof that it never produced the type of asbestos product to which the plaintiff was exposed.

273. See Note, *supra* note 2, at 690.

274. *Id.*

the probability that each defendant's product was the actual cause of the plaintiff's injury.²⁷⁵ To achieve this apportionment, courts therefore look to each defendant manufacturer's share of the relevant market.²⁷⁶

The *Sindell* court offered several policy considerations to support its application of market share liability in a DES case. First, it noted that the increased production of fungible products exacerbates the plaintiff's burden of proving causation. The court recognized the need for a theory that would allow plaintiffs to overcome these proof problems. Second, the *Sindell* court reiterated the fairness policy underlying the alternative liability theory: "[A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury."²⁷⁷ Last, the court reasoned that the manufacturers are better able to bear the cost of the injury because they can pass the costs along to consumers.²⁷⁸

A few courts have acknowledged the applicability of market share liability in asbestos products cases.²⁷⁹ In *Hardy v. Johns-Manville Sales Corp.*²⁸⁰ a federal district court determined that Texas courts had adopted the theory of market share liability. The district judge noted that in many asbestos products cases in Texas since *Borel v. Fibreboard Paper Products Corp.*,²⁸¹ the plaintiff's only proof of causation was his own testimony about the asbestos products he encountered.²⁸² Thus, the Texas courts effectively had

275. See Fischer, *supra* note 180, at 1623.

276. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court noted that each manufacturer's liability would depend on the probability that it caused the harm to plaintiff. The court, however, failed to account for the possibility that plaintiff would fail to join 100% of the relevant market. The dissent contended that the defendants whom plaintiff could join should be liable for all of plaintiff's injuries. *Id.* at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148. (Richardson, J., dissenting). An alternative solution would be to hold the manufacturer liable only for a percentage of the award based on that manufacturer's share of the entire market. This approach would limit the plaintiff's recovery to a portion of the entire amount of damages awarded proportionate to the percentage of the market that he had joined. See Note, *supra* note 2, at 696.

277. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

278. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

279. See, e.g., *Herbeck v. Johns-Manville Sales Corp.*, No. SA-80-CA-520 (W.D. Tex. order issued Feb. 23, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 4698 (Mar. 12, 1982); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982); see also *Burke v. Johns-Manville Corp.*, No. C-1-81-289 (W.D. Ohio order issued Oct. 27, 1981), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 4136 (Nov. 13, 1981).

280. 509 F. Supp. 1353 (E.D. Tex. 1981).

281. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

282. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. at 1358.

shifted the burden of identifying the manufacturer from the plaintiff to the defendant. The district court then explained its choice of market share liability over other burden-shifting theories by declaring that the imposition of joint and several liability results in unfairness to the small producers.²⁸³

Most courts that have considered applying market share liability to asbestos products cases, however, have declined to follow the *Hardy* position.²⁸⁴ Recently, in *In re Related Asbestos Cases*²⁸⁵ and in *Starling v. Seaboard Coast Line Railroad*²⁸⁶ two federal district courts criticized the theory's applicability to asbestos litigation.²⁸⁷ Both courts observed that asbestos products, unlike DES, are not fungible goods,²⁸⁸ and indeed, the different products vary in asbestos content and propensity to emit harmful asbestos particles. Therefore, because each type of product creates a unique risk of harm,²⁸⁹ the likelihood that a particular manufacturer's product caused the plaintiff's harm depends not only on the manufacturer's share of the asbestos market but also on the relative risk of harm created by each manufacturer's product.²⁹⁰ Because the *Sindell* court designed market share liability for use with a generic product, however, the theory does not account for these differences and its application could result in an apportionment of damages that does not correspond to fault.²⁹¹ Indeed, the *Starling* court expressly rejected the notion that it could adjust the *Sindell* theory to represent fairly the relative harmfulness of each product.²⁹²

283. *Id.* at 1358-59.

284. *See, e.g., In re Related Asbestos Cases*, 543 F. Supp. 1152 (N.D. Cal. 1982); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982); *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96 (W.D. Pa. 1982); *Garcia v. Johns-Manville Sales Corp.*, No. 81-649-Civ-T-GC (M.D. Fla. order issued Aug. 28, 1981) (this order applied to 10 other cases), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 3931 (Sept. 25, 1981); *Gorniak v. Combustion Eng'g*, No. C78-465 (N.D. Ohio order issued July 6, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4141 (Nov. 13, 1981); *Aguilar v. Johns-Manville Corp.*, No. 400769 (Cal. Super. Ct. Sept. 8, 1981) (order without opinion).

285. 543 F. Supp. 1152 (N.D. Cal. 1982).

286. 533 F. Supp. 183 (S.D. Ga. 1982).

287. *See supra* note 269.

288. *In re Related Asbestos Cases*, 543 F. Supp. at 1158; *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. at 191. The *Asbestos Cases* noted that asbestos fibers are of several varieties, that they differ in their capacities to cause harm, and that defendant manufacturers use them in varying quantities in their products. 543 F. Supp. at 1158; see *supra* note 1.

289. *In re Related Asbestos Cases*, 543 F. Supp. at 1158; *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. at 191.

290. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. at 191.

291. *See id.*

292. *Id.*

Both courts also emphasized the practical difficulties of ascertaining the appropriate relevant markets and apportioning liability according to the defendants' market shares.²⁹³ The likelihood that the plaintiffs encountered numerous asbestos products²⁹⁴ during many years in several geographic regions²⁹⁵ complicates the procedure of defining relevant product and geographic markets.²⁹⁶ Additionally, the market share for each manufacturer's product lines may vary and these market shares may have fluctuated significantly through the years.²⁹⁷ Thus, an accurate division along market share lines may be impossible.²⁹⁸ The *Asbestos Cases* and *Starling* courts concluded that if a plaintiff can identify at least one manufacturer whose products contributed to the plaintiff's injury, the rationale for shifting the burden of proving causation no longer exists.²⁹⁹ The court in *Starling* expressly refuted the contention that its position was overly burdensome to plaintiffs, and it conveyed its belief that the plaintiff's proof problems in asbestos litigation usually are not as great as those of DES plaintiffs. The *Starling* court noted that in most cases plaintiffs can present sufficient circumstantial evidence that they had become exposed to the products of a particular defendant manufacturer.³⁰⁰

The California Supreme Court designed market share liability

293. 543 F. Supp. at 1158; 533 F. Supp. at 191.

294. Asbestos products manufacturers have produced at least 3,000 different products. Comment, *supra* note 24, at 1327 n.89.

295. The *Asbestos Cases* court included the many uses of asbestos products and the diverse purchasing practices of plaintiffs' employers as considerations making the determination of relevant markets extremely complex. 543 F. Supp. at 1158.

296. *Id.*

297. *Id.*

298. 543 F. Supp. at 1158; 533 F. Supp. at 191. The *Starling* Court also criticized the market share liability theory's failure to discuss a defendant's liability for the contributorily harmful effects of substances other than asbestos. *Id.* at 191. This deficiency, however, is not peculiar to market share liability; it is an issue of causation that courts often face in asbestos products cases irrespective of the theory asserted by the plaintiff. See *supra* note 190.

299. 543 F. Supp. at 1158; 533 F. Supp. at 91; see also *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96 (W.D. Pa. 1982) (enterprise liability not applied when at least one manufacturer identified as causing the plaintiff's injury). Commentators have expressed concern that market share liability creates an incentive for a plaintiff to suppress evidence when he can prove that a specific manufacturer causes his harm but that manufacturer is insolvent. In such a case, the plaintiff might conceal his knowledge and allow the burden to shift to the defendants to absolve themselves. Fischer, *supra* note 180, at 1650.

300. 533 F. Supp. at 191. Judge Alaimo listed several types of evidence that distinguish asbestos cases from DES cases: (1) asbestos products are not generically marked, but have brand names; (2) the plaintiffs encountered these products at their places of employment; and (3) the employers who purchased the products were large corporations who probably kept invoice records. *Id.*

in a DES case to meet the exigencies of a unique products liability situation.³⁰¹ When courts apply it to asbestos products litigation, they upset the balance of fairness between defendants and plaintiffs, which the *Sindell* theory arguably attained in DES litigation.³⁰² Because of the many different asbestos products and the indistinct market boundaries, the theory does not achieve its objective when used in asbestos litigation; it does not apportion liability according to fault. The courts' reservations about the theory's adaptability to asbestos litigation suggest that few courts will embrace market share liability as a means of relaxing the plaintiff's evidentiary burdens.

E. Summary

Because of the great potential for the inequitable allocation of liability, each of the alternative theories of recovery will be difficult to apply in asbestos disease litigation.³⁰³ A few courts, however, may apply the market share theory after determining that the plaintiff's proof problems are unfairly burdensome. In attempting to conform the theory to the demands of asbestos litigation,³⁰⁴ these courts must be mindful of the theory's deficiencies and potential inequities. In particular these courts should assess carefully the enormous procedural and practical difficulties of fairly applying the theory,³⁰⁵ and they should balance the value of using the theory against the costs of achieving a level of "mathematical exactitude"³⁰⁶ in apportioning liability. Also, they should remember that courts primarily have designed market share liability, alternative liability, concert of action, and enterprise liability to alleviate the plaintiff's problems of identifying specific defendant manufacturers. Therefore, courts should consider applying these theories only after they determine that the plaintiff, through no fault of his own, cannot produce sufficient evidence to identify a manufacturer that caused or contributed to his injury. Otherwise, these alternative theories of recovery only will shift the potential inequities

301. See *supra* notes 267-78 and accompanying text.

302. But see Fischer, *supra* note 180, at 1651-52.

303. See *supra* notes 216-22, 242-50, 263-66, & 284-302 and accompanying text.

304. Some commentators have suggested that courts could adapt market share liability to asbestos litigation by incorporating considerations representing each product's relative propensity to cause harm into the final apportionment of liability. See, e.g., Note, *supra* note 21, at 704.

305. See Fischer, *supra* note 180, at 1642-50.

306. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 613, 607 P.2d at 937, 163 Cal. Rptr. at 145.

from the plaintiffs to the manufacturers.

IV. DEFENSES

When faced with liability for injury caused by their asbestos products, defendant manufacturers may assert a number of arguments that can bar or diminish recovery by the plaintiff. These arguments, when successful, either break plaintiff's chain of causation and render his cause of action incomplete, or preclude recovery as affirmative defenses.³⁰⁷ To avoid or diminish liability, asbestos manufacturers also have filed cross-claims against other potential defendants.³⁰⁸ While this method of defensive strategy is not a defense in the traditional sense, it is, like the affirmative defense or the refutation of causation, a useful means of limiting liability.

In a broad sense, therefore, all these arguments are defenses to liability. The availability and potential success of each defense depends on the theories of liability asserted by the plaintiff, the law of the jurisdiction, and the facts and circumstances of each case. This part of the Special Project discusses the defensive positions most commonly asserted in asbestos product cases. This part notes the requirements of each defense and the strategies posited by the asbestos defendants. It also assesses the success of the defenses thus far and the potential usefulness of the defenses in the future.

A. *State of the Art*

Courts have based the so-called state-of-the-art defense on the technical knowledge in the industry available at the time the defendant manufactured the product. The primary issue in this defense is whether at the time the manufacturer sold the product he had sufficient knowledge reasonably to foresee dangers inherent in its use.³⁰⁹ Some commentators analyze the state-of-the-art argument as an actual defense and place the burden on the defendant to demonstrate that it could not have foreseen the dangers of as-

307. Typically, the manufacturers attempt to refute the plaintiff's proof of causation or, when applicable, the element of foreseeability. By preventing the plaintiff from carrying his burden of proving every element of his cause of action, the defendant prevails.

308. ASBESTOS LITIG. REP. (ANDREWS) 2500, 2523 (Oct. 24, 1980) (summarizing *Standard Asbestos Mfg. & Insulating Co. v. American Tobacco Co.* (cross-complaint filed Sept. 17, 1980)) (asbestos manufacturer cross-claims against the American tobacco industry for its role in exacerbating asbestos-related lung disease); ASBESTOS LITIG. REP. (ANDREWS) 5974-75 (Dec. 24, 1982) (complaint dismissed).

309. See *supra* notes 70-81 and accompanying text.

bestos exposure given the knowledge available at the time of manufacture.³¹⁰ In most jurisdictions, however, the plaintiff has the burden of proving that the defendant knew or should have known of the dangers inherent in its product at the time of manufacture and that the defendant failed to remedy the defect, failed to provide sufficient testing, or failed to provide adequate warnings.³¹¹ Finally, a few courts reject the state-of-the-art argument entirely and hold manufacturers liable regardless of whether they could have foreseen the dangers of their products.³¹²

B. Contributory Negligence

“[C]ontributory negligence consists of the plaintiff’s failure to exercise the care of a reasonable person for his own protection.”³¹³ Both contributory negligence and comparative negligence rely on the rationale that courts should consider the plaintiff’s negligence or unreasonable behavior in determining the defendant’s liability.³¹⁴ Contributory negligence thus requires a balancing of the plaintiff’s conduct against the gravity of the potential harm.³¹⁵ In most jurisdictions, the defendant has the burden of pleading and proving the plaintiff’s contributory negligence.³¹⁶ A decreasing number of jurisdictions recognize contributory negligence as a defense to negligence actions that totally bars plaintiff’s recovery, even if the plaintiff’s conduct is less culpable than that of the defendant.³¹⁷

Courts and commentators disagree about the applicability of

310. See *supra* note 79 and accompanying text.

311. See *supra* notes 63-65 & 71 and accompanying text.

312. See *supra* notes 74-77 & 161-71 and accompanying text. For a complete discussion of state-of-the-art analysis, see *supra* notes 63-178 and accompanying text. For a discussion of state of the art and the doctrine of collateral estoppel, see *infra* part VI. See generally Sobota, *Product Liability Reform Proposals: The State of the Art Defense*, 43 ALB. L. REV. 941 (1979); Note, *Use of “State of the Art” Evidence in Strict Liability Claims: The New Texas Standard*, 33 BAYLOR L. REV. 165 (1981).

313. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1096 (5th Cir. 1973).

314. W. PROSSER, *supra* note 29, §§ 65, 67.

315. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1096; see RESTATEMENT (SECOND) OF TORTS §§ 463, 466 (1964).

316. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 105 (1972); see W. PROSSER, *supra* note 29, § 65, at 416. A few jurisdictions have held that the plaintiff must prove as a part of his case that he was not contributorily negligent. *Id.*

317. W. PROSSER, *supra* note 29, § 65, at 416. When the defendant is guilty of an intentional tort or gross negligence, however, many courts hold that the plaintiff’s contributory negligence does not bar recovery. *Id.* at 426.

contributory negligence principles to strict liability cases.³¹⁸ The philosophy underlying strict liability actions leads many courts to question the use of this defense in strict products liability lawsuits.³¹⁹ These courts generally accept the position of the *Restatement (Second) of Torts* that "[c]ontributory negligence of the plaintiff, is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."³²⁰ Virtually all courts, however, agree that

[t]he form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger . . . is a defense [to strict products liability] If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.³²¹

Thus, according to the *Restatement (Second) of Torts*, contributory negligence is a defense to strict liability claims only if the plaintiff voluntarily and unreasonably encounters a known risk,³²² the plaintiff's mere failure to exercise due care will not bar his recovery.³²³ Although a few courts hold that ordinary contributory negligence can bar the plaintiff's recovery in a strict products liability action,³²⁴ most courts follow the *Restatement (Second) of Torts* approach.³²⁵

One of the most widely accepted uses of the contributory negligence defense in strict liability actions concerns a plaintiff's ab-

318. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1097; W. PROSSER, *supra* note 29, § 102 at 670 ("[T]he decisions are ostensibly in a state of flat contradiction as to whether contributory negligence is available as a defense [to strict liability claims.];" *infra* authorities cited notes 319, 324.

319. See, e.g., 493 F.2d at 1108; *Benson v. Beloit Corp.*, 443 F.2d 839, 840 (9th Cir. 1971); *DeFelice v. Ford Motor Co.*, 28 Conn. Supp. 164, 255 A.2d 636 (Super. Ct. 1969); *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); see generally Noel, *supra* note 316, at 105-19 (discussing the courts' various rationales for not allowing contributory negligence as a defense to strict products liability).

320. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1964).

321. *Id.*

322. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1097.

323. See *supra* authorities cited note 319.

324. The Supreme Court of Wisconsin, for example, has held that "[t]he defense of contributory negligence is available to the seller. The plaintiff has the duty to use ordinary care to protect himself from known or readily apparent danger." *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967); see *Stephan v. Sears, Roebuck & Co.*, 266 A.2d 855 (N.H. 1970). For a discussion of these cases, see Noel, *supra* note 316, at 114-15.

325. Noel, *supra* note 316, at 118 ("When the plaintiff's contributory negligence, along with a defect in the product, is found to be one of the proximate causes of the accident, it is the prevailing view that the plaintiff still can recover in a strict liability case.").

normal use or misuse of a product.³²⁶ Misuse encompasses use of a product in a fashion "not reasonably foreseeable by the seller or manufacturer."³²⁷ Common forms of misuse include failure to follow adequate warnings or instructions, failure to follow safety procedures, and failure to use protective equipment.³²⁸ Proof of this misuse may bar a plaintiff's recovery.³²⁹

The use of the contributory negligence defense may be particularly relevant in failure to warn cases in which the manufacturer's warning, if adequate, renders the product nondefective and hence makes the plaintiff responsible for his own injuries. If the plaintiff disregards known warnings, he arguably assumes the risk inherent in the use of the product.³³⁰ In asbestos litigation, however, the defendant manufacturers rarely prevail in their assertions that the plaintiffs were contributorily negligent for failing to follow proper safety procedures or failing to heed warnings, because at the time of most plaintiffs' exposure, adequate safety procedures, warnings, and instructions were nonexistent.³³¹ Thus, while the defendants favor the contributory negligence defense because it completely bars the plaintiff's recovery, the defense probably will not be useful in strict liability asbestos litigation. The lack of warning and safety procedures at the time of manufacture and exposure, the limited popularity of the contributory negligence defense among the jurisdictions, and the defense's inherently harsh effect upon the plaintiff will limit the defense's use in asbestos litigation.

C. Comparative Negligence

A comparative negligence system attempts to divide liability between the plaintiff and the defendant in proportion to their relative degrees of fault.³³² Because comparative negligence, unlike

326. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1099. Dean Prosser distinguished abnormal use and contributory negligence: "[A]lthough the two frequently coincide, one may exist without the other." W. PROSSER, *supra* note 29, § 102, at 670.

327. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1099.

328. See Noel, *supra* note 316, at 100-01 (discussing cases in which the plaintiff failed to heed warnings or follow instructions).

329. See *id.*; W. PROSSER, *supra* note 29, § 102, at 668-69.

330. See RESTATEMENT (SECOND) OF TORTS § 402A comment h (1964).

331. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1099.

332. The comparative negligence systems used in most states may be classified as either "pure" or "fifty percent" systems. PROSSER, WADE, & SCHWARTZ, *TORTS CASES AND MATERIALS* 612 (7th ed. 1982). In a pure system, the plaintiff may recover even if his negligence is greater than that of the defendant. *Id.* at 613 (citing UNIFORM COMPARATIVE FAULT ACT § 1(a) (1979)). In a 50% system the plaintiff may recover if his negligence is "no greater

contributory negligence, does not totally bar recovery, defendant asbestos manufacturers successfully have raised comparative negligence as a defense in both negligence and strict liability actions.³³³ The application of comparative negligence principles to strict liability cases has created a controversy over whether, given the philosophical underpinnings and policy objectives of strict liability,³³⁴ courts should allow the plaintiff's culpable behavior to mitigate the defendant's liability.³³⁵ Nonetheless, many jurisdictions have stated that fundamental fairness requires this application to products liability lawsuits.³³⁶

These courts typically argue that a plaintiff whose misconduct contributed to the condition or situation which gave rise to his injury should not escape from having his fault considered under a strict products liability theory since a defendant seller or manufacturer is only responsible for the injury caused by the defect in its product.³³⁷

If a court accepts comparative negligence as a defense in a strict liability lawsuit and the defendant is liable, then the defendant has the burden of proving the existence and extent of the plaintiff's negligence. If the defendant establishes this negligence, the court will reduce the plaintiff's recovery in proportion to his degree of fault.³³⁸ In traditional negligence actions, calculating the parties' comparative fault requires examining and comparing the conduct of both parties. Yet in a strict products liability action,

than" the negligence of the defendant or "less than" the negligence of the defendant, depending on the wording of the statute or decision. PROSSER, WADE, & SCHWARTZ, *supra*, at 612.

333. See *infra* authorities cited note 336.

334. See *supra* notes 42-62 and accompanying text.

335. Compare V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 1.1-1.7 (1974) (advocating application of comparative negligence principles to strict products liability actions) with Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 346-56 (1977) (arguing that the concept of comparative fault is inconsistent with the principles of strict liability and should not be applied in strict liability actions). For a summary of this controversy and its historical development, see Daly v. General Motors Corp., 20 Cal. 3d 725, 731-43, 575 P.2d 1162, 1165-73, 144 Cal. Rptr. 380, 382-90 (1978).

336. Nobriga v. Johns-Manville Sales Corp., No. 55624 (1st Cir. Hawaii order issued May 24, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5093, 5099-5101 (June 11, 1982); see Butad v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979); Baccelleri v. Hyster Co., 287 Or. 3, 597 P.2d 351 (1979).

337. Nobriga v. Johns-Manville Sales Corp., Civ. No. 55-624 (1st Cir. Hawaii order issued May 24, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) at 5099 (June 11, 1982).

338. UNIFORM COMPARATIVE FAULT ACT § 2 (1979).

the defendant's conduct is not an issue.³³⁹ Thus, in products liability litigation, "the plaintiff's fault will be considered against the defect in the defendants' product to determine to what extent the injury sustained by the plaintiff was caused by the defendants' defective product."³⁴⁰

Examples of comparative negligence often are identical to examples of contributory negligence and may include failure to follow safety procedures, failure to use protective equipment, failure to discover or provide against defects, and failure to use a product in the proper manner.³⁴¹ Thus, the factual considerations that limit the utility of the contributory negligence defense in asbestos cases also will limit the applicability of comparative negligence.³⁴² Moreover, while alleviating the harshness of contributory negligence, the comparative negligence doctrine may exclude other potential defenses such as assumption of the risk or the doctrine of last clear chance.³⁴³

D. *Effects of Plaintiff's Tobacco Smoking*

Asbestos workers who smoke cigarettes greatly increase the likelihood of their contracting lung cancer.³⁴⁴ A spokesman for one manufacturer has noted that "but for smoking, lung cancer would not have been a significant health factor among people occupationally exposed to asbestos."³⁴⁵ Using such information, defendants have sought to bar or to limit plaintiffs' recovery for asbestos-related diseases when the plaintiff is a cigarette smoker. Although the tobacco defense has not completely barred recovery by plaintiffs, the defense often has precipitated a dramatic reduction in the

339. See *supra* notes 43 & 167 and accompanying text.

340. *Nobriga v. Johns-Manville Sales Corp.*, Civ. No. 55-624 (1st Cir. Hawaii order issued May 24, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* at 5100 (June 11, 1982). The reasons for permitting a comparative negligence defense in strict liability cases are, or may be, equally relevant to the reasons for permitting a contributory negligence defense. For example, a seller is responsible only for injuries caused by a defect in his product. Thus, if the warning is adequate and the product is not defective, the misuse of the product by the plaintiff should bar or diminish recovery.

341. See *supra* note 328.

342. See *supra* notes 330-31 and accompanying text.

343. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); PROSSER, WADE, & SCHWARTZ, *supra* note 332, at 614, 622.

344. See *supra* note 190; see also Selikoff, Seidman, & Hammond, *Mortality Effects of Cigarette Smoking Amongst Amosite Asbestos Factory Workers* (Mar. 17, 1980), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 2710-13 (Dec. 12, 1980).

345. Letter from Mr. Curtis G. Linke, senior director of corporate relations for Johns-Manville Corporation, to Mr. Robert Lubar, managing editor of *Fortune Magazine* (May 2, 1979), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 491 (June 28, 1979).

damages awarded.³⁴⁶ Nonetheless, the courts that have permitted the tobacco defense to limit recovery have not articulated any legal rationale for reducing damages, nor have they established any specific formula for determining the amount of the reduction. Rather, these courts, in the exercise of discretion, have based the reduced recovery on notions of fairness and justice.³⁴⁷

Basing this reduction on ad hoc determinations of fairness, however, may lead to inconsistent decisions. An alternative approach treats smoking as a widespread form of contributory negligence that, when proven, serves as an affirmative defense to the plaintiff's recovery. Although cigarette smoking certainly is a contributing factor to lung disease, characterizing smoking as a form of contributory negligence may be incorrect because smoking may not be negligent. The tobacco defense better may be analyzed as it relates to the causal elements of the plaintiff's case. Given that both asbestos and tobacco smoke may cause or did cause the plaintiff's lung disease, the issue is the degree to which each factor is responsible for the disease. If the court decides that both the plaintiff's exposure to the defendant's asbestos products and the plaintiff's cigarette smoking contributed to his disease, the court should reduce the damages in proportion to the extent that his smoking caused the ailment. Thus, the courts should consider the number of years the plaintiff has smoked cigarettes; the extent, duration, and intensity of the plaintiff's exposure to asbestos; the na-

346. See *Martin v. Louisville Insulation & Supply Co.*, Claim No. 80-29600 (Ky. Workmen's Comp. Bd. Nov. 23, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4791 (Mar. 26, 1982) (ruling that asbestos victim's disability compensation award should be cut by 50% because he suffered from other respiratory ailments that stemmed from smoking); *ASBESTOS LITIG. REP. (ANDREWS)* 4160 (Nov. 25, 1981) (summarizing *Hillen v. Johns-Manville Corp.*, C.A. No. 79-73236 (E.D. Mich. order issued Nov. 23, 1981) (jury award reduced by 90% because plaintiff smoked two packs of nonfiltered Camel cigarettes each day for 30 years; asbestos exposure was only six years)). Cigarette smoking also is important to the apportionment of market share liability. See *supra* notes 267-302 and accompanying text.

Because tobacco substantially contributes to the high incidence of lung cancer among asbestos workers, and because smoking has become so widespread, one manufacturer of asbestos has initiated legal proceedings against the American tobacco industry. *Standard Asbestos Mfg. & Insulating Co. v. American Tobacco Co.*, No. 764 046 (Cal. Super. Ct. cross-complaint filed Sept. 17, 1980), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 2382 (Sept. 26, 1980); see *ASBESTOS LITIG. REP. (ANDREWS)* at 2500, 2523 (Oct. 24, 1980). Although the asbestos defendant's use of a cross-complaint was a creative effort to limit liability or to receive indemnification, the cross-complaint against the tobacco industry recently was dismissed. *Id.* at 5974-75 (Dec. 24, 1982). Third party complaints also have been filed against the government in Arkansas, Connecticut, Georgia, Hawaii, Minnesota, Massachusetts, Texas, Virginia, and Washington. *Id.* at 6033.

347. See *supra* authorities cited note 346.

ture and severity of the disease; the costs of requisite health care; and the amount of the damages awarded. The balancing of these considerations and the use of remittitur should make the courts' treatment of the tobacco defense more consistent.

E. Assumption of the Risk

The doctrine of assumption of the risk has four basic elements: "(1) the plaintiff knows the facts constituting a dangerous condition; (2) he knows the condition or activity to be dangerous; (3) he appreciates the nature or extent of the danger; and (4) he voluntarily exposes himself to the danger."³⁴⁸ If these elements are present, a court may completely deny the plaintiff's recovery.³⁴⁹ As in the case of contributory negligence, the defendant usually has the burden of pleading and proving each element of assumption of the risk.³⁵⁰ Unlike contributory negligence, however, assumption of the risk is a defense to both actions in negligence and actions in strict liability.³⁵¹

The defendants in asbestos lawsuits have not used the assumption of the risk defense with great frequency despite its value as a defense to strict liability. The average asbestos worker probably was entirely unaware of the danger to which he was exposed. Thus, his assumption of any risk would be neither objectively unreasonable nor voluntary. Furthermore, even if the plaintiff knew or should have known of the dangers to which he was exposed, courts refuse to accept the assumption of the risk defense if the plaintiff's only alternative to assuming the risk was to lose his job. This economic coercion would render the plaintiff's actions involuntary and thus negate the assumption of the risk defense.³⁵² Finally, the jurisdictions that have adopted comparative negligence principles hold that assumption of the risk is no longer an absolute defense, but instead is a factor to be considered in the apportionment of harm.³⁵³ Altogether, these considerations greatly diminish the value of this defense in the context of asbestos litigation. Nonetheless, the defense may remain a useful tool for reducing a

348. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1096. In some jurisdictions, assumption of the risk is known as *volenti non fit injuria*, an ancient maxim meaning that "no wrong is done to one who consents." *Id.*

349. RESTATEMENT (SECOND) OF TORTS § 496A (1964).

350. *Id.* § 496G.

351. *Id.* § 402A comment n; see *supra* notes 320-29 and accompanying text.

352. See, e.g., *Siragusa v. Swedish Hosp.*, 373 P.2d 767 (Wash. 1962).

353. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41 (1975).

defendant's liability in a few situations.³⁵⁴

F. Superseding Cause

A superseding cause is some act or event that so substantially contributed to the plaintiff's injury that it cuts off the defendant's tort liability.³⁵⁵ Regarding asbestos litigation, a superseding cause relieves the manufacturer from liability "irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm."³⁵⁶ Defendant manufacturers therefore may argue that a superseding event, rather than a defect in the manufacturer's product, proximately caused the plaintiff's injuries. Defendant manufacturers may argue, for example, that the failure of the plaintiff's employer to provide adequate protective equipment, sufficient warnings, and a safe work environment constituted a superseding cause.³⁵⁷ This argument is the basis of the "sophisticated user doctrine."³⁵⁸ Asbestos manufacturers argue that the plaintiff's employer was a sophisticated user and thus was as aware of the dangers of asbestos as the defendant manufacturer. They

354. For a discussion of this topic, see Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Greenhill, *Assumption of Risk*, 16 BAYLOR L. REV. 111 (1964); KEETON, *Assumption of Product Risk*, 19 SW. L.J. 61 (1965); KEETON, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961); Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Noel, *supra* note 316.

355. According to the *Restatement (Second) of Torts*, "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT (SECOND) OF TORTS § 440 (1964).

356. *Id.* § 440 comment b. Considerations important in determining whether an intervening force is a superseding cause of harm include:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Id. § 442 (1964).

357. See, e.g., *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1150 (N.D. Cal. 1982).

358. *Id.* at 1151; see *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977).

argue that the failure of the plaintiff's employer to warn the plaintiff absolves the defendant manufacturer of liability.³⁵⁹

The plaintiff may rebut the defendant's superseding cause argument, however, by showing that the manufacturer could have foreseen the superseding event³⁶⁰ or that the ensuing harm was the same as that risked by the manufacturer's conduct.³⁶¹ While the foreseeability notion may not be a formidable barrier to the use of the superseding cause defense in asbestos cases, plaintiffs may find more troublesome the requirement that the harm caused by the superseding event be of a different kind than that risked by the manufacturer's conduct. The *Restatement (Second) of Torts* states that when the plaintiff's injury is the same as that risked by the defendant's conduct, an intervening cause relieves the defendant of liability only if "the harm is intentionally caused by a third party and is not within the scope of the risk created by the actor's conduct."³⁶² Under this provision, the courts in most asbestos cases may diminish the defense of superseding cause because the harm inflicted by the manufacturer's conduct and the harm caused by the negligence of the plaintiff's employer essentially are the same: a high incidence of asbestosis, mesothelioma, or other lung diseases arising from workers' exposure to asbestos. Although no court in an asbestos case similarly has analyzed the superseding cause defense, this defense apparently would be appropriate only if the plaintiff's employer intentionally failed to follow safety procedures when these procedures would have obviated any risk in the use of the asbestos product.³⁶³

A manufacturer also is not liable for "miscarriages in the communication process that are not attributable to his failure to warn or the adequacy of the warning."³⁶⁴ This form of superseding cause occurs when the manufacturer alerts an intermediate party of the product's danger, or when that party independently discovers the danger, and the intermediate party nevertheless deliberately ex-

359. See, e.g., *In re Related Asbestos Cases*, 543 F. Supp. at 1150-51.

360. *Id.* at 1150-51.

361. *Id.* at 1151.

362. RESTATEMENT (SECOND) OF TORTS § 442B (1964) provides:

Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

363. See *id.*

364. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1091.

poses others to the product without providing a warning.³⁶⁵

The superseding cause argument may prove to be an appropriate defense to asbestos negligence and strict liability. At the very least, proper assertion of the defense should be a question for the jury.³⁶⁶ The defense has had limited success in asbestos litigation, but few courts have confronted it. The defense could become an effective device for apportioning liability among the guilty parties along the chain of product use. Moreover, because the defense usually involves the United States Navy as the plaintiff's employer,³⁶⁷ its use could hasten governmental intervention into asbestos litigation.

G. Government Contract Specifications Defense

Defendant manufacturers argue that their compliance with the government's contract specifications absolves them of part or all liability for injuries that their products caused to government employees. Essentially, they argue that the manufacturer cannot be liable for injuries caused by its product because it manufactured and supplied the product as the government specified. This defense is an extension of the general rule that an employer who exercises extensive control over an independent contractor may be responsible for the torts of the independent contractor.³⁶⁸ The contract specifications argument may be a defense to both negligence and strict liability³⁶⁹ and could prove especially useful to those defendants who supplied asbestos to United States Navy shipyards during the Second World War.³⁷⁰

Manufacturers successfully have asserted the government contract specifications defense in contexts other than asbestos litigation. In the celebrated case of *In re "Agent Orange" Product Lia-*

365. *Id.* at 1091-92. A court also may classify cigarette smoking, product misuse, failure to follow instructions, and employee carelessness as superseding causes when a third party or an independent force induces them. These actions are usually the result of the plaintiff's own initiative, however, and courts treat them under the traditional labels of contributory negligence, comparative negligence, or assumption of the risk. *See supra* notes 313-43 & 348-54 and accompanying text.

366. *See, e.g., In re Related Asbestos Cases*, 543 F. Supp. at 1150.

367. *Id.*

368. Order Granting Motion for Separate Trials, *Tefft v. A.C. & S. Inc.*, Nos. C80-924M, C81-179M, & C81-533M (W.D. Wash. Sept. 15, 1982), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 5606 (Sept. 24, 1982); *see* ASBESTOS LITIG. REP. (ANDREWS) at 5572 (Sept. 24, 1982).

369. ASBESTOS LITIG. REP. (ANDREWS) 6031 (Jan. 14, 1983) (summarizing *Brown v. Caterpillar Tractor Co.*, No. 81-2479 (3d Cir. order issued Dec. 28, 1982)).

370. *See infra* text accompanying note 373.

bility Litigation³⁷¹ the court held that the manufacturers of Agent Orange, a widely used Vietnam War-era defoliant that has debilitating effects upon human life, may escape liability because they manufactured the product and put it into operation pursuant to government contract specifications.³⁷² The court noted that "as a matter of public policy, a manufacturer who supplies equipment to the United States [military] in a time of war pursuant to government specifications may not be held liable for any inadequacy in the plans"³⁷³ The court stated that the government specifications defense requires the defendant to prove that: (1) he supplied the injury-causing product to the government pursuant to contract; (2) the government established specifications for the product; (3) the product manufactured by the defendant met those specifications in all material aspects; and (4) the government knew as much or more than the defendant about the hazards associated with the use of the product.³⁷⁴

In jurisdictions that permit its use, courts have accepted the government specifications argument with increasing frequency in asbestos litigation.³⁷⁵ These courts adhere to the requirements established in the *Agent Orange* litigation,³⁷⁶ and the defendants often meet these requirements in the cases concerning the installation of asbestos insulation in Navy ships during the Second World War.³⁷⁷ In adhering to these requirements, the courts have rejected arguments that the defense is applicable only to suppliers of war materials such as Agent Orange³⁷⁸ or that the defense is inapplica-

371. 506 F. Supp. 762 (E.D.N.Y. 1980).

372. *Id.*

373. *Id.* at 794.

374. *Id.* at 792-96; see *In re Related Asbestos Cases*, 543 F. Supp. at 1152; ASBESTOS LITIG. REP. (ANDREWS) 5572 (Sept. 24, 1982) (summarizing *Tefft v. A.C. & S. Inc.*, Nos. C80-924M, C81-179M, & C81-533M (W.D. Wash. order issued Sept. 15, 1982)).

375. Winter, *Asbestos Fight—Feds, Manufacturers Gear Up*, 69 A.B.A. J. 33 (1983); Order Granting Motion for Separate Trial, *Tefft v. A.C. & S., Inc.* Nos. C80-924M, C81-179M, & C81-533M (W.D. Wash. Sept. 15, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5606 (Sept. 24, 1982); ASBESTOS LITIG. REP. (ANDREWS) at 5572 (Sept. 24, 1982) (summarizing *Tefft v. A.C. & S. Inc.*, Nos. C80-924M, C81-179M, & C81-533M (W.D. Wash. order issued Sept. 15, 1982)); ASBESTOS LITIG. REP. (ANDREWS) 6033 (Jan. 14, 1983); *id.* at 6031 (summarizing *Brown v. Caterpillar Tractor Co.*, No. 81-2479 (3d Cir.) (pending)); ASBESTOS LITIG. REP. (ANDREWS) 2098 (July 25, 1980) (discussing *Hogard v. Johns-Manville Corp.*, No. 137 466 (Cal. Super. Ct.)).

376. ASBESTOS LITIG. REP. (ANDREWS) 5572 (Sept. 24, 1982) (summarizing *Tefft v. A.C. & S. Inc.*, Nos. C80-924M, C81-179M, & C81-533M (W.D. Wash. order issued Sept. 15, 1982)).

377. See *supra* note 374 and accompanying text.

378. Order Granting Motion for Separate Trial, *Tefft v. A.C. & S. Inc.*, Nos. C80-

ble to products not supplied exclusively to the government.³⁷⁹ Courts that have recognized the defense have used it to bar completely³⁸⁰ or diminish the plaintiff's recovery.³⁸¹

While the current trend is to allow the assertion of the government contract specifications defense in asbestos-related lawsuits, the use of the defense in this context often is problematic. Some courts have held that compliance with government specifications does not relieve the defendant manufacturer of the duty to test and to inspect his product in a strict liability lawsuit.³⁸² Other courts have recognized the defense only in rare cases in which the government guaranteed to indemnify the defendant or in which the government coerced the defendant to follow the defective specifications.³⁸³ In addition, because not all jurisdictions recognize this defense, the problem of forum shopping may arise. The choice of forum also may be significant in determining whether the defendant may shift the burden of proof or even liability to the government.³⁸⁴ The defense necessarily requires the filing of third party complaints against the government, which could result in confusion, complexity, inefficiency, and the possibility of separate trials with the government and the manufacturer as litigants.³⁸⁵ Finally,

924M, C81-179M, & C81-533M (W.D. Wash. Sept. 15, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5606 (Sept. 24, 1982); ASBESTOS LITIG. REP. (ANDREWS) at 5572 (Sept. 24, 1982) (summarizing *Tefft v. A.C. & S. Inc.*, Nos. C80-924M, C81-179M, & C81-533M (W.D. Wash. order issued Sept. 15, 1982)).

379. *Id.* Winter, *supra* note 375, at 33. Chief Judge Walter McGovern, speaking for the District Court for the Western District of Washington, ruled that asbestos defendants may assert the government contracts defense. If every element of the defense is proven, the defendant would be relieved of all liability. *Id.*

380. *Id.*

381. See ASBESTOS LITIG. REP. (ANDREWS) 2098 (July 25, 1980) ("Commenting that the jury verdict awarding \$1.2 million to shipyard insulator Robert J. Hogard was based on 'either passion, prejudice or speculation,' Los Angeles Superior Court Judge Earl F. Riley lowered the award this week to \$250,000. . . ." partly because of Johns-Manville Corporation's conformity with Navy specifications) (quoting *Hogard v. Johns-Manville Corp.*, No. 137 466 (Cal Super. Ct.)).

382. *Nobriga v. Johns-Manville Sales Corp.*, Civ. No. 55624 (1st Cir. Hawaii order issued May 24, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5093, 5097 (June 11, 1982).

383. *Nobriga v. Johns-Manville Sales Corp.*, Civ. No. 55624 (1st Cir. Hawaii order issued May 24, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) at 5097 & n.16; see Rubin, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030 (1981).

384. See, e.g., ASBESTOS LITIG. REP. (ANDREWS) 5572 (Sept. 24, 1982) (summarizing *Tefft v. A.C. & S. Inc.*, Nos. C80-924M, C81-179M, & C81-533M (W. D. Wash. order issued Sept. 15, 1982)).

385. ASBESTOS LITIG. REP. (ANDREWS) 6033 (Jan. 14, 1983) (Third party complaints have been filed against the government in Arkansas, Connecticut, Georgia, Hawaii, Minne-

the government may claim immunity under the Federal Tort Claims Act,³⁸⁶ and thereby raise the possibility that plaintiffs will have no recovery when the defendant successfully asserts the government contract defense.

H. Miscellaneous Defenses

In addition to the defensive strategies already enumerated, defendant manufacturers have made other arguments that have had mixed success. Defendants repeatedly have asserted the statute of limitations defense, for the statute of limitations is a natural threshold requirement in every case: if the claim is time-barred, the defendant automatically prevails.³⁸⁷ Defendants have argued that insufficient exposure should be a defense to liability.³⁸⁸ Defendants also have suggested that because asbestos is a uniquely useful material, its social utility always should outweigh its risks and thus always bar recovery. Although defendants often present this argument as a defense, it is actually a component of strict liability analysis.³⁸⁹

I. Summary

Defendant asbestos manufacturers have asserted various defensive strategies in an effort to negate an asbestos victim's claim of causation and render his cause of action incomplete, or to preclude recovery by affirmative defenses. The defenses have had varying degrees of success depending on the circumstances under which the defendant asserted them. Contributory negligence, comparative negligence, the so-called tobacco defense, and assumption of the risk are classifiable as affirmative defenses, which the defendant must plead and prove. Of these four defenses, contributory negligence is the least useful in asbestos litigation because of its declining popularity with the courts, its harsh effect upon the plaintiff, and its general inapplicability to strict liability actions. Comparative negligence may be a more useful means of limiting

sota, Massachusetts, Texas, Virginia and Washington.).

386. 28 U.S.C. § 2680 (1976).

387. For a complete discussion of statutes of limitations and statutes of repose in asbestos litigation, see *infra* part V.

388. See *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836, 840 (E.D. Tex. 1980).

389. See *supra* notes 66-69 and accompanying text. Under strict liability analysis, courts generally assume that asbestos is a useful product and that its utility often outweighs the risks it poses. This cost-benefit determination is made initially in deciding whether the defendant should ever have placed the product on the market.

the defendant's liability in asbestos litigation because a majority of jurisdictions have accepted it as a defense and because it has a less severe effect upon the plaintiff. The tobacco defense is analytically similar to the other defenses that consider the conduct of the plaintiff. The tobacco defense already has proven to be a useful means of diminishing the defendant's liability in cases concerning a plaintiff who smokes cigarettes. Although this defense needs an improved definitional framework, it is an equitable device for considering the plaintiff's own contribution to his health problems. Of the noted defenses, assumption of the risk may prove to be a most useful tool for reducing the plaintiff's recovery because this defense generally is applicable to strict liability claims such as those advanced in the majority of asbestos lawsuits.

Although the defendant usually must raise and prove the superseding cause theory, the sophisticated user doctrine, the government contracts specifications defense, and the state-of-the-art argument, these defenses relate more closely to the plaintiff's chain of causation. The state-of-the-art defense will become less prominent as a "defense" in the traditional sense of the word. In most jurisdictions the plaintiff must prove the state-of-the-art argument as a part of his case. The superseding cause defense and the sophisticated user doctrine may preclude or diminish the liability of the defendant asbestos manufacturers if an intermediate employer fails to provide a safe work environment, adequate protective equipment, or sufficient warnings to apprise employees of the dangers related to asbestos exposure. The government contract specifications defense may prove to be the most useful defensive argument available to asbestos manufacturers.

Defendants already have used the government contract defense to diminish the plaintiff's recovery in an asbestos case. The defense is especially applicable to asbestos manufacturers who supplied asbestos to navy shipyards pursuant to government contracts during the Second World War because many current asbestos plaintiffs were shipyard insulators during the war years. The defense also necessarily includes the United States government as a potential solution to the problems raised by asbestos litigation.

The complexities, problems, and demands posed by asbestos litigation ensure that defendants will be innovative in modifying traditional defenses and in creating new ones to preclude or to limit liability. The potential changes not only may diminish or bar recovery by the plaintiff but also may alter traditional defensive strategies in shaping the future of tort law.

V. LIMITATIONS OF ACTIONS

The limitation of actions issue, one of the most heavily litigated issues in asbestos products liability cases, provides a unique forum for balancing the interests of plaintiffs and defendants. Statutory limitations of actions fall into two categories: statutes of limitations and statutes of repose. In a products liability context, the cause of action accrues and, consequently, the statute of limitations begins to run at the time of the plaintiff's injury. In the latent disease context, the time of accrual can vary greatly depending on when, in the court's view, a legal injury occurred.³⁹⁰ A statute of repose,³⁹¹ on the other hand, begins to run independently of any personal harm to the plaintiff—normally when the manufacturer sells or delivers the product.³⁹² Because a court may find that a legal injury occurred years after delivery of a product, the applicable statute of repose may expire long before the applicable statute of limitations and thus bar an otherwise valid claim against the manufacturer.³⁹³

This part of the Special Project first considers statutes of limitations. It investigates the various points at which courts place the time of accrual but primarily focuses on the prevailing standard in asbestos cases—the discovery rule. This part then examines statutes of repose as a restriction on the discovery rule and discusses the policy rationale and constitutionality of these statutes as well as their application to asbestos litigation.

A. *Statutes of Limitations*

The courts have employed three different theories in determining when an asbestos-caused injury occurred and thus have created three possible times of accrual for a given cause of action.

390. The effects of exposure to asbestos dust may not become evident for over 25 years after initial contact. *See, e.g., Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Pauley v. Combustion Eng'g, Inc.*, 528 F. Supp. 759 (S.D. Va. 1981). Therefore, the court must decide whether the injury occurred at the time of exposure or at a later time related to the disease's progress. *See infra* part VIII.

391. Eighteen states now have products liability statutes of repose. *See infra* note 464.

392. Some statutes have two periods, one running from the date of delivery and another beginning on the date of manufacture. The expiration of either bars the claim. *See, e.g., 7 Ky. Rev. Stat. § 411.310(1)* (Supp. 1979) ("five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture"); *UTAH CODE ANN. § 78-15-3* (1977) ("six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture").

393. *See Birnbaum, "First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 *FORUM* 279 (1977).

These theories are: the discovery rule, the time of exposure rule, and the medical evidence rule.

1. The Discovery Rule

The discovery rule, by far the most pervasive accrual theory in asbestos cases, states that a "cause of action accrues when the plaintiff knows or through the exercise of due diligence should have known of the injury."³⁹⁴ The rule is well-established in the latent disease context as *Urie v. Thompson*³⁹⁵ illustrates. In *Urie*, one of the earliest cases to apply the discovery rule, a fireman on defendant's steam locomotive sued under the Federal Employees' Liability Act³⁹⁶ and the Boiler Inspection Act.³⁹⁷ Plaintiff alleged negligence in the maintenance of a sanding apparatus that created silica dust from which plaintiff contracted silicosis.³⁹⁸ Although plaintiff had been exposed to the dust since approximately 1910, he did not learn of his disease until 1940. He thus claimed that his filing suit in 1941 was within the three-year statute of limitations.³⁹⁹ Defendant, however, argued that plaintiff must have contracted silicosis long before 1938 and that the three-year statute of limitations therefore barred the claim.⁴⁰⁰ The United States Supreme Court upheld plaintiff's position and ruled that Congress did not intend to charge plaintiffs with knowledge of an "inherently unknowable"⁴⁰¹ disease and thus provide them with only a "delusive remedy."⁴⁰² The Court further stated that barring the claim was inconsistent with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."⁴⁰³ Consequently, the Court held that a statutory injury occurs "only when the accumulated effects of the deleterious substance manifest themselves."⁴⁰⁴

394. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 116 (D.C. Cir. 1982).

395. 337 U.S. 163 (1949).

396. 45 U.S.C. § 51 (1976).

397. *Id.* § 23.

398. 337 U.S. at 165-66.

399. *Id.* at 168-69.

400. *Id.* at 169. Alternatively, defendant asserted that each inhalation was a separate tort and that plaintiff could recover only for injuries occurring between 1938 and 1940. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* at 170.

404. *Id.* (quoting *Associated Indem. Corp. v. Industrial Accident Comm'n*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)).

By making the time of accrual of a cause of action dependent upon the plaintiff's knowledge of a harmful condition, the Court in *Urie* recognized the unique nature of latent disease cases and added a notice component to the traditional rule that a cause of action accrues at the time of injury.⁴⁰⁵ While this notice component expands the traditional theory of accrual, logic dictates that a statute of limitations cannot bar a claim before the plaintiff is aware of any harm.⁴⁰⁶ Moreover, use of the discovery rule balances the interests of the parties. On one side, the plaintiff has the opportunity to seek a remedy but cannot sleep on his rights. On the other, the defendant has a measure of protection against stale claims but no more than a tortfeasor reasonably should expect.⁴⁰⁷

The discovery rule is readily applicable to asbestos litigation since both asbestosis and mesothelioma have long latency periods,⁴⁰⁸ and consequently, the discovery rule is the prevailing standard in all but a few jurisdictions.⁴⁰⁹ Application of the rule differs among the states using it, however, because courts disagree about what facts constitute discovery. Accrual and discovery might coincide, for example, with one or more elements: knowledge of the injury, its cause, the identity of the defendant, and the existence of

405. Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?*, 43 U. PRR. L. REV. 501, 517 (1982). This situation is analogous to medical malpractice cases in which the physician leaves a foreign object in the body of a patient and the patient has no way of learning about the negligence until physical symptoms of the mistake manifest themselves. See, e.g., *Hill v. Clarke*, 241 S.E.2d 572 (W. Va. 1978).

406. Dean Prosser has asserted that failure to employ some type of discovery rule would be an "obvious and flagrant injustice." W. PROSSER, *supra* note 29, § 30, at 144. The injustice becomes even clearer when one realizes that a plaintiff cannot recover damages based on future consequences unless the consequences are "reasonably certain." *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982). Therefore, if an asbestos plaintiff brings within the traditional statutory period an action based on the possibility of developing a disease in the future, he would lose because of failure to state a claim for which relief can be granted.

407. Note, *supra* note 405, at 517. Another argument for applying the discovery rule in asbestos cases is that the passage of time in these cases does not cause evidentiary problems. When circumstances delay accrual of the cause of action, evidence often becomes either lost or stale. In asbestos cases, however, the evidence of the disease remains in the body and consequently "improves" over time. *Id.* at 514.

408. See *supra* note 390. Asbestosis and mesothelioma, however, are distinct afflictions that manifest themselves at different times. Therefore, accrual of a cause of action for asbestosis does not compel a court to find that a claim for mesothelioma has accrued. See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982).

409. Some states that have adopted the discovery rule, however, do not apply it when a wrongful death statute of limitations already has run. See, e.g., *De Cosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Anthony v. Koppers Co.*, 496 Pa. 97, 436 A.2d 181 (1981). But see *In re Johns-Manville Asbestos Cases*, 511 F. Supp. 1235 (N.D. Ill. 1981).

a legal claim.⁴¹⁰

Early asbestos cases that applied the discovery rule followed *Urie* and held that the plaintiff's cause of action accrues when the disease manifests itself to the extent that the plaintiff is or should be aware of both the injury and the causal relationship between the injury and exposure to asbestos. *Karjala v. Johns-Manville Products Corp.*⁴¹¹ exemplifies this approach. Plaintiff, an asbestos insulation installer, experienced shortness of breath and in 1959 had his chest X-rayed for tuberculosis. Although the X-ray was negative, plaintiff soon noticed that his hospital record showed "possible asbestosis."⁴¹² In 1963 doctors removed a tumor from his lung, but his difficulty in breathing continued. Finally, in 1966 plaintiff learned that he indeed had asbestosis. He filed suit in 1971. Applying Minnesota law the United States Court of Appeals for the Eighth Circuit affirmed a jury's finding that Karjala had filed within the six-year statute of limitations; the court held that accrual occurs "when the disease manifests itself in a way which supplies some evidence of causal relationship to the manufactured product."⁴¹³ Under *Karjala*, therefore, the reasonably diligent plaintiff must be aware of both the injury and its cause for the statute of limitations to begin to run.⁴¹⁴

The expanding acceptance of the discovery rule in the late 1970's paralleled an expansion of the discovery rule itself. Under this liberalized standard, not only must a reasonably diligent plaintiff be aware of an injury and its cause for the statute to run, but also he must be aware of a possible legal claim. In *Velasquez v. Fibreboard Paper Products Corp.*⁴¹⁵ plaintiff insulation worker knew of his injury and its cause at a time which, if deemed the time of accrual, would have barred the claim.⁴¹⁶ The appellate

410. McGovern, *supra* note 24, at 255.

411. 523 F.2d 155 (8th Cir. 1975).

412. *Id.* at 156.

413. *Id.* at 160-61. The court refused to examine the sufficiency of the evidence and upheld the jury's finding in spite of the knowledge plaintiff had gained in 1959 and 1963.

414. The leading case in asbestos litigation, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), employed a similar rule in holding that the "cause of action does not accrue until the effects of such exposures manifest themselves." *Id.* at 1102 (citation omitted).

415. 97 Cal. App. 3d 881, 159 Cal. Rptr. 113 (1979).

416. Plaintiff learned in 1971 that he had "indications of asbestosis" based upon "unequivocal diagnosis." *Id.* at 883-84, 159 Cal. Rptr. at 115. In March 1973 plaintiff had another examination, at which time the examining physicians made "positive findings" of asbestosis. *Id.*, 159 Cal. Rptr. at 115. Finally, a reexamination in November 1973 revealed further evidence of asbestosis, and the attending physician recommended that plaintiff leave

court nevertheless reversed the trial court's grant of defendant's motion for summary judgment and held that the cause of action accrued when plaintiff knew or should have known "that he was suffering from a disease that had caused or was likely to cause him injury for which relief could be sought at law."⁴¹⁷ This language and the depth of knowledge required by the court manifest a heightened standard regarding the plaintiff's knowledge of a possible cause of action.⁴¹⁸

The trend toward a more liberalized discovery rule for latent injuries in general and asbestos cases in particular reached a turning point in *United States v. Kubrick*.⁴¹⁹ In *Kubrick* plaintiff was unaware of a possible legal action until shortly before he filed his claim.⁴²⁰ The Supreme Court, however, found that the statute of limitations barred plaintiff's claim because the cause of action accrued when plaintiff discovered the injury and its probable cause.⁴²¹ Significantly, the Court drew a distinct line between knowledge of the injury and its cause and knowledge of a legal cause of action:

We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a

his job. Plaintiff filed suit in October 1974. The applicable statute of limitations was one year. *Id.*, 159 Cal. Rptr. at 115.

417. *Id.* at 888, 159 Cal. Rptr. at 117.

418. In *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977), a medical malpractice case, the court found that the cause of action does not accrue "until a claimant has had a reasonable opportunity to discover *all* of the essential elements of a possible cause of action. . . ." *Id.* at 420 (footnote omitted) (emphasis by the court). In a claim against a drug manufacturer for a contraceptive that caused thrombophlebitis, another court distinguished between knowledge of a possible causal relationship and knowledge of an actionable claim, requiring the latter as well as the former. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 575 (3d Cir. 1976).

419. 444 U.S. 111 (1979). For a more detailed analysis of this decision, see Comment, *Federal Tort Claims Act—Lack of Reason to Know of Possible Medical Malpractice Claim Does Not Toll Statute of Limitations—United States v. Kubrick*, 14 SUFFOLK U.L. REV. 1428 (1980).

420. Plaintiff received treatment with an antibiotic that eventually caused hearing loss. Upon examination in 1969, plaintiff's doctor informed him that it was "highly possible" that the antibiotic had caused the problem. *United States v. Kubrick*, 444 U.S. at 114. Plaintiff then filed an administrative claim that did not toll the statute of limitations. *Id.* In 1971 another doctor told plaintiff that the antibiotic had injured him and that it should not have been administered. Plaintiff brought suit in 1972. *Id.* at 114. The applicable statute of limitations was two years. 28 U.S.C. § 2401(b) (1976).

421. 444 U.S. at 123.

plaintiff in possession of the critical fact that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.⁴²²

Kubrick attempted to restrict the discovery rule and require only awareness of injury and causation to trigger the statute of limitations. While this decision was consistent with the traditional rule espoused in *Urie v. Thompson*,⁴²³ *Kubrick* marked an important development favoring defendants. Since a plaintiff had little obligation to investigate a possible invasion of his legal right under the liberalized discovery rule employed in *Velasquez*,⁴²⁴ he theoretically could keep claims alive indefinitely. According to the stricter rule articulated in *Kubrick*, however, a plaintiff had an affirmative duty to ascertain whether he suffered a legal wrong.⁴²⁵ *Kubrick*, therefore, put a limit on the statutory period and offered a defendant some measure of repose.

The tightening of the discovery rule carried over to asbestos litigation as *McDaniel v. Johns-Manville Sales Corp.*⁴²⁶ illustrates. In *McDaniel* plaintiffs, a group of Johns-Manville Corporation employees, had filed workers' compensation claims during 1975 and 1976 and alleged an occupational disease resulting from asbestos exposure. In October 1978 they brought suit against defendant asbestos suppliers, and defendants moved for summary judgment.⁴²⁷ The district court granted the motion based on a two-step analysis. First, the court found that the filing of the workers' compensation claims demonstrated knowledge of both an injury and wrongful causation.⁴²⁸ Second, plaintiffs failed to demonstrate that by exercising due diligence they could not have discovered their cause of

422. *Id.* at 122.

423. 337 U.S. 163 (1949); see *supra* notes 393-404 and accompanying text.

424. See *supra* notes 415-18 and accompanying text.

425. See *United States v. Kubrick*, 444 U.S. at 123 n.10.

426. 542 F. Supp. 716 (N.D. Ill. 1982).

427. *Id.* at 717-18.

428. *Id.* at 718. In making this finding the court used a common-sense approach. Arguably, since workers' compensation claims are no-fault proceedings, the filing of a claim need not indicate awareness of wrongful causation. The court, however, reasoned that even a layman should realize that serious illnesses resulting from occupation related exposure implied wrongful conduct. *Id.* This common-sense approach demonstrates that the addition of "wrongful" to the traditional injury and causation elements makes little difference. Cf. *Harig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 394 A.2d 299 (1978) (cause of action accrues when plaintiff discovers or should have discovered nature and cause of injury; no mention of wrongful conduct). If an ordinary person develops asbestosis or mesothelioma as a result of exposure to a manufacturer's products, that person should realize that the precipitating conduct was wrongful.

action.⁴²⁹ Therefore, plaintiffs' knowledge of the injury and wrongful causation triggered the running of the statute, and plaintiffs bore the responsibility of discovering their legal claims.⁴³⁰ The great majority of asbestos cases decided since *Kubrick* follow this interpretation of the discovery rule.⁴³¹

2. The Time of Exposure Rule

Under the time of exposure rule, the statute of limitations begins to run when the plaintiff comes in contact with the harmful material. In *Steinhardt v. Johns-Manville Corp.*⁴³² the New York Court of Appeals employed the time of exposure rule to bar a claim for asbestos-caused injuries.⁴³³ In a memorandum opinion the majority relied on three cases in which the court found that a cause of action accrued at the moment the offending substance invaded the plaintiff's body.⁴³⁴ The court also noted that the New York Legislature had not extended the discovery rule to this type of injury and that the matter was more suitable for legislative than judicial scrutiny.⁴³⁵ The court thus held that the three-year statute of limitations barred plaintiffs' claims since the last employment-related exposure to asbestos occurred four years prior to the date

429. *Id.* at 719.

430. *Id.* *McDaniel* also shows that the plaintiff need not be aware of the identity of the defendant for the cognition of injury and causation to trigger the statute. Discovering the identity of the defendant is simply another duty of the plaintiff. *Id.* at 718-19.

431. See, e.g., *Pauley v. Combustion Eng'g, Inc.*, 528 F. Supp. 759 (S.D. W. Va. 1981); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981).

432. 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981).

433. *Id.* New York is one of the few states that uses the time of exposure rule. Note, *supra* note 405, at 505-06. Alabama still has some vestige of the rule even though that state enacted a discovery rule for asbestos cases in 1980. See ALA. CODE § 6-2-30 (Supp. 1982). In *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981), the court decided not to apply the new statute retroactively to revive claims barred before enactment of the new law on May 19, 1980. Because Alabama has a one-year products liability statute of limitations, the time of last exposure rule enunciated in *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979), should apply to any plaintiff whose last exposure was prior to May 19, 1979.

434. *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979) (radium injected for diagnostic purposes caused cancer 20 years later); *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (compound injected into plaintiff's sinuses to make them more perceptible in X-ray examination caused carcinoma 13 years later), *cert. denied*, 374 U.S. 808 (1963); *Schmidt v. Merchants Despatch Transp. Corp.*, 270 N.Y. 287, 200 N.E. 824 (1936) (inhalation of dust eventually caused pneumoconiosis).

435. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d at 1010-11, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246. The New York Legislature has made a discovery rule exception for Agent Orange, the chemical defoliant used in the Vietnam War. See N.Y. CIV. PRAC. LAW § 214-b(3) (McKinney 1972).

of filing.⁴³⁶

The dissenting opinion criticized the application of the time of exposure rule and argued that a statute of limitations should not bar plaintiffs' recovery "before they learned or could have learned that they had sustained the injuries of which they complain."⁴³⁷ The dissent maintained that because asbestos particles have no immediate effect at the time of exposure, no real injury occurs at that moment.⁴³⁸ Moreover, not every person exposed to asbestos contracts a disease, and the time of development for those who suffer the malady is unpredictable. The dissent concluded, therefore, that on a case-by-case basis the trier of fact and not a judge applying an inflexible rule⁴³⁹ should decide when the disease comes into existence.

3. The Medical Evidence Rule

The medical evidence rule, an alternative to the discovery rule, makes a cause of action's accrual dependent upon the medical evidence available in each case. Under this rule the statute begins to run at one of two times: when the injury is diagnosable⁴⁴⁰ or when medical evidence fixes the time of injury.⁴⁴¹ Only two asbestos cases have adopted the medical evidence approach,⁴⁴² the most recent of which is *Neubauer v. Owens-Corning Fiberglass Corp.*⁴⁴³ In *Neubauer* plaintiffs appealed a district court decision which held that the three-year statute of limitations began to run at the time of last exposure.⁴⁴⁴ The United States Court of Appeals for

436. Although it held that the statute of limitations barred the claim, the court nonetheless indicated that the statute accrues at the time of the last exposure rather than the first. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d at 1010, 430 N.E.2d at 1298, 446 N.Y.S.2d at 245. The exposure, therefore, is in the nature of a continuing tort.

437. *Id.* at 1011, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246 (Fuchsberg, J., dissenting). This problem also can arise under the *Locke* interpretation of the medical evidence rule. See *infra* text accompanying note 456.

438. 54 N.Y.2d at 1013, 430 N.E.2d at 1300, 446 N.Y.S.2d at 247. A medical argument, however, does exist for the proposition that an injury occurs upon exposure. For example, a histologist, who studies body tissues, would assert that the harm begins to occur when the asbestos particles reach the lungs, even before impairment. See Note, *supra* note 405, at 516.

439. 54 N.Y.2d at 1013, 430 N.E.2d at 1300-01, 446 N.Y.S.2d at 247-48.

440. *Neubauer v. Owens-Corning Fiberglass Corp.*, 686 F.2d 570 (7th Cir. 1982).

441. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

442. *Neubauer v. Owens-Corning Fiberglass Corp.*, 686 F.2d 570 (7th Cir. 1982); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

443. *Neubauer v. Owens-Corning Fiberglass Corp.*, 686 F.2d 570 (7th Cir. 1982).

444. *Neubauer v. Owens-Corning Fiberglass Corp.*, 504 F. Supp. 1210 (E.D. Wis. 1981), *modified and remanded*, 686 F.2d 570 (7th Cir. 1982).

the Seventh Circuit, applying Wisconsin law, first noted that a cause of action could not accrue until plaintiff had a legally provable claim.⁴⁴⁵ The court then held that, since asbestosis and mesothelioma are impossible to diagnose at the time of exposure, exposure and accrual cannot be simultaneous.⁴⁴⁶ Next, the court determined that plaintiff's knowledge of the injury and its cause was irrelevant under Wisconsin case law and that the court would not adopt a judge-made discovery rule.⁴⁴⁷ Finally, following medical malpractice cases⁴⁴⁸ decided prior to enactment of a special discovery rule statute,⁴⁴⁹ the court held that "the limitations period begins when the injury was diagnosable without regard for any noticeable impairment to the plaintiff."⁴⁵⁰ The court then remanded the case for an almost certain disposition against plaintiffs.⁴⁵¹

4. Analysis

Because statutes of limitations function to regulate remedies,

445. 686 F.2d at 573.

446. *Id.* at 574.

447. *Id.* at 574-75. In 1979 the Wisconsin Legislature refused to adopt a discovery rule applicable to all personal injury claims. *Id.* at 575.

448. See *Olson v. St. Croix Valley Mem'l Hosp., Inc.*, 55 Wis. 2d 628, 201 N.W.2d 63 (1972) (statute began to run when plaintiff received faulty blood transfusion since injury was provable at that time); *McCluskey v. Thranow*, 31 Wis. 2d 245, 142 N.W.2d 787 (1966) (statute began to run when doctor left hemostat in plaintiff's abdomen).

449. WIS. STAT. § 893.55 (Supp. 1982-1983).

450. 686 F.2d at 575. The United States Court of Appeals for the Sixth Circuit reached a similar conclusion in *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981) (applying Ohio law), by using a "manifestation" rule. Under this rule the statute begins to run when the disease manifests itself, meaning that someone "could have discovered the injury had one made an appropriate investigation as to the cause even though the symptoms were not such that a reasonable person would have investigated the cause." *Id.* at 1154 (emphasis in original). This rule implies diagnosability although the case does not emphasize the medical component.

451. 686 F.2d at 577. Similarly, in *Locke v. Johns-Manville Corp.*, 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981), the Virginia Supreme Court held that accrual occurs when the available evidence "pinpoints the precise date of injury with a reasonable degree of medical certainty." While *Locke* and *Neubauer* have virtually identical rationales, the two differ in one respect: the *Locke* court emphasized the time at which the injury occurred while the *Neubauer* court stressed diagnosability. This variation could be important to plaintiffs since an injury almost certainly can occur before it can be diagnosed. See Note, *Preserving Causes of Action in Latent Disease Cases: The Locke v. Johns-Manville Corp. Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615, 626-27 n.86 (1982). In addition, the *Locke* court's emphasis on pinpointing the time at which the harm occurred rather than the time at which the harm could have been diagnosed presents an analytical deficiency. Like the court in *Neubauer*, the *Locke* court noted that a cause of action cannot accrue until the plaintiff has a legally provable injury. 221 Va. at 957, 275 S.E.2d at 904. If a court were to hold that a cause of action accrues when the medical harm occurs, however, accrual often will occur long before the plaintiff suffers legally provable damage.

a comparative analysis of the discovery, time of exposure, and medical evidence rules must focus on each rule's ability to balance the respective interests of plaintiffs and defendants. The evolution of the discovery rule not only demonstrates the courts' attempts to balance the respective interests of plaintiffs and defendants but also evinces the rule's inherent capability to obtain an equilibrium. Created to give plaintiffs an opportunity to state a claim that is "inherently unknowable"⁴⁵² within the ordinary statutory period, the original rule presumed that a reasonably diligent plaintiff's right to a remedy outweighs a defendant's interest in absolute repose. Expansion of the rule, however, by tolling the statute until the plaintiff discovers the legal cause of action, shifted the balance heavily in favor of plaintiffs. Under this standard, the statute of limitations would not begin to run until the injured party discovers his legal rights.⁴⁵³ The *Kubrick* rule provides an equilibrium: the defendant receives some measure of protection and the plaintiff has the opportunity to bring suit provided he exercises reasonable diligence in investigating a possible invasion of his legal rights.

The time of exposure rule provides a definitive standard to determine when a statute of limitations begins to run. The arbitrariness of the rule, however, outweighs this benefit, and, consequently, use of the rule has evoked criticism.⁴⁵⁴ By employing the rule in asbestos-related latent disease cases, a court decides that the value of repose is absolute and virtually ignores the plaintiff's interest in recovering for wrongfully caused injuries.⁴⁵⁵ Certainly, the rule's unfairness to plaintiffs⁴⁵⁶ has provided an impetus for the judge-made discovery rules in many states⁴⁵⁷ and should lead

452. *Urie v. Thompson*, 337 U.S. at 169.

453. This discovery might not occur for years after the plaintiff had knowledge of the injury and the cause. The argument for this approach rests on the premise that an ordinary person, with knowledge of only injury and causation, cannot recognize the elements of a cause of action and thus might not discover a possible invasion of his legal rights within a reasonable time. See *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981). A similar argument is that, in technically complex cases, even the most diligent plaintiff depends totally upon experts in investigating a possible cause of action and should not be held responsible when he has no reason to suspect actionable conduct. See *United States v. Kubrick*, 444 U.S. at 127-28 (Stevens, J., dissenting). The majority in *Kubrick* rejected this argument and asserted that the determination of negligence often is complicated and that the plaintiff has the duty to seek appropriate advice and then to decide whether to sue. *Id.* at 124.

454. See, e.g., *Birnbaum*, *supra* note 393, at 283-84.

455. See *supra* notes 437-39 and accompanying text.

456. *Id.*

457. See, e.g., *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981); *Harig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 394 A.2d 299 (1978).

New York to abandon the time of exposure rule.⁴⁵⁸

The medical evidence rule represents a compromise between the discovery rule⁴⁵⁹ and the time of exposure rule.⁴⁶⁰ In latent disease cases medical evidence would not show harm or diagnosability until some time after the last exposure, but it almost always would establish accrual before the reasonably diligent plaintiff could discover the injury and wrongful causation. While this compromise approach initially might appear the most equitable balancing of the plaintiffs' and the defendants' interests, any theory that allows for the determination of accrual without consideration of the plaintiff's knowledge has an inherent flaw. A statute of limitations should give a reasonably diligent plaintiff an opportunity to bring an action and offer a defendant a reasonable amount of protection against stale claims. Therefore, the medical evidence rule is deficient since the statute may run before a reasonable person would have investigated a possible cause of action.⁴⁶¹ In this situation, the plaintiff has no control over his legal fate.

A second problem with the medical evidence rule is that its major attraction is illusory. Theoretically, the rule determines accrual using an objective physiological determination that sets the point of injury "with a reasonable degree of medical certainty."⁴⁶² This method should produce a date of injury free of the subjective uncertainties that exist in discovery rule cases. Scientific evidence, however, indicates that such an accurate determination is unlikely, since the rate of deterioration in asbestos-related diseases varies from person to person.⁴⁶³ Therefore, the medical evidence rule actually provides little more certainty than does the discovery rule. In sum, the medical evidence rule represents a compromise view that is more equitable than traditional time of injury theories, but its failure to consider the plaintiff's awareness of a cause of action and its inability to pinpoint the date of injury with certainty make it less satisfactory than the discovery rule.

458. Even if New York eventually does abandon the rule, it probably will linger in workers' compensation laws. *See, e.g., Stark v. Zimmerman*, 638 P.2d 843 (Colo. Ct. App. 1981); *Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982); *Fossum v. State Accident Ins. Fund*, 293 Or. 252, 646 P.2d 1337 (1982).

459. *See supra* notes 393-425 and accompanying text.

460. *See supra* notes 444-51 and accompanying text.

461. *See Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1154 (6th Cir. 1981).

462. *Locke v. Johns-Manville*, 221 Va. at 959, 275 S.E.2d at 905.

463. Note, *supra* note 451, at 631.

B. Statutes of Repose

1. Definitions

Since the majority of jurisdictions apply the discovery rule, asbestos litigation defendants may attempt to use statutes of repose to restrict a plaintiff's ability to preserve a cause of action.⁴⁶⁴ A statute of repose functions as a "cap" on the discovery rule because it runs independently of any harm to the plaintiff and puts an absolute limit on the period within which a plaintiff can bring an action against a manufacturer.⁴⁶⁵ Therefore, it is practically and conceptually distinguishable from a statute of limitations. Although a statute of limitations limits a particular remedy, a statute of repose extinguishes a claim and thus defines a substantive right.⁴⁶⁶ Indeed, a statute of repose can bar a cause of action before it accrues.⁴⁶⁷

2. Policy Rationale

Manufacturers have asserted governmental, legal, economic, and societal policy arguments in favor of statutes of repose that would relieve their liability for products they have marketed for many years.⁴⁶⁸ From a governmental standpoint, a statute of repose shifts major products liability compensation decisions from the courts to the legislatures.⁴⁶⁹ Manufacturers argue that this shift

464. For a survey of the states that have enacted statutes of repose, see Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323, 333 (1982). See generally McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981).

465. Most statutes of repose begin to run at the time of delivery of the harmful substance and circumvent the problem of determining the time of injury. See *supra* notes 390-392 and accompanying text. The ending date, or the tolling of the statute, varies from state to state. In some states the statute stops running on the date of injury with the date of injury determined by the discovery rule. See, e.g., MICH. COMP. LAWS ANN. § 600.5805(9) (West Supp. 1982); MINN. STAT. ANN. § 604.03 (West Supp. 1982). The majority of states, however, use the filing of the action as the terminal point. See, e.g., N.C. GEN. STAT. § 1-50(b) (Supp. 1979); OR. REV. STAT. § 30.905(1)(1979). For further elaboration on this point, see Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745 (1982).

466. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 419 (1981).

467. *Id.* at 418-19.

468. This is the so-called "long-tail" problem. See Martin, *supra* note 465, at 746-47; see also *Green v. Volkswagen of Am.* 485 F.2d 430 (6th Cir. 1973) (action brought concerning defect in 16-year old Volkswagen van); *Wittkamp v. United States*, 343 F. Supp. 1075 (E.D. Mich. 1972) (action based on malfunction of 50-year old rifle).

469. McGovern, *supra* note 464, at 592-93.

is appropriate since the legislature has better access to the data necessary to make policy decisions on questions of compensation. Moreover, the courts often fail to use available social science information when confronting policy issues.⁴⁷⁰ Therefore, manufacturers argue that statutes of repose place the responsibility for making these policy decisions in the more appropriate branch of government. Similarly, defendant manufacturers contend from a legal perspective that the long time span between manufacture and trial causes difficulties in defending products liability suits: the admissibility of certain evidence becomes questionable; the availability of proof diminishes over time; and the determination of damages becomes more difficult.⁴⁷¹ Furthermore, juries tend to judge older products by current standards.⁴⁷²

From a business point of view, a manufacturer's continuing responsibility for its products' safety coupled with the manufacturer's inability to avoid long-term liability or estimate its costs has led to increased products liability insurance premiums.⁴⁷³ Defendants argue that statutes of repose lead to more reasonable insurance rates, especially for capital goods producers.⁴⁷⁴ Furthermore, older producers have a competitive disadvantage relative to new producers because older producers must charge consumers with the costs of liability for products already on the market.⁴⁷⁵ Therefore, proponents of statutes of repose argue that a statutory bar would help businesses compete as well as plan for the future.

In addition to the legal and business arguments, proponents of statutes of repose assert that the statutes are beneficial to society as a whole. They contend that the costs of trying cases based on defective older products substantially exceed the benefits to the plaintiffs who recover.⁴⁷⁶ If statutes of repose would eliminate these "transaction costs," the manufacturers would pass on their savings to society and would effect a more efficient allocation of

470. *See id.* at 592.

471. *Id.* at 589.

472. *Id.* Manufacturers thus may hesitate to make changes in design that would increase safety, because they fear that plaintiffs would introduce the changes against them at trial. *Id.*

473. Estimation of asbestos manufacturers' tort liability is impossible. Therefore, asbestos manufacturers face inflated insurance premiums to cover all anticipated claims. Such increases have been common in the products liability field. *See Martin, supra* note 465, at 748-49.

474. *Id.* at 756. Capital goods producers pay the bulk of the claims for injuries caused long after manufacture.

475. *Id.* at 747 (footnote omitted).

476. McGovern, *supra* note 464, at 593-94.

economic resources.⁴⁷⁷ Furthermore, by barring long-term liability, a statute of repose encourages product safety in the short run.⁴⁷⁸

Plaintiffs' arguments against statutes of repose, however, also have merit. They argue from a governmental standpoint that although the legislature has greater access to information, much of that information comes from manufacturers who have a relatively greater influence upon legislative bodies than do consumers.⁴⁷⁹ Under these circumstances, a court of law probably would treat the individual plaintiff and the corporate defendant more equally. Therefore, although the legislature theoretically may be the best forum, it realistically may not be the most equitable. In a legal context, application of these statutes present litigation problems similar to the defendants' problems, including the definition and proof of defect.⁴⁸⁰ In addition, opponents of the statutes contend that they do not significantly reduce insurance rates because insurers set rates on a national scale and are unaffected by the passage of nonuniform state statutes.⁴⁸¹

Moreover, opponents assert that the statutes of repose do not benefit society as a whole. First, a statute of repose leads to harsh results by barring claims before the plaintiff ever had an opportunity to file suit. Second, a simple and easily administered statute would not account for the differences in the longevity of products or the variations in short- and long-term defects.⁴⁸² Third, the statutes inevitably contain exceptions that decrease efficiency and result in arbitrariness.⁴⁸³ Last, while erasing long-term liability might encourage short-term product safety,⁴⁸⁴ statutes of repose may reduce long-term safety incentives and thus abrogate a significant aspect of products liability law.⁴⁸⁵ Therefore, with arguments and counter-arguments abounding, the policy questions surrounding products liability statutes of repose remain hotly contested.

477. *Id.* at 594.

478. *Id.* at 599.

479. *Id.* at 596-97.

480. *Id.* at 589.

481. *Id.* at 595.

482. *Id.* An alternative is to create "useful life" provisions for individual products and thus add flexibility. See McGovern, *supra* note 466, at 426. Of course, this solution would add complexity and inefficiency, two problems that a statute of repose is intended to solve.

483. Typical exceptions would include situations in which the manufacturer has a continuing duty to correct or warn when the manufacturer fraudulently has concealed the cause of action. For other examples, see Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. Rev. 663, 666-72 (1978).

484. See *supra* text accompanying note 478.

485. McGovern, *supra* note 464, at 598.

3. Constitutionality

Because they extinguish substantive rights, statutes of repose have provoked charges of unconstitutionality. More specifically, plaintiffs have alleged violations of equal protection, the prohibition of special legislation, due process, or right to remedy.⁴⁸⁶ To date, two state supreme courts have ruled on the constitutionality of a products liability statute of repose, and they have reached conflicting conclusions.

In *Dague v. Piper Aircraft Corp.*⁴⁸⁷ the Indiana Supreme Court upheld a statute that barred plaintiff's action for wrongful death against defendant aircraft manufacturer. Rejecting plaintiff's due process and right to remedy challenges, the court first noted that the legislature "has the power to abrogate or modify common law rights and remedies."⁴⁸⁸ The court then stated that no party has a vested right in any common-law rule and that the right to bring a common-law action is not fundamental.⁴⁸⁹ Thus, plaintiff had no vested right to a remedy and no right to due process protection.⁴⁹⁰ Furthermore, the court held that the Indiana Constitution does not require the legislature to offer an alternative remedy simply because it took away a common-law right.⁴⁹¹ Combining this evaluation of the affected interests with a strong presumption of constitutionality, the court upheld the statute of repose.⁴⁹²

Conversely, the Florida Supreme Court in *Battilla v. Allis Chalmers Manufacturing Co.*⁴⁹³ held that its statute of repose unconstitutionally violated plaintiff's "right of access" to the courts. In a per curiam opinion the court relied on *Overland Construction Co. v. Sirmons*⁴⁹⁴ which held that if a statute takes away a remedy and no alternative remedy exists, then the statute must be "grounded both on an overpowering public necessity and an ab-

486. For a detailed discussion of the constitutionality of statutes of repose, see *id.* at 600-20.

487. 418 N.E.2d 207 (Ind. 1981).

488. *Id.* at 213.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

493. 392 So. 2d 874 (Fla. 1981). The "right of access" to the courts protected in many state constitutions is basically the same as the right to a remedy protected by an "open court" provision in Indiana. See *Dague v. Piper Aircraft Corp.*, 418 N.E.2d at 212; McGovern, *supra* note 464, at 615.

494. 369 So. 2d 572 (Fla. 1979).

sence of any less onerous alternative means"⁴⁹⁵ The challenged statute could not meet this demanding standard. Thus, the Florida Supreme Court accepted virtually the same argument that the Indiana Supreme Court rejected. Together, these decisions make two points: first, the right to a remedy or access to court challenge is the best method for attacking products liability statutes of repose; and second, the court's relative deference to the legislature probably will determine the outcome of any constitutional challenge.

4. Application to Asbestos Litigation

Statutes of repose potentially may limit the discovery rule in the context of asbestos exposure cases. Since asbestosis and mesothelioma normally do not produce legally provable injuries until years after exposure,⁴⁹⁶ a statute of repose could bar many of the claims against asbestos manufacturers. To date, however, only the United States District Court for the Northern District of Illinois in *O'Connell v. Keene Corp.*⁴⁹⁷ has applied a statute of repose to an asbestos plaintiff's cause of action.

In *O'Connell* plaintiff's decedent was exposed to asbestos products between 1961 and 1969. As a result of this exposure, plaintiff's decedent developed mesothelioma, which doctors diagnosed in January 1980.⁴⁹⁸ Plaintiff filed a strict products liability claim in December 1981. Illinois has a two-year statute of limitations⁴⁹⁹ that begins to run when the plaintiff discovers or should have discovered the injury,⁵⁰⁰ and it has a ten-year statute of repose that applies to any cause of action accruing on or after Janu-

495. *Id.* at 573.

496. *See supra* note 407. Existing statutes of repose are between 5 and 12 years in length. *See supra* note 464.

497. No. 81 C 7306 (N.D. Ill. Sept. 7, 1982) (available Nov. 1, 1982, on LEXIS, Genfed library, Dist file). Two reasons exist for the minimal use of the statute of repose defense in asbestos cases. First, most of the statutes are recently enacted and apply only to causes of action accruing after their enactment. *See, e.g.*, ILL. ANN. STAT. ch. 83, § 22.2(g) (Smith-Hurd Supp. 1982). Second, the statutes often apply only to certain causes of action. *See, e.g.*, GA. CODE ANN. § 105-106(b)(2) (Supp. 1981) (applies only to strict liability claims); ILL. ANN. STAT. ch. 83, § 21.2(3) (Smith-Hurd Supp. 1982) (applies only to strict liability claims); IND. CODE ANN. § 34-4-20A-1 (Burns Supp. 1981) (does not apply to warranty claims). Defendants successfully used the defense in *Diamond v. E. R. Squibb & Sons*, 366 So. 2d 1221 (Fla. Dist. Ct. App. 1979), a drug products liability case.

498. No. 81 C 7306 (N.D. Ill. Sept. 7, 1982) (available Nov. 1, 1982, on LEXIS, Genfed library, Dist file). The disease proved fatal in October 1980.

499. ILL. ANN. STAT. ch. 83, § 22.2(d) (Smith-Hurd Supp. 1982).

500. *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981).

ary 1, 1979.⁵⁰¹ Plaintiff contended that her claim remained actionable because she had brought suit within two years of discovery.⁵⁰² The court, however, found that because accrual occurred after January 1, 1979, and because the decedent was an asbestos products user within the meaning of the statute, the statute of repose rather than the statute of limitations governed.⁵⁰³ The court held, therefore, that the statute of repose extinguished all strict products liability claims on December 31, 1979, ten years after the last possible date of exposure.⁵⁰⁴

While *O'Connell* illustrates the potential effect of statute of repose on asbestos-related claims, the rationale favoring this statutory bar does not necessarily extend to latent injury actions. First, unlike most products liability claims, some of the essential evidence in asbestos exposure cases does not deteriorate—it improves.⁵⁰⁵ Second, a statute of repose for asbestos manufacturers does not stabilize insurance rates since these manufacturers virtually cannot obtain insurance.⁵⁰⁶ Third, although holding an ordinary manufacturer responsible in perpetuity for a product with a finite useful sale life seems harsh, asbestos has no useful safe life; it is dangerous from the beginning and remains dangerous.⁵⁰⁷ Therefore, no inequity results from imposing continuing responsibility. Fourth, in the context of asbestos litigation, a statute of repose will

501. ILL. ANN. STAT. ch. 83, § 22.2(g) (Smith-Hurd Supp. 1982).

502. The court accepted the time of diagnosis as the time of discovery (January 1980). No. 81 C 7306 (N.D. Ill. Sept. 7, 1982) (available Nov. 1, 1982, on LEXIS, Genfed library, Dist file).

503. *Id.*

504. *Id.* The court offered an abbreviated constitutional analysis. First, it recognized that a statute which extinguishes a cause of action before discovery is not necessarily unconstitutional. *Id.* (citing *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) (special limitations period for medical malpractice actions against physicians and hospitals)). Second, the court followed *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981), which upheld the constitutionality of the state statute of repose against a due process challenge because the statute was rationally related to a legitimate state purpose and because it barred the cause of action before any right vested. *Id.* at 725-26, 425 N.E.2d at 525. Last, the *O'Connell* court found that the statute operated uniformly upon all persons in similar circumstances and thus did not violate equal protection. No. 81 C 7306 (N.D. Ill. Sept. 7, 1982) (available Nov. 1, 1982, on LEXIS, Genfed library, Dist file).

505. Indeed, evidence of the plaintiff's injury may not exist at all until after the statute of repose bars the cause of action. For a discussion of the unfairness of this result, see *supra* note 406.

506. *See infra* part VIII.

507. *See supra* part III. Moreover, exposure to asbestos products during their expected useful lives causes injuries that become detectable many years later. *See supra* part I.

not promote a more efficient allocation of resources.⁵⁰⁸ The transaction costs of trying asbestos cases in which exposure to the product occurred long ago does not outweigh the benefits to the recovering plaintiffs since the majority of asbestos plaintiffs can sue only many years after exposure.⁵⁰⁹ Therefore, a statute of repose tends to bar a disproportionate number of asbestos exposure claims. Last, a statute of repose fails to balance properly the respective interests of plaintiffs and defendants. Indeed, the practical effect of a statute of repose in asbestos litigation is similar to that of the time of exposure theory for statutes of limitations.⁵¹⁰ The statute places inordinate value upon repose and thus deprives a potentially large group of plaintiffs of compensation.⁵¹¹

The need for products liability statutes of repose raises strong policy arguments on both sides. Moreover, the constitutionality of these statutes is questionable. Even if these statutes were beneficial in most instances, however, they are inappropriate in the context of asbestos litigation. Therefore, the proper resolution of the statutes of repose issue in asbestos exposure cases is to except asbestos-related injuries from the statutory bar and to rely on the discovery rule to balance the interests at stake.⁵¹² This approach gives a state the option of employing a statute of repose and at the same time prevents the imposition of undue harshness on asbestos exposure plaintiffs.

C. Summary

The limitations of actions issue will continue to be one of the most heavily litigated aspects of asbestos exposure cases as long as the discovery rule remains prevalent. The discovery rule, unlike some other issues in asbestos litigation, depends entirely on factual determinations made in individual cases and thus allows courts to make essentially ad hoc decisions. In most instances counsel's ability to prove the plaintiff's knowledge or lack of knowledge will determine the outcome. Although courts may make more consistent decisions by applying statutes of repose, the better position exempts asbestos exposure actions from this statutory bar.⁵¹³ While

508. See *supra* notes 483-84 and accompanying text.

509. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (over 25 years elapsed between the time of exposure and trial).

510. See *supra* notes 444-51 & 460-63 and accompanying text.

511. See *supra* text accompanying notes 459-61.

512. Tennessee has adopted this approach. TENN. CODE ANN. § 29-28-103(b) (1980).

513. See *supra* notes 505-12 and accompanying text.

this approach fosters case-by-case and, therefore, inconsistent court decisions, it is the most equitable because it equalizes the positions of plaintiffs and defendants.

VI. COLLATERAL ESTOPPEL

Collateral estoppel⁵¹⁴ promotes judicial efficiency by precluding the unnecessary relitigation of issues that prior proceedings have determined.⁵¹⁵ Thus, the invocation of collateral estoppel may alleviate the duplication of arguments and presentation of evidence at trial. By accepting the validity and sufficiency of a prior determination of an issue, collateral estoppel seeks to bring the litigation of that issue to a reasonably prompt, final conclusion.⁵¹⁶

514. Collateral estoppel, like the doctrines of merger and bar, is a type of *res judicata*. "Issue preclusion" is another term for collateral estoppel; "claim preclusion" is another label for merger and bar. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 532 (2d ed. 1977). Claim preclusion affects actions in which the claim presented was or should have been the subject of a former action. Note, *Use of Juror Depositions to Bar Collateral Estoppel: A Necessary Safeguard or Dangerous Precedent?*, 34 *VAND. L. REV.* 143, 144 (1981); cf. *RESTATEMENT (SECOND) OF JUDGMENTS* § 45 (1982) (the term "res judicata" referred only to claim preclusion while "collateral estoppel" denoted issue preclusion). "On the other hand, when the second case involves a different cause of action, the doctrine of collateral estoppel operates to preclude deliberation as to any issue upon which a judge or jury actually based a finding or verdict in the first action." Note, *supra*, at 144. The *Restatement (Second) of Judgments* has adopted the terms "claim preclusion" and "issue preclusion." It defines issue preclusion as follows: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *RESTATEMENT (SECOND) OF JUDGMENTS* § 27 (1982). Sections 28 and 29 discuss exceptions to the general rule of issue preclusion and the nonmutual use of issue preclusion. *Id.* §§ 28-29. For the United States Supreme Court's formulation of the rule see *Montana v. United States*, 440 U.S. 147 (1979); *Cromwell v. County of Sac*, 94 U.S. 351 (1877).

515. Collateral estoppel also protects the same litigants from having to relitigate the same issues, and it protects the public from excessive litigation. 1B J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 0.412[1], at 1809 (2d ed. 1948); Note, *supra* note 514, at 146 n.15; cf., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (offensive collateral estoppel has "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation").

The rule of collateral estoppel applies to issues of fact and, with some qualifications, to issues of law also. *RESTATEMENT (SECOND) OF JUDGMENTS* § 627 comment c (1982); see, e.g., *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, *reh. denied*, 591 F.2d 1343 (5th Cir. 1979). Collateral estoppel should not prevent the relitigation of an issue of law when: (1) it would place the party asserting collateral estoppel in a favored position in the general administration of the law; (2) the first determination of the issue was not taken through the appellate process; and (3) the body of law to which the issue belongs has changed significantly since the issue's first determinations. For a more thorough discussion on this matter, see F. JAMES & G. HAZARD, *supra* note 514, at 571; 1B J. MOORE, *supra*, ¶ 0.442, at 3851.

516. In *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), the Supreme Court noted that collateral estoppel does not serve merely to relieve

Because of these objectives and the mechanisms designed to achieve them, the use of collateral estoppel theoretically is a natural way to streamline the monstrous docket of asbestos product cases encompassing numerous similar issues.⁵¹⁷ The actual application of collateral estoppel to these cases, however, has been difficult, and the courts have been dubious of extending it. Both doctrinal and practical considerations contribute to the courts' reluctance and inability to apply collateral estoppel more frequently in asbestos product cases. The courts' attitudes suggest that collateral estoppel is not a timesaving panacea in mass tort asbestos product litigation.⁵¹⁸ This part of the Special Project discusses the doctrine of collateral estoppel and its varied application in asbestos products cases.

A. *Elements of Collateral Estoppel*

The party seeking the benefits of collateral estoppel must show the following: (1) the issue in contention is identical to an issue litigated to a final judgment in a prior action;⁵¹⁹ (2) a court of competent jurisdiction actually determined the issue in the prior

crowded dockets: "The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.* at 328; see generally F. JAMES & F. HAZARD, *supra* note 514, at 529-32 (discussing policy considerations underlying *res judicata*).

517. Other articles discussing the use of collateral estoppel in asbestos product litigation include: Baldwin, *Asbestos Litigation and Collateral Estoppel*, 17 FORUM 772 (1982); Birnbaum & Wrubel, *supra* note 75, at 31; Mehaffy, *supra* note 2; Wheeler & Allee, *Collateral Estoppel in Products Liability Cases*, Nat'l L.J., Dec. 13, 1982, at 15; Comment, *supra* note 24, at 1330-41.

518. Some mass tort litigation situations are more amenable to the economizing effects of collateral estoppel. For example, in tort actions arising from a single airplane crash the issues raised by the many claimants often are similar because the injuries resulted from one event, the crash. Thus, a court can establish an identity of issues and identify inconsistencies in prior judgments more easily. In asbestos product litigation, however, the claimants' injuries often are not attributable to any one event or product. Because an identity of issues is more difficult to establish, considerations of fairness limit the courts' use of collateral estoppel. See *infra* notes 606-16 & 656-700 and accompanying text for a discussion of the requirement of identity of issues and considerations of fairness in collateral estoppel. In *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977), however, the court stated that "[t]he doctrine of collateral estoppel should not . . . be used as a club to attain [the] goal [of preventing repetitive litigation] but as a fine instrument that protects 'the litigant's right to a hearing [and protects] his adversary and the courts from repetitive litigation.'" *Id.* at 551 (quoting *Exhibitors Post Exch., Inc. v. National Screen Serv. Corp.*, 421 F.2d 1313, 1316 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971)); cf. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) (discussing the multiple claimant anomaly created by nonmutual collateral estoppel).

519. See, e.g., *Russell v. Place*, 94 U.S. 606 (1876); *infra* notes 606-16 and accompanying text.

action;⁵²⁰ (3) the determination of that issue was necessary to the result in the prior action;⁵²¹ and (4) the target party against whom the proponent asserts collateral estoppel was either a party or a privy of a party that litigated the issue in the prior action.⁵²² Although some states still require mutuality between the parties—both the proponent and the target party must have been parties to the previous litigation of the issue⁵²³—most state and federal courts permit the offensive⁵²⁴ and defensive⁵²⁵ use of collateral estoppel on a case-by-case basis.⁵²⁶

A target party may avoid the effects of collateral estoppel by demonstrating that its application in a particular case would cause an unfair result.⁵²⁷ The United States Supreme Court acknowledged this “fairness” element in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*⁵²⁸ and *Parklane Hosiery Co. v. Shore*.⁵²⁹ In *Blonder-Tongue* the Court abolished the mutuality requirement for the defensive use of collateral estoppel.⁵³⁰ In

520. See, e.g., *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 453 (D.D.C. 1978); *infra* notes 617-48 and accompanying text.

521. See, e.g., *Defenders of Wildlife v. Andrus*, 77 F.R.D. at 453; *infra* notes 649-55 and accompanying text.

522. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *infra* notes 555-86 and accompanying text.

523. See, e.g., *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111 (1912); *infra* notes 535-54 and accompanying text.

524. Offensive collateral estoppel permits a plaintiff to preclude a defendant who lost in a prior proceeding from relitigating an issue previously determined against him. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979).

525. Defensive collateral estoppel enables a defendant to bar the plaintiff from relitigating an issue determined against him in a prior action. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971).

526. F. JAMES & G. HAZARD, *supra* note 514, at 580-82; Note, *supra* note 514, at 150. For a more detailed review of the mutuality rule, see Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 HASTINGS L.J. 755 (1980); Currie, *supra* note 518; Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 IND. L.J. 1 (1969); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964); Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978); Note, *Collateral Estoppel Without Mutuality: Accepting the Bernhard Doctrine*, 35 VAND. L. REV. 1423 (1982) [hereinafter cited as Note, *Collateral Estoppel Without Mutuality*].

527. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Although the target party has the burden of showing that he did not have a full and fair opportunity to litigate the issue, the court may reject this party's argument but still refuse to apply collateral estoppel. This scenario may occur because the court has broad discretionary power when applying collateral estoppel. See *infra* notes 656-700 and accompanying text.

528. 402 U.S. 313 (1971).

529. 439 U.S. 322 (1979).

530. *Blonder-Tongue* concerned a patent infringement claim. Plaintiff sought enforcement of a patent that a court had declared invalid in a prior action against another party.

Parklane the Court permitted the offensive use of collateral estoppel without mutuality.⁵³¹ Thus, the Court abolished the mutuality requirement of federal common-law collateral estoppel and declared that the touchstone for its use is whether the target party had a "full and fair opportunity to litigate" the issue in the former action.⁵³² In a broad sense, *Parklane* describes the constraints that the Constitution and notions of fairness place on the doctrine of collateral estoppel. Privity and the identity of issues actually and necessarily determined are requirements designed to keep collateral estoppel in compliance with the fairness guideline. In a narrower sense, "full and fair opportunity to litigate" denotes a group of elements, in addition to privity and the identity of issues, that must exist for a court to apply collateral estoppel. This group includes consideration of whether the target party had an adequate opportunity to call and to cross-examine witnesses in the prior action. These considerations, like those of identity and privity, are subsets of the standard and are necessary to sustain it.⁵³³

The final component of a collateral estoppel analysis is the likelihood that its use will economize judicial resources, or alternatively, that use of the doctrine will not effect a more confusing and cumbersome procedure. Evaluation of the appropriateness of collateral estoppel requires consideration of judicial economy regardless of whether the parties raise the question.⁵³⁴ The following sections review asbestos product cases that apply or reject the doctrine of collateral estoppel. Each section focuses on the courts'

Defendant in *Blonder-Tongue* argued that the prior judgment should preclude relitigation of the issue and the Supreme Court agreed. Acknowledging the strain that such relitigation places on judicial resources, the Court endorsed the use of nonmutual defensive collateral estoppel when the target party had a "full and fair opportunity" to pursue his claim in the prior action. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971).

531. In *Parklane*, a stockholder's derivative suit, the stockholder asserted a nonmutual offensive use of collateral estoppel on the ground that a prior SEC suit already had resolved the issue against the defendant corporation. The Court permitted the use of collateral estoppel but cautioned that nonmutual offensive collateral estoppel poses problems that nonmutual defensive collateral estoppel does not. In particular, the Court noted the problems of encouraging a "wait and see" attitude among potential plaintiffs, inconsistent verdicts, and the possibility of different procedural opportunities in the two actions. In granting trial courts broad discretion to determine when to apply collateral estoppel, the Court emphasized the consideration of fairness to the target party. *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

532. *Id.* at 332.

533. For further discussion of this consideration, see *infra* notes 756-700 and accompanying text.

534. See *infra* notes 702-03 and accompanying text.

analyses of the particular requirements of collateral estoppel: the identity of issues, the actual and necessary determination of the issues, fairness, and judicial economy.

B. Identity of Parties

1. Rule of Mutuality

The rule of mutuality originally restricted the application of collateral estoppel⁵³⁵ by requiring that "in order [for a party] to take advantage of a judgment [he] must have been so related to the case that he would have been bound by it if the judgment had gone the other way."⁵³⁶ Thus, only parties to the prior litigation or their privies could use collateral estoppel.⁵³⁷ In 1942, however, the California Supreme Court in *Bernhard v. Bank of America National Trust and Savings Association*⁵³⁸ stated that "[n]o satisfactory rationalization has been advanced for the requirement of mutuality."⁵³⁹ The *Bernhard* court sustained the defensive use of collateral estoppel by discarding the rule of mutuality.⁵⁴⁰ The court replaced the rule of mutuality with a rule of privity, under which collateral estoppel may be asserted only against "a party or [one] in privity with a party to the prior adjudication."⁵⁴¹

A majority of state courts substituted the *Bernhard* rule for their state rule of collateral estoppel.⁵⁴² The United States Supreme Court effectively eliminated the mutuality requirement of collateral estoppel with its decisions in *Blonder-Tongue Laborato-*

535. See, e.g., *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111 (1912).

536. M. GREEN, *BASIC CIVIL PROCEDURE* 244 (2d ed. 1979).

537. Privity constitutes a relationship between two persons that justifies making a previous judgment conclusive upon one of them because the other was a party to the original action. See F. JAMES & G. HAZARD, *supra* note 514, at 576. Privity connotes something more than a similar interest in the subject matter litigated in an action. See Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511, 512-17. For further discussion of privity and collateral estoppel, see Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974); *infra* notes 555-604 and accompanying text.

538. 19 Cal. 2d 807, 122 P.2d 892 (1942).

539. *Id.* at 812, 122 P.2d at 895.

540. See *supra* note 525.

541. 19 Cal. 2d at 813, 122 P.2d at 895.

542. E.g., *Illinois State Chamber of Commerce v. Pollution Control Bd.*, 78 Ill.2d 1, 398 N.E.2d 9 (1979); *Pat Peruse Realty Co. v. Lingo*, 249 Md. 33, 238 A.2d 100 (1968); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956). For a complete list of the states applying the *Bernhard* rule, see Note, *Collateral Estoppel Without Mutuality*, *supra* note 526, at 1423-24 n.8. For discussions of the evolution of exceptions to the mutuality rule, see Note, *supra* note 514, at 147; M. GREEN, *supra* note 536, at 246-53.

ries, *Inc. v. University of Illinois Foundation*⁵⁴³ and *Parklane Hosiery Co. v. Shore*.⁵⁴⁴ The "full and fair opportunity" language of those cases embraces a requirement of actual identity of the parties or privity comparable to that of the *Bernhard* rule.⁵⁴⁵ Some states, however, still require mutuality as an element of the rule of collateral estoppel.⁵⁴⁶

Because some jurisdictions require mutuality while others have abandoned it, plaintiffs hoping to benefit from collateral estoppel can seek the most beneficial litigating forum. In asbestos products cases, plaintiffs rarely meet the mutuality requirement but often assert collateral estoppel offensively against the manufacturer-defendant. The plaintiff, therefore, probably will select a forum state whose rule of collateral estoppel automatically will not foreclose the offensive use of collateral estoppel by requiring mutuality.⁵⁴⁷ When an asbestos case meets federal diversity jurisdiction requirements, a plaintiff lacking mutuality and desiring to litigate his claim in a state requiring mutuality may attempt to circumvent the rule by filing his claim in federal court. Electing the federal

543. 402 U.S. 313 (1971).

544. 439 U.S. 322 (1979).

545. See *supra* notes 538-41 and accompanying text; *infra* notes 555-603 and accompanying text.

546. F. JAMES & G. HAZARD, *supra* note 514, at 580. For a survey of the states that still require mutuality as an element of collateral estoppel, see Note, *Collateral Estoppel Without Mutuality*, *supra* note 526, at 1424 n.9. In *Recommendation of Magistrate, Van Harville v. Johns-Manville Prods. Corp.*, Civ. Action No. 78-642-H (S.D. Ala. filed Dec. 11, 1980), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 2737 (Dec. 26, 1980), an asbestos product case, the court noted that Alabama still requires mutuality as an element of its rule of collateral estoppel. The Arizona Court of Appeals in *Spettigue v. Mahoney*, 8 Ariz. App. 281, 445 P.2d 557 (1968), concluded that the differences between trials can detract from the truth seeking goals of the court, and it thus required mutuality as an essential guarantor of fairness to the parties. *Id.* at 288, 445 P.2d at 564.

547. Generally, as long as a court has jurisdiction its judgment will be given effect by courts of other jurisdictions. Thus, a state court can observe the judgment of a federal court as the basis of a collateral estoppel, and a federal court likewise can accept the judgment of a state court. See, e.g., *Vernitron Corp. v. Benjamin*, 440 F.2d 105 (2d Cir. 1971). In some instances, however, a court that does not require mutuality for the application of collateral estoppel must determine whether it appropriately can base a nonmutual use of collateral estoppel on a judgment of a court that recognizes the mutuality requirement in collateral estoppel. One commentator has suggested that despite the obviously different policy concerns of the court's practices, the judgment is a sufficient basis for collateral estoppel if all other requisites are present because the target party had the opportunity to litigate the issue. Scoles, *Interstate Preclusion by Prior Litigation*, 74 Nw. U.L. REV. 5 (1979). A court, in determining whether to apply collateral estoppel, at least should consider whether the mutuality requirement in the forum of the prior proceeding affected the target party's ability to foresee the collateral estoppel effect which that judgment would receive in other forums. The foreseeability strand of the fairness test seems to require at least that inquiry. See *infra* notes 670-84 and accompanying text.

forum, however, does not guarantee the availability of the more liberal federal rule of collateral estoppel. The federal courts disagree whether they must apply the state or federal rule of collateral estoppel to diversity cases. Federal district courts in Pennsylvania⁵⁴⁸ and Mississippi,⁵⁴⁹ relying on *Erie Railroad v. Tompkins*,⁵⁵⁰ have ruled in asbestos products cases that because state collateral estoppel rules requiring mutuality are substantive, federal courts must follow state law in diversity actions. Conversely, the United States Court of Appeals for the Fifth Circuit requires the application of the federal rule of collateral estoppel, which does not require mutuality in federal diversity cases.⁵⁵¹ Accordingly, federal district courts in Texas apply the federal rule of collateral estoppel even though the Texas rule of collateral estoppel requires mutuality.⁵⁵² Of course, for federal district courts sit-

548. *Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384 (E.D. Pa. 1982).

549. *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335 (S.D. Miss. 1980). The *McCarty* court cited *Angel v. Bullington*, 330 U.S. 183 (1947), in which the Supreme Court held that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires federal courts sitting in diversity actions to apply the law of the forum state to determine the availability of defenses to the application of collateral estoppel. 502 F. Supp. at 338. The *McCarty* court was uneasy about its position on this issue and noted that even if federal law controls the application of collateral estoppel, several other reasons made offensive collateral estoppel inappropriate in that case. *Id.* at 339.

550. 304 U.S. 64 (1938).

551. *See, e.g., Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982). In *Hardy* the United States Court of Appeals for the Fifth Circuit cited its decision in *Johnson v. United States*, 576 F.2d 606 (1978), *cert. denied*, 451 U.S. 1018 (1981), as authority for its rule that in federal tort claims federal res judicata principles apply in order to preserve the integrity of federal court judgments. The court reasoned that the same rationale also applies to diversity cases. *Accord, Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716-17 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982). The court acknowledged that all federal circuits do not follow this rule, but added that it is nevertheless the better reasoned position because the principle of finality demands that "federal law determine the effects under rules of res judicata of a judgment of federal court." 681 F.2d at 337-38 & n.2 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 87 comment b (1982)).

552. *E.g., Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 337 (5th Cir. 1982); *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1982); *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980); *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980).

The Fifth Circuit and, particularly, the federal district courts in the Eastern District of Texas have been at the center of asbestos product litigation and the use of collateral estoppel in asbestos cases. Federal district courts in Texas have relied on *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), as the basis for collateral estoppel in numerous cases. Judges Fisher and Parker of the Eastern District of Texas have been two of the more creative judges in using collateral estoppel in asbestos litigation. *See infra* notes 564, 567, 580, 595, 614, & 708 and accompanying text for discussions of the asbestos cases over which Judges Parker and Fisher have presided.

ting in states that have abandoned the mutuality requirement the issue is academic.⁵⁵³

Forum shopping is one result of the federal courts' discrepant practices regarding the rule of mutuality. Plaintiffs in asbestos products cases who cannot meet the mutuality requirement will seek the courts that are willing to apply collateral estoppel without requiring mutuality. Paradoxically, these courts may find that although they wish to conserve judicial resources, plaintiffs anxious to benefit from collateral estoppel will crowd their dockets.⁵⁵⁴ A uniform federal policy defining the rule of collateral estoppel as procedural under the *Erie* doctrine and allowing all federal courts to use nonmutual collateral estoppel may distribute more equitably the number of asbestos products cases in the federal judicial system.

2. Requirement of Privity Between Parties

Even in forums not requiring mutuality, courts may apply collateral estoppel only against parties or privies of parties that had a full and fair opportunity to litigate their claims in the prior action.⁵⁵⁵ The requirement of privity provides the rule of collateral estoppel with an element of fairness grounded in the due process considerations of the Constitution⁵⁵⁶ and the notion that each party should have his day in court.⁵⁵⁷ For collateral estoppel purposes the concept of privity denotes a relationship between a party to a prior proceeding (the privy) and the target party in the present proceeding. Privity expresses the idea that the relationship between these parties is sufficiently close to justify a court's precluding the target party from relitigating an issue previously deter-

553. In *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539 (D. Minn. 1982), the court commented on the appropriate rule of mutuality in a footnote to its decision. *Id.* at 542-43 n.3. The court concluded that the disagreement among federal courts whether to apply the state or the federal rule of collateral estoppel was inconsequential in that case because Minnesota's rule of collateral estoppel was identical to the federal rule.

554. Undoubtedly, the tremendous number of asbestos products cases filed in the federal courts of the Eastern District of Texas is due in part to the district's reputation for granting plaintiffs' motions to apply collateral estoppel. By 1980 over 3000 asbestos products cases were on the dockets of the Eastern District of Texas. *Wheeler & Allee, supra* note 517, at 17.

555. *See, e.g.*, *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Amader v. Johns-Manville Corp.*, 431 F. Supp. 1384 (E.D. Pa. 1982); *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 265 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

556. U.S. CONST. amends. V, XIV.

557. *M. GREEN, supra* note 536, at 244; *see, e.g.*, *Jorgenson v. Jorgenson*, 32 Cal. 2d 13, 18, 193 P.2d 728, 732 (1948).

mined against his privity. Substantial representation of the target party's interest in the prior action is a principle determinant of privity.⁵⁵⁸

The similarity of many issues commonly litigated in asbestos products cases invites attempts by plaintiffs to construct privity relationships among defendant-manufacturers. Generally, the courts in asbestos products cases neither have retreated from the traditional requirements of privity nor have recognized these relationships as sufficient to find privity, notwithstanding plausible arguments that the target party's interests had adequate representation in prior litigation.

The Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*⁵⁵⁹ labelled the district court's failure to distinguish between parties that were and were not participants in the prior action⁵⁶⁰ an "insurmountable problem with the . . . application of collateral estoppel."⁵⁶¹ In *Hardy* Judge Parker of the United States District Court for the Eastern District of Texas issued a pretrial order giving preclusive effect to determinations previously made in *Borel v. Fibreboard Paper Products Corp.*⁵⁶² Although most of the *Hardy* defendants were not parties to *Borel*, Judge Parker's order estopped all defendants from litigating the issues of whether asbestos can cause asbestosis or mesothelioma and whether asbestos products are unreasonably dangerous. Judge Parker advanced two bases for extending an estoppel against all defendants including those who never had litigated the issues in question.⁵⁶³ First, Judge Parker reasoned that the extension was appropriate because all de-

558. The courts have failed to explain precisely the meaning of "substantial representation" of another party's interest. Certain well-recognized legal relationships, such as indemnitor-indemnitee, and some other contractual agreements usually evidence substantial representation. F. JAMES & G. HAZARD, *supra* note 514, at 589-95. The courts, however, may consider less formal relationships sufficient; the focus of their determination is whether the other party fairly has represented the interests of the nonparty to the prior litigation. *Id.* at 584. For a discussion of the concept of privity, see M. GREEN, *supra* note 536, at 241-44; F. JAMES & G. HAZARD, *supra* note 514, at 575-76; Berch, *supra* note 537, at 512-17.

559. 681 F.2d 334 (5th Cir. 1982).

560. Plaintiff in *Hardy* sought an estoppel of several issues that he believed *Borel* previously had determined. *Id.* at 336.

561. *Id.* at 338.

562. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *See supra* part II.

563. In *Hardy* Judge Parker entered an omnibus pretrial order based on nonmutual offensive collateral estoppel that was effectively a summary judgment for plaintiffs. The order precluded litigation on the following issues: (1) whether asbestos causes either asbestosis or mesothelioma; (2) defendants' knowledge of asbestos' harmful effects as it may relate to a duty to warn; and (3) the state-of-the-art defense. *Id.* at 336 n.1.

defendant-manufacturers "shared an identity of interests" sufficient to constitute privity.⁵⁶⁴ Second, Judge Parker relied on the doctrine of "virtual representation" to find privity among the parties.⁵⁶⁵

The Fifth Circuit rejected the "identity of interests" reasoning because it stretched "the idea of privity beyond meaningful limits."⁵⁶⁶ The court acknowledged the district court's creative union of collateral estoppel and the theory of enterprise liability,⁵⁶⁷ which courts have applied in mass tort litigation cases and recently in asbestos-related litigation.⁵⁶⁸ In rejecting the identity of interests rationale, the Fifth Circuit relied on its decision in *Southwest Airlines Co. v. Texas International Airlines*,⁵⁶⁹ in which the court listed acceptable privies for purposes of collateral estoppel. These included: (1) nonparty persons who succeeded to the party's interest in property; (2) nonparty persons who controlled the original suit; and (3) nonparty persons whose interests had adequate representation in the original suit.⁵⁷⁰ Although the court failed to explain why the third type of privity did not pertain to the instant case, it did explain that the court had an interest in keeping nonparty exceptions strictly confined. The Fifth Circuit stated that privity does not exist merely because all the defendants manufac-

564. Judge Fisher, Judge Parker's colleague in the Eastern District of Texas, previously rejected this same "identity of interest" theory of privity in *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980). Judge Fisher held that the theory would violate the full and fair opportunity standard that governs the use of collateral estoppel. The increased number of asbestos products cases in the district since Judge Fisher's decision might have prompted Judge Parker to accept the identity of interest theory. Judge Fisher based his identity of interest theory on the concert of action theory. *Id.* at 249. "The [concert of action theory] relies on the fact that market entities for economic reasons often cooperate in their exploitation of the market. Where this cooperation can be shown, the doctrine allows the jury to regard the market entities as a single person." *Concert of Action Theory: Polluters Beware*, 68 A.B.A. J. 1209, 1209 (1982) (quoting Broder, N.Y.L.J., July 9, 1982). Although Judge Parker's efforts appear to deviate dramatically from traditional notions of privity in the application of collateral estoppel, the concert of action theory is analogous to the modern tort theory of enterprise liability. See *supra* part III.

565. See *infra* note 576.

566. 681 F.2d 339 (1982); *cf.*, *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971) (a mere interest in the same question or in proving the same set of facts by parties does not prove privity between those parties).

567. *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1982) ("The enterprise liability theory of collateral estoppel set forth by Parker in *Hardy* may appear at first glance to be revolutionary.").

568. See Fischer, *supra* note 180; *supra* part III.

569. 546 F.2d 84 (5th Cir. 1977).

570. *Id.* at 95; *cf.* RESTATEMENT (SECOND) OF JUDGMENTS §§ 30, 31, 34, 39-41 (1982) (describing the privity requirements of collateral estoppel).

tured products containing asbestos.⁵⁷¹ Noting that the defenses in *Borel* were not linked and that some of the defendants in *Hardy* were not aware of the *Borel* litigation when it occurred, the court determined that privity relationships did not exist between the *Borel* and non-*Borel* defendants in *Hardy*.⁵⁷²

Although the Fifth Circuit appeared to require that privity exist for all the issues litigated in *Borel* as a prerequisite for the use of collateral estoppel, a more traditional application of the doctrine requires that privity exist only for the particular issue being estopped. By following the traditional approach, the Fifth Circuit would have determined whether the relationships among the *Borel* and non-*Borel* defendants were sufficient to evince privity with respect to the causation issue independent of the privity question on the unreasonably dangerous issue. The Fifth Circuit's analysis ignored the defendant manufacturers' shared interests in specific asbestos product litigation issues. For example, the issue of whether asbestos dust is a competent producing cause of mesothelioma is common to virtually every asbestos product case. The Fifth Circuit, using a blanket approach to privity, reversed Judge Parker's application of collateral estoppel to this causation issue against the non-*Borel* defendants because privity was absent.⁵⁷³ Had the *Hardy* court addressed each issue individually, it might have found that the *Borel* defendants'⁵⁷⁴ litigation of the causation issue sufficiently represented the non-*Borel* defendants to support a finding

571. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 339.

572. *Id.* at 339-40. The Fifth Circuit in *Hardy* also extended the protection of its decision to named parties in *Borel* who settled with plaintiff before trial. The court, however, intimated that the rule of privity would not shield parties that settled before a known final judgment was entered against them in a trial in which they participated, because their settling suggests that they purposefully tried to avoid the use of that determination as the basis for an estoppel in subsequent cases. Such a case would not violate due process considerations of fairness because the party had its day in court.

The absence of an evidentiary bearing or a requirement that the proponent prove some link between the *Borel* and the non-*Borel* defendants before the trial court makes its determination also troubled the Fifth Circuit. *Id.* at 339.

573. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 338-41.

574. Seven of the defendants in *Hardy* were parties to the *Borel* litigation: Pittsburgh Corning, Armstrong Cork Co., Phillip Carey, Ruberoid Co., Johns-Manville Corp., Fibreboard Corp., and Combustion Engineering. Four of the *Hardy* defendants were named in *Borel* but settled before trial: Owens-Corning Fiberglass, Standard Asbestos Mfg. & Insulating, Unarco, and Eagle-Picher Industries. The other *Hardy* defendants—Forty-eight Insulations Inc., Garlock, Crown Cork & Seale Co., Moodette Corp., GREFCO Inc., Keene Corp., Owens-Illinois, Raybestos-Manhattan Inc., Nicolet, GAF Corp., and Celotex—were not defendants in *Borel*. *See id.* at 339 n.4.

of privity on that issue.⁵⁷⁵ An issue-by-issue privity analysis also might have produced a more refined articulation of the adequate representation test established in *Southwest Airlines*. The Fifth Circuit also rejected Judge Parker's reliance on the doctrine of "virtual representation"⁵⁷⁶ as a basis for finding privity in *Hardy*. The court stated that virtual representation requires an express or implied legal relationship of accountability between parties.⁵⁷⁷ Plaintiffs in *Hardy* showed no such relationship among defendants that were parties to *Borel* and those that were not.

The Eastern District of Texas has employed two other theories—*stare decisis*⁵⁷⁸ and judicial notice⁵⁷⁹—to preclude defendant manufacturers from litigating particular issues in asbestos products cases. The Fifth Circuit, however, rebuffed those efforts,⁵⁸⁰ which would have sidestepped the privity requirement of collateral estoppel and prevented defendant manufacturers from litigating

575. Even if the court had determined that privity existed in this case, the non-*Borel* defendants would not have been subject to collateral estoppel for the same reasons that the court refused to permit its use against the *Borel* defendants: the absence of a full and fair opportunity to litigate the issues in *Borel*. If the parties actually participating in *Borel* did not represent themselves adequately, they could not have represented adequately the non-*Borel* defendants.

576. The Fifth Circuit articulated the doctrine of virtual representation in *Aerojet-General Corp. v. Askew*, 511 F.2d 710, cert. denied, 423 U.S. 908 (1975): "Under the federal law of res judicata, a person may be bound by a judgment even though not a party [to the original litigation], if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." 511 F.2d at 719.

577. See *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978).

578. The principle of *stare decisis* embodies the idea that judges should follow the decisions of their predecessors rather than make new law. Ruppin, *The Legend of Stare Decisis*, 41 ALA. LAW. 601, 601-02 (1981). For a more thorough review of *stare decisis*, see 1B J. MOORE, *supra* note 515, ¶ 0.402; Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

579. Judicial notice denotes the power of a judge to accept the truth of certain facts without requiring formal proof. See, e.g., *Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, 235 F.2d 303, 307 (7th Cir. 1956); *Geer v. Birmingham*, 88 F. Supp. 189, 228 (N.D. Iowa 1950); *Thurman v. Illinois Dep't of Pub. Aid*, 25 Ill. App. 3d 367, 370, 323 N.E.2d 502, 504 (1974). The objectives of judicial notice are the prevention of incorrect determinations of fact by the jury and the conservation of judicial resources. See Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. FLA. L. REV. 723, 729-30 (1976). Rule 201 of the Federal Rules of Evidence codifies the doctrine of judicial notice, which originated in the common law. FED. R. EVID. 201. For further discussion of judicial notice, see Keeffe, Landis, & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1958); McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944); Roberts, *Judicial Notice: An Exercise in Exorcism*, 19 N.Y.L.F. 745 (1974); Note, *Judicial Intervention in Evidence*, 10 LOY. U. CHI. L.J. 585, 595-606 (1979).

580. See *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); *Migues v. Fibreboard Corp.*, 493 F.Supp. 61 (E.D. Tex. 1980), *rev'd*, 662 F.2d 1182 (5th Cir. 1981).

issues irrespective of their relation to the defendants in the previous litigation. In *Migues v. Fibreboard Corp.*⁵⁸¹ Judge Parker interpreted the *Borel* decision⁵⁸² to be "precedential authority for the proposition that all asbestos products are unreasonably dangerous as a matter of law."⁵⁸³ Citing the principle of stare decisis as the basis for his order, Judge Parker estopped both *Borel* and non-*Borel* defendants from litigating that issue. The Fifth Circuit rejected Judge Parker's attempt to apply an estoppel based on stare decisis, which does not require privity between parties. Stare decisis⁵⁸⁴ applies only to those issues necessarily decided by the court.⁵⁸⁵ Clarifying the meaning of its decision in *Borel*, the Fifth Circuit stated that "[t]he only determination made by this court in *Borel* was that, based on the evidence in the case, the jury's findings could not be said to be incorrect as a matter of law. The jury was entitled not compelled to find the products unreasonably dangerous."⁵⁸⁶

In *Hardy v. Johns-Manville Sales Corp.*⁵⁸⁷ Judge Parker justified his attempt to estop all parties from litigating the medical causation issue by taking judicial notice⁵⁸⁸ that asbestos is a "competent producing cause of mesothelioma and asbestosis."⁵⁸⁹ Again, the Fifth Circuit overturned the district court's order, this time by expressly rejecting the applicability of judicial notice to the causation issue.⁵⁹⁰ The court found that rule 201 of the Federal Rules of Evidence applies only to medical facts not subject to reasonable dispute.⁵⁹¹ The court listed a "host of disputed issues," such as whether "mesothelioma [can] arise without exposure to asbestos"

581. 662 F.2d 1182 (1982).

582. Judge Parker also cited *Condray v. Fibreboard*, No. B-76-108-CA (E.D. Tex. 1977) as the basis for precluding litigation on the unreasonably dangerous nature of some of the defendants' asbestos products. *Id.* at 1185.

583. 662 F.2d at 1183 (emphasis in original).

584. See *supra* note 578.

585. 662 F.2d at 1187.

586. *Id.* at 1188 (emphasis in original); see also *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345 (5th Cir. 1982) (the court quotes its *Migues* opinion to reiterate its reading of *Borel*).

587. 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982). Judge Parker issued his pretrial order in *Hardy* before the Fifth Circuit handed down its decision in *Migues*.

588. See *supra* note 579.

589. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 347.

590. *Id.* at 347-48.

591. See FED. R. EVID. 201; cf. *Klein v. Dep't of Registration and Educ.*, 412 Ill. 75, 105 N.E.2d 758 (1952) (court takes judicial notice that the eyesight of eyeglass wearers continues to change over the years and may return to normal).

to support its decision to overrule the district court.⁵⁹² The court of appeals also found that Judge Parker's use of judicial notice did not meet the requirement that "there [be] no evidence before the jury in disproof"⁵⁹³ of the issue because "there [was] evidence on both sides of an issue" before the court.⁵⁹⁴

In reversing Judge Parker's judicial notice that asbestos causes mesothelioma and asbestosis, the Fifth Circuit may have been unnecessarily cautious.⁵⁹⁵ Judge Parker's determination that the issue was not subject to reasonable dispute apparently was within the bounds of judicial discretion,⁵⁹⁶ given the current medical knowledge about the causes of those diseases.⁵⁹⁷ Because Judge Parker narrowly characterized the factual issue he judicially noticed, the circuit court's "host of disputed issues"⁵⁹⁸ were beside the point. Judge Parker judicially noticed only that asbestos is one known cause of asbestosis and mesothelioma,⁵⁹⁹ not that asbestos is the

592. 681 F.2d 347-38.

593. *Id.* at 348 (quoting FED. R. EVID. 201 advisory committee note (1975)). The note acknowledges that courts and commentators disagree whether courts should admit evidence to disprove facts of which they took judicial notice. *Id.*

594. 681 F.2d at 348.

595. *But see* Wheeler & Alee, *supra* note 517, at 18. In *Migues* Judge Parker had heard expert witness testimony that asbestos is the only known cause of mesothelioma. *Migues v. Fibreboard Corp.*, 662 F.2d at 1185.

596. Subdivision b of the advisory committee note to Rule 201(b) of the Federal Rules of Evidence describes the use of judicial notice as a "significant vehicle for progress in the law . . . particularly in developing fields of scientific knowledge." FED. R. EVID. 201 advisory committee note.

597. Dr. Maxey Rosenau has summarized the medical profession's position on the relationship between asbestos and cancer: "Few credible doctors will dispute the causative role of asbestos in cases of mesothelioma. Indeed, Dr. Irving J. Selikoff has characterized mesothelioma as a 'signal tumor', that is a tumor, the existence of which almost invariably points to prior asbestos exposure." M. ROSENAU, PUB. HEALTH AND PREVENTIVE MED. 581-82 (1980). Likewise, in *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975), the district court's jury instructions contained the following passage: "It is admitted that Johns-Manville knew as early as 1942 that asbestos would cause asbestosis when inhaled by factory workers." *Id.* at 158. The district court in *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539 (D. Minn. 1982), recently applied collateral estoppel to the issue of whether asbestos dust is a competent producing cause of mesothelioma and asbestosis. The court said the proposition that asbestos dust is a competent producing cause of disease is "so firmly entrenched in the medical and legal literature that it is not subject to serious dispute." *Id.* at 544. The *Bertrand* court expressly distinguished this ruling from a finding "that asbestos dust is the *only* cause of asbestosis or mesothelioma." *Id.* at 544-45 n.4 (emphasis in original).

598. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 347-48.

599. *See* J. McCORMICK, EVIDENCE 764 (2d ed. 1972) ("it suffices if the principle [of which judicial notice is taken] is accepted as a valid one in the appropriate scientific community").

only cause of those diseases.⁶⁰⁰ Judicial notice would not foreclose litigation on the issues about which the Fifth Circuit voiced concern—for example, “can mesothelioma arise without exposure to asbestos.”⁶⁰¹ The circuit court further suggested that Judge Parker inappropriately exercised judicial notice because its use would create an unfair presumption that all products containing asbestos cause cancer.⁶⁰² Thus, the court grafted the collateral estoppel fairness consideration onto the doctrine of judicial notice.⁶⁰³ By focusing on the likely effect of judicial notice in the trial rather than on whether the “fact” was beyond reasonable dispute, the Fifth Circuit may have only postponed the inevitable at the expense of consuming further judicial resources to relitigate the issue.⁶⁰⁴

C. Identity of Issues

To acquire the benefits of collateral estoppel the proponent must demonstrate that the matter on which he seeks the estoppel is identical⁶⁰⁵ to an issue actually litigated⁶⁰⁶ in a prior action.⁶⁰⁷ To meet this burden the proponent may submit as evidence the pleadings, any part of the record action,⁶⁰⁸ or the testimony of any observer⁶⁰⁹ of the former action. If the court has any reasonable

600. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. at 1362.

601. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 348.

602. *Id.* at 347.

603. In *Hardy* the Fifth Circuit found that judicial notice was improper “[f]or much the same reasons” that it rejected the use of collateral estoppel. *Id.*

604. See Keeffe, Landis, & Shaad, *supra* note 579, at 670 (“It brings discredit upon the legal profession and it makes a mockery of a court of justice to permit a jury to accept or reject in accordance with their prejudices a fact capable of exact scientific determination.”).

605. For a discussion concerning the identity of issues requirement as it relates to the issues of medical causation, knowledge of the product’s dangerousness, and product defectiveness in asbestos product litigation, see Note, *supra* note 24, at 1334-39.

606. Professor Vestal has criticized the “actually litigated” requirement of collateral estoppel incorporated in the *Restatement (Second) of Judgments* as unnecessarily restrictive. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464 (1981). This requirement prohibits courts from giving preclusive effect to certain agreements on issues made before or during trial. Professor Vestal has argued that the actual litigation of an issue should be irrelevant to the determination of collateral estoppel as long as the target party had the opportunity and the incentive to litigate the issue and the issue was essential to the decision in the prior action. *Id.* at 470-95.

607. See F. JAMES & G. HAZARD, *supra* note 514, § 11.18.

608. In cases tried to the court, the judge usually issues written findings of law and fact. These written findings often are helpful in ascertaining those issues actually determined. *Id.*

609. The parties may submit the testimony of the judge or jurors from the prior action to prove their assertions regarding the issues actually litigated. *Id.* § 11.17, at 567; see also RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment f (1982) (discussing the use of extrinsic

doubt whether the issues are identical or actually litigated in the earlier proceeding, it usually will refuse to apply collateral estoppel.⁶¹⁰ Rulings concerning identity of issues depend on how broadly or narrowly the court conceives the issues litigated in the prior and current actions.⁶¹¹ Typically, the proponent will broadly characterize the issue in the former action as identical to the issue in the present litigation. Conversely, the target party will minimize the similarities of the issues and attempt to show that the issue in the former action was so narrow that it is inapposite to any issue in the current action. By reviewing the prior and current proceedings the court will determine whether the issues are identical.

A court's failure to view an issue in the context of the previous litigation may result in an interpretation that does not comport with the original scope of the issue. If, for example, the court agrees with a proponent in a strict liability case that the issue of whether all products containing asbestos are defective and unreasonably dangerous was the subject of litigation and determination in a prior action, then knowledge that the elements of proof in the prior action also included a determination of whether the plaintiff's exposure to the particular product was a sufficient producing cause of injury should limit the estoppel effect of the determination on the defectiveness issue.

The issues litigated in asbestos products cases vary with the theories of liability pleaded by the plaintiff.⁶¹² Some of the issues, such as the plaintiff's damages, usually will not be appropriate subjects for application of collateral estoppel because each plaintiff

evidence to determine the issues actually litigated).

610. See, e.g., *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970); *Mulligan v. Schlacter*, 389 F.2d 231 (6th Cir. 1968); *McNellis v. First Fed. Sav. & Loan Ass'n*, 364 F.2d 251, 257 (2d Cir.), cert. denied, 385 U.S. 970 (1966) ("a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue").

611. See F. JAMES & G. HAZARD, *supra* note 514, § 11.17 at 564-65 n.3; Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217, 222-224 (1954). Comment c to the *Restatement (Second) of Judgments* § 27 discusses the difficulties inherent in delineating the dimensions of an issue. Some of the considerations for a court in determining whether the issues in the two proceedings are identical include:

Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pre-trial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1982).

612. See *supra* part II.

must prove the damages peculiar to his own case.⁶¹³ The issues most likely to be subjects of collateral estoppel are those that are common to many cases and that concern the behavior of the defendant or the properties of a product. For example, one element plaintiffs must prove in asbestos products cases relating to the application of collateral estoppel is that the defendant manufactured a product containing asbestos.⁶¹⁴

Because asbestos products litigation entails numerous variables, establishing identity of issues is a particularly difficult task for the proponent. While the proponent may characterize a previous ruling on the issue of an asbestos product's defectiveness as a determination that all asbestos-containing products are defective, the target party may argue that the prior action concerned only the defective nature of the particular product.⁶¹⁵ Since the asbestos products often vary from case to case, the target party may argue that collateral estoppel cannot apply because no identity of issues exists. Similarly, variations in the period of exposure to the product, the duration of the exposure, the conditions under which the exposure occurred, the plaintiff's exposure to warnings about the product, and the nature of the warning may defeat a proponent's

613. See Kroll, *Principles of Collateral Estoppel in Products Liability*, 1979 *INS. L.J.* 313, 319.

614. In a typical asbestos product case a plaintiff relying on a strict liability theory will have to prove the following elements: (1) The defendants manufactured, sold, distributed, marketed, or placed in the stream of commerce products containing asbestos; (2) the products containing asbestos are unreasonably dangerous; (3) asbestos dust is a competent producing cause of asbestosis, mesothelioma, or whatever disease from which the plaintiff claims to be suffering; (4) the plaintiff was exposed to the defendant's product; (5) the exposure was sufficient to be a producing cause of the asbestosis, mesothelioma, or other disease the plaintiff claims to have; (6) the plaintiff contracted asbestosis, mesothelioma, or another disease that asbestos dust can cause; and (7) the plaintiff suffered damages. See, e.g., *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539, 540-41 (D. Minn. 1982); *Flatt v. Johns-Mansville Sales Corp.*, 488 F. Supp. 836, 838 (E.D. Tex. 1980); Plaintiff's Motion, *Hebert v. Fibreboard Corp.*, Civ. No. B-77-595 (E.D. Tex. filed May 15, 1979), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 364 (June 12, 1979); *RESTATEMENT (SECOND) OF TORTS* § 402A(1) (1965). Working within this general framework, some courts have construed more narrowly the elements of an asbestos product case. Thus, in *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980), the court's list of the elements of plaintiff's proof concerned only asbestos insulation products rather than all asbestos-containing products. *Id.* at 244. This type of precise construction of the issues enables courts in subsequent actions to discern the scope of the issues more easily, and thus fosters confidence in the application of collateral estoppel.

615. Many defendants in asbestos products cases manufactured or distributed more than one type of asbestos or asbestos-containing product. For an extensive list of asbestos products used by the railroad industry, see Motley & Middleton, *Asbestos Disease Among Railroad Workers—Legacy of the Laggin' Wagon*, 17 *TRIAL*, Dec. 1981, at 39, 41 table 1.

claim of identity of issues.⁶¹⁶ Although the court may preclude the target party-defendant from relitigating the issue of the defectiveness of asbestos-containing products, it should permit the target party to litigate the issue of whether the plaintiff's exposure to his product was sufficient to cause the injury. To deny him this opportunity would enlarge unfairly the effect of the original determination beyond its intended scope.

D. Issue Actually Determined

In addition to establishing the prior litigation of the issue in question, the proponent must show that a judge or jury actually determined the issue in that prior action.⁶¹⁷ General verdicts make application of collateral estoppel difficult because the issues actually resolved may not be easily discernible. If the jury in the prior action did not illuminate its general verdict with specific findings,⁶¹⁸ the proponent may submit any part of the record of the

616. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 343-44.

617. The rule of collateral estoppel requires a final and valid determination of the issue on which the party bases a claim of estoppel. F. JAMES & G. HAZARD, *supra* note 514, §§ 11.4.-6; RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment k (1982). The requisites of a valid determination are the court's jurisdiction over the subject matter and the party against whom the court makes the determination. *Id.* § 1; *see also id.* §§ 2-9 (discussing adequate notice and personal jurisdiction).

The court's entry of a final judgment in an action is usually dispositive that the court finally determined the issue. F. JAMES & G. HAZARD, *supra* note 514, § 11.4, at 534. Accordingly, the *Restatement (Second) of Judgments* states generally that "[t]he rules of res judicata are applicable only when a final judgment is rendered." RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982). For purposes of collateral estoppel, however, § 13 defines "final judgment" to include "any prior adjudication of an issue . . . that is determined to be sufficiently firm to be accorded conclusive effect." *Id.* § 13 comment e. Thus, a court may consider a prior determination of an issue final for collateral estoppel purposes if the court believes that an appellate court would not overturn the determination or that the court in the prior action would not revise it before a final judgment.

Because of the large number of asbestos products cases currently in court and on the dockets, the finality requirement likely will pose some troublesome questions for the courts. As proponents seek collateral estoppel on issues determined in recent prior actions and perhaps some concurrent actions as well, the courts will need to weigh the value of giving conclusive effect to those determinations against the risks that appellate courts will reverse those determinations. Fairness to the target party militates in favor of the trial court's waiting for appellate affirmation of a judgment before relying on it to preclude litigation of issues in a subsequent action. To minimize the unnecessary relitigation of issues, the courts might postpone trials in which parties seek collateral estoppel until final disposition of the appeal of the prior action. The delay would not be unfair to plaintiffs asserting collateral estoppel arguments because they benefit from the use of collateral estoppel; but they should not benefit at the expense of the defendant-manufacturer.

618. The availability of specific findings of fact by the jury will depend on the practice within the relevant jurisdiction. F. JAMES & G. HAZARD, *supra* note 514, § 7.15; *see* FED. R. CIV. P. 49(a)-(b).

prior action or the testimony of a qualified observer to prove submission of an issue for determination.⁶¹⁹ The parties, however, may not inquire into the determination process of the prior litigation,⁶²⁰ and the court will not receive the testimony of a judge or juror from the prior action to establish the grounds for the judgment.⁶²¹ Courts will resolve the question of whether a prior proceeding actually determined a specific issue only by reviewing the record of that proceeding, the jury's answers to interrogatories (if they exist), and the verdict. Because juries determine most asbestos products cases, the use of special interrogatories increases the opportunities for courts to apply collateral estoppel by clarifying the issues determined in reaching the verdict.

In *Amader v. Johns-Manville Corp.*⁶²² a federal district court refused to review extrinsic information when it applied collateral estoppel in an asbestos products case. The proponent sought collateral estoppel on the issue of the defectiveness of asbestos-containing products in a strict liability action.⁶²³ The *Borel* decision provided the basis for the use of an estoppel.⁶²⁴ One of the defendant target parties offered extrinsic evidence to show that *Borel* could not be the basis for collateral estoppel in a strict liability case because the *Borel* jury considered only whether the defendants were negligent.⁶²⁵ The *Amader* court ruled that because the target party was a defendant in *Borel* and because the *Borel* jury found all the defendants "strictly liable," collateral estoppel was appropriate.⁶²⁶

Issues litigated in the *Borel* case have served as the basis for parties asserting collateral estoppel in several asbestos products cases. Federal courts in the Eastern District of Texas have relied on *Borel* in collaterally estopping defendant manufacturers from rebutting the propositions that products containing asbestos were unreasonably dangerous and that asbestos is a competent producing cause of asbestosis and mesothelioma.⁶²⁷ Other federal district

619. See *supra* notes 608-10 and accompanying text.

620. Note, *supra* note 514, at 154.

621. *Id.*

622. 541 F. Supp. 1384 (E.D. Pa. 1982).

623. *Id.* at 1385.

624. See *supra* note 562 and accompanying text.

625. 541 F. Supp. at 1386. n.1.

626. *Id.*

627. *E.g.*, *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982); *Behringer v. Standard Asbestos Mfg. & Insulating Co.*, No. 81-2229 (5th Cir. 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5275 (July 23, 1982); *Migues v. Fibreboard Corp.*, 662 F.2d

courts similarly accepted *Borel* as a basis for collateral estoppel of those issues.⁶²⁸ In *Bertrand v. Johns-Manville Sales Corp.*⁶²⁹ the court interpreted the *Borel* decision to support estoppel on the causation issue but not on the strict liability issue of unreasonable dangerousness.⁶³⁰ To apply collateral estoppel, these courts must have found that the *Borel* jury actually determined those issues. Some district courts, however, disagree.⁶³¹ The magistrate presiding in *Van Harville v. Johns-Manville Corp.*,⁶³² for example, found that the *Borel* jury did not precisely determine the issues of causation and unreasonable dangerousness of asbestos products.⁶³³ He stated that the charge to the *Borel* jury was confusing and "a thin reed upon which to construct an estoppel."⁶³⁴ The court in *McCarty v. Johns-Manville Sales Corp.*⁶³⁵ likewise denied plaintiff's request for collateral estoppel concerning the defectiveness of asbestos products.⁶³⁶ The court ruled that the issues were not clearly identical because the case at bar was solely a strict liability case while *Borel* comprised litigation on the warranty and negligence theories of liability in addition to strict liability.⁶³⁷ Because the *Borel* verdict was unclear, the court could not ascertain which issues the *Borel* jury actually determined in reaching its verdict, and, therefore, the court would not apply collateral estoppel.⁶³⁸

1182 (5th Cir. 1982); *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980).

628. *E.g.*, *In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106 (D. Conn. 1982); *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539 (D. Minn. 1982).

629. 529 F. Supp. 539 (D. Minn. 1982).

630. *Id.* at 544-45.

631. *See, e.g.*, Recommendation of Magistrate, *Van Harville v. Johns-Manville Prods. Corp.*, Civ. Action No. 78-642-H (S.D. Ala. filed Dec. 11, 1980), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 2737 (Oct. 12, 1979); *Bailey v. Johns-Manville Sales Corp.*, No. 3-80-192 (E.D. Tenn. 1980), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 2537 (Oct. 26, 1980); *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335 (S.D. Miss. 1980).

632. Recommendation of Magistrate, *Van Harville v. Johns-Manville Prods. Corp.*, Civ. Action No. 78-642-H (S.D. Ala. filed Dec. 11, 1980), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 2737 (Oct. 12, 1980).

633. *Id.*

634. *Id.* at 2738.

635. 502 F. Supp. 339 (S.D. Miss. 1980).

636. Plaintiffs relied on *Borel* as the basis for collateral estoppel. *Id.* at 338.

637. *Id.* at 339. Judge Nixon gave two other less persuasive reasons for denying plaintiff's motion for collateral estoppel in *McCarty*. First, he said that defendants' showing that they had prevailed in 14 of 24 previous asbestos product cases was a legitimate basis for denying collateral estoppel. Second, Judge Nixon ruled that application of collateral estoppel based on determinations made in *Borel* would be unfair because defendants could not have foreseen during the *Borel* litigation the extent of their potential liability in asbestos products actions. *Id.*; see *infra* notes 670-79 and accompanying text.

638. 502 F. Supp. at 339.

The Fifth Circuit recently agreed with the *Van Harville* and *McCarty* courts' interpretation of *Borel* and once again rejected the use of collateral estoppel in an asbestos products case. In *Hardy v. Johns-Manville Sales Corp.*⁶³⁹ the Fifth Circuit concluded that "the judgment in *Borel* cannot estop even the *Borel* defendants in this case" on the issues of product defectiveness or the adequacy of the warning.⁶⁴⁰ The court noted that the *Borel* decision was ambiguous on "certain key issues."⁶⁴¹ Thus, the jury's decision about when defendants' duty to warn attached was not clear.⁶⁴² Further, the jury's verdict did not clearly indicate whether the jury accepted plaintiff's state-of-the-art defense.⁶⁴³ Likewise, it did not explain whether the jury based strict liability on the insufficiency of the warnings themselves or the failure to ensure that the warnings reached all persons reasonably expected to come in contact with the product.⁶⁴⁴ In short, the court found that neither the verdict nor the jury instructions in *Borel* adequately delineated the scope of the issues actually determined by the jury. In the wake of *Hardy*, asbestos litigation plaintiffs no longer may be able to rely on *Borel* as the basis for collateral estoppel.

Some plaintiffs, however, may be able to use *Karjala v. Johns-Manville Products Corp.*⁶⁴⁵ as a predicate for collateral estoppel. Indeed, some courts have cited *Karjala* along with *Borel* as the basis for estopping litigation of an asbestos product's defectiveness.⁶⁴⁶ Plaintiff in *Karjala* was an asbestos insulation installer who contracted asbestosis. He submitted to the jury only one theory of liability: defendants were strictly liable in tort for failing to warn plaintiff that their products were unreasonably dangerous.⁶⁴⁷ The jury awarded Mr. Karjala \$200,000 in damages. Because the jury in *Karjala* considered only one theory of liability and based

639. 681 F.2d 334 (5th Cir. 1982).

640. *Id.* at 343. The *Hardy* court discussed in another section of its decision the district court's decision to estop litigation of whether asbestos is a competent producing cause of cancer. *Id.* at 347-48.

641. *Id.* at 343. The court gave two other reasons for denying the application of collateral estoppel to the issue of the product's defectiveness: (1) the existence of verdicts inconsistent with the *Borel* verdict; and (2) the *Borel* defendants' inability to foresee the magnitude of their potential liability during the *Borel* litigation. *Id.* at 346-47.

642. *Id.* at 344.

643. *Id.*

644. *Id.*

645. 523 F.2d 155 (8th Cir. 1975).

646. *E.g., In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106 (D. Conn. 1982); *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539 (D. Minn. 1982).

647. *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d at 157 n.1.

its decision on evidence that defendants failed to warn plaintiff of the product's hazards, the issues actually decided are more readily discernible than those in *Borel*. Thus, *Karjala* may provide a sufficient basis for collateral estoppel if the court deems the proponent's issue identical.⁶⁴⁸

E. Issues Necessarily Determined

Finally, the proponent must show that the determination of the issue in question was necessary to the result in the prior action.⁶⁴⁹ Courts usually ascertain whether an issue was necessarily determined by examining the pleadings, the record, the final judgment, and any special jury findings of the prior action.⁶⁵⁰ In asbestos litigation the capacity of asbestos to cause mesothelioma or asbestosis exemplifies an issue that is a necessary component of a judgment for a plaintiff afflicted with those diseases.⁶⁵¹ Conversely, when mesothelioma is the injury for which the plaintiff seeks damages, an explicit finding by the trier of fact that asbestos also causes asthma is not necessary to the final judgment. The finding regarding asthma, therefore, would not support a collateral estoppel of that issue in a later action.⁶⁵² The "necessarily determined"

648. If the proponent's contact with asbestos was reasonably foreseeable by the defendant-target party and the proponent received *no warning* of the asbestos product's dangerous nature, then he may have a valid collateral estoppel claim based on *Karjala*. Alternatively, a proponent averring that the target party's warnings were insufficient or not timely poses an issue different from that determined in *Karjala*. Thus, *Karjala* probably would not support an application of collateral estoppel to this proponent's action.

649. F. JAMES & G. HAZARD, *supra* note 514, at 569. This requirement makes sense because issues actually determined but unnecessary to the result usually are not reviewable on appeal. Also, the court and the parties probably focused their attention and efforts on the issues necessary to the result. This element of the rule of collateral estoppel thus limits the rule's use to cases in which the parties actually litigated the issue diligently. *Id.* at 570; see, e.g., *Hinchey v. Sellers*, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959); see also RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment j (1982) (discussing the requirement that the determination is essential to the judgment).

650. Note, *supra* note 514, at 155.

651. In asbestos products cases such a determination is implicit in a verdict awarding damages, even if the issue did not appear explicitly in the pleadings, record, jury instructions, or verdict.

652. A relatively narrow finding by a jury, however, might have a broader collateral estoppel effect by implication. If, for example, a plaintiff were to base his claim for damages on his exposure to an asbestos product and the defendant's concomitant failure to warn him of the products' hazardous characteristics during a specified period of time, then a court could view a verdict for the plaintiff by implication as necessarily finding that the duty to warn arose sometime during or before the time the defendant marketed the product that injured the plaintiff. Thus, a plaintiff in a later case with a similar claim might be able to rely on the former judgment for the proposition that the duty to warn existed after the exposure period determined in the former action.

element of collateral estoppel permits the court to limit the scope of a previously decided issue by characterizing parts of the broad finding as nonessential to the final judgment of the prior action.

A proponent in an asbestos products case also may encounter difficulties applying collateral estoppel when the trier of fact in the prior case based its judgment on alternative findings.⁶⁵³ In a *Borel*-type case,⁶⁵⁴ in which the court submits more than one theory of liability to the jury for consideration, the jury may return a verdict for the plaintiff based on either a warranty theory of liability or, in the alternative, a strict liability theory. Because courts cannot determine whether either finding was necessary to the judgment, later cases may use neither as a basis for collateral estoppel.⁶⁵⁵

F. Considerations of Fairness

When assessing the propriety of applying collateral estoppel in a case, courts have assigned significant value to considerations of whether the target party had a full and fair opportunity to litigate the issue in the former action. This practice comports with the Supreme Court's requirement in *Parklane Hosiery Co. v. Shore*.⁶⁵⁶ Courts have considered the following as considerations affecting their determination of fairness:⁶⁵⁷

(1) Whether differences exist between the procedural laws of the original forum and the current forum;⁶⁵⁸

653. For a discussion of the effect of alternative findings on the use of collateral estoppel, see F. JAMES & G. HAZARD, *supra* note 514, at 570-71. See also RESTATEMENT (SECOND) OF JUDGMENTS § 27 comments h, i (1982) (discussing the effect of alternative findings and the requirement that the determination be necessary to the judgment).

654. The trial judge in *Borel* instructed the jury on breach of warranty and strict liability in tort. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1090 (5th Cir. 1973).

655. F. JAMES & G. HAZARD, *supra* note 514, at 571-72.

656. In *Parklane* the Court held that the offensive use of collateral estoppel does not violate a defendant's seventh amendment right to a jury trial, but the Court cautioned that when "the application of offensive estoppel would be unfair to a defendant, the trial judge should not allow the use of offensive collateral estoppel." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). See *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170 (5th Cir. 1981) (quoting *Parklane*).

657. The burden of persuading the court that application of collateral estoppel would be unfair is on the target party. See *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); *Kroll*, *supra* note 613, at 315.

658. See *Holland, Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 625 (1979-80); RESTATEMENT (SECOND) OF JUDGMENTS §§ 28(3), 29(2) (1982). Comment d to *Restatement (Second) of Judgments* § 29 lists as pertinent procedural differences "such procedures as discovery devices" and the target party's limited voice in choosing the forum of the original action. See, e.g., *Fink v. Coates*, 323 F. Supp. 988 (S.D.N.Y. 1971) (whether target party selected forum of prior action is a consideration in applying collateral estoppel).

- (2) whether a party offensively or defensively seeks to apply collateral estoppel;⁶⁵⁹
- (3) whether the amount of damages sought in both actions are significantly different;⁶⁶⁰
- (4) whether the target party could foresee subsequent actions and further liability on the issue litigated in the original action;⁶⁶¹
- (5) whether the original action exhibits evidence of a compromise verdict;⁶⁶²
- (6) whether conflicting judgments exist;⁶⁶³
- (7) whether the target party had the opportunity to appeal findings on specific issues in the original action;⁶⁶⁴
- (8) whether the use of collateral estoppel against some but not all defendants or plaintiffs would unduly prejudice a jury against the nonstopped parties;⁶⁶⁵
- (9) whether the estoppel of one issue might unduly prejudice the jury's determination of any other issue.⁶⁶⁶

Litigation of most asbestos products cases occurs in federal courts, which rely almost exclusively on federal court cases to ap-

659. The Court in *Parklane* registered its concern that the use of offensive collateral estoppel might encourage potential plaintiffs to "wait and see" how other plaintiffs fared in the litigation of an issue against a particular defendant rather than joining in the original action. Thus, the ease with which a proponent of offensive collateral estoppel could have joined the litigation of the issue in an earlier action is a consideration in determining if collateral estoppel is appropriate. 439 U.S. at 331; *see also* *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836, 840 (E.D. Tex. 1980) (if the plaintiff easily could have joined in the original action, offensive collateral estoppel will not be allowed).

660. *See, e.g.*, *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

661. *See, e.g.*, *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335 (S.D. Miss. 1980).

662. RESTATEMENT (SECOND) OF JUDGMENTS § 29(5) (1982); Note, *supra* note 514, *passim*; *see, e.g.*, *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378 (E.D.N.Y. 1979).

663. RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982); *see, e.g.*, *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335, 338 (S.D. Miss. 1980).

664. RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982); *see, e.g.*, *Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384 (E.D. Pa. 1982). The court in *Amader* referred to *Flynn v. Johns-Manville Corp.*, No. 88(123) Case No. 23 CCP, (Philadelphia Sept. Term 1978), in which the jury found that the product was not defective but nonetheless awarded damages to plaintiff, and *Roesberg v. Johns-Manville Corp.*, No. 79-3016 (E.D. Pa. May 6, 1982), in which the jury found that the product was defective but also found in favor of defendant because the claim was time barred. 541 F. Supp. at 1385; *see also* *Diagiaco v. Johns-Manville Corp.*, No. 76-604 (D.N.J. May 1982) (although the court adversely determined an issue for the target party in a prior action, that issue could not be grounds for collateral estoppel because the target party won the judgment in the prior action and, therefore, could not appeal the determination of that issue).

665. RESTATEMENT (SECOND) OF JUDGMENTS § 29(6) (1982).

666. *Id.*; *see, e.g.*, *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 337 (5th Cir. 1982).

ply collateral estoppel. Since procedural laws are uniform throughout the federal court system they rarely will frustrate the application of collateral estoppel. Any differences, such as the permitted scope of a target party's discovery in two federal court cases, will be attributable primarily to judicial discretion rather than the rules of procedure.⁶⁶⁷ Differing substantive laws applied by the courts in the original and current actions may require that the court in the current action give closer scrutiny to the identity of issues and the fairness determination. The differences in substantive law may preclude the use of collateral estoppel because of difficulties in ascertaining whether the issues are identical or whether the issues were actually and necessarily determined in the original action. For example, considerations of fairness may preclude the use of collateral estoppel when the court in the original action applied an enterprise liability theory of tort⁶⁶⁸ but the current forum refuses to accept that theory. Although the two actions may appear to have some issues in common, the court in the current action may refuse to apply collateral estoppel because the differences between the two theories of liability may make reliance on determinations in the original action inappropriate in the current forum.⁶⁶⁹

Differences in the amount of damages sought in both actions and the foreseeability of future liability arising from the issue litigated in the original action are closely related considerations of fairness, because they both concern the constitutional notion of adequate notice.⁶⁷⁰ Without adequate notice the parties might not appreciate the gravity of the issues, and, therefore, they may fail to litigate the issues fully and vigorously. In *Flatt v. Johns-Manville Corp.*⁶⁷¹ the District Court for the Eastern District of Texas declared that, at the time of the *Borel* litigation, the *Borel* defendants could foresee the magnitude of the collateral estoppel effect

667. When a federal court is considering whether to apply collateral estoppel based on an issue determined in a state court, the federal court should scrutinize the state courts' procedural policies because the state procedural rules may differ significantly from the federal rules. See, e.g., *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977).

668. See *supra* part III.

669. The court also may find that the defendant could not have foreseen that findings made in an enterprise liability action would serve as the basis for collateral estoppel in a court that does not recognize the enterprise liability theory. For a discussion of the foreseeability element of the full and fair opportunity test, see *infra* notes 670-84 and accompanying text.

670. *Parklane Hosiery Co. v. Shore*, 439 U.S. at 332; see *Birnbaum & Wrubel, supra* note 75.

671. 488 F. Supp. 836 (E.D. Tex. 1982).

of the case and their potential liability in asbestos cases.⁶⁷² The Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*,⁶⁷³ however, reversed the district court's use of collateral estoppel and stated that it was "very doubtful that these defendants could have foreseen that their \$[59],000 liability to plaintiff would foreshadow multimillion dollar asbestos liability."⁶⁷⁴ The court cited the Supreme Court's explanation in *Parklane* that the unforeseeability of future lawsuits may discourage a vigorous defense⁶⁷⁵ and adopted the rationale of *McCarty v. Johns-Manville Sales Corp.*⁶⁷⁶ The *McCarty* court voiced concerns about defendants' fifth and seventh amendment protections⁶⁷⁷ and included among its reasons for denying the estoppel motion defendants' inability to foresee the staggering potential liability of asbestos cases.⁶⁷⁸ Thus, the *McCarty* court could not apply collateral estoppel without violating the full and fair opportunity to litigate requirement.⁶⁷⁹

The reasoning of the *Hardy* and *McCarty* courts is unpersuasive.⁶⁸⁰ The \$59,000 awarded in *Borel* should have provided a sufficient inducement for defendants to defend the suit vigorously.⁶⁸¹ In appealing the judgment,⁶⁸² the defendants demonstrated their concern about losing at trial and possibly indicated their anticipation of potential future liability.⁶⁸³ Perhaps these courts refused to

672. *Id.* at 841.

673. 681 F.2d 334 (5th Cir. 1982).

674. *Id.* at 346.

675. *Id.* at 346-47.

676. 502 F. Supp. 335 (S.D. Miss. 1980).

677. *Id.* at 339-40.

678. *Id.* at 339. Judge Nixon noted in *McCarty* that because some of the *Borel* defendants did not have any asbestos cases filed against them before *Borel*, "those defendants could not have foreseen any future prospective liability." *Id.*

679. *Id.* ("it would . . . violate the unfairness test set forth by the Supreme Court").

680. Wheeler & Allee, *supra* note 517, at 18.

681. See *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). In *Berner* defendant was sued for \$500,000, did not appeal an adverse judgment for \$35,000, and later was sued for \$7 million. *Id.* at 539. *Berner* is distinguishable from *Hardy* because Johns-Manville Corporation did appeal the judgment against it in *Hardy*. This appeal signifies that Johns-Manville Corporation made a more vigorous defense than defendant in *Berner*, cf. *South Pac. Transp. Co. v. Smith Material Corp.*, 616 F.2d 111, 115 (5th Cir. 1980) (In applying collateral estoppel, the court observed that the target party "engaged in a week long trial in which several hundred thousand dollars were at stake; [the target party] had, therefore, every incentive to litigate [the issues] to the fullest extent.").

682. 493 F.2d 1076 (5th Cir. 1973).

683. In 1973, when *Borel* was decided, mass tort litigation was not a novel concept. Given the widespread use of their asbestos products, the *Borel* defendants should have anticipated more actions arising from asbestos-related diseases, even though they might not have foreseen the collateral estoppel effect of adverse determinations.

apply collateral estoppel because in 1973, the time of the *Borel* litigation, courts had not yet developed the more liberal use of collateral estoppel.⁶⁸⁴ Thus, the *Borel* defendants might not have litigated all the issues as vigorously as they would if they had been aware of the potential collateral estoppel effect of the determination. The proliferation of asbestos products cases and the increased use of offensive collateral estoppel illustrate the potential losses that an adverse determination can engender. These developments should encourage defendant manufacturers to litigate the issues more fully, and they ultimately will reduce the availability of the unforeseeability defense to collateral estoppel.

Inconsistent judgments⁶⁸⁵ in prior actions is another reason some courts have refused to apply collateral estoppel in asbestos product litigation.⁶⁸⁶ These courts conclude that it is unfair to the target party for the courts arbitrarily to give preclusive effect to a prior determination of an issue against the target party when equally valid determinations of the issue favoring the target party exist.⁶⁸⁷ In *Hardy* the Fifth Circuit partially relied on the existence

684. The Supreme Court's decision in *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), was, in 1973, a relatively recent development in the law of collateral estoppel. The *Parklane* fairness doctrine had not yet emerged. Cf. *Holland*, *supra* note 658, at 625.

685. Although the courts often speak in terms of "inconsistent verdicts" or "inconsistent judgments," their concern is with the consistency of prior determinations of issues embraced by the prior judgments. See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345-46 (5th Cir. 1982). For purposes of applying collateral estoppel, the focus is always on the determination of issues.

686. E.g., *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335 (S.D. Miss. 1980); *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980); *Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329 (E.D. Mo. 1980). In *Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384 (E.D. Pa. 1982), the court applied collateral estoppel on the basis of a determination made in *Borel*. The court stated, however, that in future cases it might have to reexamine that position because it might face judgments inconsistent with *Borel*. *Id.* at 1386.

687. 681 F.2d 334, 346 (5th Cir. 1982). *But see* *Blumcraft of Pittsburgh v. Kawneer Co.*, 482 F.2d 542 (5th Cir. 1973) (court held in patent infringement suit that inconsistent prior determinations of the patent's validity do not bar use of collateral estoppel unless target party did not have a full and fair opportunity to litigate the issue forming the basis for the estoppel).

The courts' practice of not giving preclusive effect to determinations when inconsistent judgments exist allays the concerns raised by Professor Currie's "Multiple-Claimant Anomaly." See Currie, *supra* note 518, at 285. Professor Currie, using his noted train wreck scenario, illustrated the possible unfair effects of nonmutual offensive collateral estoppel. In this hypothetical the defendant railroad faces negligence actions by 50 passengers injured in the same train wreck. After litigating and prevailing on the negligence issue in 20 cases, the railroad loses on that issue in the twenty-first trial. If in subsequent actions against the railroad the courts give preclusive effect to the determination made in the twenty-first action, the remaining 29 claimants will prevail despite the railroad's victories in the first 20 cases. *Id.* at 285-89. The courts' practice of not allowing collateral estoppel when prior in-

of prior inconsistent judgments to reject the district court's use of collateral estoppel.⁶⁸⁸ The court of appeals expressly disagreed with the district court's finding that none of the prior judgments offered by the target party contained inconsistent determinations of the specific issues on which the court granted collateral estoppel.⁶⁸⁹ In its opinion the Fifth Circuit questioned both the adequacy of the district court's information about the prior actions in which defendant target party prevailed and the district court's ability to discern "with certainty" the basis for the juries' verdicts in those cases.⁶⁹⁰ Thus, the circuit court found that the district court's reliance upon *Borel* was arbitrary and impermissible.

The Fifth Circuit's position in *Hardy* prompts two observations about the effect of prior inconsistent judgments on the use of collateral estoppel. First, a court's recognition of prior inconsistent determinations of an issue is subject to the same judicial subjectivity attending the determination of an identity of issues.⁶⁹¹ A court not only must acknowledge an identity of the previously determined issues to find them inconsistent, but also must find an identity of issues between these prior inconsistent determinations and the issue in the current litigation. Thus, a court may shade the characterization of its findings in order to evade or adopt a recognition of prior inconsistent judgments if the court is result oriented. Second, a complete review of prior actions for inconsistent determinations sometimes may be more time consuming⁶⁹² than retrying the issue. Yet, anything less than a comprehensive review of all prior cases may make a court's finding of no prior inconsistent determination incorrect and unfair to the target party if the court applies collateral estoppel. The *Hardy* decision exemplifies this dilemma in the context of asbestos litigation, for courts had decided more than seventy similar cases before *Hardy*.⁶⁹³ The Fifth Circuit's dissatisfaction with the district court's findings regarding prior inconsistent verdicts shows the circuit court's concern about the potential for unfair application of collateral estoppel resulting from inadequate review of prior actions. As long as the courts ad-

consistent determinations exist is a consideration of fairness that tempers the potential harshness of nonmutual offensive collateral estoppel identified by Professor Currie.

688. 681 F.2d 334, 345-46 (5th Cir. 1982).

689. *Id.* at 346.

690. *Id.*

691. See *supra* notes 606-17 and accompanying text.

692. See *infra* notes 701-04 and accompanying text.

693. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d at 346.

here to the belief that choosing between prior inconsistent determinations works a patent unfairness on the target party,⁶⁹⁴ the courts must make a comprehensive review of prior cases or permit relitigation of the issue.

Another fairness consideration identified in *Hardy* is whether estoppel of one issue may unduly prejudice the jury's determination of any other issue.⁶⁹⁵ Because of the potential for undue influence of the jury, the *Hardy* court rejected the district courts' application of collateral estoppel to the "fact" that the generic ingredient asbestos is a competent producing cause of asbestosis and mesothelioma.⁶⁹⁶ Noting the varieties of defendants' asbestos-containing products, the court found the "conclusive presumption that asbestos in all forms causes cancer" to be an unjust burden on defendants.⁶⁹⁷ The court's decision implies that the jury probably could not separate the distinct issues of whether an asbestos product causes cancer and whether a specific type of asbestos product caused plaintiff's cancer. This lack of confidence in the jury is curious since juries regularly are called upon to make and apply precisely these types of distinctions.

Some courts in asbestos cases have voiced a more defensible concern by suggesting that jury instructions create an unfair risk of prejudice if they require the jury to apply collateral estoppel of certain issues to some, but not all, of the defendants.⁶⁹⁸ In these cases, risk of prejudice results when the nonstopped defendants

694. The courts' confidence that a prior determination substantially is correct is a primary reason that the courts give preclusive effect to that determination in subsequent actions. See RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment f (1982). Inconsistent prior determinations of an issue weaken this inference of substantial correctness because the inconsistent resolutions imply a reasonable doubt about the persuasiveness of the evidence presented in the prior action or the application of law to that evidence. *Id.* Thus, selecting between inconsistent determinations to apply collateral estoppel is indeed unfair. When the courts have determined an issue many times, however, as they have some of the common issues in asbestos product litigation, then the tally of those determinations arguably establishes the "substantial correctness" of one of the inconsistent resolutions. If, for example, 49 juries find that a product emits asbestos dust and one jury finds that the product does not emit asbestos dust, then the correctness—though not the validity—of the dissenting jury's determination justifiably appears questionable. A collateral estoppel of that issue in a subsequent action might not be unfair to the manufacturer-target party despite the inconsistent determinations. Thus, the existence of prior inconsistent determinations should not constitute an automatic bar to collateral estoppel under all circumstances.

695. 681 F.2d at 347.

696. *Id.*

697. *Id.*

698. *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539, 544-45 (D. Minn. 1982). *But see Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384, 1387 (E.D. Pa. 1982).

litigate virtually the same issues that the court has collaterally estopped their codefendants from litigating.⁶⁹⁹ Because the jury probably will have difficulty ignoring the prior determination of essentially identical issues, bifurcating the trial to permit the use of collateral estoppel without prejudicing the jury against the nonestopped defendants often would be appropriate. Bifurcation may not be necessary, however, when the court applies collateral estoppel to issues that the jury more readily can distinguish from the issues that the nonestopped defendants must litigate. For example, knowledge of a prior determination that a specific product of one defendant is unreasonably dangerous might not predispose a jury to find that another product of another defendant is also unreasonably dangerous, unless the two products are extremely similar in form or function.⁷⁰⁰

G. Judicial Economy

Because collateral estoppel is a discretionary device designed to achieve judicial economy, courts should consider whether the use of collateral estoppel in a particular instance will result in the desired effect.⁷⁰¹ When the use of collateral estoppel confuses the jury or compels the bifurcation of the trials, it consumes extra time and resources or causes longer trials. In these cases the court might well refuse to apply collateral estoppel irrespective of the merits of the proponent's motion. In *Bertrand v. Johns-Manville Sales Corp.*⁷⁰² the court did not apply collateral estoppel to many of the defendants because they lacked the requisite privity. The court further concluded that bifurcating the trial to use collateral estoppel against the few defendants who were defendants in the *Borel* and *Karjala* cases would require more time and effort than the application of collateral estoppel would save.⁷⁰³ Accordingly, the

699. See, e.g., *Cannon v. Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971); *O'Connor v. O'Leary*, 247 Cal. App. 2d 646, 56 Cal. Rptr. 1 (Dist. Ct. App. 1967); RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment h (1982).

700. For example, two similar products would be two brands of asbestos insulation. See, e.g., *Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384 (E.D. Pa. 1982). The *Amader* court precluded defendant Unarco from relitigating the issue of the defectiveness of a particular product, "Unibestos," which a court in a previous action had judged defective. The court's decision not to bifurcate the trial was reasonable because the issue estopped was specific and, therefore, less likely to prejudice the jury's determinations of the defectiveness of the other defendant's products. *Id.* at 1387.

701. See, e.g., *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539, 544 (D. Minn. 1982).

702. *Id.*

703. *Id.* at 545.

court chose not to grant the estoppel on any issues that would necessitate, for the sake of fairness, a bifurcation of the trial.⁷⁰⁴

H. Summary

Collateral estoppel in asbestos products cases thus far has been only mildly effective as a means of streamlining asbestos litigation, and the courts have given little if any indication that collateral estoppel can harness the explosive growth of asbestos product litigation.⁷⁰⁵ Collateral estoppel effectively may prevent the relitigation of a few issues common to asbestos products cases; for example, whether asbestos is a competent producing cause of asbestosis.⁷⁰⁶ The courts, however, have acknowledged that due process and fairness considerations limit the use of collateral estoppel and that these considerations rightfully prevail over the desire to achieve judicial economy. Thus, even if continued asbestos litigation enables collateral estoppel proponents to meet more frequently the requirement of identity of issues,⁷⁰⁷ the courts probably will exercise their broad discretionary powers and rely on sensible notions of judicial economy in a case-by-case approach to limit the application of collateral estoppel. This practice will reduce the threat of collateral estoppel against defendants, and it might lessen the defendants' incentive to settle these cases out of court.⁷⁰⁸ Moreover, with the ever litigable questions of exposure

704. *Id.* Similarly, the court in *McCarty* did not apply collateral estoppel because "judicial economy [was] not saved and it [was] patently unfair to [the] defendants to apply collateral estoppel and bifurcate the trial, thus confusing the jury." *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. at 339. The *McCarty* court believed that the application of collateral estoppel against some but not all defendants would require the court to bifurcate the trial. Bifurcation would be necessary, the court asserted, to prevent the jury from being confused by the need to apply different standards of proof to defendants litigating essentially the same claims. *Id.* at 339.

705. *Cf.* Wheeler & Allee, *supra* note 517, at 18 (recognizing the increasing judicial reluctance to apply collateral estoppel in products liability cases).

706. *See supra* notes 587-604 and accompanying text.

707. *See supra* notes 606-16 and accompanying text. One commentator has suggested that because all defendants eventually will litigate the issue of primary liability, courts someday will limit asbestos products trials to the determination of damages. Mehaffy, *supra* note 2, at 347.

708. The manner in which some courts have used collateral estoppel in asbestos products cases has elicited criticism from attorneys. *See, e.g.*, Mehaffy, *supra* note 2, at 347. These attorneys have complained that some trial court judges are using the threat of collateral estoppel against defendant-manufacturers to encourage settlement. *Id.* Irrespective of the judges' motives for applying collateral estoppel, the threat of its use perhaps persuades defendants to settle. In *Migues v. Fiberboard Corp.*, 662 F.2d 1182 (5th Cir. 1982), 13 of 14 defendants settled with plaintiff after the trial court issued an order collaterally estopping litigation on the issue of their products' defectiveness.

and sufficiency of exposure to the asbestos product, even the more liberal use of collateral estoppel will save little judicial time given the great number of potential cases and accompanying issues.⁷⁰⁹ Nonetheless, the courts might use collateral estoppel more effectively if they were to define the issues determined in asbestos products cases more precisely so that subsequent courts could determine the identity of issues more easily, more accurately, and more fairly. The Fifth Circuit observed that through either "common law or legislative enactment, there is an urgent need for new approaches to the national tragedy of asbestos-related disease."⁷¹⁰ Unfortunately, collateral estoppel is at best only a minor part of the answer to the asbestos problem.

VII. PUNITIVE DAMAGES

During the last decade much attention has focused on the availability of punitive damages⁷¹¹ in mass-marketed products liability litigation.⁷¹² Large punitive damages awards⁷¹³ raise special

709. Professor Holland has observed that "[t]he advantage which doubtless attracted the Supreme Court to the vastly broadened type of preclusion sanctioned in *Parklane* was clearly the gains in judicial economies which it would seem to promise. . . . [T]he Justices [may have] overestimate[d] the saving it would accomplish . . . [and] underestimate[d] difficulties that might be encountered in its administration." Holland, *supra* note 658, at 638. These remarks accurately describe the use of collateral estoppel in asbestos products cases, in which the courts face difficult identity of issue and fairness questions, and applications of collateral estoppel typically engender interlocutory appeals. *Cf.* Polasky, *supra* note 611, at 220 (one effect of collateral estoppel may be to intensify litigation even though it reduces the number of trials).

710. *Migues v. Fiberboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981).

711. Courts have used the terms "punitive," "exemplary," or "vindictive" damages and "smart-money" interchangeably. Noto, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV., 517 (1957). In this part of the Special Project punitive damages encompasses all these terms and refers to all damages awarded a plaintiff beyond his compensatory damages. .

712. See Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1 (1980); Coccia & Morissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 TRIAL L. GUIDE 46 (1978); Igoe, *Punitive Damages in Products Liability Cases Should Be Allowed*, 22 TRIAL LAW. GUIDE 24 (1978); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982) [hereinafter cited as *Problems in Assessing Punitive Damages*]; Owen, *Punitive Damages In Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976) [hereinafter cited as *Punitive Damages*]; Robinson & Kane, *Punitive Damages in Products Liability Cases*, 6 PEPPERDINE L. REV. 139 (1978); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972); Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979) [hereinafter cited as Note, *Overkill*]; Note, *Punitive Damages in Mass-Marketed Product Litigation*, 14 LOY. L.A.L. REV. 405 (1981) [hereinafter cited as Note, *Product Litigation*]; Note, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895 (1976) [hereinafter cited as Note, *Products Liability Cases*].

concerns in mass-marketed products liability litigation because their existence exposes the manufacturer of a defective or unreasonably dangerous⁷¹⁴ product to almost unlimited potential liability.⁷¹⁵ Manville Corporation's decision to file for Chapter 11 reorganization because of its huge contingent liability in asbestos litigation⁷¹⁶ highlights the inherent danger of allowing successive punitive damages awards in this type of litigation. This part of the Special Project discusses the policy justifications behind punitive damages, the elements needed to establish a case for punitive damages, and the defenses that asbestos manufacturers raise to avoid punitive damages assessments.

A. Policy Justifications Behind Punitive Damages Awards

Punitive damages existed in some form as early as 2000 B.C. in the Code of Hammurabi.⁷¹⁷ The doctrine appeared first in the English common law around the mid-eighteenth century with the courts first using the term "exemplary damages" in 1763.⁷¹⁸ Ameri-

713. See, e.g., *Grimshaw v. Ford Motor Co.*, No. 19-77-61 (Cal. Super. Ct. Feb. 7, 1978), *aff'd as amended*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (judge reduces to \$3,500,000 jury's original award of \$125,000,000 in punitive damages); *Palmer v. A. H. Robins Co.*, No. C60442 (Colo. Dist. Ct. filed July 30, 1979) (jury award of \$6,200,000 in punitive damages for faulty intrauterine device); see ASBESTOS LITIG. REP. (ANDREWS) 4910 (May 14, 1982) (summarizing *Dorell v. Johns-Manville*, C.A. 7809-88-12-18 (Pa. C.P. Philadelphia May 3, 1982) (jury award of \$1,000,000 in punitive damages)).

714. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

715. For example, in June 1982 Johns-Manville Corporation estimated that more than 15,500 claimants had filed over 11,000 asbestosis suits against it, and that plaintiffs had filed approximately 425 new suits per month during the first half of 1982. It estimated that the number of claims eventually may reach 52,000 and result in potential liability exceeding \$2 billion in compensatory damages alone. ASBESTOS LITIG. REP. (ANDREWS) 5397 (Aug. 27, 1982) (citing affidavit of Mr. James F. Beasley, Manville Corporation).

716. On August 26, 1982, Johns-Manville Corporation filed for Chapter 11 reorganization and cited sky-rocketing and unpredictable litigation costs as the motivating factor behind its decision. In support of its claim, Johns-Manville pointed out that in 1981 and the first half of 1982 litigation had resulted in 10 punitive damages verdicts against it at an average of \$616,000 per verdict. *In re Johns-Manville Corp.*, No. 82 B (S.D.N.Y. petition filed Aug. 26, 1982), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 5419, 5423 (Aug. 27, 1978); see *infra* part XII.

717. The Code of Hammurabi actually provided for the multiple recovery of compensatory damages, the earliest form of punitive damages. See, e.g., G. DRIVER & J. MILES, *THE BABYLONIA LAWS* 500-01 (1952); A. KOCOUREK & J. WIGMORE, *SOURCES OF ANCIENT & PRIMITIVE LAW* 391 (1915).

718. In *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763), a journeyman printer sued the King's officers for assault, trespass, and false imprisonment under an illegal warrant and recovered 300 pounds in damages even though his actual damages did not exceed 20 pounds. For a brief discussion of the case, see Coccia & Morissey, *supra* note 712, at 51-52.

can courts have recognized the doctrine since the early 1780's,⁷¹⁹ but consistently have disagreed on the purposes of punitive awards and the situations in which they are appropriate.⁷²⁰ Despite the disagreement surrounding their validity, punitive damages remain a vital part of our tort compensation system,⁷²¹ and several policy justifications support their continued existence.⁷²²

Punitive damages exist primarily to punish the defendant for his misconduct and to deter him and others similarly situated from similar misconduct.⁷²³ Courts and commentators repeatedly have criticized this rationale because they consider punishment and deterrence to be goals of the criminal, not the civil, law.⁷²⁴ Allowing punitive damages in mass-marketed products liability litigation has created a new set of objections to the punishment and deterrence rationale.⁷²⁵ First, critics have stressed that the availability of punitive damages in this type of litigation subjects a manufacturer to potential successive punitive damages awards.⁷²⁶ They have argued that successive punitive damages awards do not serve the deterrence rationale at all since the latter awards probably

719. The first American case to allow punitive damages was *Genay v. Norris*, 1 S.C.L. 3, (1 Bay) (1784) (plaintiff recovered punitive damages when he became ill after drinking wine that defendant had spiked with cantharides). Today, Louisiana, Massachusetts, Nebraska, and Washington are the only states not recognizing punitive damages. See *infra* note 747.

720. Compare *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (stating in dictum that "damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory") with *Fay v. Parker*, 53 N.H. 342, 382 (1873) (disallowing punitive damages and denouncing them as "monstrous heresy"). For a brief synopsis of the early development and controversy, see Belli, *supra* note 712, at 2-5; *Punitive Damages*, *supra* note 712, at 1262-64.

721. In contrast, the English system now allows punitive damages in only three situations: (1) for arbitrary and outrageous abuses of government power; (2) in a limited class of deliberate, calculated, intentional torts; and (3) in those situations expressly authorized by statute. See *Rookes v. Barnard* [1964] 1 All E.R. 367.

722. See *Punitive Damages*, *supra* note 712, at 1277-99; Note, *Product Litigation*, *supra* note 712, at 7-8.

723. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982); Note, *supra* note 711, at 522.

724. See, e.g., *Fay v. Parker*, 53 N.H. 342, 382 (1873) ("What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law."); see also Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1176 (1931); Tozer, *supra* note 712, at 303; Note, *Product Litigation*, *supra* note 712, at 407.

725. See *Coccia & Morissey*, *supra* note 712, at 53-65; Tozer, *supra* note 712, at 301-05.

726. See Note, *Product Litigation*, *supra* note 712, at 418.

have no greater deterrent effect than the first award.⁷²⁷ Second, critics have argued that the officials whose conduct is the basis for the punitive damages award are unlikely to feel the effects of the award.⁷²⁸ Therefore, the punishment of the corporation and its shareholders neither reaches nor deters those individuals actually responsible for the misconduct.⁷²⁹ Last, critics have contended that the threat of mass litigation in itself is a sufficient deterrent to manufacturer misbehavior and that subjecting the defendant to multiple compensatory claims when misbehavior occurs is sufficient punishment for that misconduct.⁷³⁰ These arguments have led some commentators to conclude that although punitive damages serve a useful function in a traditional "one on one" tort situation, their application in mass-marketed products liability litigation is improper because the primary policy justification underlying their application is not valid in this context.⁷³¹ Despite these criticisms, most scholars have agreed that allowing punitive damages in mass-marketed products liability litigation serves the punishment and deterrence rationale and that the continued availability of punitive damages is necessary to ensure public control over manufacturers' misbehavior.⁷³²

A secondary, and often unstated, purpose of punitive damages is to compensate fully the victim for his injuries.⁷³³ Critics of punitive damages have maintained that this compensation rationale developed when the scope of recoverable compensatory damages was extremely narrow.⁷³⁴ Considering the expanded scope of recover-

727. *Id.* Without the deterrence rationale the award becomes strictly punitive, and critics have argued that punishment is not a proper function of the civil law. *See supra* note 724 and accompanying text.

728. *See Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 816-17 (1982); *Punitive Damages*, *supra* note 712, at 1299-1304.

729. *Coccia & Morissey*, *supra* note 712, at 59.

730. *See Tozer*, *supra* note 712, at 304; Note, *Product Litigation*, *supra* note 712, at 419.

731. *See, e.g., Tozer*, *supra* note 712, at 301.

732. *Belli*, *supra* note 712, at 23; *Igoe*, *supra* note 712, at 29; *Problems in Assessing Punitive Damages*, *supra* note 712, at 59; *Punitive Damages*, *supra* note 712, at 1371; Note, *Exemplary Damages in Products Liability Cases*, 1980 DET. C.L. REV. 647, 666-67; Note, *Overkill*, *supra* note 712, at 1813-14; Note, *Punitive Damages in Products Liability Litigation: Maxey v. Freightliner Corp.*, 33 SW. L.J. 1117, 1127 (1979).

733. Several states have recognized expressly this function of punitive damages. *See, e.g., Doroszka v. Lavine*, 111 Conn. 575, 150 A. 692 (1930); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922); *Vratsenes v. New Hampshire Auto Inc.*, 112 N.H. 71, 289 A.2d 66 (1972); *Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904 (Tex. Civ. App. 1963); *Kesler v. Rogers*, 542 P.2d 354 (Utah 1975); Note, *supra* note 711, at 520-21.

734. *Tozer*, *supra* note 712, at 303-04.

able compensatory damages, critics have argued that large punitive awards no longer are necessary to compensate fully the victim.⁷³⁵ Supporters of punitive damages have countered by pointing out that a successful plaintiff must spend at least one-third of his award on legal fees⁷³⁶ and that recent estimates suggest that in "big damage cases" few victims actually recover more than twenty-five percent of their real economic loss.⁷³⁷ Therefore, they have contended, punitive damages are still necessary to compensate victims fully.

A third policy justification for punitive damages, the "law enforcement"⁷³⁸ or "public justice"⁷³⁹ rationale, rests on the premise that a private citizen is more apt to act as a "private attorney general"⁷⁴⁰ and bring suits when injured if he has a sufficient stake in the outcome. Because private suits are the primary means for enforcing the civil law, society has a compelling need to provide injured parties with adequate incentive to bring suits even when the injuries suffered are relatively slight.⁷⁴¹ Advocates have argued that without punitive damages manufacturers could avoid civil liability in many situations simply because a law suit for compensatory damages alone would not be economically feasible for the injured victim.⁷⁴² Thus, punitive damages serve the dual purpose of encouraging injured victims to enforce the civil law and encouraging large manufacturers to correct defective products rather than risk marketing defective products and absorbing as a business expense the cost of the few suits brought.⁷⁴³

The last policy justification for punitive damages is revenge.⁷⁴⁴ For obvious reasons commentators have devoted little attention to this justification and have derogated its role in the system. Few cases today acknowledge the revenge justification, but early cases

735. Coccia & Morissey, *supra* note 712, at 64.

736. *Punitive Damages*, *supra* note 712, at 1297.

737. *Id.* at 1298.

738. *Id.* at 1287.

739. Belli, *supra* note 712, at 5-6.

740. *Id.* at 6; *Punitive Damages*, *supra* note 712, at 1288.

741. Belli, *supra* note 712, at 6.

742. Professor Owen has discussed three situations in which, if not for punitive damages, a manufacturer might risk marketing a defective product: (1) when the resulting injury is not easily cognizable to the plaintiff and he is unlikely to link the injury to the manufacturer; (2) when asserting the victim's rights is likely to be expensive and the recoverable reward minimal; and (3) when safety measures substantially reduce profit margins. *Punitive Damages*, *supra* note 712, at 1292-95.

743. *Id.* at 1287-95.

744. Belli, *supra* note 712, at 5; Note, *supra* note 711, at 521.

often cited it as a primary reason for imposing punitive damages.⁷⁴⁵ While many commentators have criticized the revenge motive as archaic or barbaric, most have recognized that punitive damages may serve the useful function of encouraging use of the legal system and discouraging victims from taking matters into their own hands.⁷⁴⁶

B. Proof Required of Plaintiff Seeking Punitive Damages

1. In General

All but four states⁷⁴⁷ allow some form of punitive damages. The exact proof required of a plaintiff seeking punitive damages varies among the states; the requirements of all states, however, focus on the defendant's conduct,⁷⁴⁸ and most states require a showing that the defendants acted with either gross negligence, willfulness, or wantonness.⁷⁴⁹ Although defendants often have attacked these standards as unconstitutionally vague, the challenges repeatedly have failed because courts have found that these standards provide sufficient guidance and are no more vague than many other legal standards.⁷⁵⁰ As with most civil issues, the plaintiff seeking punitive damages bears the burden of establishing the requisite intent by a preponderance of the evidence.⁷⁵¹

In most states the jury determines the amount of punitive damages awards.⁷⁵² In setting the amount of the award the jury usually considers the seriousness of the defendant's misconduct, the seriousness of the plaintiff's injury, and the wealth of the de-

745. See, e.g., *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (1764).

746. Belli, *supra* note 712, at 5.

747. Louisiana, Massachusetts, Nebraska, and Washington are the only states that do not recognize punitive damages; in certain situations, however, even these states allow double and treble damages. Belli, *supra* note 712, at 4-5.

748. McGovern, *supra* note 24, at 294.

749. *Id.* Other courts have used similar standards. See, e.g., *Smith v. Chapman*, 115 Ariz. 211, 564 P.2d 900 (1977) (reckless disregard); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A.2d 825 (1967) (wanton disregard); *Kang v. Harrington*, 59 Hawaii 652, 587 P.2d 285 (1978) (malice, oppression, or gross negligence); *Buteher v. Petranek*, 593 P.2d 743 (Mont. 1979) (willfulness, wantonness, malice, oppression, brutality, insult, gross negligence, or recklessness).

750. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 377 (E.D. Pa. 1982) ("standard for punitive damages is no more vague than the standards for preponderance of the evidence or proximate cause, or a number of court-defined standards that are applied frequently by judges and juries in civil or criminal cases").

751. See *id.* at 375-76.

752. *Problems in Assessing Punitive Damages*, *supra* note 712, at 9. But see CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1982) (limiting amount of punitive damages recoverable in a products liability action to twice that of the compensatory damages).

defendant.⁷⁵³ Most states require that the defendant be liable for at least nominal compensatory damages for the jury to impose punitive damages,⁷⁵⁴ but the permissible amount of punitive damages, like the state of mind requirement, varies among states.⁷⁵⁵ Some states require a reasonable relationship between the amount of compensatory and punitive damages⁷⁵⁶ while others require no relationship at all.⁷⁵⁷

States also differ about the types of actions in which punitive damages are available. For example, some states allow punitive damages in wrongful death⁷⁵⁸ and survival statute⁷⁵⁹ cases while others do not. A major variation among states that is particularly important in mass-marketed products liability litigation is the availability of punitive damages under a strict liability theory. States allowing punitive damages in strict liability cases have noted the ease of hearing additional evidence about the defendant's state of mind at the trial.⁷⁶⁰ States disallowing punitive damages under a strict liability theory, on the other hand, have

753. Belli, *supra* note 712, at 11-13. Three states do not allow consideration of the defendant's wealth: Alabama, Kentucky, and Texas. Note, *Punitive Damages and the Admissibility of Evidence of Wealth*, 29 ALA. L. REV. 564, 567 (1978). Idaho and Kansas allow the jury to consider attorney's fees and court costs. See *Jolley v. Puregro Co.*, 94 Idaho 702, 496 P.2d 939 (1972); *Brewer v. Home-Stake Prod. Co.*, 200 Kan. 96, 434 P.2d 828 (1967). Although some writers have suggested that in mass-marketed products liability litigation the jury should consider other suits pending and previous punitive awards against the defendant, this consideration may bias the jury. See Note, *Products Liability Cases*, *supra* note 712, at 920.

754. McGovern, *supra* note 24, at 294.

755. Compare *Liodas v. Sahadi*, 19 Cal. 3d 278, 562 P.2d 316, 137 Cal. Rptr. 635 (1977) (reasonable relationship required between compensatory and punitive damages) with *Northern Nev. Mobile Home Brokers v. Penrod*, 610 P.2d 724 (Nev. 1980) (no relationship required between compensatory and punitive damages).

756. *E.g.*, *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 377 (E.D. Pa. 1982). For a discussion of the rule requiring a rational relationship between compensatory and punitive damages, see Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823 (1978).

757. *E.g.*, *Butcher v. Petranek*, 593 P.2d 743, 746 (Mont. 1979).

758. Compare *Meehan v. Central R.R.*, 181 F. Supp. 594, 598 (S.D.N.Y. 1960) (disallowing punitive damages in a wrongful death suit) with *Lankford v. Mong*, 283 Ala. 24, 214 So. 2d 301 (1968) (allowing punitive damages recoverable in a wrongful death suit). Under Alabama's wrongful death statute all recoverable damages are punitive. ALA. CODE § 6-5-410 (1975).

759. Compare *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974) (punitive damages not available under survival statute) with *Atlas Properties Inc. v. Didich*, 226 So. 2d 684 (Fla. 1969) (allowing recovery of punitive damages under survival statute).

760. See, *e.g.*, *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 378 (E.D. Pa. 1982) ("[T]he law of strict liability does not preclude consideration of 'aggravated fault,' if the plaintiffs can properly meet their burden . . .").

observed that strict liability depends on the defectiveness of the product, not the defendant's state of mind.⁷⁶¹ A second major variation among the states that has considerable effect on mass-marketed products liability litigation is the availability of insurance coverage for punitive damages.⁷⁶² States allowing insurance coverage emphasize the parties' freedom to contract,⁷⁶³ while those disallowing insurance coverage argue that allowing insurance to cover punitive damages defeats the deterrence rationale.⁷⁶⁴

These variations are especially important in mass-marketed products liability litigation because plaintiffs suffering the same injuries, from the same product, that the same manufacturer produced and sold, may recover substantially different sums because of differences in their states' punitive damages laws. These variations also encourage forum-shopping since most large manufacturers have sufficient contacts to allow a plaintiff to sue in any jurisdiction.

2. The Case for Punitive Damages in Asbestos Litigation

Plaintiffs have recovered punitive damages in asbestos litigation because they have shown that officers of the large asbestos manufacturers knew twenty to thirty years before they began to warn employees and the public that continuous exposure to asbestos increases the likelihood of pulmonary disease.⁷⁶⁵ Relying heavily on evidence available from a British study⁷⁶⁶ in the 1930's and the Saranac Laboratories studies⁷⁶⁷ in the late 1930's and early 1940's, plaintiffs argue that manufacturers knew of the potential dangers of continued exposure to asbestos fibers as early as 1940.⁷⁶⁸

761. See, e.g., Transcript of Proceedings, *Gold v. Johns-Manville Sales Corp.*, Civ. No. 80-2907 (D.N.J. July 16, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5673, 5684-85 (Oct. 8, 1982).

762. For a general discussion of punitive damages and insurance coverage, see Note, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 *Cum. L. Rev.* 487 (1978).

763. See, e.g., *Lazenby v. Universal Underwriters Ins. Co.*, 214 *Tenn.* 639, 383 *S.W.2d* 1 (1964).

764. See, e.g., *Tedesco v. Maryland Casualty Co.*, 127 *Conn.* 533, 18 *A.2d* 357 (1941).

765. See, e.g., *ASBESTOS LITIG. REP. (ANDREWS)* 4910-12 (May 14, 1982) (summarizing *Dorell v. Johns-Manville*, C.A. 7809-88-123-18 (Pa. C.P. Philadelphia May 3, 1982)). See *supra* part II.

766. *MEREWEATHER & PRICE, REPORT ON EFFECTS OF ASBESTOS DUST ON THE LUNGS AND DUST SUPPRESSION IN THE ASBESTOS INDUSTRY* (1930).

767. See Motley, *supra* note 249, at 22-23, for a discussion of the history and contents of this study.

768. See *Neal v. Carey Canadian Mines, Ltd.*, 548 *F. Supp.* 357, 375 (E.D. Pa. 1982).

In addition to showing that manufacturers had this knowledge, plaintiffs have shown that the manufacturers' officers took affirmative steps to keep this information from their employees and the general public.⁷⁶⁹ The testimony of former officers of the large manufacturers⁷⁷⁰ and some correspondence during the 1930's between high-ranking officials of the two largest asbestos manufacturers⁷⁷¹ are the primary support for plaintiffs' claims of affirmative concealment.

Most damaging of the former officers' testimony has been the deposition testimony of Dr. Kenneth Smith, former chief medical advisor of Johns-Manville Corporation.⁷⁷² Before his death, Dr. Smith testified that the results of a series of tests he conducted shortly after coming to Johns-Manville in the late 1940's led him to recommend the immediate implementation of various changes in working conditions to decrease the level of employee exposure to asbestos dust.⁷⁷³ After further tests, he recommended in early 1953 that Johns-Manville place warning labels on asbestos fiber bags. Higher-ranking Johns-Manville officials, however, declined to do so until the mid-1960's.⁷⁷⁴ Corroborating Dr. Smith's testimony, Mr. Hugh Jackson, a former safety director and manager of Johns-Manville's industrial health program, testified that he and other Johns-Manville officials were aware of the many dangers of extended exposure to asbestos dust throughout the 1950's.⁷⁷⁵ A third Johns-Manville official, Dr. Ruff, a former plant manager on industrial awareness, has testified that the company's policy was to withhold from employees X-rays indicating that the employees might be suffering from asbestosis.⁷⁷⁶ Plaintiffs have used this testimony effectively in justifying their punitive damages claims.

769. See e.g., ASBESTOS LITIG. REP. (ANDREWS) 4910-12 (May 14, 1982) (summarizing *Dorell v. Johns-Manville*, C.A. 7809-88-123-18 (Pa. C.P. Philadelphia May 3, 1982)).

770. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 375-76; *infra* notes 772-76 and accompanying text.

771. This correspondence, commonly called the "Sumner Simpson letters," occurred in the mid- and late-1930's between Mr. Sumner Simpson, president of Raybestos Manhattan, Inc. and Mr. Vandiver Brown, executive secretary of Johns-Manville Corp. For a full discussion of the letters' content, see Motley, *supra* note 249, at 21-23; *supra* part II.

772. Dr. Smith joined Canadian Johns-Manville, a division of the parent company, as a medical officer in the early 1940's. He served as medical director of Canadian Johns-Manville from 1947 to 1951 and as Johns-Manville's chief medical advisor from 1952 to 1966. *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 375.

773. *Id.* at 375-76.

774. *Id.*

775. *Id.* at 375.

776. See ASBESTOS LITIG. REP. (ANDREWS) 4910-12 (May 14, 1982) (summarizing *Dorell v. Johns-Manville*, C.A. 7809-88-123-18 (Pa. C.P. Philadelphia May 3, 1982)).

Some plaintiffs also have succeeded in using the Sumner Simpson letters⁷⁷⁷ as evidence of affirmative concealment by manufacturers. This correspondence, between the president of Raybestos-Manhattan, Incorporated and the executive secretary of Johns-Manville, indicates that in the 1930's these manufacturers knew of the potential dangers inherent in extended exposure to asbestos dust and believed that they should minimize the publicity about these dangers.⁷⁷⁸ Many courts have held that this type of evidence justifies imposing punitive damages because it indicates that manufacturers were aware of the dangers inherent in asbestos exposure long before they warned their employees and the public.⁷⁷⁹

C. Manufacturers' Defenses

Asbestos manufacturers have raised a variety of defenses in their struggle to avoid punitive damages assessments.⁷⁸⁰ These defenses range from simple challenges to the sufficiency of the evidence⁷⁸¹ to constitutional challenges to the validity of punitive damages⁷⁸² and complex public policy defenses concerning the industry's survival.⁷⁸³ Although manufacturers have had mixed success with these defenses, the plaintiffs that have prevailed have received large awards.⁷⁸⁴

First, manufacturers argue that the evidence for the plaintiffs' claims is insufficient to satisfy the requirements necessary to impose punitive damages.⁷⁸⁵ To refute the plaintiffs' claims, manufacturers assert that the evidence shows that they took the first affirmative steps to prevent and control asbestos exposure⁷⁸⁶ by

777. See ASBESTOS LITIG. REP. (ANDREWS) 3686 (Aug. 14, 1981) (summarizing *Janssens v. Johns-Manville Corp.* (Fla. Cir. Ct. July 31, 1981)); *supra* part II.

778. See *supra* note 771.

779. See ASBESTOS LITIG. REP. (ANDREWS) 5054 (June 11, 1982) (summarizing *Jackson v. Johns-Manville Sales Corp.*, No. S 79-0211 [R] (S.D. Miss. June 3, 1982)). For further discussion of the Sumner Simpson letters, the Smith deposition, and early studies on asbestos diseases, see *supra* notes 114-60 and accompanying text.

780. See, e.g., *Bunch v. Johns-Manville Sales Corp.*, No. 3-81-416 (E.D. Tenn. June 16, 1982), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 5146-47 (June 25, 1982) (order granting remittitur); *Austin v. Johns-Manville Sales Corp.*, Nos. 78-122 P & 79-1228 P (D. Me. Sept. 29, 1981), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 4044, 4045-47 (Oct. 23, 1981).

781. *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 376-77.

782. *Id.* at 374-76.

783. *Id.* at 377.

784. See *supra* note 716.

785. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 375; see also ASBESTOS LITIG. REP. (ANDREWS) 3690 (Aug. 14, 1981) (summarizing *Directo v. Johns-Manville Corp.* (Cal. Super. Ct. Aug. 11, 1981)).

786. *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 376.

funding independent research studies investigating the effect of asbestos-related work on pulmonary diseases,⁷⁸⁷ conducting their own in-house studies⁷⁸⁸ and disseminating knowledge through trade associations⁷⁸⁹ about asbestos-related diseases. Manufacturers also have pointed to physical plant improvements, personal protective gear, and generally improved working conditions as evidence of their attempts to minimize the dangers of asbestos-related work as they became more keenly aware of those dangers.⁷⁹⁰ Responding to the charge that they knew of the dangers of asbestos-related work many years before they began warning the public, manufacturers have insisted that until the 1964 Selikoff study,⁷⁹¹ they did not realize the full potential of those dangers. Defendant manufacturers generally have not succeeded with this defense. Courts have held that the conclusions of the studies in the 1930's and 1940's,⁷⁹² combined with the former officers' testimony and correspondence⁷⁹³ and the manufacturers' failure to place warning labels on products until the mid-1960's, constitute sufficient evidence to justify punitive damages awards.⁷⁹⁴

Second, asbestos manufacturers have argued that awarding punitive damages in these cases is improper because most plaintiffs proceed under a strict liability theory, which focuses on the defectiveness of the product and ignores the defendant's state of mind.⁷⁹⁵ This defense also has enjoyed only limited success.⁷⁹⁶

787. Manufacturers did contribute to the Saranac Laboratory studies on asbestos in the late 1930's and early 1940's. Motley, *supra* note 249, at 22-23.

788. Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. at 375.

789. *Id.*

790. *Id.*

791. Selikoff, Churg, & Hammond, *supra* note 140, at 139. The results of this study led to the placement of warning labels on asbestos products.

792. See *supra* notes 766-77 and accompanying text.

793. See *supra* notes 771-75 and accompanying text.

794. See, e.g., Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. at 374-76. *But see* ASBESTOS LITIG. REP. (ANDREWS) 3690 (Aug. 14, 1981) (summarizing Directo v. Johns-Manville Corp. (Cal. Super. Ct. Aug. 11, 1981) (without showing of malice, claim for punitive damages unsupported)); ASBESTOS LITIG. REP. (ANDREWS) 74 (Mar. 16, 1979) (summarizing Campbell v. Johns-Manville Corp. (E.D. Tenn. 1978) (evidence insufficient to support punitive damages claim)).

795. See, e.g., Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. at 378; Transcript of Proceedings, Gold v. Johns-Manville Sales Corp., No. 80-2907 (D.N.J. July 16, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5673, 5686 (Oct. 8, 1982).

796. See, e.g., ASBESTOS LITIG. REP. (ANDREWS) 5642 (Oct. 8, 1982) (summarizing Cook v. Lake Asbestos, Civ. No. 18-1519 (D.N.J. Oct. 4, 1982)); Transcript of Proceedings, Gold v. Johns-Manville Sales Corp., No. 80-2907 (D.N.J. July 16, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5673 (Oct. 8, 1982). In each case the judge refused to allow the plaintiff to seek punitive damages under a strict liability theory, but permitted the plaintiff to continue

Courts allowing punitive damages generally have held that dispensing with the need to prove fault in establishing liability does not preclude a showing of aggravated fault if the defendant has acted outrageously.⁷⁹⁷ These courts have disregarded the conceptual differences between negligence and strict liability theories and have focused instead on the outrageousness of the defendant's conduct and the seriousness of the plaintiff's injuries.⁷⁹⁸ Conversely, courts not allowing punitive damages on strict liability claims have pointed to the conceptual differences between negligence and strict liability theories.⁷⁹⁹ These courts have stressed that punitive damages arise in a negligence context in which the defendant's normative behavior is the focus, while strict liability depends solely upon the product's defectiveness.⁸⁰⁰ They fear that allowing punitive damages in a strict liability claim will confuse the jury and undermine the goals of the cause of action.⁸⁰¹

Third, manufacturers have argued that punitive damages awards are unconstitutional because the requirements for imposing them are unconstitutionally vague and because allowing successive punitive damages awards violates the fifth amendment's double jeopardy clause.⁸⁰² In making the unconstitutionally vague argument, manufacturers have insisted that the standards governing the imposition of punitive damages are so amorphous that they fail to provide adequate notice of prohibited conduct. Furthermore, manufacturers have maintained that the standards are so vague that they fail to create legal standards on which a judge or jury rationally can base a decision.⁸⁰³ Noting that these standards are no less vague than other legal standards, courts have rejected this argument and have found that the standards provide adequate no-

to pursue punitive damages under a negligence theory.

797. *See, e.g.,* Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. at 378.

798. *Id.*

799. *See, e.g.,* Transcript of Proceedings, Gold v. Johns-Manville Sales Corp., No. 80-2097 (D.N.J. July 16, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5673, 5686 (Oct. 8, 1982).

800. *Id.*

801. *Id.*

802. *See, e.g.,* Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. at 377-78. The fifth amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V. Defendant-Manufacturers argue that since punitive damages are quasi-criminal, fifth amendment considerations should apply. Manufacturers in mass-marketed products litigation other than asbestosis cases also have raised these constitutional objections. *See, e.g.,* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967).

803. Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. at 377-78.

tice to the defendant and adequate guidance to judges and juries.⁸⁰⁴ Defendant manufacturers also have argued that successive punitive damages awards in products liability litigation violate the double jeopardy clause, since they impose repeated punishment on the defendant for essentially the same act.⁸⁰⁵ Asbestos manufacturers stress that a single act—their failure to warn the public of the dangers of asbestos-related work—is the basis for all punitive damages awards against them. Courts have rejected the double jeopardy argument by finding that the failure to warn each injured individual constitutes a separate and independent act meriting punishment.⁸⁰⁶ To date, these constitutional defenses have failed.⁸⁰⁷

Fourth, asbestos manufacturers have contended that repeatedly punishing the same manufacturers for essentially the same act through the imposition of punitive damages does not further the punishment and deterrence rationale.⁸⁰⁸ Manufacturers have insisted that the deterrence rationale is invalid in asbestos litigation because all manufacturers modified their behavior in the 1960's when they began placing warning labels on asbestos products.⁸⁰⁹ Furthermore, manufacturers have argued that the sheer magnitude of the litigation is sufficient punishment for their misconduct.⁸¹⁰ Although a few courts have expressed sympathy for the manufacturers' argument,⁸¹¹ no court has disallowed a punitive damages claim because of this defense.⁸¹² Courts addressing the argument generally have found it without merit since most jurisdictions allow punitive damages not only to deter the particular defendant from future misconduct but also to deter others from similar misconduct.⁸¹³

In attacking the failure of successive punitive damages awards

804. *Id.*; see *supra* note 750.

805. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 377-78. For a brief discussion of the validity of the double jeopardy defense in mass-marketed products liability litigation, see Note, *Overkill*, *supra* note 712, at 1805-06.

806. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 378.

807. See *id.* at 377-78.

808. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 816 (6th Cir. 1982); see *supra* notes 723-32 and accompanying text.

809. *Moran v. Johns-Manville Sales Corp.*, 691 F.2d at 816.

810. See, e.g., *Bunch v. Johns-Manville Sales Corp.*, No. 3-81-416 (E.D. Tenn. June 16, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5146, 5147 (June 25, 1982).

811. *Id.* at 5146-47.

812. *Id.* (judge decided to wait for directions from the United States Court of Appeals for the Sixth Circuit rather than rule on the punitive damages issue).

813. See *Moran v. Johns-Manville Sales Corp.*, 691 F.2d at 816.

to accomplish its deterrent and punishment purposes, defendant manufacturers also have argued that punitive damages awards do not punish or deter any presently culpable party because those responsible for the misconduct no longer work for the manufacturers.⁸¹⁴ Courts have rejected this defense and have emphasized that liability depends on the agency relationship at the time of the tortious misconduct, not the relationship at the time of the litigation.⁸¹⁵ They also have noted the inherent unfairness of a policy that would allow a corporate defendant to avoid liability simply because those responsible for the misconduct have left the company.⁸¹⁶

Fifth, manufacturers have maintained that allowing successive punitive damages awards in asbestos litigation actually punishes the innocent shareholders of these companies.⁸¹⁷ Because successive punitive damages awards theoretically threaten financial ruin for many of these manufacturers,⁸¹⁸ defendants have asserted that these innocent shareholders, who had no voice in the decisions leading to the misbehavior, are the ones whom the successive punitive awards affect most.⁸¹⁹ Courts have rejected this defense for a variety of reasons. Because shareholders are free to invest their money as they choose, courts usually have found them accountable for the decisions of the corporations in which they invested.⁸²⁰ Stressing that some degree of risk characterizes all investment, courts have held that the risk of punitive damages against the corporation is only one of the many risks that a shareholder encounters.⁸²¹ Thus, over time, punitive damages awards in this type

814. *Id.* at 816-17.

815. *Id.*

816. *Id.*

817. *Id.* at 817; *see also* ASBESTOS LITIG. REP. (ANDREWS) 5159 (July 9, 1982) (summarizing *Nobriga v. Johns-Manville Sales Corp.*, No. 55-624 (1st Cir. Hawaii Feb. 12, 1982)). The "innocent shareholders" defense is a common one in mass-marketed products liability litigation. *See, e.g.*, *Green v. Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967). In making this argument, defense attorneys typically attempt to create the image that the average corporate shareholder is an elderly retiree who depends on her meager dividends to make ends meet or a blue collar worker who has put his life's savings into the stock in hopes of building a secure future for his family.

818. *See e.g.*, *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982) (defendants claim that multiple punitive damages eventually will drive them to financial ruin). *See infra* notes 825-57 and accompanying text.

819. *See, e.g.*, *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 817 (6th Cir. 1982).

820. *See, e.g., id.*

821. *Id.*

of litigation may promote prudent investing.⁸²² Perhaps the strongest argument against the innocent shareholder defense is that these innocent shareholders now bearing the brunt of the punitive damages are likely the same shareholders who profited from the misbehavior.⁸²³ Therefore, justice requires them to account for their tainted profits.⁸²⁴

Last, manufacturers have argued that allowing successive punitive damages awards in asbestos litigation will result in the bankruptcy or financial ruin of the industry.⁸²⁵ This defense, known as the "overkill" or "annihilation" defense, has its origin in Judge Friendly's now infamous *Roginsky v. Richardson-Merrell, Inc.*⁸²⁶ opinion. Since its origin it has been among the most frequently raised and discussed defenses in mass-marketed products liability litigation.⁸²⁷ In *Roginsky* the United States Court of Appeals for the Second Circuit refused to allow a punitive damages award against defendant manufacturer in a MER/29⁸²⁸ drug litigation case.⁸²⁹ Judge Friendly expressed fear that allowing successive punitive damages awards would result in "overkill" since no judicial mechanisms existed to prevent financial annihilation of a corporation for a single management sin.⁸³⁰ Although no other court has ever disallowed a punitive damages award solely on the strength of this argument, asbestos manufacturers have continued to argue that allowance of successive punitive damages awards eventually

822. *Id.*

823. *Punitive Damages*, *supra* note 712, at 1304-05.

824. *See id.*

825. *See Moran v. Johns-Manville Sales Corp.*, 691 F.2d at 817; *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376 (E.D. Pa. 1982); *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982).

826. 378 F.2d 832 (2d Cir. 1967).

827. *See infra* notes 828-49 and accompanying text.

828. Scientists in the 1950's believed that high levels of cholesterol led to atherosclerosis, or hardening of the arteries. Since low cholesterol diets generally were thought ineffective, many drug companies developed drugs to reduce cholesterol levels. One such drug was MER/29, developed by Richardson-Merrell, Incorporated. MER/29 received FDA approval for sale in interstate commerce only by prescription and under approved labelling conditions. The drug proved ineffective, however, because it caused cataracts in humans. Eventually, the FDA required its removal from the market. Plaintiffs brought over 1500 suits against Richardson-Merrell for injuries received while using the drug. For a detailed discussion, see Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

829. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 851.

830. *Id.* at 839 ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

will bankrupt even the richest defendant.⁸³¹ If early plaintiffs were to collect large punitive awards, defendants have argued they will exhaust the corporations' limited funds and leave nothing for later litigants who deserve compensatory damages.⁸³² Only one trial judge has expressed sympathy and agreement with the overkill defense in asbestos litigation.⁸³³ Though choosing not to rule on defendant's motion to strike a punitive damages award,⁸³⁴ the judge expressed concern that successive punitive damages awards in asbestos litigation eventually would bankrupt the industry and leave future plaintiffs without a remedy for their compensatory damages.⁸³⁵ The overkill argument also led an Illinois appellate judge to recommend that the Illinois Legislature reevaluate that state's punitive damages doctrine.⁸³⁶

Notwithstanding their refusals to disallow punitive awards on the basis of the overkill defense, most courts have recognized that allowing successive punitive awards in mass-marketed products liability litigation creates special problems.⁸³⁷ Nevertheless, the courts continue to find that the policy justifications⁸³⁸ for allowing punitive damages to deserving individuals are more important than the risk of annihilation that may threaten manufacturers.⁸³⁹ These courts have stressed that judicial controls are available to ensure that the punitive awards adequately punish past misconduct and deter future misconduct without inflicting an unjust result on the defendant.⁸⁴⁰ For example, most states that allow punitive damages also allow remittitur and follow the rational relation

831. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 376.

832. See, e.g., *ASBESTOS LITIG. REP. (ANDREWS)* 4519 (Feb. 12, 1982) (discussing defendants' summary judgment motion in *Nobriga v. Johns-Manville Sales Corp.*, Civ. No. 55-624 (1st Cir. Hawaii filed 1978)).

833. *Bunch v. Johns-Manville Sales Corp.*, No. 3-81-416 (E.D. Tenn. June 16, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5146, 5146-47 (June 25, 1982).

834. *Id.* The trial judge preferred to wait for the Sixth Circuit's decision in *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982), which was pending and would address the same issue.

835. *Bunch v. Johns-Manville Sales Corp.*, No. 3-81-416 (E.D. Tenn. June 16, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5146-47 (June 25, 1982).

836. *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982) (Sullivan, J., specially concurring); see *infra* note 857.

837. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 376-77.

838. See *supra* notes 723-46 and accompanying text.

839. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 376-77.

840. See, e.g., *Austin v. Johns-Manville Sales Corp.*, Civ. Nos. 78-122 P & 79-228 P (D. Me. Sept. 29, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4044, 4047 (Oct. 23, 1981).

rule.⁸⁴¹ Therefore, judges can prevent annihilation of a manufacturer by evaluating each punitive award in light of past and probable future awards.⁸⁴² Courts also have hesitated to permit manufacturers to avoid imposition of punitive awards merely because they injured a large number of persons with the same product.⁸⁴³ Such a rule not only would fail to promote responsible product marketing, but also would encourage manufacturers to continue injuring large numbers with a product to avoid punitive damages.⁸⁴⁴

To date courts have resisted modifying existing punitive damages rules to cope with the problems of successive punitive awards in asbestos litigation.⁸⁴⁵ One court suggested that if asbestos manufacturers seriously doubt their financial ability to survive multiple punitive damages awards, they should seek to settle all punitive awards in a single class action.⁸⁴⁶ Recent developments, however, suggest that this approach may not be a practicable alternative.⁸⁴⁷ At any rate, the courts believe that any change in present punitive damages rules should come from the legislatures and seem content to allow recovery under existing rules until those changes take place.⁸⁴⁸ Courts simply have refused to disallow a plaintiff punitive damages because others have already received such awards in related litigation.⁸⁴⁹

The overkill or annihilation defense has lost impetus over the years because punitive damages awards in mass-marketed products liability litigation have not yet destroyed a manufacturer. Thus, many have concluded that Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*⁸⁵⁰ exaggerated the danger of financial disaster in this type of litigation.⁸⁵¹ Indeed, in the MER/29 drug litigation, from which *Roginsky* arose, only three of 1500 cases re-

841. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 377; *supra* note 756.

842. See *Austin v. Johns-Manville Sales Corp.*, Civ. Nos. 78-122 P & 79-228 P (D. Me. Sept. 29, 1981), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 4047 (Oct. 23, 1981).

843. *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982).

844. *Id.*

845. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d at 816-17.

846. *Froud v. Celotex Corp.*, 107 Ill. App. 3d at 654, 437 N.E.2d at 910.

847. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847, 850-54 (9th Cir. 1981) (refusing to allow class certification on the issue of punitive damages).

848. *Moran v. Johns-Manville Sales Corp.*, 691 F.2d at 817.

849. *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982).

850. 378 F.2d 832 (2d Cir. 1967); see *supra* notes 117-20 and accompanying text.

851. See, e.g., *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. at 376-77.

sulted in punitive damages awards.⁸⁵² Whether the asbestos litigation will lead to the financial ruin of any of the major manufacturers is difficult to predict.⁸⁵³ Over the last two years, however, courts have levied large punitive damages awards against manufacturers on a consistent basis.⁸⁵⁴ Should this trend continue, the threat of financial ruin could become a reality for even the largest manufacturers.⁸⁵⁵ Since the courts defer to legislative action,⁸⁵⁶ legislatures seriously should reevaluate the policy justifications underlying punitive damages and their utility in mass-marketed products liability litigation.⁸⁵⁷

Several commentators have recommended solutions to the potential overkill problem.⁸⁵⁸ First, states could adopt a uniform standard of conduct requirement for imposing punitive damages in products liability litigation.⁸⁵⁹ This standard would be higher than that presently required to impose punitive damages and theoretically would reduce the number of cases in which punitive damages awards are available.⁸⁶⁰ The primary weakness of this proposed solution is its failure to eliminate the possibility of staggering multiple punitive awards against the same manufacturer and to provide additional judicial safeguards to prevent overkill.⁸⁶¹ Second, the legislature or the courts could impose a dollar limit on the amount

852. See Rheingold, *supra* note 828, at 136-37.

853. Of the 147 cases that have gone to trial, 21 have resulted in punitive damages totalling \$39,468,002. ASBESTOS LITIG. REP. (ANDREWS) 5663-71 (Oct. 8, 1982).

854. *Id.*

855. See *supra* note 715.

856. *E.g.*, Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982).

857. Justice Sullivan suggested that the Illinois Legislature consider the following factors in reevaluating its punitive damages policies:

(1) [W]hether the reason for punitive damages has ceased to exist and, if not, should they be awarded only for extremely flagrant conduct; (2) whether recovery should be allowed only by statute; (3) whether the amount recovered should bear some relation to the harm involved and the compensatory damages received; (4) whether the awarding of unlimited damages as a punishment to deter like offenses is unfair compared to the fixed minimum and maximum criminal penalties which are also imposed as punishment and deterrence; (5) whether the standard of proof should be "clear and convincing" rather than preponderance; and (6) whether payment of such awards should be made other than to the already fully compensated plaintiffs, such as to a public fund. Froud v. Celotex Corp., 107 Ill. App. 3d 654, —, 437 N.E.2d 910, 915-16 (1982) (Sullivan, J., concurring).

858. See *Punitive Damages*, *supra* note 712, at 1325-71; Tozer, *supra* note 712, at 303-04; Note, *Overkill*, *supra* note 712, at 1800-01.

859. *Punitive Damages*, *supra* note 712, at 1325-71.

860. The imposed standard would allow punitive damages only when the manufacturer knowingly misleads the public concerning the product's safety. *Id.* at 1361.

861. Since all who met the standard could recover punitive damages not subject to judicial limitations, the possibility of overkill still would exist.

of punitive damages available in particular types of mass-marketed products liability litigation.⁸⁶² This solution, however, fails to allow for individual consideration of a particular plaintiff's injuries and needs.⁸⁶³ It also requires the body setting the dollar limitation to estimate the number of cases that eventually will allow the imposition of punitive damages.⁸⁶⁴ One writer has recommended a solution that would reduce significantly the possibility of overkill by limiting the total amount of punitive damages recoverable in a particular suit to that portion of the award exceeding the highest punitive award in previous litigation of the same kind of suits.⁸⁶⁵ This type of limitation, however, would create races to judgment and increase the danger of forum shopping.⁸⁶⁶ A third possible solution is the total abolition of punitive damages.⁸⁶⁷ Most scholars have criticized this proposal because they believe that some form of punitive damages is necessary to ensure that the judicial branch maintains some control over manufacturers.⁸⁶⁸ Last, the courts could consolidate all punitive damages claims against a manufacturer into a single action through the use of the class action.⁸⁶⁹ While some believe this solution is judicially feasible,⁸⁷⁰ to date it has not been successful in any mass-marketed products liability

862. Note, *Overkill*, *supra* note 712, at 1804-05.

863. Estimation would be necessary to ensure that the amount of punitive damages eventually awarded would be high enough to punish and deter but low enough to prevent financial ruin.

864. Note, *Overkill*, *supra* note 712, at 1804-05.

865. *Id.* at 1800-01. The judge in the first case coming to trial would give the usual instructions concerning punitive damages. If the jury were to award punitive damages, the plaintiff would receive the entire award. In subsequent cases judges would continue to instruct the juries on punitive damages; however, a subsequent plaintiff would receive punitive damages only if the award in his case exceeded the awards in previous cases. Each time a plaintiff's award exceeded the previous high award he would receive the difference between his award and the previous award. Thus, the manufacturer ultimately would pay only as much as the highest single award.

866. Since the first plaintiff is the only one assured of any punitive award, the likelihood of races to judgment would increase. Also, since subsequent plaintiffs' only hope of punitive damages is an award higher than all previous awards, the various states' punitive damages laws would become more significant and plaintiffs would shop for the most liberal forums.

867. Coccia & Morrissey, *supra* note 712, at 46.

868. See *supra* note 732 and accompanying text.

869. See, e.g., *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 914-15 (N.D. Cal. 1981) (allowing class certification on issue of punitive damages), *rev'd*, 693 F.2d 847 (9th Cir. 1982); see also Note, *Overkill*, *supra* note 712, at 1803.

870. See, e.g., *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910; *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982).

litigation.⁸⁷¹ The chief criticisms of the consolidation solution are that it fails to treat plaintiffs individually and that it ignores the differences among state laws concerning punitive damages.⁸⁷²

D. Summary

The debate over the validity and utility of punitive damages continues. The special problems they present in mass-marketed products liability litigation suggest the need for special rules to govern their availability in this type of litigation. Some changes must take place to prevent asbestos manufacturers and other manufacturers from becoming overkill victims. In searching for a practicable solution, courts and legislatures should not constrain themselves to traditional punitive damages principles. Society and the system of compensation have changed considerably since most of these principles developed, and a complete reevaluation is therefore appropriate. Whatever solution courts and legislatures ultimately adopt, its central characteristic must be fairness⁸⁷³—manufacturers must receive protection from overkill, and consumers must receive adequate protection from malicious injury.

VIII. INSURANCE ISSUES IN ASBESTOS LITIGATION

The expansive asbestos litigation and corresponding liability of asbestos manufacturers pose grave problems for the insurance industry. Insurance companies have divided both on the issue of an insurer's obligation to asbestos claimants and manufacturers and on definitions of insurance policy terms. Ascertaining which, if any, insurance company has incurred the duty to defend and indemnify an asbestos manufacturer is difficult because many different insurers may have insured a manufacturer during the progress of a claimant's asbestos-related disease. Insurance companies and manufacturers increasingly are asking the courts to decide which insurer must bear liability. Insurers whom the courts find to be "on the risk"⁸⁷⁴ face thousands of claims.⁸⁷⁵ Three elements complicate

871. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

872. Reply Brief for Oregon Appellants at 2-5, *In re Northern Dist. of Cal. "Dalkon Shield" Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

873. See Tozer, *supra* note 712, at 303-04.

874. The term "on the risk" describes the basic premise of insurance: the insured exchanges the risk of an unknown loss—liability—for a known loss—the premium payment. The insurer agrees to assume the risk of liability in exchange for a fixed sum. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041.

the question of insurer liability: (1) the language of the insurance policies and the inappropriateness of that language to asbestos-related disease; (2) the lack of medical evidence about this disease; and (3) the public policy of maximizing coverage when the application of the insurance policy is uncertain. When the insurance industry drafted and negotiated language in the insurance policies,⁸⁷⁶ the concept of latent diseases was virtually unknown.⁸⁷⁷ Also, at the time the policies were drafted, liability operated differently.⁸⁷⁸ Hence, policy language that requires a single injury is inappropriate for latent diseases such as asbestos-related illnesses. In addition, the available medical data cannot explain the exact causes or etiologies of the asbestos-related diseases.⁸⁷⁹ The lack of medical information concerning these diseases makes it difficult for courts to interpret the insurance clauses and delineate liability clearly. Nevertheless, courts must assign liability. Not surprisingly, public policy guidelines for insurance contract interpretation play a major role in courts' eventual assignment of liability and largely explain the varied results.⁸⁸⁰

Two main theories have developed to determine when the insurer's responsibility to provide insurance coverage for asbestos injuries arises: the "exposure" and the "manifestation" theories.

875. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir.) (6000 suits), *cert. denied*, 102 S. Ct. 164 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (2000 suits), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110 (D. Mass. 1981) (5000 suits), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1982).

876. The language of an insurance policy determines the extent of the insurer's duty to defend or indemnify. See *infra* notes 896-908 and accompanying text.

877. See Comment, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S.D.L. Rev. 239, 242-43 (1982). *But see* *American Mut. Liab. Ins. Co. v. Agricola Furnace Co.*, 236 Ala. 535, 183 So. 677 (1938) (silicosis case concerning 10-year exposure period).

878. See *infra* text accompanying notes 896-935. During its development, tort law has shifted liability from the injured party to the manufacturer based on the theory that industry more easily can spread the risk among members of society through insurance and increased production costs. Strict liability for manufacturers, as courts have interpreted it, has changed tort law considerably. Today, unlike the period in which asbestos manufacturers and insurers entered into insurance contracts, manufacturers are better prepared for the consequences of a litigious public and an accommodating common law. In the past, companies took precautions that were wholly inadequate for the modern context in which claimants are testing them. See W. PROSSER, *supra* note 29, §§ 96-104.

879. Although the medical community became aware of asbestosis in the early 1900's, recognition of the general danger of latent diseases associated with asbestos did not occur until the late 1960's or early 1970's. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir.), *cert. denied*, 102 S. Ct. 164 (1981); *infra* text accompanying notes 936-56.

880. See generally *AC&S, Inc. v. Aetna Casualty and Sur. Co.*, 544 F. Supp. 128, 129 (E.D. Pa. 1982) (discussing various theories of interpretation applicable to the policies).

Under the exposure theory, the claimant's exposure to asbestos triggers policy coverage. Hence, all insurers on the risk⁸⁸¹ are liable during the years of the claimant's exposure.⁸⁸² The manifestation theory states that the insurer is not liable until the diagnosis of the disease or the manifestation of physical symptoms.⁸⁸³ Both theories are imperfect, and numerous versions of each exist.⁸⁸⁴ This part of the Special Project examines the three elements that courts use to determine the imposition of insurer liability: the language of the Comprehensive General Liability (CGL) policy, medical evidence, and public policy guidelines for interpreting insurance policies. This part then analyzes these elements in terms of the theories on which courts have relied to determine insurance coverage for asbestos-related "injury."

A. *The Asbestos Litigation Problem*

Claimants who have suffered injury from asbestos products have filed a virtual avalanche of lawsuits against asbestos manufacturers. Present estimates of the number of cases range as high as 35,000,⁸⁸⁵ and manufacturers have spent millions of dollars in the defense and resolution of these claims.⁸⁸⁶ As manufacturers' costs have mounted, manufacturers have put increasing pressure on insurance companies to indemnify them.⁸⁸⁷ The insurance companies, of course, are reluctant to accept liability for claims whose average cost to resolve or defend is \$170,000.⁸⁸⁸ If, as former Secretary of Health, Education, and Welfare Joseph Califano has esti-

881. See *supra* note 874.

882. See *infra* text accompanying notes 977-85.

883. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216 n.8.

884. See *infra* text accompanying notes 1001-19.

885. See *Mansfield*, *supra* note 7, at 865-67; see also *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.) (liability imposed on manufacturer of respirator and filter apparatus), *cert. denied*, 454 U.S. 1109 (1981).

886. See *Comment*, *supra* note 877, at 240.

887. See *Mansfield*, *supra* note 7, at 877.

888. See COMMERCIAL UNION INSURANCE COMPANIES ENVIRONMENTAL ISSUES TASK FORCE, ASBESTOS . . . A SOCIAL PROBLEM 34 (May 12, 1981) (citing Insurance Services Office, 1977 Survey of Product Liability Closed Claims in the United States 38) [hereinafter cited as ASBESTOS . . . A SOCIAL PROBLEM]. Johns-Manville Corporation estimates its cost per lawsuit at \$18,690. Affidavit of John F. Beasley, *In re Johns-Manville Corp.*, No. 82 B (S.D.N.Y. filed Aug. 26, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5419, 5423 (Aug. 27, 1982). One commentator has estimated the average settlement per worker to be \$175,000. Winter, *Defendant Asbestos Firms Form an Alliance*, 68 A.B.A. J., 137, 137 (1982). Projection of the disposition costs for future cases raises these figures to \$40,600. *Oversight Hearing*, *supra* note 16, at 53.

mated, the future death toll from asbestos exposure is 5.6 million people,⁸⁸⁹ the ultimate cost of asbestos litigation will be monumental. Manville Corporation's filing for reorganization under the protection of the bankruptcy laws is evidence of this great economic pressure on the asbestos industry.⁸⁹⁰

The controversy between manufacturers and insurers and among the insurers arises out of the language of the insurance policies and the latent nature of asbestos-related diseases.⁸⁹¹ Typically, claimants name numerous manufacturers as defendants in lawsuits brought for disabilities that resulted from exposure to asbestos over a number of years. Because asbestos-related diseases occur after long periods of exposure to the mineral's fibers, no discrete time of "injury" is identifiable.⁸⁹² Additionally, a manufacturer's insurance companies change over time. With the enormous sums of money at issue, parties have asked courts to interpret insurance policies, and if necessary, to determine and apportion liability.

B. *The Policy Language*

The terms of the insurance contract determine insurer liability for indemnification and for costs of defense. In asbestos cases the insurance contract is a CGL policy, which the company issues each year to the insured.⁸⁹³ Because the pertinent language is the same in policies of different insurers, examination of language changes over time is more instructive than a comparison of the terms that various firms use.⁸⁹⁴ Typically, insurer liability questions focus on the interpretation of the CGL policies that were in force during the three stages of the development of asbestos-related disabilities: ex-

889. ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 13.

890. For a detailed discussion of Chapter 11 reorganization filings by Manville Corporation, UNARCO, and Amatex Corporation, see *infra* part XI.

891. The insurance policy provides for coverage at the time of the "injury." Latent diseases, however, cause injuries over a period of time and hence do not permit identification of a discrete temporal period for imposition of insurer liability. See *infra* text accompanying notes 896-905.

892. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1042-47 (D.C. Cir.), *cert. denied*, 102 S. Ct. 164 (1981).

893. Comprehensive General Liability (CGL) policies utilize the same terms to facilitate easy comparison of coverage by customers. See *Ingram*, *supra* note 10, at 339-40.

894. For a summary of language changes over time, see *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1227-28 (6th Cir. 1980) (table showing variance in language from 1955-1976), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1053-57 (table showing variance in language from 1961-1980).

posure, exposure in residence, and manifestation.⁸⁹⁵

1. The Duty to Indemnify

Most CGL insurance contracts contain the language of the forms drafted by the National Bureau of Casualty Underwriters and the Mutual Insurance Ratings Bureau.⁸⁹⁶ A typical indemnity clause provides:

The [insurer] will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false, or fraudulent⁸⁹⁷

In most insurance policies the existence of a "bodily injury" triggers the duty to indemnify.⁸⁹⁸ The policies generally define "bodily injury" as "bodily injury, sickness or disease."⁸⁹⁹ Upon a showing of bodily injury, any liability of the insured becomes that of the insurer. A few insurance contracts, however, stipulate that the trigger of coverage is the "occurrence."⁹⁰⁰ Prior to 1966 policies used the term "accident," but the growing awareness of progressive and cumulative diseases has prompted a shift in language.⁹⁰¹

895. These periods represent the stages of asbestos-related disease development. The "exposure" period is the time during which the claimant inhales asbestos fibers. The period during which each fiber affects the body is the latency or "exposure in residence" period. The final stage is the "manifestation" of the disease in a clinically diagnosable form. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1042-44.

896. *Ingram*, *supra* note 10, at 339-40.

897. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1039; see *supra* cases cited note 894.

898. *E.g.*, *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 (1st Cir. 1982); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1042; *Porter v. American Optical Corp.*, 641 F.2d at 1145; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216.

899. See *supra* cases cited note 898.

900. See, *e.g.*, *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available April 1, 1983, on LEXIS, Genfed library, Dist file).

901. Commentators differ on the meaning of and the reasons for this shift. See *Ingram*, *supra* note 10, at 340 n.126:

The definition [of occurrence] embraces an injurious exposure to conditions which result in injury. Thus, it is no longer necessary that the event causing the injury will be simultaneous with the exposure. However, in some other cases, injuries will take place over a long period of time before they become manifest. The slow ingestion of foreign matters and inhalation of noxious fumes are examples of injuries of this kind. The definition serves to identify the time of loss for application of coverage to these cases, *viz.*, the injury must take place during the policy period. This means that in exposure-type cases, cases involving cumulative injuries, more than one policy contract may come into play in determining coverage. Apparently, the phrase "including injurious

Courts have interpreted "occurrence" to mean an accident, including continuous or repeated exposure to conditions, that unexpectedly results in bodily injury or property damage during the policy period.⁹⁰² The terms "bodily injury" and "occurrence" are inappropriate for asbestos-related injury claims since the language fails to describe diseases that are progressive and cumulative. Rather, the terms are more suitable for typical industrial mishaps that take place over short periods of time. The symptoms necessary to characterize asbestosis, mesothelioma, and other asbestos-related conditions take many years to develop fully. Hence, the courts frequently must determine the meaning of policy language that fails to describe accurately events that the contracting parties did not foresee.⁹⁰³

2. The Duty to Defend

The CGL policy also standardized the policy language governing the duty to defend. Because the language is fairly broad, however, ascertaining which insurer must defend is not as difficult as determining which company has the duty to indemnify. For the defendant manufacturer the question is still important, because for every dollar the company spends in settlement or satisfaction of a judgment, it must pay another dollar to defend the claims.⁹⁰⁴ The broad policy language requires the insurer to defend any case against the insured concerning alleged injury even if the allegations of the suit are groundless, false, or fraudulent.⁹⁰⁵ The question that arises is not whether the insurer has a duty to defend at all but whether the insurer's duty has terminated. The court in *Commercial Union Insurance Co. v. Pittsburgh Corning Corp.*⁹⁰⁶ outlined

exposure to conditions which results, during the policy period, in bodily injury" was intended to make coverage depend on whether bodily injury results during the policy period, with the consequence that, if this intent is enforceable in the courts, an insurer might escape liability by cancelling or declining to renew coverage before bodily injury resulted.

Id. (citing Nachman *The New Policy Provisions for General Liability Insurance*, in 18 THE ANNALS 197 (1965)); see 2 R. LONG, THE LAW OF LIABILITY INSURANCE, §§ 11.05-.05A (1981).

902. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1228.

903. Once the court determines the meaning of the policy language, it then must determine the scope and extent of the policy's coverage. For a discussion of insurance coverage theories in asbestos litigation, see *infra* notes 971-1019 and accompanying text.

904. See ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 36.

905. *E.g.*, *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1039; *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available Apr. 1, 1983, on LEXIS, Genfed library, Dist file).

906. No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available Apr. 1, 1983, on LEXIS, Genfed

the two divergent views on this issue. One approach indicates that the insurer must defend even if it no longer has a duty to indemnify the insured.⁹⁰⁷ The opposing view relates the extent of the duty to defend to the limits on the indemnification coverage.⁹⁰⁸

a. Continuing Duty to Defend

Most courts that have interpreted duty to defend clauses have found, absent specific language to the contrary, that the duty to defend continues despite fulfillment of the duty to indemnify.⁹⁰⁹ These courts have perceived the duty to indemnify and the duty to defend as two independent obligations under the insurance contract.⁹¹⁰

*Anchor Casualty Co. v. McCaleb*⁹¹¹ illustrates this approach. *McCaleb* concerned an oil well explosion that caused property damage and resulted in four claims that exceeded the insured's policy limits.⁹¹² Insurer wanted to pay the amount of the policy limit for indemnity into the court and thus shift the duty to defend to the insured.⁹¹³ The court refused to allow insurer to avoid its obligation on the ground that the policy language clearly distinguished between the duties to defend and indemnify.⁹¹⁴ In view of *McCaleb*, its progeny,⁹¹⁵ and strong policy considerations that operate to protect the insured, the insurer may not abandon its duty to defend upon fulfillment of its duty to indemnify.⁹¹⁶

library, Dist file).

907. See, e.g., *American Casualty Co. v. Howard*, 187 F.2d 322 (4th Cir. 1951); *Anchor Casualty Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949); *Simmons v. Jeffords*, 260 F. Supp. 641 (E.D. Pa. 1966); *National Casualty Co. v. Insurance Co. of N. Am.*, 230 F. Supp. 617 (N.D. Ohio 1964); *Travelers Indem. Co. v. East*, 240 So. 2d 277 (Miss. 1970); *St. Paul Fire & Marine Ins. Co. v. Thompson*, 150 Mont. 182, 433 P.2d 795 (1967); *Kocse v. Liberty Mut. Ins. Co.*, 159 N.J. Super. 340, 387 A.2d 1259 (1978); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954), *appeal withdrawn*, 1 A.D.2d 1008, 154 N.Y.S.2d 835 (1956).

908. See, e.g., *General Casualty Co. v. Whipple*, 328 F.2d 353 (7th Cir. 1964); *Denham v. LaSalle-Madison Hotel Co.*, 168 F.2d 576 (7th Cir.), *cert. denied*, 335 U.S. 871 (1948); *Allstate Ins. Co. v. Montgomery Trucking Co.*, 328 F. Supp. 415 (N.D. Ga. 1971); *National Union Ins. Co. v. Phoenix Assurance Co.*, 301 A.2d 222 (D.C. 1973); *Liberty Mut. Ins. Co. v. Mead Corp.*, 219 Ga. 6, 131 S.E.2d 534 (1963); *Oda v. Highway Ins. Co.*, 44 Ill. App. 2d 235, 194 N.E.2d 489 (1963).

909. See *supra* cases cited note 907.

910. *Id.*

911. 178 F.2d 322 (5th Cir. 1949).

912. *Id.* at 324.

913. *Id.* at 325.

914. *Id.*

915. See *supra* cases cited note 907.

916. See *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D.

The court in *Keene Corp. v. Insurance Co. of North America*,⁹¹⁷ which concerned policy coverage of liability for asbestos-related diseases, adopted the *McCaleb* view.⁹¹⁸ In reaching its decision that the duty to defend is broader than the duty to indemnify,⁹¹⁹ the court emphasized its desire to increase efficiency and to minimize confusion in the already complex tort litigation.⁹²⁰ Hence, the court held that the insurance company selected by the manufacturer must defend defendant's claim.⁹²¹ The *Keene* court chose this approach to avoid resolving insurance contract disputes and the victim's tort claims in the same lawsuit.⁹²² If a court were to insist upon resolving the tort and contract issues together, all defendants would have to join other asbestos manufacturers and their insurers in each tort suit.⁹²³ Each suit would become an "unwieldy spectacle," with inconvenience and high litigation costs to the victim, whose action for damages would be the scene of disputes among the defendants.⁹²⁴

b. Limited Duty to Defend

Some courts have found that an insurer's duty to defend terminates upon its exhaustion of policy limits by payment of judgment or settlement.⁹²⁵ These courts interpret the duties as coextensive—upon performance of the obligation of payment by the insurer its duty to defend ceases.⁹²⁶ In *Lumberman's Mutual Casualty Co. v. McCarthy*⁹²⁷ two lawsuits arose out of an automobile accident.⁹²⁸ Insurer defended the insured in both suits. After the court had reached a verdict on one suit⁹²⁹ and insurer had paid the policy limit in satisfaction of the judgment, insurer refused to continue defending the insured in the subsequent suit.⁹³⁰ Finding that the duty to indemnify represented the extent of insurer's obliga-

Pa. Dec. 4, 1981) (available April 1, 1983, on LEXIS, Genfed library, Dist file).

917. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1644 (1982).

918. 667 F.2d at 1038.

919. *Id.* at 1050.

920. *Id.* at 1050-51.

921. *Id.* at 1051.

922. *Id.*

923. *Id.* at 1051 n.38.

924. *Id.*

925. *See supra* cases cited note 908.

926. *Id.*

927. 90 N.H. 320, 8 A.2d 750 (1939).

928. *Id.* at 320-21, 8 A.2d at 751.

929. *Id.*, 8 A.2d at 751.

930. *Id.*, 8 A.2d at 751.

tion to the insured, the *McCarthy* court ruled that insurer was free to withdraw from further defense of the insured.⁹³¹

No courts have applied *McCarthy* to policy coverage in asbestos litigation. In *Commercial Union Insurance Co. v. Pittsburgh Corning Corp.*⁹³² Commercial Union argued that since the insurance contract was between businesses and parties that were of relatively equal bargaining power, the ordinary tenets of contract law should apply to the policy. Therefore, insurer asserted, strict construction of the contract and adoption of the public policy rationale that supports resolving ambiguities in favor of the insured in-appropriate.⁹³³ The *Pittsburgh Corning* court, however, looked beyond the economic parity of the individual parties to the insurance contract itself and focused on the parties' relative sophistication regarding the contract. The court strictly construed the contract language that required insurer to "defend any suit" to mean that "insurer must continue to defend the insured after exhaustion of policy limits."⁹³⁴ Commercial Union asserted that the terms of the contract were not ambiguous and did not require strict construction in favor of the insured. The court, however, pointed to a subsequent redrafting of the policy language that specifically limited the duty to defend as indicative of ambiguity in the policy. The *Pittsburgh Corning* court rejected the *McCarthy* view and concluded that the contract required Commercial Union to continue to defend Pittsburgh Corning Corporation.⁹³⁵

C. Medical Evidence

The lack of medical information about asbestos-related diseases has contributed to the difficulty in assigning liability among insurers. Medical experts have identified asbestos as a causative agent in three diseases: asbestosis, mesothelioma, and lung cancer.⁹³⁶ Asbestosis, the most common asbestos-related disease, results from the inhalation of asbestos fibers.⁹³⁷ The mining, processing, or use of asbestos on construction sites releases asbestos fibers

931. *Id.* at 323, 8 A.2d at 752.

932. No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available Apr. 1, 1983, on LEXIS, Genfed library, Dist file).

933. *Id.*

934. *Id.*

935. *Id.*

936. See Ingram, *supra* note 10, at 320-25; Mansfield, *supra* note 7, at 861-64.

937. See generally I. SELIKOFF & D. LEE, *supra* note 10; Selikoff, Bader, Churg, & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg, & Hammond, *supra* note 10.

into the air and workers in the area inhale the fibers into their lungs. The fibrous lung tissue encapsulates the particles and traps them in one area of the lung. As the amount of asbestos fibers in the lung increases, the area of healthy lung tissue decreases, which in turn impairs the pulmonary function. After years of exposure to asbestos a victim's lung becomes covered with scar tissue. The lung volume decreases, the efficiency of oxygen transfer diminishes and disability results. Asbestosis is a progressive disease—the more fibers that a worker inhales the greater the chance that he will contract the disease. The precise amount of inhaled asbestos fibers that causes the disease varies among individuals.⁹³⁸

Mesothelioma, another asbestos-related disability, is a cancer of the cells that surround the organs in the chest cavity and line the chest wall.⁹³⁹ Unlike asbestosis, mesothelioma is not “dose-responsive.”⁹⁴⁰ Generally, mesothelioma manifests itself approximately twenty years or more after an excessive inhalation of asbestos.⁹⁴¹ The disease is invariably fatal within several years of its development.⁹⁴² Lung cancer follows a similar pattern of development.⁹⁴³ Although medical research has not established a correlation between inhalation of asbestos and the development of the cancer,⁹⁴⁴ asbestos inhalation apparently accelerates the development of lung cancer among workers who smoke.⁹⁴⁵ Doctors also have linked inhalation of asbestos to heart disease.⁹⁴⁶ The encapsulation of fibers and destruction of lung tissues that occur during the development of asbestosis increases the resistance of the blood flow through the pulmonary capillary bed. This condition, known as *cor pulmonale*, strains the heart, which enlarges to accommodate the strain and eventually collapses.⁹⁴⁷

938. See Ingram, *supra* note 10, at 320-21.

939. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 n.3 (D.C. Cir.), *cert. denied*, 102 S. Ct. 104 (1981); *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973).

940. Dose-responsive refers to a disease that develops in direct relation to the external stimulus. The development of mesothelioma does not bear this linear relation to the dosages of asbestos that a claimant receives. See Selikoff, Bader, Churg, & Hammond, *supra* note 937, Selikoff, Churg, & Hammond, *supra* note 140.

941. See Note, *supra* note 2, at 242 n.24. *But see* Ingram, *supra* note 10, at 321-22 (disease can manifest itself anywhere between 3½ and 77 years after inhalation).

942. I. SELIKOFF & D. LEE, *supra* note 10, at 303.

943. *Id.* at 26-28.

944. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1214 n.1 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981).

945. I. SELIKOFF & D. LEE, *supra* note 10, at 185.

946. *Id.* at 149.

947. *Id.*

The latent nature of asbestos-related diseases in general, and asbestosis in particular, frustrates the resolution of legal issues in the insurance area. Because the available medical data cannot pinpoint accurately the moment that an asbestos-related disability occurs, courts cannot ascertain precisely when a victim's "bodily injury" existed.⁹⁴⁸ Judge Merritt, in his dissent in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,⁹⁴⁹ advocated dividing the progression of asbestosis into three stages: exposure, discoverability, and manifestation.⁹⁵⁰ According to this scheme, the disease begins upon an individual's *exposure* to asbestos fibers; the disease becomes *discoverable* at some point through the use of X-rays or biopsy procedures; and later, the disease becomes diagnosable because it *manifests* itself through physical symptoms.⁹⁵¹ Judge Merritt advocated assigning "bodily injury" to the discovery date—a date set ten years after the initial inhalation of asbestos fibers.⁹⁵² Alternatively, some courts have assigned the point of injury to the exposure date when the fiber strikes the lung tissue and initiates the body's defense mechanism.⁹⁵³ Other courts have found the moment of injury to coincide with the manifestation of the disease.⁹⁵⁴ Finally, the court in *Keene Corp. v. Insurance Co. of North America*⁹⁵⁵ ruled that bodily injury was a process that endured from initial exposure through manifestation of the disease.⁹⁵⁶

D. Policies Governing Insurance Policy Interpretation

Contract law dictates that the terms which appear in the contract must govern because these terms indicate the intent of the signers.⁹⁵⁷ Hence, courts construe the words or phrases in their plain and ordinary meaning;⁹⁵⁸ they construe ambiguous language,

948. See *supra* text accompanying notes 896-903.

949. 633 F.2d at 1229.

950. *Id.*; see *infra* text accompanying notes 1001-11.

951. 633 F.2d at 1229.

952. *Id.* at 1230-31.

953. See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 657 F.2d at 816; *infra* notes 973-87 and accompanying text.

954. See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 (1st Cir. 1982); *infra* notes 980-1000 and accompanying text.

955. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007; see *infra* notes 1012-19 and accompanying text.

956. 667 F.2d at 1045-46.

957. J. MURRAY, MURRAY ON CONTRACTS § 113 (1974).

958. See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1219.

however, against the drafter of the contract.⁹⁵⁹ In insurance law, in which contracts of adhesion are prevalent,⁹⁶⁰ this policy is even stronger. Courts construe ambiguous language against the drafter-insurer to secure the reasonable expectations of the parties.⁹⁶¹

Because the ambiguous terms "injury" and "occurrence" do not define a discrete temporal period as the time of injury for asbestos-related diseases,⁹⁶² courts must use policy guidelines and judicial draftsmanship to interpret the terms of the CGL policies. To pursue a policy goal of maximizing coverage to the insured, courts frequently apply different theories of policy coverage to the same terms in different insurance contracts. For example, in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*⁹⁶³ the court faced two possible constructions of the insurance contract—one that would provide coverage to Forty-Eight Insulations and one that would leave the company uninsured.⁹⁶⁴ The court construed the language of the policy to fit the exposure theory of liability because that interpretation permitted recovery.⁹⁶⁵ Conversely, in *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*⁹⁶⁶ the court applied the manifestation theory to virtually identical terms to permit maximum insurance coverage to the insured.⁹⁶⁷ Both courts gave great deference to the expectations of the insured,⁹⁶⁸ and the court in *Eagle-Picher* stated:

When purchasing liability insurance, a company in the shoes of Eagle-Picher would have the following expectations. It would reasonably expect that it could buy insurance and that the insurance would provide coverage for lawsuits alleging damage occurring during the term of insurance resulting from products sold in the past. . . . [I]t would expect that it was covered for all future liability, except for specific injuries of which it could have been aware

959. J. MURRAY, *supra* note 957, § 119.

960. *See* Comment, *supra* note 877, at 253.

961. *Id.* at 254.

962. *See supra* text accompanying notes 896-903.

963. 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981).

964. 633 F.2d at 1222.

965. *Id.*

966. 523 F. Supp. 110 (D. Mass. 1981), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1982).

967. 523 F. Supp. at 118.

968. In *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), the dominant purpose of the court was to secure indemnity for the insured. *Id.* at 1041; *see supra* note 874. The court analyzed the "reasonable expectations" of the parties. *See generally* Comment, *supra* note 2, at 252-59 (discussing "reasonable expectation" doctrine, its scope in insurance contracts, and its application in asbestos cases). The court also found that whether or not manufacturers expected coverage for latent injuries, they clearly believed that they had purchased certainty up to the amounts of the policy limits. 667 F.2d at 1044-45.

prior to its purchase of insurance, and that its security would not be undermined by the existence of prior periods in which it was uninsured

It would reasonably expect that the theories of liability under which it was found liable would dictate the extent of its insurance coverage.⁹⁶⁹

Although each court chose a different theory of insurance coverage, both sought to apply common, popular, and ordinary meaning to the policy language to reflect accurately existing medical knowledge about asbestos-related diseases.⁹⁷⁰

E. Theories of Coverage

Courts have advanced two theories of insurer liability for claims against insured manufacturers and distributors of asbestos: the "exposure" theory and the "manifestation" theory. Each court that has considered the asbestos insurance coverage question has adopted some variation of one of these theories.⁹⁷¹ Advocates of both theories have agreed that the existence of "bodily injury" triggers coverage under the CGL policies.⁹⁷² The theories diverge on the question of when the injury occurred in asbestos-related diseases.

1. The Exposure Theory

Under the exposure theory "bodily injury" occurs upon a claimant's first exposure to asbestos fibers.⁹⁷³ The theory requires that an insurer who entered into an insurance contract with a manufacturer during the time of a claimant's exposure defend and indemnify the manufacturer against the claim.⁹⁷⁴ Exposure theorists consider the deposit of an asbestos fiber on a lung to constitute an injury. Available medical data supports this position because asbestos-related diseases are cumulative; hence some injury occurs with each deposit of fiber.⁹⁷⁵ Proponents of the exposure theory

969. Brief for Appellant at 27, *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4474 (Jan. 22, 1982).

970. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. at 115-16.

971. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982).

972. See *id.* at 24; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1042 (D.C. Cir.), cert. denied, 102 S. Ct. 164 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218. But see *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available Apr. 1, 1983, on LEXIS, Genfed library, Dist file) (court "unsure whether 'injury' or 'occurrence' must occur during the policy period").

973. Brief for Appellant at 27, *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4474 (Jan. 22, 1982).

974. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1224-25.

975. *Id.* at 1219.

maintain that damage occurs continually throughout the term of exposure, before the manifestation of any disease.⁹⁷⁶

Critics of the exposure theory have alleged that the approach elevates the microscopic "insults" to lung tissue caused by the inhalation of asbestos fibers to the status of a compensable "bodily injury."⁹⁷⁷ The exposure theory creates a fictional injury to assign liability. Indeed, some medical evidence does exist to suggest that inhalation of some quantity of asbestos will not cause identifiable harm.

Application of the exposure theory by the courts has varied. The district court in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,⁹⁷⁸ which was the first court that considered this insurance coverage question in the asbestos context,⁹⁷⁹ adopted the exposure theory.⁹⁸⁰ The court referred to exposure as the period of inhalation of asbestos fibers.⁹⁸¹ The United States Court of Appeals for the Sixth Circuit affirmed the decision and adopted the district court's interpretation of exposure.⁹⁸² The circuit court, however, failed to clarify whether exposure included only the period of inhalation of asbestos fibers or whether it also included the latency period during which the disease was progressing.⁹⁸³ In *Porter v. American Optical Corp.*⁹⁸⁴ the United States Court of Appeals for the Fifth Circuit did nothing to clarify the definition of exposure and chose instead to refer to the *Forty-Eight Insulations* case as dispositive on all points.⁹⁸⁵

A conservative interpretation of exposure, which limits the exposure period to the time of actual inhalation of asbestos fibers, makes it more difficult for manufacturers to establish that they had insurance. Most defendant-manufacturers have available evidence of insurance coverage from about 1960 on,⁹⁸⁶ and some com-

976. See *id.* at 1217.

977. See *id.* at 1218-23.

978. 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 120 S. Ct. 686 (1981).

979. See Comment, *supra* note 877, at 246.

980. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. at 1238, 1240.

981. *Id.*; see Oshinsky, *Comprehensive General Liability Insurance: Trigger and Scope of Coverage in Long-Term Exposure Cases*, 17 FORUM 1035, 1042-43 (1982).

982. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 12 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981).

983. 633 F.2d at 1222-23.

984. 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

985. 641 F.2d at 1145.

986. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 (D.C. Cir.),

panies face great losses due to their inability to prove their insurance prior to that date.⁹⁸⁷

2. The Manifestation Theory

The manifestation theory imposes liability solely upon the insurer on the risk from the time that a claimant's injury manifests itself through either physical symptoms or medical diagnosis.⁹⁸⁸ Proponents of the manifestation theory argue that the exposure theory is inappropriate because claimants are not filing suit for individual deposits of asbestos fibers on their lungs. Rather, claimants sue because they have contracted an asbestos-related disability. The necessary "bodily injury," therefore, occurs when the disease manifests itself in physical symptoms and is provable.⁹⁸⁹ Insurance companies, which support the manifestation theory, are its greatest beneficiaries because they have the opportunity to adjust the contracts and premiums of asbestos manufacturers according to expected costs.⁹⁹⁰ The problems of apportioning liability among insurers under the exposure theory⁹⁹¹ do not arise under the manifestation theory because only one insurer will have to defend and indemnify the claimant.⁹⁹² A flaw in the theory, however, is the arbitrariness of the result. Injuries in latent diseases do not occur upon diagnosis but at a point in time between exposure and diagnosis.⁹⁹³ Additionally, since insurance companies have ceased

cert. denied, 102 S. Ct. 164 (1981); *Porter v. American Optical Corp.*, 641 F.2d at 1142; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1215; *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 117 (D. Mass. 1981), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1982). Few companies keep records more than 15 or 20 years. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225 n.27.

987. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225 n.27.

988. See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 16; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1045; *Porter v. American Optical Corp.*, 641 F.2d at 1144; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1220; *AC&S, Inc. v. Aetna Casualty & Sur. Co.*, 544 F. Supp. 128, 129 (E.D. Pa. 1982); *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available Apr. 1, 1983, LEXIS, Genfed library, Dist file).

989. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. at 116.

990. See *Mansfield*, *supra* note 7, at 876.

991. Some courts that apply the exposure theory assess joint and several liability for indemnity. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047. Other courts use a pro rata exposure theory and apportion liability among the insurers on the risk during the period of exposure. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225; *infra* text accompanying notes 1020-27.

992. See *Ingram*, *supra* note 10, at 336.

993. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230.

issuing policies to manufacturers that adequately protect them from liability for asbestos-related disability, the manifestation theory will result in a lack of insurance coverage for manufacturers.⁹⁹⁴

The court in *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*⁹⁹⁵ adopted the manifestation theory⁹⁹⁶ on the ground that the policy language required that the *disease* or *injury*, not the exposure, take place "during the policy period."⁹⁹⁷ The court rejected as "fiction" the argument of exposure theory proponents that each inhalation of asbestos fibers is an injury.⁹⁹⁸ The case represents an anomaly, however, because the manufacturer-insured propounded the manifestation theory to maximize its coverage.⁹⁹⁹ The court concluded that "[c]overage based on manifestation was certainly more desirable than coverage based on exposure, given that Eagle-Picher was uninsured during the longest period of exposure and that the number of claims was accelerating during the period of coverage."¹⁰⁰⁰

3. The Discoverability/Arbitrary Date Theory

Judge Merritt in his dissent in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* outlined a compromise alternative to the exposure and manifestation theories.¹⁰⁰¹ Judge Merritt's "discoverability" theory reflects the view that "[a]sbestosis is a discoverable disease long before it reaches the advanced stage of manifestation."¹⁰⁰² The judge selected an arbitrary point in time between exposure and manifestation as the date of the disease's discoverability.¹⁰⁰³ After analyzing the existing theories of coverage and medical data, Judge Merritt determined that asbestosis "occurs" ten years after the first exposure.¹⁰⁰⁴ He recognized that because a typical claimant brings suit after the disease has manifested itself, retrospective determinations of discoverabil-

994. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 23; see *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1045.

995. 682 F.2d 12 (1st Cir. 1982).

996. *Id.* at 16.

997. *Id.* at 19.

998. *Id.* at 19 n.3.

999. *Id.* at 16.

1000. *Id.* at 23.

1001. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230-32 (Merritt, J., dissenting).

1002. *Id.* at 1230.

1003. *Id.* at 1230-31.

1004. *Id.*

ity are impractical, if not impossible.¹⁰⁰⁵ Although the theoretical time frame concededly is arbitrary,¹⁰⁰⁶ it does reflect a statistical estimate of when diseases such as asbestosis are likely to develop.¹⁰⁰⁷ Courts that apply the discoverability theory would prorate liability among insurers who were on the risk ten years after the date of a victim's initial exposure.¹⁰⁰⁸ Insurance companies covering manufacturers for periods during which the disease was in its latent stage would not be liable to the insured.¹⁰⁰⁹

Critics of the discoverability theory argue that, like the manifestation theory, it fails to recognize the medical evidence indicating that injury occurs with exposure.¹⁰¹⁰ Critics also assert that the basis for Judge Merritt's rule is the state of the art for medical diagnosis, not known medical data.¹⁰¹¹

4. The *Keene* Approach

The United States Court of Appeals for the District of Columbia Circuit in *Keene Corp. v. Insurance Co. of North America*¹⁰¹² adopted both the exposure and manifestation theories of insurance coverage. Speaking for the court, Judge Bazelon, after reviewing the available medical data and policy language, discussed the three stages of asbestos-related disease: exposure, subsequent development of the disease (exposure in residence), and manifestation.¹⁰¹³ He found that selection of either the exposure or manifestation theories as the sole trigger of coverage would undermine the rights and obligations that the insurance policy established.¹⁰¹⁴ In addition, the court ruled that exposure, exposure in residence, and

1005. *Id.* at 1230.

1006. *Id.* Judge Merritt pointed out that arbitrariness in the selection of a date is not unusual in the field of law. The common law often has drawn arbitrary lines, such as the 21-year adverse possession limitation. *Id.* at 1231 n.1.

1007. *Id.* at 1231.

1008. *Id.*

1009. *Id.*

1010. *See* *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981) (available Apr. 1, 1983, on LEXIS, Genfed library, Dist file).

1011. Judge Merritt based his choice of an arbitrary date on the most commonly available diagnostic device, an X-ray machine, which has inherent limitations. *See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (Merritt, J., dissenting).

1012. 667 F.2d 1034, 1045 (D.C. Cir.), *cert. denied*, 102 S. Ct. 164 (1981).

1013. 667 F.2d at 1042.

1014. *Id.* at 1046. The court noted that neither the manifestation theory nor the exposure theory provided Keene Corporation with the protection that it purchased by carrying insurance. A manufacturer's insurance, according to the court, should cover the entire injurious process. *Id.*

manifestation *all* trigger coverage pursuant to the policies.¹⁰¹⁵ Exposure to asbestos, the court stated, causes an immediate and discrete injury that is part of the "injurious process" of asbestos-related diseases.¹⁰¹⁶ "Bodily injury" means "any part of the single injurious process that asbestos-related diseases entail."¹⁰¹⁷ The court, therefore, concluded that both the exposure and manifestation theories were consistent with the language of the policies and the expectations of the insured.

In the context of asbestos-related disease, the *Keene* court's expansive interpretation of "bodily injury" is the most realistic view that courts have espoused to date. Neither the proponents of the exposure theory nor the advocates of the manifestation theory can prove that the opposing viewpoint is incorrect. Each theorist can state only that his method more appropriately effectuates the "reasonable expectations" of the parties. Judge Bazelon, on the other hand, accepts both theories as correct and at the same time recognizes that asbestos-related diseases entail an "injurious process."¹⁰¹⁸ The court's conclusion is consistent with insurance law, which requires coverage of losses that have their genesis during a period of coverage and continue after a policy's expiration.¹⁰¹⁹

Although the exposure theory properly reflects the medical evidence that some "bodily injury" occurs with each inhalation of asbestos fibers, the theory does not take account of the injury that occurs after the initial exposure and that develops over time. The theory is also insufficient because it does not correspond with the basis of the claimant's actionable injury—the manifestation of the disease. The manifestation theory suffers from similar deficiencies. The bodily injury caused by the inhalation of asbestos clearly occurs at some point in time before the physical symptoms appear. The *Keene* approach, therefore, provides the most rational coverage theory. By treating the disease as an injurious process, the theory follows the real progress of the injury to assign liability appropriately. Furthermore, the theory serves the established public policy of maximization of coverage.

1015. *Id.* at 1047.

1016. *Id.* at 1046.

1017. *Id.* at 1047.

1018. *Id.* at 1046-47.

1019. *Id.* at 1046.

F. Additional Insurance Issues

1. Apportioning Liability

Courts that adopt the exposure theory¹⁰²⁰ but refuse to apply joint and several liability¹⁰²¹ must allocate liability among the different insurers on the risk. Most courts use a simple proportion of the number of years during which an insurer was on the risk to the total years of a victim's exposure.¹⁰²² For example, if an insurer were on the risk for two years and a claimant's exposure totaled ten years, then that insurer is responsible for twenty percent of the judgment against its insured.¹⁰²³

Opponents of this pro rata exposure liability method argue that the seemingly equitable arrangement fails to provide adequate coverage for manufacturers that did not carry insurance or that cannot provide records of insurance for the early years of a claimant's exposure.¹⁰²⁴ The *Keene* court indicated that none of the insurance policies provided for reductions in insurer liability for injuries occurring only partially within the policy period.¹⁰²⁵ The *Keene* court also found that manufacturers expected their policies to provide for full indemnification. The court concluded that each insurer on the risk should be jointly and severally liable—limited, of course, by the policy limits.¹⁰²⁶ Proponents of apportioning liability have argued that an alternative approach is to assume that a manufacturer was its own insurer during the years for which it cannot prove coverage. The court in *Forty-Eight Insulations* adopted this approach and required the manufacturer to assume its share of the costs of defense and indemnity for any judgment or settlement.¹⁰²⁷

Courts that adopt the exposure theory or the *Keene* rationale

1020. *E.g.*, *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225.

1021. *Porter v. American Optical Corp.*, 641 F.2d at 1145; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225.

1022. *E.g.*, *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225.

1023. *See id.* at 1226.

1024. *See supra* text accompanying notes 986-87.

1025. *See Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1048.

1026. *Id.* at 1048-49. This holding rests upon the *Keene* court's belief that the dominant purpose of a CGL is indemnity. Pursuant to this belief, the resulting theory of liability for the insurer must guarantee the insured relief from all risk of liability. *See id.*

1027. *See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225. The insured must bear the burden of proving that it carried insurance, and any pro rata formula must consider all the years of exposure. Hence, courts often require the manufacturer to contribute its fair share for those years in which it either decided not to carry insurance or cannot prove that it carried insurance.

but reject pro rata liability could approach the overlapping coverage issue through a third variant. In automobile liability cases, in which overlapping insurance coverage occurs frequently, insurers argue about which one among them should shoulder the burden of primary responsibility.¹⁰²⁸ After primary liability is assigned, the other insurers pay only for losses that exceed the policy limits of the primary insurer. In the asbestos context the underlying theories of liability may make this approach difficult to apply. Under the exposure theory courts cannot assess primary liability because they deem each exposure equally causative of the asbestos-related disease. The *Keene* approach likewise does not offer an opportunity for insurers to shift the blame among themselves because the court assigns liability based on the concept of the disease as a continual process.¹⁰²⁹ This rationale does not permit insurers to argue over which link in the process should be primarily liable. Given the millions of dollars at stake in asbestos litigation,¹⁰³⁰ however, insurers should begin to examine legitimate means of delaying the imposition of liability so that they can maximize the time that they might use their funds for investment. As asbestos litigation and the search for solvent defendants continue to increase, insurers must begin to shift the liability among themselves, not to avoid fault, but to gain use of their money for valuable time.¹⁰³¹

2. Stacking of Policy Limits

Courts that apply the exposure theory of coverage face a troublesome problem concerning the stacking of policy liability limits. Following the exposure theory to its logical conclusion, each exposure to asbestos fibers by a claimant is a separate, distinct injury. In *Forty-Eight Insulations* twelve insurance policies were in issue with limits ranging from \$300,000 to \$1,000,000.¹⁰³² The combined total limit was \$5.6 million. If each inhalation or exposure were to constitute a separate injury, however, the resulting coverage would far exceed \$5.6 million.¹⁰³³ The *Forty-Eight Insulations*

1028. See, e.g., *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958 (9th Cir. 1952); *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.*, 23 Ohio St. 2d 45, 261 N.E.2d 128 (1970); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 346 P.2d 643 (1959).

1029. See *supra* text accompanying notes 1012-17.

1030. See *supra* notes 886-87 and accompanying text.

1031. See generally 3 R. LONG, *supra* note 901, §§ 22.01-.11 (1981).

1032. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1226 n.28.

1033. *Id.*

court noted the policy language, which stated that "for the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."¹⁰³⁴ The court concluded that the limit of any insurer's liability for the year of exposure was the policy limit, and the court placed the limit on insurer liability at the policy limit "per occurrence."¹⁰³⁵

G. Summary

Manufacturers and insurers are only beginning to feel the enormous economic impact of asbestos litigation.¹⁰³⁶ As claimants continue to seek remedies from manufacturers—either informally or in judicial proceedings—manufacturers must turn to their insurers. Courts have interpreted policies issued in the 1950's to ensure relief today.¹⁰³⁷ Following a policy of maximizing coverage, courts have awarded judgments against insurers as sources for claimants' relief. Insurers fear for their own continued existence because of enormous potential liability from asbestos-related claims. Complaining of their characterization as "deep pockets,"¹⁰³⁸ insurers have emphasized that their ability to function depends on the accuracy with which they are able to balance earnings from premiums with actuarially calculated loss estimates.¹⁰³⁹ Gross shifts in the manner of imposing liability destroy this balance.¹⁰⁴⁰ Furthermore, insurance companies have asserted that when calculating premiums in the 1950's they could not have foreseen the large jury awards of the 1980's.

In their efforts to avoid future asbestos litigation, insurance companies have made it difficult, if not impossible, for manufacturers to obtain insurance covering asbestos-related losses.¹⁰⁴¹

1034. See Ingram, *supra* note 10, at 354 n.187 (citing Brief for Appellant at 56, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980)).

1035. *Id.*

1036. See ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888.

1037. Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir.), *cert. denied*, 102 S. Ct. 104 (1981); Porter v. American Optical Co., 641 F.2d 1128 (5th Cir. 1981); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981).

1038. See ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 34-39.

1039. See *id.* at 37-39.

1040. See *id.*

1041. See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 102 S. Ct. 686 (1981).

Johns-Manville Corporation recently filed suit against its insurers to require them to pay the claims that the insurers already owed.¹⁰⁴² Court decisions that artificially maximize coverage force the insurance industry to redistribute assets that the companies maintained for other purposes.¹⁰⁴³ The real costs will be borne by the general public in the form of increased overall premium rates and decreased insurance industry investment.¹⁰⁴⁴ The side effect of the forceful public policy concerns in asbestos litigation is inconsistent court determinations. The courts themselves freely admit that no one theory of liability suits the realities of asbestos-related disease better than another. Indeed, courts assign liability according to which theory provides greater insurance coverage to the manufacturer. This ad hoc determination can only lead insurers to predict that if insurer liability can be found, then it will. As a result, premiums will rise, and investment will decrease, and insurance companies will continue to be reluctant or unwilling to insure manufacturers that engage in asbestos-related activities.

IX. WORKERS' COMPENSATION

Because most asbestos-related disease cases have arisen from occupational exposures,¹⁰⁴⁵ workers' compensation is a significant available remedy. Injured asbestos employees may use workers' compensation as one-half of a two-part plan to recover damages: the employee may institute a products liability tort action against the manufacturer and supplier of the asbestos product and also may seek a smaller but more dependable award from his employer through workers' compensation.¹⁰⁴⁶ Recognizing the delays inherent in the workers' compensation process and the inadequacy of the proffered award,¹⁰⁴⁷ most claimants choose the tort remedy.¹⁰⁴⁸

1042. *E.g.*, Memorandum submitted by Johns-Manville parties, *In re Asbestos Ins. Coverage Cases*, No. 753885 (Cal. Sup. Ct. filed Aug. 13, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5453 (Aug. 27, 1982) (suit by Johns-Manville Corporation against Travelers Indemnity Company for indemnification).

1043. *See ASBESTOS . . . A SOCIAL PROBLEM*, *supra* note 888, at 34-39.

1044. *Id.*

1045. *ASBESTOS . . . A SOCIAL PROBLEM*, *supra* note 888, at 18.

1046. *H.R. 5735 Hearings*, *supra* note 13, at 508 (statement of Daniel W. Vennoy of the National Association of Manufacturers).

1047. *See infra* text accompanying notes 1082-1152.

1048. *H.R. 5735 Hearings*, *supra* note 13, at 508. Some claimants pursue both a tort remedy and workers' compensation relief. *Id.* If both actions succeed, courts generally reduce the amount of tort damages by the amount of the workers' compensation award. Some courts, however, have forced the manufacturer to bear the entire cost of the liability, including the workers' compensation award. *Id.* at 512; *see infra* notes 1167-91 and accompanying

The thousands of employees of asbestos products manufacturers, however, cannot profit from this two-part remedy because every workers' compensation program incorporates the exclusive remedy doctrine, which limits an employee's recovery to workers' compensation by estopping the employee from suing the employer in tort.¹⁰⁴⁹ Workers' compensation awards, although minimal, often provide the asbestos employee's only means of recovery.

This part of the Special Project examines the exclusive remedy doctrine and the options available to an employee when exclusive remedy precludes tort relief. Discussion of the background of workers' compensation, the exclusive remedy doctrine, and the present deficiencies in workers' compensation precedes an examination of the erosion of employer's exclusive remedy and the success of employees in suing their employers concerning asbestos-related diseases. This part concludes with suggested alternatives available to workers' compensation claimants.

A. *History of Workers' Compensation*

The workers' compensation concept did not exist before late nineteenth century industrialization.¹⁰⁵⁰ The few injured employees who sought relief¹⁰⁵¹ relied upon the sympathy of the employer or a suit at common law. The industrial revolution rendered this method of compensation inadequate because mechanization enormously increased on-the-job injuries.¹⁰⁵² Employers also became more adept at defending actions by using three defenses to avoid liability:¹⁰⁵³ contributory negligence, assumption of risk, and perhaps most importantly, the "fellow servant rule."¹⁰⁵⁴ Further, employees had difficulty obtaining testimony because most fellow em-

text.

1049. See *infra* text accompanying notes 1073-81.

1050. S. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 2 (1944).

1051. *Id.*

1052. See *id.* at 6.

1053. *Id.* at 2.

1054. The fellow servant rule

precluded a servant's recovery from his employer for any injury in the course of employment when such injury was caused solely by the negligence of another servant of the employer engaged in the same general business and not by any lack of due care on the part of the employer himself.

M. Lowe, *Erosion of the Exclusive Remedy Doctrine: The Continuing Assault* 1 (Feb. 4-6, 1981) (report presented to the California Self-Insurers Association). This defense particularly was harmful to employee suits. See S. HOROVITZ, *supra* note 1050, at 3.

ployees were reluctant to testify against their employers.¹⁰⁵⁵ In short, the common law could not provide effective relief—employee actions overwhelmingly failed¹⁰⁵⁶ and the time and expense of litigation diminished the awards of the few that succeeded.¹⁰⁵⁷ Responding to this injustice, courts¹⁰⁵⁸ urged legislators to devise a new form of relief for injured employees. Consequently, between 1910 and 1920 many legislatures enacted workers' compensation statutes,¹⁰⁵⁹ "imperfect but humane efforts to bring timely financial assistance to those who suffer industrial casualties."¹⁰⁶⁰

Workers' compensation statutes typically afford recovery to employees for accidental injuries incurred in the course of employment.¹⁰⁶¹ The acts assure injured employees of dependable, albeit limited, recovery¹⁰⁶² because employers are liable regardless of fault.¹⁰⁶³ To recover from the employer, the employee must prove

1055. Comment, *Intentional Employer Torts and Workers' Compensation: A Legal Morass*, 11 PAC. L.J. 187, 189 (1979); see 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 4.30 (1976).

1056. Between 70 and 94% of employee suits resulted in no recovery. E. BLAIR, *WORKMEN'S COMPENSATION LAW 1-1* (1968); see also S. HOROVITZ, *supra* note 1050, at 2-3 (80% of the cases went uncompensated).

1057. E. BLAIR, *supra* note 1056, at 1-1.

1058. See, e.g., *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911). Attacking the injustice, the Wisconsin Supreme Court stated:

Legislate as we may . . . for safety . . . devices the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread.

Id. at 348, 133 N.W. at 215.

1059. See E. BLAIR, *supra* note 1056, at 1-1; S. HOROVITZ, *supra* note 1050, at 6-7. Switzerland enacted the first workers' compensation law in 1877; Germany (1883) and England (1897) had enacted statutes before New York in 1910 passed the first statute in the United States. See E. BLAIR, *supra* note 1056, at 1-1. Every state now has a workers' compensation statute. See *id.*

1060. *Id.* Humanitarianism was not the only impetus for the enactment of workers' compensation statutes, for legislatures also desired to systematize the payment of awards to injured employees. In *Union Iron Works v. Industrial Accident Comm'n*, 190 Cal. 33, 210 P. 410 (1922), the California Supreme Court noted that the

economic thought that personal injury losses incident to an industry [should be] a part of the costs of production to be borne, just as the depreciation and replacement of a machine is borne, by the industry itself, which compensation will be included in the cost of the product of the industry.

Id. at 39, 210 P. 413.

1061. The statutes of 39 states specify that coverage is only for employees injured "by accident." Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 921 (1980). For a discussion of the unfortunate effect these "by accident" clauses have upon occupational disease claimants, see *infra* notes 1097-1101 and accompanying text.

1062. Vieweg, *Erosion of the Exclusive Remedy Doctrine: Actions Against the Employer*, 17 FORUM 422, 422 (1981).

1063. See, e.g., *id.*

he suffered a compensable injury and must establish a causal relationship between the employment and the injury.¹⁰⁶⁴ Because the imposition of no-fault liability greatly increases the number of awards that the employer must pay, the statutes protect the employers' financial position by limiting the amount of each award.¹⁰⁶⁵

Workers' compensation programs initially omitted occupational disease victims from coverage.¹⁰⁶⁶ Legislators, ignorant of the link between certain diseases and exposure to various workplace substances, included only industrial accidents within the coverage.¹⁰⁶⁷ Consequently, suits at common law remained the only remedy for employees with occupational diseases.¹⁰⁶⁸

Omission of occupational diseases from coverage was a major oversight. As many as 100,000 deaths per year in the United States result from occupational diseases, and an estimated 390,000 new cases of occupational disease occur each year.¹⁰⁶⁹ A significant portion of these deaths are asbestos-related.¹⁰⁷⁰

Workers' compensation coverage, however, no longer omits oc-

1064. Comment, *Workers' Compensation and Occupational Disease*, 43 MONT. L. REV. 75, 76 (1982).

1065. See Vieweg, *supra* note 1062, at 422. The awards generally include payments for lost income—usually between 50 and 66% of the employee's preaccident wage—and medical benefits. See Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555, 556 (1963); Note, *supra* note 1061, at 919. Most statutes also provide a ceiling on the total amount of cash benefits. See Page, *supra*, at 556; Note, *supra* note 1061, at 919.

1066. The first two workers' compensation statutes, enacted by Switzerland and Germany, see *supra* note 1059, did include occupational diseases in their coverage. E. BLAIR, *supra* note 1056, at 1-1.

1067. E. BLAIR, *supra* note 1056, at 1-1; see Kutchins, *The Most Exclusive Remedy Is No Remedy at All: Workers' Compensation Coverage for Occupational Disease*, 32 LAB. L.J. 212, 212 (1981).

1068. These employees faced formidable obstacles in their suits. In addition to forcing employees to overcome employers' established defenses, see *supra* text accompanying notes 1053-54, courts required plaintiffs seeking recovery for occupational diseases to prove a causal connection between the disease and the employment. See Note, *Workmen's Compensation: Occupational Carcinogenesis and Statutes of Limitation*, 32 OKLA. L. REV. 712, 712-13 (1979).

1069. THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH 111 (1972); see Kutchins, *supra* note 1067, at 217; Note, *supra* note 1061, at 916.

1070. Although 20 to 25% of asbestos workers die from lung cancer, the disease kills only 4 to 5% of the general population. Note, *supra* note 1068, at 712 n.2. Asbestos workers also suffer from a high incidence of mesothelioma, a rather uncommon form of cancer. See *id.* Of course, asbestos workers contract asbestosis, "a condition resulting only from the inhalation of asbestos fibers and characterized by chemical changes in the lungs which result in decreased lung capacity and increased susceptibility to lung infection. . . ." Yates v. United States Rubber Co., 100 Ga. App. 583, 585, 112 S.E.2d 182, 185 (1959); see *supra* note 10 and accompanying text.

cupational diseases.¹⁰⁷¹ As legislatures became aware of the increasing incidence of occupationally related diseases and the causal connection between exposure and disease, they broadened workers' compensation statutes to provide benefits for the victims.¹⁰⁷²

B. *The Exclusive Remedy Doctrine and Its Ramifications*

1. Definition and Rationale

The exclusive remedy doctrine bars an employee¹⁰⁷³ from bringing a common-law¹⁰⁷⁴ or statutory¹⁰⁷⁵ suit for compensation against his employer¹⁰⁷⁶ for an employment injury.¹⁰⁷⁷ Exclusivity is an integral part of every workers' compensation program.¹⁰⁷⁸ The exclusive remedy doctrine theoretically balances the interests of both employees and employers—each party sacrifices and gains in the balancing.¹⁰⁷⁹ Workers' compensation affords the employee a statutory right to recovery, but the exclusive remedy provision prevents the employee from recovering damages greater than the statutory maximum.¹⁰⁸⁰ Exclusive remedy provisions shield the employer from large verdicts, but he must assume liability without fault.¹⁰⁸¹ Most importantly, both parties benefit from a prompt res-

1071. "As of 1978, every state had statutory provisions making occupational diseases generally compensable under workers' compensation." Kutchins, *supra* note 1067, at 212-13. The inclusion of occupational diseases in workers' compensation coverage arguably is not beneficial to stricken employees. *See id.*

1072. *Id.*; *see Note, supra* note 1068, at 713.

1073. In all but three states, the exclusive remedy doctrine bars not only employees but also their dependents and relatives from filing suit against the employers. *See infra* notes 1154-57 and accompanying text.

1074. In *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917), the Supreme Court endorsed the abrogation of the common-law right to damages as a reasonable and constitutional exercise of the police power of the state.

1075. California, for example, provides that compensation benefits are "in lieu of any other liability whatsoever" and that the right to compensation benefits is "the exclusive remedy for injury or death of an employee against the employer." CAL. LAB. CODE §§ 3600-3601 (West 1971).

1076. The doctrine similarly may bar suits against the employer's insurer. For an analysis of the availability of common-law actions against third parties such as insurers, see 2A A. LARSON, *supra* note 1055, §§ 71-77; Smith & Ramos, *Exclusive Remedy Under Workers' Compensation Laws*, 25 FED'N INS. COUNS. Q. 383, 384-90 (1975).

1077. The injury must arise out of and must be in the scope of employment. Vieweg, *supra* note 1062, at 423; *see* 2A A. LARSON, *supra* note 1055, § 65.00.

1078. *See* 2A A. LARSON, *supra* note 1055, § 65.11.

1079. *Id.*

1080. *Id.*

1081. *Id.* Workers' compensation is a significant departure from accepted common-law principles of recovery in tort. S. HOROVITZ, *supra* note 1050, at 8.

olution of the matter at a minimum cost.¹⁰⁸²

2. Deficiencies in the Workers' Compensation System

Although a system such as workers' compensation conceivably could be the solution to problems of recovering for workplace injuries, the system has many flaws. Notwithstanding the efforts of administrators who generally construe the statutes in favor of compensability,¹⁰⁸³ recovery rarely is adequate. Benefits paid by workers' compensation include out-of-pocket medical expenses and a percentage of lost wages,¹⁰⁸⁴ but the system will not provide payments for pain and suffering, loss of consortium, and other injuries that do not directly affect earning capacity.¹⁰⁸⁵ Furthermore, low ceilings usually govern lost income benefits,¹⁰⁸⁶ and because these ceilings do not adequately reflect inflation,¹⁰⁸⁷ most workers never will receive benefits that approach the statutory maximum percentage of their preaccident wages.¹⁰⁸⁸ Consequently, the awards rarely compensate workers sufficiently.¹⁰⁸⁹

Ironically, the great changes in tort law during the seventy years since the passage of the first workers' compensation law¹⁰⁹⁰ have demonstrated the inadequacy of the remedy offered by workers' compensation. The employee now has a high probability of recovering at law,¹⁰⁹¹ and while workers' compensation judgments have a predetermined limit, juries and courts award tort damages as justice requires in certain circumstances. As a result, the parties have reversed their original positions—employees whom legislatures intended to help frequently seek to maximize recovery by cir-

1082. See E. BLAIR, *supra* note 1056, at 1-1. *But see infra* notes 1144-50 and accompanying text.

1083. See M. Lowe, *supra* note 1054, at 6-7; Comment, Johns-Manville Products Corp. v. Superior Court: *The Not-So-Exclusive Remedy Rule*, 33 HASTINGS L.J. 263, 266-70 (1981). The California statute, for example, provides that workers' compensation provisions "be liberally construed with the purpose of extending their benefit for the protection of persons injured. . . ." CAL. LAB. CODE § 3202 (West 1971).

1084. See *supra* note 1065 and accompanying text.

1085. See 2A A. LARSON, *supra* note 1055, § 65.50.

1086. Note, *supra* note 1061, at 919.

1087. See Comment, *supra* note 1083, at 267-70.

1088. Page, *supra* note 1065, at 556.

1089. "[No] equitable correlation [exists] between what the worker has lost and what he receives under workmen's compensation." *Id.*

1090. See *supra* note 1059.

1091. Page, *supra* note 1065, at 557. Both settlements and jury verdicts have multiplied. Settlements reduce court costs for both parties, but they usually result in reduced recovery for employees. Juries are increasingly sympathetic as wages, prices, and medical costs increase.

cumventing the exclusive remedy doctrine, while employers encourage workers' compensation as a moneysaving alternative to a tort action and rely on the exclusive remedy to minimize employee recovery.¹⁰⁹²

3. Deficiencies in the Treatment of Occupational Disease

Application of the exclusive remedy doctrine renders workers' compensation a particularly deficient remedy for occupational disease victims.¹⁰⁹³ Relatively few victims file state workers' compensation claims and of the claims filed, few succeed.¹⁰⁹⁴ Although approximately 30,000 disease claimants receive workers' compensation each year, more than three times this number die every year from industrial diseases, and more than thirteen times this number of claimants contract disabling occupational illnesses each year.¹⁰⁹⁵ Accident-oriented compensation systems cannot "deal with the special medical and legal problems of work-related diseases."¹⁰⁹⁶ As a result, workers' compensation, designed to provide dependable, prompt and adequate recovery for stricken employees, has failed disease victims in all three respects: recovery is uncertain, seldom adequate, and often delayed.

a. Difficulty of Recovery

(1) Restrictive Language and Interpretation

The accident-oriented language of most statutes immediately prejudices disease victims seeking compensation. Thirty-nine states include "by accident" clauses in their statutes,¹⁰⁹⁷ and while the terms "occupational disease" and "accident" are not necessarily mutually exclusive,¹⁰⁹⁸ they are "conceptually antithetical."¹⁰⁹⁹

1092. See 2A A. LARSON, *supra* note 1055, § 65.10.

1093. Stating that an exclusive remedy under workers' compensation effectively is no remedy at all, Professor Kutchins has criticized occupational disease treatment in workers' compensation programs as "a 'bad deal' for workers and for society as a whole." Kutchins, *supra* note 1067, at 213; see Comment, *supra* note 1064, at 91.

1094. Note, *supra* note 1061, at 925.

1095. *Id.* For the derivation of these proportions, see *supra* note 1069 and accompanying text (discussing estimates for fatalities per year and illnesses per year). In 1978 awards for occupational disease claimants comprised only two percent of the total benefits paid. Kutchins, *supra* note 1067, at 221.

1096. Kutchins, *supra* note 1067, at 213.

1097. See *supra* note 1061. *But see, e.g.,* CAL. LAB. CODE § 3600 (West 1971) (no reference to an "accident").

1098. E. BLAIR, *supra* note 1056, at 8-2.

1099. Kutchins, *supra* note 1067, at 218-19.

An accident implies an event fixed in time and space; a disease, however, usually is a slow and gradual process.¹¹⁰⁰ This wording in effect limits the number of disease cases admitted into the workers' compensation system.¹¹⁰¹

Restrictive definitions of compensable disease also inhibit conferral of workers' compensation benefits. To ensure a nexus between the work and the disease, workers' compensation programs in twenty-two states¹¹⁰² require that the disease "be reasonably peculiar to the worker's occupation,"¹¹⁰³ and exclude the "ordinary diseases of life" from coverage.¹¹⁰⁴ These provisions can be disastrous to the stricken employee. Manifestations of asbestosis, such as emphysema, bronchitis, pulmonary artery disease, and primary lung cancer, are widespread among the general population and therefore are not directly attributable to any particular employment.¹¹⁰⁵ Thus, these twenty-two states likely would allow asbestos workers compensation only for mesothelioma, a uniquely asbestos-related cancer.¹¹⁰⁶

The occupational disease victim also must meet the disability requirement in all workers' compensation programs.¹¹⁰⁷ The disability must be identifiable and distinct from any separate chronic medical condition, and the disability must affect the claimant's earning capacity.¹¹⁰⁸ The worker who constantly is out of breath,

1100. See E. BLAIR, *supra* note 1056, at 8-2.

1101. "[The] 'real objective [of workers' compensation programs] is to deliberately limit the number of cases, especially of the chronic, long-term . . . variety, which are admitted to the system.'" Kutchins, *supra* note 1067, at 219.

1102. The 22 states are Alabama, Arizona, Arkansas, Connecticut, Georgia, Indiana, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia. Note, *supra* note 1061, at 921-22 & n.47.

1103. See, e.g., ALA. CODE § 25-5-110(1) (1975); CONN. STAT. ANN. 31-275 (1958 & Supp. 1982); MICH. COMP. LAWS ANN. § 418.401(c) (Supp. 1979); R.I. GEN. LAWS § 28-34-1(c) (1968).

1104. See, e.g., ARK. STAT. ANN. § 81-1314(5) (1976); GA. CODE ANN. § 114-803 (1973); IND. CODE ANN. § 22-3-7-10(a) (Burns 1974); OR. REV. STAT. § 656.802(a) (1977); VA. CODE § 65.1-46 (1973).

1105. Kutchins, *supra* note 1067 at 219.

1106. See *supra* part I.

1107. See Kutchins, *supra* note 1067, at 220.

1108. Some states disallow recovery if the injured employee can earn any wages at all. See, e.g., *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 112 S.E.2d 182 (1959) (successful asbestosis claim). In Oklahoma "disability" means an incapacity to perform work or to earn wages in an occupation for which the disabled party is trained or physically suited. Note, *supra* note 23, at 714. On the other hand, some states require only a reduction in earning capacity. See, e.g., *Ryden v. Johns-Manville Prods.*, 518 F. Supp. 311, 323 (W.D. Pa. 1981) ("to constitute a disability under the act and the basis for compensation, it [the dis-

coughing, and in misery clearly may not receive relief under workers' compensation. Only the disability, not the disease, is compensable.¹¹⁰⁹

(2) Time Limitations

Workers' compensation statutes of limitation¹¹¹⁰ often begin to run without regard to the long latency periods¹¹¹¹ of many diseases and thus cut off many meritorious claims.¹¹¹² When the statutory time period for seeking workers' compensation has expired, a potential claimant nonetheless may not begin an action at common law.¹¹¹³ Consequently, an unreasonable statute effectively can bar recovery for many employees.

Workers' compensation statutes of limitation begin to run at one of four times:¹¹¹⁴ the last exposure,¹¹¹⁵ the manifestation of the disease,¹¹¹⁶ the time that the victim becomes or reasonably should become aware of the disease,¹¹¹⁷ or the occurrence of compensable disability.¹¹¹⁸ States that choose the time of last exposure effec-

ease] must impair the claimant's earning capacity").

1109. E. BLAIR, *supra* note 1056, at 8-1.

1110. Notice requirements usually accompany statutes of limitation in workers' compensation systems and mandate that the employee give notice to his employer of the accidental injury or disease within a certain period of time. E. BLAIR, *supra* note 1056, at 18-1. Thus, unreasonable notice requirements may be as dangerous to the sufferer of a latent disease as are unreasonable time periods for statutes of limitation.

1111. Asbestos-related cancer, for example, may not appear for 4 to 50 years after first exposure. Note, *supra* note 1068, at 714 n.17.

1112. Statutes of limitation issues within the workers' compensation context duplicate, for the most part, general statutes of limitations issues. See *supra* part V.

1113. 2A A. LARSON, *supra* note 1055, § 65.20.

1114. For an analysis of the various alternative statutes of limitation used in workers' compensation systems, see Annot., 11 A.L.R.2d 277, 297-311 (1950).

1115. See, e.g., ME. REV. STAT. ANN. tit. 39, § 189 (1978); NEV. REV. STAT. § 617.440(I)(a) (1979).

1116. This test for "manifestation" is an objective test. For example, Oklahoma law provides that

with respect to disease or disability caused by disease . . . the right to claim compensation . . . shall be forever barred unless a claim is filed within eighteen (18) months after the last hazardous exposure or *within eighteen (18) months after the disease first becomes manifest* by a symptom or condition from which one learned in medicine could with reasonable accuracy diagnose this specific disease whichever last occurs.

OKLA. STAT. ANN. tit. 85, § 43 (West Supp. 1982) (emphasis added).

1117. See, e.g., Mead v. American Smelting & Refining Co., 1 Ariz. App. 72, 399 P.2d 694 (1965); Davidson v. Bermo Inc., 272 Minn. 97, 137 N.W.2d 567 (1965); Montell v. Orndorff, 67 N.M. 156, 353 P.2d 680 (1960); Pittman v. City Stores, Inc., 204 Tenn. 650, 325 S.W.2d 249 (1959) (statute begins to run when the injury becomes manifest, or when claimant in the exercise of reasonable diligence should know that his injury is compensable).

1118. In Ryden v. Johns-Manville Prods., 518 F. Supp. 311 (W.D. Pa. 1981), the court concluded that "when the cumulative impact of the inhalation of asbestos debilitates a

tively bar workers' compensation coverage to employees who suffer from diseases with long latency periods.¹¹¹⁹ The time of manifestation and the time of subjective awareness of the disease are inappropriate starting points, because the disease may manifest itself long before it disables the victim or affects his earning capacity.¹¹²⁰ Only the time of disability statutes fulfill disease victims' needs. Legislatures intended workers' compensation statutes of limitation to protect employers from unnecessarily delayed liability, but they surely did not intend to prevent claimants afflicted with latent diseases from receiving appropriate compensation. If employees must wait years for their diseases to develop, employers also should wait to confront their liability.¹¹²¹

(3) The Burden of Proving Causation

The universal requirement that the worker establish a causal relationship between his disability and his employment¹¹²² emerges from the "arising out of employment" language in most workers' compensation programs.¹¹²³ The proof of causation forms another obstacle that renders the supposedly dependable recovery quite uncertain. The causal element, of course, is divorced from the concept of fault—the claimant simply must show a connection between his work and his disease.¹¹²⁴ While this is an easy task in

claimant to the extent that he can no longer continue at his former job, the injury and cause of action for a workmen's compensation claim arises." *Id.* at 323; accord *Yates v. United States Rubber Co.*, 100 Ga. App. 583, 587, 112 S.E.2d 182, 186 (1959) (Disability occurs at "the earliest time the disease can be identified when the employee actually becomes physically unable to work.").

1119. Professor Larson has noted the "senseless and inexcusable cruelty of dating the limitations period from a point in time, such as time of accident or termination of employment, earlier than the moment when the claimant knew or should have known the nature of her condition and its connection with the employment." 2A A. LARSON, *supra* note 1055, § 65.20.

1120. Of course, the disease victim must lose his earning capacity before he may receive compensation. See *supra* text accompanying notes 1107-09.

1121. Comment, *supra* note 1064, at 106. The criticism of unreasonable statutes of limitations has culminated in "[t]he inclination . . . [of courts] to hold that the time does not commence to run prior to occurrence of an actual disability which is traceable to the disease and the employment." Annot., 11 A.L.R.2d 277, 298 (1950); see E. BLAIR, *supra* note 1056, at 18-3.

1122. See 1 A. LARSON, *supra* note 1055, § 8.33; Kutchins, *supra* note 22, at 220. In some jurisdictions the claimant must establish causation by clear and convincing evidence. Kutchins, *supra* note 22, at 220. For a discussion of the employee's burden to prove causation in common-law suits, see *supra* part III.

1123. See *supra* text accompanying notes 1061-64.

1124. See, e.g., Comment, *supra* note 1064, at 80.

accident cases,¹¹²⁵ the burden of proving work-relatedness in disease cases often requires more accuracy than medical science can supply.¹¹²⁶ Studies showing a high incidence of the suffered disease in the industry help, but they do not establish causation for an individual claim.¹¹²⁷ Further, a number of factors unrelated to the workplace can hinder attempts to link a job and an illness.¹¹²⁸ For instance, is the cancer of the claimant who has smoked tobacco for years truly attributable to the workplace?¹¹²⁹ Asbestos workers may enjoy a slight advantage in their endeavors to prove work-relatedness since they usually carry medically discoverable traces of asbestos in their bodies,¹¹³⁰ yet they still face quite a formidable task.

Many legislatures have sought to guarantee work-relatedness through recent and minimum¹¹³¹ exposure requirements, which severely restrict a disease victim's opportunity to recover.¹¹³² The recent exposure requirements, which require that the disease manifest itself within a certain period after the last exposure,¹¹³³ have the same reprehensible effect as statutes of limitation that run from the time of last exposure. Minimum exposure rules condition a diseased worker's recovery on his contact with the cause of illness for a minimum period of time, often five or ten years.¹¹³⁴ Although

1125. Proof that the resulting injury arose out of employment should be easy in accident cases because the effect follows so clearly and immediately from the cause. Note, *supra* note 1061, at 922.

1126. Comment, *supra* note 1064, at 100. For a general discussion of the claimant's causation obstacle, see Levine, *Legal Questions Regarding the Causation of Occupational Disease*, 26 LAB. L.J. 88 (1975).

1127. Kutchins, *supra* note 1067, at 220.

1128. Note, *supra* note 1061, at 922.

1129. In *Olson v. Federal Am. Partners*, 567 P.2d 710 (Wyo. 1977), a uranium worker who had smoked for 22 years received no recovery, despite doctors' testimony that his lung cancer "most probably" resulted from occupational exposure to radiation. See *id.* at 719 (Rose, J., dissenting). Claimant failed to establish work-relatedness with the requisite "medical certainty." See *id.* at 713. In *Martin v. Louisville Insulation & Supply Co.*, No. 80-29600 (Ky. Workmen's Comp. Bd. Nov. 23, 1981), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 4791 (March 26, 1982), the Kentucky Workers' Compensation Board halved the benefits awarded to an asbestos worker who could not trace various ailments solely to asbestos exposure.

1130. For example, in *Moore's Case*, 289 N.E.2d 862 (Mass. 1972), a former asbestos worker successfully met the work-relatedness burden.

1131. See, e.g., KAN. STAT. ANN. § 44-5a10 (1981); PA. STAT. ANN. tit. 77, § 1401(d) (Purdon Supp. 1982).

1132. See Kutchins, *supra* note 1067, at 220.

1133. *Id.*

1134. See, e.g., W. VA. CODE § 23-4-1 (1981) (exposure to asbestos dust for "continuous period of not less than two years during the ten years immediately preceding the date of his last exposure . . . or for any five of the fifteen years immediately preceding the date of

the rules attempt to assure the nexus between the disease and the workplace, workers may contract many diseases, including asbestosis, from one day of exposure.¹¹³⁵ Consequently, these statutes may block meritorious claims.

b. Inadequacy of Recovery

Even when a disease victim's claim is successful, compensation is often inadequate. Workers' compensation pays an average of \$23,400 to a worker totally disabled for life in an industrial accident, but the average payment decreases to \$9700 for disability from industrial disease.¹¹³⁶ Furthermore, the surviving family of the accident victim receives an average of \$57,500, yet survivors of disease victims receive an average of \$3500.¹¹³⁷ While several factors contribute to this disparity,¹¹³⁸ the disparity chiefly arises from the calculation of the employee's wage-earning capacity. Benefits generally consist of medical expenses and a percentage of wages earned at the time of injury.¹¹³⁹ In accident cases, the unfortunate consequences are immediate and these wages afford a true estimate of loss. In disease cases, however, the administrative board often determines that the time of last exposure is the time of injury.¹¹⁴⁰ Because of the long latency periods of asbestos-related diseases, the wages earned at the time of last exposure, unadjusted for inflation, can be an unrealistically small amount.¹¹⁴¹

such last exposure . . . "); S.D. CODIFIED LAWS ANN. § 62-8-14 (1978) (exposure two years in state for silicosis); NEV. REV. STAT. § 617.460 (1981) (exposure for 10 years immediately preceding disablement or death and for three years in state); TEX. CIV. STAT. ANN. art. 8306 § 26 (Vernon 1967) (repealed 1971) (exposure for not less than five years of 10 years immediately preceding incapacity and at least two years exposure in state); Note, *supra* note 1065, at 923.

1135. Note, *supra* note 1061, at 923.

1136. Kutchins, *supra* note 1067, at 221.

1137. *Id.*

1138. These factors include the prejudice created through accident-oriented statutes, *see supra* text accompanying notes 1097-1101, and the option of compensation boards to reduce the award when industrial exposure is not the sole cause of the illness, *see, e.g.,* Martin v. Louisville Insulation & Supply Co., No. 80-29600 (Ky. Workmen's Comp. Bd. Nov. 23, 1981), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 4791 (March 26, 1982).

1139. *See supra* note 1065.

1140. *See, e.g.,* Dunn v. Todd Shipyards Corp., No. 78-510 (U.S. Labor Dep't Workmen's Comp. Div. June 12, 1981), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 3596 (July 10, 1981).

1141. *Id.* (dissenting opinion), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 3596, 3617-22 (July 10, 1981). The dissent doubted that the board should limit benefits "by wages earned many years prior to the actual date of disability." *See id.* (dissenting opinion), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 3622 (July 10, 1981). The dissent claimed that choosing the time of last exposure as the point from which to calculate benefits "distorts the

Even when the board decides the time of disability marks the injury,¹¹⁴² the disease's slow progress may so debilitate the worker that by the time compensable disability results, his actual loss of earning capacity is minimal.¹¹⁴³

c. *Delay of Recovery*

Although legislatures designed workers' compensation programs to be a simple, efficient alternative to the courts by providing prompt relief, the systems in operation are inefficient and fail to award claims promptly. Workers' compensation programs are costly to employers¹¹⁴⁴ and employees¹¹⁴⁵ because employers increasingly choose to contest workers' compensation claims.¹¹⁴⁶ This growing litigiousness causes longer delays in the conferral of benefits,¹¹⁴⁷ especially in disease cases. Although employers challenge only 9.8% of accident claims, they challenge 62.7% of all occupational disease claims and almost 90% of dust disease claims.¹¹⁴⁸ Consequently, only an average of forty-three days elapses from filing time to first payment in an accident claim, but successful disease claimants must wait 390 days for their first payment.¹¹⁴⁹ Since relatively few can wait so long and none can be certain of recovery, most dust disease claimants settle with employers for very small amounts before the official award.¹¹⁵⁰

C. *Erosion of the Exclusive Remedy Doctrine*

Because stricken employees do not recover adequate benefits,

very intent of the [compensation] act, which is to replace the actual loss of wage-earning capacity suffered by employees as the result of work-related injuries or occupational diseases." *Id.* (dissenting opinion), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 3622 (July 10, 1981).

1142. See, e.g., *Ryden v. Johns-Manville Prods.*, 518 F. Supp. 311 (W.D. Pa. 1981) (asbestosis claim).

1143. This problem is especially acute in jurisdictions that recognize only a total inability to perform work for wages as a compensable disability. See *supra* text accompanying notes 1107-09. By the time the worker qualifies as disabled, he earns very little.

1144. Of employers' payments to workers' compensation insurers, "40 cents out of every premium dollar pays for something other than current benefits, e.g., insurance company reserves, dividends, litigation expenses, insurance company overhead, etc." Kutchins, *supra* note 1067, at 221-22 (citation omitted).

1145. The claimant must pay legal fees out of his benefits. *Id.* at 222.

1146. See *id.*

1147. See *id.* at 222-23; Note, *supra* note 1061, at 923.

1148. Kutchins, *supra* note 1067, at 222.

1149. Note, *supra* note 1061, at 923.

1150. An estimated 82% of dust disease claims are settled prior to an official ruling. Kutchins, *supra* note 1067, at 223.

workers' compensation increases the public assistance burden¹¹⁵¹ and fails to deter employers from maintaining unsafe work environments.¹¹⁵² As the programs continue to prove inadequate and inefficient, employees suffering from asbestos-related diseases have attempted to circumvent the system by seeking a common-law remedy. This section examines ways of circumventing the exclusive remedy doctrine and the likelihood that an asbestos-related disease victim will succeed.

1. Statutory Erosion of the Exclusive Remedy Doctrine

a. Actions by Employees' Relatives

The exclusive remedy doctrine, as codified in most jurisdictions,¹¹⁵³ bars common-law suits by employees and those persons related to employees.¹¹⁵⁴ Some provide that the employer's liability is "exclusive,"¹¹⁵⁵ or that the employer has no "other liability whatsoever."¹¹⁵⁶ Others bar the employee and anyone else entitled to recovery from bringing suit.¹¹⁵⁷ Three states mandate that the exclusiveness of the recovery applies only to the injured employee.¹¹⁵⁸ However the statute is worded, in forty-seven states the

1151. Of those workers severely disabled from occupational disease, 53% receive social security and 16% receive welfare; this government compensation costs \$2.2 billion a year. *Id.* at 225.

1152. *See id.* at 224-25.

1153. One commentator has classified exclusive remedy provisions into three categories: the "California and Michigan type," the "New York type," and the "Massachusetts type." *See* 2A A. LARSON, *supra* note 1055, § 66.10.

1154. *See id.* § 66.00. Depending on the statute, "those associated with employees" may or may not refer to dependents, relatives, or other personal representatives of the employee.

1155. *See, e.g.,* CAL. LAB. CODE § 3601 (West 1971); OKLA. STAT. ANN. tit. 85, § 12 (West 1951).

1156. *See, e.g.,* CAL. LAB. CODE § 3600 (West 1971); MICH. COMP. LAWS ANN. § 411.4 (1967); W. VA. CODE § 23-2-6 (1981).

1157. The New York statute, for example, proscribes actions by the "employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages . . . on account of such injury or death . . ." N.Y. WORK. COMP. LAWS § 11 (McKinney 1968).

1158. These three jurisdictions statutorily have narrowed the exclusive remedy doctrine. In Massachusetts and New Jersey exclusive remedy provisions stipulate only that the waiver applies to the employee's rights, which implies that others may bring a suit at common law. *See* MASS. GEN. LAWS ANN. ch. 152, § 24 (West 1958); N.J. STAT. ANN. § 34.15-8 (West Supp. 1982-1983). *Ferriter v. Daniel O'Connell's Sons, Inc.* (Mass. Sup. Ct. Sept. 9, 1980), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 2459 (Oct. 10, 1980), indicates that these statutes currently allow representatives of deceased employees to bring a common-law action. *See infra* notes 1203-05 and accompanying text. Texas allows survivors' suits for any "willful act or omission or gross negligence resulting in death." TEX. REV. CIV. STAT. ANN.

employer has an effective statutory shield against suits by employees' relatives.¹¹⁵⁹

b. Common-Law Suits for Employer Misconduct

Because the limited liability of workers' compensation protects an employer who injures his employee willfully or through gross misconduct, ten states¹¹⁶⁰ have enacted statutes allowing employee suits for certain types of employer misconduct.¹¹⁶¹ Courts, however, have limited common-law actions by requiring the employee to prove an actual or specific intent to injure the employee, regardless of whether the statute allows actions for the employer's willful misconduct,¹¹⁶² deliberate intent¹¹⁶³ or intentional wrong.¹¹⁶⁴ The Supreme Court of West Virginia alone applies a less rigorous in-

art. 8306, § 5 (Vernon 1967). This prerequisite of employer misconduct tempers the features of the Massachusetts and New Jersey statutes.

1159. *But see* *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir.) (wife of deceased employee may sue employer for loss of consortium), *cert. denied*, 340 U.S. 852 (1950), *overruled*, *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir. 1957).

1160. Maryland, Oregon, Washington, West Virginia, and Kentucky permit employee suits when the employee's injuries result from the "deliberate intention" of the employer. *See* KY. REV. STAT. ANN. § 342.610(4) (Bobbs-Merrill 1977); MD. ANN. CODE art. 101, § 44 (1957); OR. REV. STAT. § 656.156(2) (1981); WASH. REV. CODE ANN. § 51.24.020 (1962 & Supp. 1982); W. VA. CODE § 23-4-2 (1981). Louisiana, New Jersey, and South Dakota similarly exempt "intentional" wrongs. *See* LA. REV. STAT. ANN. § 23:1032 (West Supp. 1982); N.J. STAT. ANN. § 34:15-8 (West Supp. 1982); S.D. COMP. LAWS ANN. § 62-3-2 (1978). Arizona provides that the exclusive remedy doctrine applies "except where the injury is caused by the employer's . . . willful misconduct. . . ." ARIZ. REV. STAT. ANN. § 23-1022(A) (1971 & Supp. 1982). Idaho authorizes employee suits if the injury results from the employer's "willful or unprovoked physical aggression." IDAHO CODE § 72-209(3) (1973).

1161. Some of these statutes are cumulative and thus allow workers to apply for workers' compensation benefits without relinquishing their right to sue at common law, or *vice-versa*. *See, e.g.*, WASH. REV. CODE ANN. § 51.24.020 (1962 & Supp. 1982); W. VA. CODE § 23-4-2 (1981). A greater number, however, require the employee to elect either to seek compensation or to file a suit for damages. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1022(A) (1971 & Supp. 1982); MD. ANN. CODE art. 101, § 44 (1957); Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F.L. Rev. 651, 676-78 (1981). For a discussion of the merits of suits against employers who have rejected compensation coverage, in the five states that allow this rejection, or against the few employers who have not obtained adequate insurance and do not qualify as self-insurers, see 2A A. LARSON, *supra* note 1055, § 67.00.

1162. *See, e.g.*, *Lowery v. Universal Match Corp.*, 6 Ariz. App. 98, 430 P.2d 444 (1967); *Serna v. Statewide Contractors, Inc.*, 6 Ariz. App. 12, 429 P.2d 504 (1967).

1163. *See, e.g.*, *Foster v. Allsop Automatic, Inc.*, 86 Wash. 2d 579, 547 P.2d 856 (1976); *Winterroth v. Meats, Inc.*, 10 Wash. App. 7, 516 P.2d 522 (1973).

1164. *See, e.g.*, *Keating v. Shell Chem. Co.*, 610 F.2d 328 (5th Cir. 1980) (interpreting Louisiana law); *Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A.2d 129 (1968). *But see* *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981) (employer desired to cause the physical results or believed such results substantially were certain to follow).

tent standard by allowing actions for intentional torts or for willful, wanton, and reckless misconduct.¹¹⁶⁵ These stringent intent standards present more obstacles for potential litigants. Moreover, proof of concealment of workplace hazards is not prima facie evidence that an employer actually intended to injure the employee.¹¹⁶⁶

2. Court Decisions

a. Dual Capacity Doctrine

An employer normally protected from tort liability by the exclusive remedy doctrine can be liable in tort to his employee under the dual capacity doctrine if he assumes obligations independent of those imposed on him as employer.¹¹⁶⁷ In the landmark case *Duprey v. Shane*,¹¹⁶⁸ the California Supreme Court ruled that a chiropractor who attempted to treat his injured employee on the job had assumed responsibilities outside of an employer's duties and therefore had forfeited tort immunity.¹¹⁶⁹

Most courts have yet to recognize the innovative dual capacity concept.¹¹⁷⁰ Further, even in those jurisdictions that do recognize it, the courts strictly construe the dual capacity doctrine against the employee alleging the employer's second capacity.¹¹⁷¹ Recent California decisions indicate that plaintiffs nevertheless still can

1165. See *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978).

1166. Whatever the intent requirement, the Idaho statute that allows employee suits if the employer's "willful misconduct" caused the injury probably would not apply. See, e.g., *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975) (concealment of hazardous working conditions does not constitute willful or unprovoked physical aggression).

1167. 2A A. LARSON, *supra* note 1055, § 72.81; See *M. Lowe*, *supra* note 1054, at 16.

1168. 39 Cal. 2d 781, 249 P.2d 8 (1952).

1169. *Id.* at 791, 249 P.2d at 14.

1170. See, e.g., *Strickland v. Textron, Inc.*, 433 F. Supp. 326 (D.S.C. 1977); *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975); *Mapson v. Montgomery White Trucks, Inc.*, 357 So. 2d 971 (Ala. 1978); *State v. Purdy*, 601 P.2d 258 (Alaska 1979); *Vaughn v. Jernigan*, 144 Ga. App. 745, 242 S.E.2d 482 (1978); *Needham v. Fred's Frozen Foods, Inc.*, 171 Ind. App. 671, 359 N.E.2d 544 (1977); *Jansen v. Harmon*, 164 N.W.2d 323 (Iowa 1969); *Atchison v. Archer-Daniels-Midland Co.*, 360 So. 2d 599 (La. Ct. App. 1978); *Longever v. Revere Copper & Brass, Inc.*, 408 N.E.2d 857 (Mass. 1980); *Frith v. Herrah South Shore Corp.*, 92 Nev. 447, 552 P.2d 337 (1976); *Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980); *Schlenk v. Aerial Contractors*, 268 N.W.2d 466 (N.D. 1978); *McAlister v. Methodist Hosp.*, 550 S.W.2d 240 (Tenn. 1977). *But see* *Reed v. Steamship Yaka*, 373 U.S. 410 (1963) (maritime law); *State v. Luckie*, 145 So. 2d 239 (Fla. Dist. Ct. App. 1962); *Smith v. Metropolitan Sanitary Dist.*, 77 Ill. 2d 313, 396 N.E.2d 524 (1979); *Mercer v. Uniroyal, Inc.*, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

1171. Even the *Duprey* court noted that "the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic." *Duprey v. Shane*, 39 Cal. 2d at 793, 249 P.2d at 15.

use the doctrine creatively and effectively.¹¹⁷² In *Douglas v. E. & J. Gallo Winery*¹¹⁷³ and *Moreno v. Leslie's Pool Mart*¹¹⁷⁴ California courts of appeal ruled that employees may sue their employers for injuries occurring at the workplace from products manufactured by the employer for general sale to the public. The courts reasoned that the employer assumed the separate obligation of providing a safe product for the public.¹¹⁷⁵ Employees of asbestos products manufacturers undoubtedly have noted the *Gallo* and *Moreno* decisions and may attempt to apply the dual capacity doctrine in suits against their employers.

b. *Nonphysical Injury Torts*

Courts¹¹⁷⁶ have allowed nonphysical injury tort actions¹¹⁷⁷ by employees because emotional or mental trauma stemming from the workplace usually does not lead to medical expenses or loss of earning capacity and therefore does not merit recovery under workers' compensation. Public policy dictates that injuries like emotional distress should be compensable even though the injury is not physical.¹¹⁷⁸ Because physical injury always accompanies as-

1172. See, e.g., *Bell v. Industrial Vengas, Inc.*, 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981); *D'Angona v. County of Los Angeles*, 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980); *Moreno v. Leslie's Pool Mart*, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980); *Dorado v. Knudsen Corp.*, 103 Cal. App. 3d, 605, 163 Cal. Rptr. 477 (1980); *Douglas v. E. & J. Gallo Winery*, 60 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

1173. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

1174. 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980).

1175. Some commentators have criticized *Gallo Winery* and *Moreno* because the dual capacity doctrine "should apply logically only when the status of employment is *totally* coincidental, i.e., under only those circumstances where both the employer and employee have assumed non-employment relationships." See M. Lowe, *supra* note 1054, at 21 (emphasis added). In *Gallo Winery* and *Moreno* employers acted as both manufacturers and sellers to the general public, but employees did not act as public consumers.

1176. E.g., *Cohen v. Lion Products Co.*, 177 F. Supp. 486 (D. Mass. 1959) (intentional infliction of emotional distress); *Ramey v. General Petroleum Corp.*, 173 Cal. App. 2d 386, 343 P.2d 787 (1959) (fraud injury destroying a valuable right of action against the third party).

1177. Nonphysical injury torts include false imprisonment, invasion of the right of privacy, alienation of affections, fraud, deceit, malicious misrepresentation, and the intentional infliction of emotional distress. 2A A. LARSON, *supra* note 1055, § 68.30.

1178. As Professor Larson has commented, "If the essence of the tort, in law, [is] non-physical and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred." *Id.* § 68.34(a). Compare *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (nonphysical injuries—recovery in suit allowed) with *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) and *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 151 Cal. Rptr. 828 (1979) (latter two suits disallowed when physical injury accompanied emotional distress).

bestos-related diseases, no injured asbestos worker has brought an action for his concomitant nonphysical injuries. Nonphysical injury actions, however, may prove a practicable alternative for asbestos-workers and their families.

c. Intentional Torts

In the states that have not enacted statutes authorizing employee suits against the employer for intentional employer misconduct,¹¹⁷⁹ courts¹¹⁸⁰ generally have excepted the employer's intentional torts from the workers' compensation coverage and its exclusive remedy rule.¹¹⁸¹ These courts have advanced various theories in support of an intentional tort exception.¹¹⁸² In state programs that incorporate "by accident" clauses,¹¹⁸³ the nonaccidental nature of the employee's injury from the intentional tort has provided a persuasive argument.¹¹⁸⁴ Other courts have posited different theories: the employer severs the employment relationship by his act of violence;¹¹⁸⁵ the tort is not incident to the employment;¹¹⁸⁶ and the simple theory that the court perverts the purpose of the act¹¹⁸⁷ by allowing the exclusive remedy provision to protect the tortfeasor-employer.¹¹⁸⁸

Potential litigants at common law must meet the same rigor-

1179. See *supra* notes 1160-61 and accompanying text.

1180. See, e.g., *Magliulo v. Superior Court*, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975); *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930); *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd*, 271 A.D. 964, 68 N.Y.S.2d 594 (1947).

1181. See 2A A. LARSON, *supra* note 1055, § 68; Page, *supra* note 1065, at 560-61; Vieweg, *supra* note 1062, at 424-25.

1182. See 2A A. LARSON, *supra* note 1055, § 68.11.

1183. See *supra* note 1061.

1184. See, e.g., *Le Pochat v. Pendleton*, 187 Misc. 296, 63 N.Y.S.2d 313 (Sup. Ct. 1946), *aff'd*, 271 A.D. 964, 68 N.Y.S.2d 594 (1947). The nonaccidental nature of the injury may be the best justification for the exception of intentional torts from workers' compensation coverage. See 2A A. LARSON, *supra* note 1055, § 68.11.

1185. Professor Larson has described this theory as a "fictitious argument." See 2A A. LARSON, *supra* note 1055, § 68.11.

1186. See, e.g., *Conway v. Globin*, 105 Cal. App. 2d 495, 233 P.2d 612 (1951), *overruled*, *Azevedo v. Industrial Accident Comm'n*, 243 Cal. App. 2d 370, 52 Cal. Rptr. 283 (1966).

1187. See *Boek v. Wong Hing*, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930). One commentator has called this theory "unabashedly moralistic." See Page, *supra* note 1065, at 560.

1188. In *Lavin v. Goldberg Bldg. Material Corp.*, 274 A.D. 690, 87 N.Y.S.2d 90 (1949), the court concluded that "[i]t would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meagre allowance provided by the Workmen's Compensation Law." *Id.* at 693-94, 87 N.Y.S.2d at 93.

ous intent requirements facing potential litigants in the jurisdictions that statutorily authorize the actions.¹¹⁹⁹ Courts require a showing of an employer's intent to injure.¹¹⁹⁰ This burden of proof is difficult for a stricken asbestos worker to meet, because the courts regard most employer conduct as within the purview of employers' responsibilities.¹¹⁹¹

3. Penalty Provisions Within Workers' Compensation Systems

Ten states¹¹⁹² have added penalty provisions to their workers' compensation systems in an effort adequately to compensate injured employees and to deter employer misconduct. The legislatures may have intended these provisions to be less burdensome alternatives to common-law suits for intentional torts.¹¹⁹³ These penalty provisions, however, generally supplement rather than supplant the common-law remedy for employees injured through intentional employer misconduct.¹¹⁹⁴ Eight of the ten states supplement the compensation award only if the employer has failed to comply with safety statutes or orders.¹¹⁹⁵ California's penalty pro-

1189. See *supra* notes 1162-64 and accompanying text.

1190. 2A A. LARSON, *supra* note 1055, § 68.13. At common law, courts generally do not impose liability on the employer for injuries caused by conduct that is not genuinely intentional. See, e.g., *Hagger v. Wortz Biscuit Co.*, 210 Ark. 318, 196 S.W.2d 1 (1946) (no liability for "willful and reckless" conduct); *Southern Wire & Iron Inc. v. Fowler*, 217 Ga. 727, 124 S.E.2d 738 (1962) (no liability for willful failure to provide safe workplace); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946) (no liability for "wanton" conduct); *Kenner v. Hanreco*, 161 So. 2d 142 (La. Ct. App. 1964) (no liability for ordering an employee to perform a dangerous job); *Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A.2d 129 (no liability for "gross negligence").

1191. See 2A A. LARSON, *supra* note 1055, § 68.13.

1192. See CAL. LAB. CODE § 4553 (West 1971 & Supp. 1983); KY. REV. STAT. § 342.165 (1983); MASS. GEN. LAWS. ANN. ch. 152, § 28 (West 1958); MO. ANN. STAT. § 287.120(4) (Vernon 1965); N.M. STAT. ANN. § 52-1-110 (1978); N.C. GEN. STAT. § 97-12 (1979); OHIO CONST. art. II, § 35; S.C. CODE ANN. § 42-9-70 (Law. Co-op. 1976); UTAH CODE ANN. § 35-1-12 (1953); WIS. STAT. ANN. § 102.57 (West 1973 & Supp. 1982).

1193. Professor Larson has reached such a preliminary conclusion:

When a penalty has been built into the compensation act for any kind of employer conduct, the boundaries of the general exclusiveness principle are expanded to take in that conduct. The effect may thus be to bar common-law suits for a wider range of intentional, willful, or aggravated injuries by the employer.

2A A. LARSON, *supra* note 1055, § 69.30, at 13-130.

1194. See KY. REV. STAT. § 342.165 (1983) (15% increase in the amount of the award); MO. ANN. STAT. § 287.120(4) (Vernon 1965) (15% increase); N.M. STAT. ANN. § 52-1-110(B) (1978) (10% increase); N.C. GEN. STAT. § 97-12 (1979) (10% increase); OHIO CONST. art. II, § 35 (15 to 50% increase at the Board's discretion); S.C. CODE ANN. § 42-9-70 (Law. Co-op. 1976) (10% increase); UTAH CODE ANN. § 35-1-12 (1953) (15% increase); WIS. STAT. ANN. § 102.57 (West 1973 & Supp. 1982) (15% increase up to a \$10,000 ceiling).

1195. In addition to its penalty provision for failure to comply with safety regulations,

vides a fifty percent increase in the compensation for "serious and willful misconduct."¹¹⁹⁶ Although a California court originally construed this provision to preclude common-law actions,¹¹⁹⁷ a subsequent decision has held that while ordinary negligence merits the standard workers' compensation remedy, intentional misconduct provides access to common-law tort recovery.¹¹⁹⁸ As a result, only the Massachusetts statute, which provides for a doubling of the award for serious and willful misconduct,¹¹⁹⁹ precludes the common-law remedy.¹²⁰⁰

D. Prospective Workers' Compensation Treatment of Asbestos-Related Disease

Until recently almost no asbestos workers' suits have concerned issues of workers' compensation, exclusivity, and the erosion of the exclusive remedy doctrine. As more asbestos victims attempt to circumvent the exclusive remedy doctrine, courts must face these difficult issues and try to arrive at an equitable solution.

1. Representative Actions

Because Massachusetts and New Jersey expressly preclude only employees themselves from bringing common-law actions and Texas allows survivors' suits for willful acts or omissions and gross

Kentucky also has a statute authorizing suits against an employer's intentional infliction of injury.

1196. CAL. LAB. CODE § 4553 (West 1971 & Supp. 1982) (subject to \$10,000 ceiling).

1197. See, e.g., *Azevedo v. Abel*, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968). The *Azevedo* court stated,

Neither moral aversion to the employer's act nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the legislature. The policy choice is to provide employees economic insurance against disability in exchange for the speculative possibility of general damages; to offer the augmented award [which the penalty provides] for serious and willful misconduct in trade for the relatively rare award of punitive damage.

Id. at 459-60, 70 Cal. Rptr. at 715.

1198. See *Magliulo v. Superior Court*, 47 Cal. App. 3d 760, 778-79, 121 Cal. Rptr. 621, 635 (1975). *But see infra* notes 1244-51 and accompanying text.

1199. See MASS. GEN. LAWS ANN. ch. 152, § 28 (West 1958).

1200. The 100% increase, unencumbered by any ceiling on the penalty, is by far the largest among penalty statutes. The size of the penalty suggests that the legislature may have intended for the statute and not common law to be the employee's ultimate remedy. Accordingly, courts have applied workers' compensation and its supplemental penalty to cases that otherwise might have warranted common-law suits in most jurisdictions. See, e.g., *Scaia's Case*, 320 Mass. 432, 69 N.E.2d 567 (1946) ("serious and willful misconduct" includes intentional wrongs and is much more than mere negligence over even gross or culpable negligence).

negligence,¹²⁰¹ relatives, dependents, or representatives of stricken asbestos workers in these three states need not circumvent the exclusive remedy doctrine by using the dual capacity of the employer or the intentional nature of the injury arguments to maintain an action.¹²⁰² The recent decision of the Massachusetts Supreme Court in *Ferriter v. Daniel O'Connell's Sons, Inc.*¹²⁰³ demonstrates that at least the Massachusetts statute frees relatives to file suit.¹²⁰⁴ In *Ferriter* a disabled asbestos worker's spouse and children instituted an action even though the worker was still alive and receiving workers' compensation payments. The court allowed the action and noticed that the language of the Massachusetts statute unambiguously limits the scope of the employee's waiver of the common-law action.¹²⁰⁵ While compensation laws limiting the exclusivity doctrine to the employee and the *Ferriter* interpretation of these laws commendably allow more common-law suits, the continued unavailability of the tort remedy to the employee himself dulls the laws' impact.

2. Dual Capacity Doctrine

Courts consistently have rejected dual capacity of asbestos manufacturers as grounds for a common-law suit.¹²⁰⁶ Very few jurisdictions recognize the doctrine,¹²⁰⁷ and courts further have refused to acknowledge the alleged second capacities of the

1201. See *supra* note 1158 and accompanying text.

1202. See *supra* notes 1167-75 and accompanying text.

1203. *Ferriter v. Daniel O'Connell's Sons, Inc.*, (Mass. Sup. Ct. Sept. 9, 1980), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 2459 (Oct. 10, 1980).

1204. Despite the narrow exclusive remedy provision in New Jersey, a New Jersey court barred a husband's action for loss of consortium since plaintiff's decedent was an employee in *Danek v. Hommer*, 14 N.J. Super. 607, 82 A.2d 659 (1951), *aff'd*, 9 N.J. 56, 87 A.2d 5 (1952). The lack of supporting New Jersey case authority prompted the *Danek* court's action. See 14 N.J. Super. at 612-14, 82 A.2d at 661-62. Perhaps the *Ferriter* decision interpreting the similar Massachusetts statute will persuade the New Jersey courts to reverse this position.

1205. *Ferriter v. Daniel O'Connell's Sons, Inc.* (Mass. Sup. Ct. Sept. 9, 1980), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 2459, 2471 (Oct. 10, 1980).

1206. For a discussion of the dual capacity doctrine, see *supra* notes 155-62 and accompanying text.

1207. See *supra* note 1170 and accompanying text. A lack of authority endorsing the doctrine defeated plaintiff's claim in *Kohr v. Raybestos-Manhattan, Inc.*, 522 F. Supp. 1070 (E.D. Pa. 1981) (Pennsylvania law governing). The lack of authority similarly affected the outcome in *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313 (D. Me. 1981) (interpreting the Federal Longshoremen's and Harbor Workers' Compensation Act). See also ASBESTOS LITIG. REP. (ANDREWS) 4805 (Apr. 9, 1982) (summarizing *Anastasi v. Pacor Indus.* (Pa. C.P. Philadelphia Apr. 2, 1982)).

employers.¹²⁰⁸

In *Austin v. Johns-Manville Sales Corp.*¹²⁰⁹ and *In re Johns-Manville/Asbestosis Cases*¹²¹⁰ the plaintiffs contended that by retaining medical personnel to examine, diagnose, and treat employees for on-the-job injuries, the employer assumed the role of physician, including the duty to inform the patient of his health problems.¹²¹¹ Both courts denied this alleged second capacity.¹²¹² The *Austin* court observed that statutory programs frequently mandate that the employer provide such medical offerings; the obligations, then, remain the employer's as employer, not as physician.¹²¹³

Courts also have been reluctant to allow plaintiffs to regard the asbestos manufacturer as the manufacturer of a product for public use with the obligation to provide a safe product.¹²¹⁴ In *Anastasi v. Pacor Industries*¹²¹⁵ the court inexplicably insisted that the employer's manufactured products were not for general public use and rejected the claim.¹²¹⁶ The court in *In re Johns-Manville/Asbestosis Cases*¹²¹⁷ found that a "miner-supplier" had only the duty to maintain a safe workplace, a duty no different than that of any employer.¹²¹⁸ Only the United States District Court for the Eastern District of Pennsylvania in *Kohr v. Raybestos-Manhattan, Inc.*¹²¹⁹ has recognized the inequity of allowing an employee with asbestos-related injuries to recover beyond workers' compensation simply because his employer was not an asbestos

1208. See, e.g., *In re Johns-Manville/Asbestos Cases*, 511 F. Supp. 1229 (N.D. Ill. 1981); *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313 (D. Me. 1981); ASBESTOS LITIG. REP. (ANDREWS) 4805 (Apr. 9, 1982) (summarizing *Anastasi v. Pacor Indus.* (Pa. C.P. Philadelphia Apr. 2, 1982)).

1209. 508 F. Supp. 313 (D. Me. 1981).

1210. 511 F. Supp. 1229 (N.D. Ill. 1981) (Illinois law governing).

1211. 511 F. Supp. at 1232; 508 F. Supp. at 317.

1212. 511 F. Supp. at 1233; 508 F. Supp. at 318. The court in *Johns-Manville/Asbestos Cases* allowed the claim because plaintiff alleged an intentional tort. See 511 F. Supp. at 1234; *supra* text accompanying notes 1236-39.

1213. 508 F. Supp. at 318.

1214. The obligation carries the threat of products liability actions. *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977), and its progeny, see *supra* notes 1173-75 and accompanying text, have encouraged plaintiffs to sue the employer as manufacturer.

1215. ASBESTOS LITIG. REP. (ANDREWS) 4805 (Apr. 9, 1982) (summarizing *Anastasi v. Pacor Indus.* (Pa. C.P. Philadelphia Apr. 2, 1982)).

1216. *Id.*

1217. 511 F. Supp. 1229 (N.D. Ill. 1981).

1218. *Id.* at 1233.

1219. 522 F. Supp. 1070 (E.D. Pa. 1981) (applying Pennsylvania law).

manufacturer, while refusing to allow recovery beyond workers' compensation for an identical employee of an asbestos manufacturer.¹²²⁰ Because Pennsylvania does not recognize the dual capacity doctrine, however, the district court reluctantly found for defendants.¹²²¹ Until more courts exhibit receptiveness to the notion of dual capacity, asbestos workers suing employers for their failure, as manufacturers, to provide the public with a safe product will enjoy infrequent success at best. Most courts today either have not recognized the dual capacity doctrine or blindly have denied its applicability.

3. Common-Law Actions for Intentional Torts

The most prominent exception to workers' compensation coverage and its exclusive remedy doctrine is the common-law remedy for intentionally injured employees.¹²²² The success of asbestos workers in maintaining these suits depends on the individual state's willingness to ease stringent specific intent requirements.¹²²³

a. Specific Intent

The decisions of several federal courts that interpreted workers' compensation systems of various states demonstrate the difficulty that specific intent presents. In *Petruska v. Johns-Manville*¹²²⁴ plaintiff on behalf of her deceased husband alleged that defendants intentionally, willfully, and recklessly allowed the decedent to be exposed to asbestos without a warning of the related health hazard.¹²²⁵ Applying New Jersey law, the Eastern District of Pennsylvania concluded that plaintiff had not proved defendants' intention to injure as required by the New Jersey statute¹²²⁶ for exception from workers' compensation coverage.¹²²⁷ Another federal court interpreting New Jersey law in *Copeland v. Johns-Manville Products Corp.*¹²²⁸ faced virtually the same allegations as in *Petruska* and similarly barred the claim for lack of ac-

1220. *Id.* at 1076.

1221. *See id.*

1222. *See supra* notes 1161-66 & 1179-91 and accompanying text.

1223. *See supra* notes 1162-66 & 1189-91 and accompanying text.

1224. 83 F.R.D. 39 (E.D. Pa. 1979).

1225. *Id.* at 39-40.

1226. *See supra* notes 1160-64 and accompanying text.

1227. 83 F.R.D. at 40.

1228. 492 F. Supp. 498 (D.N.J. 1980).

tual intent.¹²²⁹ Finally, in *Austin v. Johns-Manville Sales Corp.*¹²³⁰ the United States District Court for the District of Maine rejected a suit against an employer and stated that “[n]othing short of a specific intent to injure the employee falls outside the scope of the Act.”¹²³¹

The Delaware Supreme Court in *Kofron v. Amoco Chemicals Co.*¹²³² demonstrated the rigors of the specific intent requirement by barring an employee’s suit despite allegations of willful and deliberate deceit concerning the hazards of employment, because “[i]t was not contended . . . that [defendant] created or maintained the condition for the purpose of causing injury to its employees.”¹²³³ *Kofron* and the previous cases illustrate the theory that neither the gravity of the harm nor the depravity of the employer’s conduct determines intent;¹²³⁴ instead, the simple issue is whether the employer’s conduct “was deliberate infiction of harm comparable to an intentional left jab to the chin.”¹²³⁵ This standard presents problems for asbestosis-afflicted plaintiffs.

b. Lesser Intent Requirements

Recognizing the difficulties facing the plaintiffs, some states have applied a more lenient intent standard.¹²³⁶ Two Illinois decisions, *McDaniel v. Johns-Manville Sales Corp.*¹²³⁷ and *In re Johns-Manville/Asbestosis Cases*,¹²³⁸ held that the plaintiff “should have an opportunity to prove . . . allegations”¹²³⁹ very

1229. *See id.* at 501.

1230. 508 F. Supp. 313 (D. Me. 1981). Although *Austin* concerned a manufacturer’s attempt to receive indemnification from the employer, the principles are the same.

1231. *Id.* at 316.

1232. 441 A.2d 226 (Del. 1982).

1233. *Id.* at 229. While the court ultimately maintained that intentional acts of any kind were not exempt from coverage, *see id.* at 231, it implied that it might have reached a different outcome if employer specifically had intended to injure employee.

1234. *See* 2A A. LARSON, *supra* note 1055, § 68.13.

1235. *Id.* Plaintiff in *Kofron* unsuccessfully argued that courts *should* incorporate the gravity of the harm and depravity of the employer’s conduct into the analysis:

The lung scarred because of one or more knife wounds is no more injured than the lung scarred by hundreds of knife-like particles introduced into a worker’s lungs by an employer with the knowledge that harm would occur, an act no less heinous than that of the knife-wielders.

Synopsis of Plaintiff’s Argument, ASBESTOS LITIG. REP. (ANDREWS) 2428 (Oct. 10, 1980).

1236. West Virginia previously adopted a less rigorous standard for employees in *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978).

1237. 487 F. Supp. 714 (N.D. Ill. 1978) (applying Illinois law).

1238. 511 F. Supp. 1229 (N.D. Ill. 1978).

1239. 487 F. Supp. at 716; *see* 511 F. Supp. at 1234.

much like the allegations rejected in *Petruska* and *Copeland*.

c. *California's Middle Ground*

With the innovative and controversial decision of the California Supreme Court in *Johns-Manville Products Corp. v. Contra Costa Superior Court*,¹²⁴⁰ California became another state that has supplemented its specific intent requirement to afford the employee a greater opportunity to obtain relief at common law. *Contra Costa* is the first comprehensive decision by a state's supreme court¹²⁴¹ to deal specifically with the common-law remedies of asbestos-afflicted workers against their employers. The opinion also illustrates the interaction of workers' compensation penalty provisions and the common-law remedy for employer misconduct and provides an inroad into a discussion of an alternative remedy for the asbestos-related disease victim.

Contra Costa held that "while the workers' compensation law bars the employee's action at law for his initial injury, a cause of action may exist for aggravation of the disease because of the employer's fraudulent concealment of the condition and its cause."¹²⁴² A California court of appeal in *Magliulo v. Superior Court*¹²⁴³ interpreted the statute's "serious and willful misconduct" standard¹²⁴⁴ as between ordinary negligence and intentional tort,¹²⁴⁵ but the supreme court in *Contra Costa* decided that the statute should penalize intentional behavior.¹²⁴⁶ The court feared that a broader standard would encourage employees alleging intentional torts to flood the courts and thus undermine the entire workers' compensation system.¹²⁴⁷ Therefore, for the plaintiff to bring a

1240. 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948 (1980).

1241. The Delaware Supreme Court lessened the impact of *Kofron* by attributing its decision to a refusal to exempt from coverage intentional torts of any kind. *See supra* notes 1233-35.

1242. 27 Cal. 3d at 469, 165 Cal. Rptr. at 860, 612 P.2d at 950.

1243. 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975).

1244. CAL. LAB. CODE § 4553 (West 1971 & Supp. 1982); *see supra* note 1196 and accompanying text.

1245. *See supra* notes 1197-98 and accompanying text.

1246. "In sum, the provisions of section 4553 were designed to penalize intentional misconduct of an employer, and the injuries which result from such acts are compensable under that section." *Johns-Manville v. Contra Costa Superior Ct.*, 27 Cal. 3d at 473, 165 Cal. Rptr. at 863, 612 P.2d at 953.

1247. The court found that allowing the common-law remedy for all intentional misconduct

would undermine the underlying premise upon which the workers' compensation system is based. That system balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation pay-

lawsuit rather than a workers' compensation claim, the plaintiff must do more than allege only that he

contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant. . . .¹²⁴⁸

The court asserted, however, that the penalty provision does not exclude all intentional acts from the court system.¹²⁴⁹ Instead, the court's "perceived trend" in state law led it to exclude two situations in which plaintiff still may obtain a remedy at common law:¹²⁵⁰ (1) if the employer has specific intent—he "acts deliberately for the purpose of injuring the employee"; or (2) if "the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury."¹²⁵¹ The latter situation is the foundation for the second prong of the remedy:

[where] a plaintiff alleges that defendant fraudulently concealed from him, and from doctors retained to treat him, . . . that he was suffering from a disease caused by the ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to work under hazardous conditions . . . [t]hese allegations are sufficient to state a cause of action for aggravation of the disease. . . .¹²⁵²

Numerous critics have attacked several features of the *Contra Costa* rule.¹²⁵³ Criticism has focused on the artificial distinction between causation and aggravation of the disease. Certain diseases such as mesothelioma are irreversible once contracted,¹²⁵⁴ and aggravation and contraction, even if distinguishable, usually stem from the same intentional concealment or fraudulent misrepresentations.

Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action This balance would be significantly disturbed if it were to hold . . . that any misconduct of an employer which may be characterized as intentional warrants an action at law for damages.

Id. at 474, 165 Cal. Rptr. at 863, 612 P.2d at 953-54.

1248. *Id.* at 474-75, 165 Cal. Rptr. at 864, 612 P.2d at 954.

1249. *Id.* at 473, 165 Cal. Rptr. at 863, 612 P.2d at 953.

1250. California thus has adopted the cumulative, rather than alternative approach—the victim may pursue and receive both tort damages and compensation benefits concurrently. *See supra* note 1161.

1251. *Johns-Manville v. Contra Costa Superior Ct.*, 27 Cal. 3d at 476, 165 Cal. Rptr. at 865, 612 P.2d at 955.

1252. *Id.*

1253. *See Kutchins, supra* note 1067, at 213-15; Comment, *supra* note 1083; Comment, *supra* note 1161, at 667-73.

1254. As one commentator has noted, "It is not clear what the court meant by 'aggravation' of [plaintiff's] mesothelioma; the disease is fatal, and generally it is considered irreversible when contracted." *Kutchins, supra* note 1067, at 214.

tation by the employer.¹²⁵⁵ Similarly, the plaintiff faces an almost impossible task of apportioning his damages between causation to claim the former through workers' compensation and the latter through the courts. Perhaps more importantly, the dissent emphasized that the holding deters employers from furnishing medical programs for employees—an employer who remains ignorant of his employees' medical status cannot be liable for aggravation resulting from intentional concealment.¹²⁵⁶

Despite these conceptual difficulties, California's response to the problem of ascertaining the proper remedy for employees victimized by asbestos-related disease is surprisingly effective: the *Contra Costa* rule manages to allay fears about the impending demise of workers' compensation while actually affording the disease victims a greater chance of recovery. The *Contra Costa* court has enhanced the possibilities of lawsuits as remedies by endorsing the suit for aggravation without requiring specific intent. The overwhelming majority of courts have limited the intentional torts for which the common-law remedy exists to those of specific intent. Further, since the court gives the defendant the difficult burden of differentiating damages arising out of the contraction of the disease from those stemming from the aggravation,¹²⁵⁷ awards will tend to be large.

The rule developed in *Contra Costa* provides a comfortable middle ground between strict jurisdictions that require specific intent and more lenient states that allow unlimited suits and thereby threaten workers' compensation systems. A system that exempts torts of specific intention and the intentional concealment of occupational disease hazards without distinguishing between the instigation or aggravation of the disease would avoid the conceptual difficulties of the California system while still providing the victim of asbestos-related disease with much-needed common-law relief.

E. Summary

Despite the worthy intentions behind both the enactment of workers' compensation laws and the incorporation of occupational disease cases into their coverage, workers' compensation programs cannot provide victims of asbestos-related disease adequate relief.

1255. See Comment, *supra* note 1161, at 670.

1256. See *Johns-Manville v. Contra Costa Superior Ct.*, 27 Cal. 3d at 479, 165 Cal. Rptr. at 866, 612 P.2d at 957 (Clark, J., dissenting).

1257. See *id.* at 477 n.11, 165 Cal. Rptr. at 865 n.11, 612 P.2d at 956 n.11.

Workers' compensation, which seeks to provide dependable, prompt, and sufficient recovery for stricken employees, has failed disease victims in all respects. Legislators may rectify the problem of insufficient awards by removing outdated ceilings and tying the awards to a price index that reflects inflation. The delay and uncertainty of recovery for the disease victim, however, are irremediable problems. Programs attempt to assure dependable and prompt recovery by imposing no-fault liability on the employer; the employee need only prove a causal link between his employment and his injury. Proof of work-relatedness, however, is an enormous hurdle for disease victims. Knowing this, employers will continue to contest the claims of disease victims and make recovery even more uncertain and more delayed. In sum, occupational disease victims, including stricken asbestos workers, forego the award of tort damages but do not get dependable and prompt relief in return. When an employer's intentional concealment of disease hazards has precipitated the employee's condition, the worker's plight simply is unconscionable.

A well-established exception to the exclusive remedy doctrine of workers' compensation allows employees to sue their employers in tort if injury has occurred through the employer's intentional misconduct. To prevent the undermining of workers' compensation, courts in most instances should continue to harness this exception by requiring specific intent on the part of the employer. The particular inadequacy that inevitably characterizes compensation programs' treatment of disease victims, however, mandates that an employee whose disease stems from intentional misconduct receive a tort remedy. Thus, the intentional employer misconduct exception to the exclusivity doctrine should comprise both torts of specific intent and the intentional concealment of occupational disease hazards. The legal system then could accommodate the needs of stricken asbestos workers.

X. MANUFACTURERS' CONTRIBUTION AND INDEMNITY CLAIMS AGAINST THE UNITED STATES

Faced with billions of dollars in asbestos-related injury claims,¹²⁵⁸ the manufacturers of asbestos products have sought to alleviate their burden by shifting all or part of their liability to the United States Government, one of the largest commercial users of

¹²⁵⁸ Employers and their insurers will pay between \$38.2 billion and \$90 billion in asbestos claims over the next 35 years. See *Wall St. J.*, Dec. 14, 1982, at 46, col. 1.

asbestos products. To seek contribution¹²⁵⁹ or indemnity¹²⁶⁰ from the government, a manufacturer must find a jurisdictional basis for its cause of action under a statute that specifically waives the government's sovereign immunity¹²⁶¹ with respect to the substance of the manufacturer's claim. Furthermore, the manufacturer must comply strictly with all procedural requirements established by that statute. Thus, selection of the proper statutory jurisdictional basis and fulfillment of procedural prerequisites are critical to the ultimate success of the action, not only because they affect the availability and utility of the substantive theory underpinning the manufacturer's claim, but also because they may determine whether a court ever will hear the cause on the merits.¹²⁶² Notwith-

1259. Contribution is an equitable doctrine that allows one who has discharged a common tort liability to recover from all joint tortfeasors in proportion to their culpability in the tortious act. *RESTATEMENT (SECOND) OF TORTS* § 886A & comments (1977). The doctrine is applicable when two or more persons are liable to a third person for the same harm on any basis of tort liability. *Id.* If the third person in fact is not liable to the injured person, he cannot be liable for contribution. The tortfeasor seeking contribution may not receive payment in an amount greater than his equitable share of liability, and no court may require a tortfeasor to contribute beyond his own share of the liability. The doctrine of contribution attempts to equalize the burden for an indivisible harm and is available under statute or judicial decision in a majority of states. *Id.*

1260. Indemnity, which every jurisdiction recognizes, prevents unjust enrichment by providing restitution to a tortfeasor who has discharged the liability of another tortfeasor who should have been responsible to pay for the harm. *Id.* § 886B & comments. While contribution shifts a proportionate share of the liability from one tortfeasor to another, indemnity shifts all liability to the other tortfeasor. The right to indemnity supersedes a right to contribution; therefore, indemnity is not available to joint tortfeasors if they owe the same duty to the injured person because courts grant indemnity only when "it is just and fair that the indemnitor should bear the total responsibility . . ." *Id.* § 886B comment c. Judicial formulations of unjust enrichment methodology for indemnity actions typically include: (1) one of the tortfeasors is primarily liable for the tort while the others have only secondary responsibility; (2) one tortfeasor owes a greater duty than the others owe to the injured person or one tortfeasor owes a higher standard of care than the others; and, (3) one tortfeasor's fault is active and the others' fault is merely passive. The *Restatement (Second) of Torts* rejects knee-jerk application of these inflexible formulations in favor of a comprehensive unjust enrichment analysis. *Id.* The right to indemnity often arises from express or implied contractual provisions, which may shift liability between the parties according to their agreement.

1261. The doctrine of sovereign immunity precludes a plaintiff from bringing suit against a sovereign unless that sovereign consents to the suit. Traditionally, courts have recognized the immunity of federal and state governments from suits concerning acts committed in their governmental capacities. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

1262. For example, in *Keene Corp. v. United States*, No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4191 (Nov. 25, 1981), plaintiff sought contribution and indemnity from the United States for 6000 asbestos claims filed against the company. Plaintiff asserted seven different jurisdictional bases and alleged 23 separate causes of action. Because plaintiff failed to match each substantive claim with the

standing the plaintiff's proper procedural conduct, the United States has retained full immunity from third party liability arising from certain important classes of claims. This part of the Special Project examines the jurisdictional bases and procedural requirements for a manufacturer's contribution and indemnity action against the United States and the government's immunity from third party liability for injuries covered by federal workers' compensation plans¹²⁶³ and injuries incident to military service.

A. Federal Tort Claims Act

1. Contribution and Indemnity

Prior to the passage of the Federal Tort Claims Act¹²⁶⁴ (FTCA) in 1946, redress for injury caused by the negligent conduct of a government employee was available only by specific congressional appropriation.¹²⁶⁵ The enactment of private relief bills¹²⁶⁶ was a clumsy, time-consuming process that threatened to overwhelm the congressional calendar.¹²⁶⁷ Through the FTCA the United States waived much of its sovereign immunity and consented to liability for the "negligent or wrongful act[s] or omis-

appropriate jurisdictional basis and failed to meet the procedural requirements of those jurisdictional bases, the court dismissed all claims for lack of subject matter jurisdiction. See *infra* text accompanying note 1278. Specifically, plaintiff based jurisdiction for many of its claims upon the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1976). Many of these claims, however, did not meet the admiralty tort jurisdiction situs requirement, and, therefore, the court could not take cognizance of the claims for lack of subject matter jurisdiction. See *infra* notes 1358-70 and accompanying text.

1263. For a detailed discussion of workers' compensation provisions, see *supra* part IX.

1264. 28 U.S.C. §§ 1291, 1346(b)-(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), & 2671-2680 (1976) (originally enacted as Title IV of the Legislative Reorganization Act of Aug. 2, 1946, ch. 753, 60 Stat. 842).

1265. The plaintiff may pursue the negligent employee separately in a civil action. The employee's financial status or insurance coverage may make this election attractive. 1 L. JAYSON, *PERSONAL INJURY: HANDLING FEDERAL TORT CLAIMS* § 178.03 (1982). In addition, under the FTCA a plaintiff may sue the negligent employee and the United States as codefendants, but no action against the employee is available when the suit proceeds to judgment against the United States. *Id.* § 178.02; see 28 U.S.C. § 2676 (1976).

1266. For a detailed discussion of congressional treatment of tort claims, see Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

1267. In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court stated that Congress enacted the FTCA because "[t]he volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication." *Id.* at 140. The 76th, 77th, and 78th Congresses considered approximately 5473 private bills and approved 1457 of these for a total appropriated sum of \$3,182,020.42. H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1946).

sion[s]" of its employees "acting within the scope of [their] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant"¹²⁶⁸ according to *lex loci delicti*.¹²⁶⁹

In *United States v. Yellow Cab Co.*¹²⁷⁰ the Supreme Court held that a joint tortfeasor may sue the United States for contribution under the FTCA. In *Yellow Cab* the Court determined that because Congress had waived the government's immunity in broad terms and had excepted only particular classes of claims from its waiver,¹²⁷¹ courts would not construe the FTCA to include contribution claims among its explicit exceptions.¹²⁷² Moreover, the Court rejected fine distinctions between the different types of claims since the FTCA did not subject the government to a previously disallowed class of obligations, but merely substituted the district courts for Congress as the forum for the settlement of claims.¹²⁷³

Following *Yellow Cab* courts have held that claimants also

1268. 28 U.S.C. § 1346(b) (1976). Although under the FTCA the government should be liable in the same manner and to the same extent as a private individual similarly situated, the FTCA does not authorize relief other than damages. *See id.* The FTCA also does not permit awards of prejudgment interest or punitive damages. *Id.* § 2674.

1269. Claimants probably cannot seek contribution or indemnity from the United States for a judgment based upon strict products liability. *See Dalehite v. United States*, 346 U.S. 15 (1954) (The "negligent or wrongful act or omission" language of the FTCA, 28 U.S.C. § 1346(b) (1976), absolutely precludes any action based on a theory of strict liability.); *see also Laird v. Nelms*, 406 U.S. 797 (1972) (reaffirming *Dalehite* and holding that Congress did not waive sovereign immunity for strict liability causes of action). *But cf. In re Swine Flu Immunization Prods. Liab. Litig.*, 533 F. Supp. 703 (D. Utah 1982) (no FTCA strict liability, but vaccination program statute deemed to constitute waiver of sovereign immunity sufficient to impose strict liability upon the United States). *See generally Jacoby, Absolute Liability Under the FTCA*, 24 FED. B.J. 139 (1964); Peck, *Absolute Liability Under the FTCA*, 9 STAN. L. REV. 433 (1957).

1270. 340 U.S. 543 (1951). The Court in *Yellow Cab* attempted to reconcile two conflicting cases: *Howey v. Yellow Cab Co.*, 181 F.2d 967 (3d Cir. 1950), *aff'd*, 340 U.S. 543 (1951), and *Capital Transit Co. v. United States*, 183 F.2d 825 (D.C. Cir. 1950), *rev'd*, 340 U.S. 543 (1951). The United States Court of Appeals for the Third Circuit in *Howey* had denied the government's motion to dismiss, which asserted that the FTCA did not authorize the taxicab company to bring a derivative indemnity suit against the United States for injuries sustained by a passenger in a collision with a postal truck. The District of Columbia Circuit in *Capital Transit* granted the government's motion to dismiss a third party claim that sought indemnity for damages recovered by a streetcar passenger injured in a collision with an Army jeep.

1271. *See* 28 U.S.C. § 2680 (1976) (specific exceptions to the coverage of the FTCA); *infra* notes 1345-57 and accompanying text. For an analysis of the "discretionary function" exception contained in 28 U.S.C. § 2680(a) (1976), *see Gardner, The Federal Tort Claims Act*, 16 CLEARINGHOUSE REV. 509, 515-18 (1982).

1272. *United States v. Yellow Cab Co.*, 340 U.S. 543, 548-49 (1951).

1273. *Id.* at 549.

may seek indemnity from the United States under the FTCA.¹²⁷⁴ Under the FTCA joint tortfeasors not only may seek contribution and indemnity from the government in separate proceedings, but also, under the Federal Rules of Civil Procedure,¹²⁷⁵ they may implead the government as a third party defendant.¹²⁷⁶ Regardless of whether the claim is for contribution or indemnity or whether the proceeding is direct or by impleader, the FTCA limits the forum to the federal district courts¹²⁷⁷ and imposes upon the claimant exacting requirements to establish proper jurisdiction. Since these requirements are jurisdictional, courts strictly construe them and do not permit waiver.¹²⁷⁸ Therefore, these procedural requirements often affect the claimant's election between direct action and impleader.

2. Procedural Requirements

a. Administrative Claim

Before a claimant can bring an action against the United States under the FTCA, he must satisfy the administrative filing requirement by presenting his claim to the appropriate federal

1274. See, e.g., *United States Lines, Inc. v. United States*, 470 F.2d 487 (5th Cir. 1972); *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965); *Hankinson v. Pennsylvania R.R.*, 280 F.2d 249 (3d Cir. 1960); *Chicago, R.I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955); *United States v. Chicago, R.I. & P. Ry.*, 171 F.2d 377 (10th Cir. 1949). But see *National Indem. Co. v. United States*, 444 F. Supp. 1356 (C.D. Cal. 1977), *aff'd sub nom. Rudelson v. United States*, 602 F.2d 1326 (9th Cir. 1979).

1275. *United States v. Yellow Cab Co.*, 340 U.S. 543, 553-57 (1951). FED. R. CIV. P. 14(a) provides in part:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

1276. 1 L. JAYSON, *supra* note 1265, § 164; see, e.g., *United States Lines, Inc. v. United States*, 470 F.2d 487 (5th Cir. 1972); *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965); *Hankinson v. Pennsylvania R.R.*, 280 F.2d 249 (3d Cir. 1960); *Chicago, R.I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955); *United States v. Chicago, R.I. & P. Ry.*, 171 F.2d 377 (10th Cir. 1949).

1277. 28 U.S.C. § 1346(b) (1976).

1278. See, e.g., *West v. United States*, 592 F.2d 487 (8th Cir. 1979); *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *Three-M Entrs. v. United States*, 548 F.2d 293 (10th Cir. 1977); *Rosario v. American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976); *Brown v. General Servs. Admin.*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976); *Bernard v. United States Lines, Inc.*, 475 F.2d 1134 (4th Cir. 1973); *Goulding v. United States*, 488 F. Supp. 755 (D. Ariz. 1980), *rev'd on other grounds sub nom. Poindexter v. United States*, 647 F.2d 34 (9th Cir. 1981).

agency.¹²⁷⁹ The FTCA vested in the head of each federal agency the authority to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages" falling within the scope of the Act.¹²⁸⁰ Until the agency has made its final determination on the claim presented, and the claimant has exhausted his agency remedy, the district courts do not have jurisdiction to entertain the suit.¹²⁸¹ The only express exception to this requirement allows dispensation of the administrative claim when it can be asserted against the government by third party complaint, cross-claim, or counterclaim under the Federal Rules of Civil Procedure.¹²⁸² This third party exception is consistent with the purpose of the administrative filing requirement:¹²⁸³ both promote judicial economy by facilitating the settlement of meritorious claims and avoiding unnecessary litigation.¹²⁸⁴ In *Raybestos-Manhattan, Inc. v. United States*¹²⁸⁵ the United States District Court for the District of Connecticut took a unique step to expand the third party exception beyond the strict statutory language when technical adherence would have hindered the effort toward judicial economy. In *Raybestos* approximately 100 employees of a defense contractor sued Raybestos, a manufacturer of asbestos products, for damages allegedly resulting from exposure to asbestos fibers. Because a number of plaintiffs lacked diversity of citizenship¹²⁸⁶ with Raybestos, these plaintiffs filed suit in state court. Raybestos impleaded the United States for indemnity and contribution in all cases against the company pending in federal court and, because it could not implead the United States in the state court, commenced a separate action in federal court for any liability resulting from the state court suits. Raybestos failed to file an administrative claim before instituting the direct action against the United States, and the government moved to dismiss for lack of subject matter jurisdiction. The district court denied the motion and held that in the

1279. 28 U.S.C. § 2675(a) (1976).

1280. *Id.* § 2672. "Provided, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General . . ." *Id.*

1281. *Id.* § 2675(a).

1282. See FED. R. CIV. P. 13, 14, & 18-20.

1283. See *Adams v. United States*, 615 F.2d 284, 288-89 (5th Cir. 1980).

1284. See *Jacoby, The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1219 (1967).

1285. No. H-78-416 (D. Conn. Feb. 15, 1979) (unpublished).

1286. Federal courts have subject matter jurisdiction in cases not concerning a federal question only if complete diversity exists between all plaintiffs and all defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); see 28 U.S.C. § 1332 (1976).

interest of judicial economy it would consider the complaint within the third party exception.¹²⁸⁷

The administrative filing requirement has undergone additional development since the enactment of the FTCA. United States Department of Justice regulations include requirements that the claim presented be in sum certain¹²⁸⁸ and that it provide sufficiently specific information to allow the government to investigate and settle the claim.¹²⁸⁹ Because these regulations derive from the FTCA's authorization of federal agencies to settle claims,¹²⁹⁰ the circuit courts¹²⁹¹ disagree whether these regulations solely affect settlement procedures or whether they also apply to provisions governing presentation of the claim.¹²⁹² The majority chooses the latter alternative and thereby furthers judicial economy by guaranteeing to the government from the outset information essential not only to the terms of the settlement but also to the decision whether to settle at all. The claimant must provide this information before a court will deem the administrative remedy exhausted.

The administrative filing requirement and pursuant regulations present a formidable barrier to the great number of claims for contribution or indemnity typically brought by an asbestos product manufacturer against the United States. In *Keene Corp. v. United States*,¹²⁹³ for example, claimant sought contribution and indemnity from the United States for any liability resulting from approximately six thousand suits filed in twenty-eight federal district courts by government project workers allegedly injured by exposure to the company's asbestos products. The United States District Court for the Southern District of New York, however, dismissed the complaint based upon claimant's failure to satisfy FTCA filing requirements. Relying on *Raybestos*,¹²⁹⁴ claimant initially argued that its complaint was exempt from filing require-

1287. *Raybestos-Manhattan, Inc. v. United States*, No. H-78-416, slip op. at 13.

1288. 28 C.F.R. § 14.2(a) (1982).

1289. *Id.* § 14.4.

1290. See 28 U.S.C. § 2672 (1976); *supra* note 1280 and accompanying text.

1291. Compare *Adams v. United States*, 615 F.2d 284, 288-93 (5th Cir. 1980) (28 C.F.R. § 14 bears solely on procedures for the settlement of claims) with *House v. Mine Safety Appliances Co.*, 573 F.2d 609, 615-16 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978) and *Lunsford v. United States*, 570 F.2d 221, 225 (8th Cir. 1977) and *Pennsylvania v. National Assoc. of Flood Insurers*, 520 F.2d 11, 19-20 (3d Cir. 1975), *cert. denied*, 102 S. Ct. 3509 (1982) (28 C.F.R. § 14 applies also to 28 U.S.C. § 2675).

1292. 28 U.S.C. § 2675 (1976).

1293. No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), *reprinted in ASBESTOS LITIG. REP. (ANDREWS)* 4191 (Nov. 25, 1981).

1294. See *supra* notes 1285-86 and accompanying text.

ments under the FTCA's exception for third party actions.¹²⁹⁵ The court ruled, however, that treating claimant's action under the exception would not promote the judicial economy concerns of *Raybestos* because claimant had not attempted to implead the government in any of the six thousand suits.¹²⁹⁶ Moreover, claimant had settled or otherwise terminated many of the suits—obviously, claimant could not implead the United States in actions no longer pending and would have had to bring separate indemnity actions. Consequently, the court refused to exempt Keene from the administrative filing requirement.¹²⁹⁷ Alternatively, claimant argued that it had met all filing requirements under the FTCA.¹²⁹⁸ The court rejected this argument and dismissed the complaint for lack of subject matter jurisdiction because the complaint was not sufficiently specific under the FTCA and because claimant had not exhausted its administrative remedy.¹²⁹⁹

1295. See *supra* text accompanying notes 1275-78. Claimant argued that *Raybestos-Manhattan, Inc. v. United States*, No. H-78-416, (D. Conn. Feb. 15, 1979), required the court to treat the complaint as "in the nature of a third-party action" and thus within the third party exception to the administrative filing requirement. *Id.* slip op. at 4.

1296. *Keene Corp. v. United States*, No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4191, 4194-95 (Nov. 25, 1981).

1297. *Id.*

1298. *Id.*, reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4195 (Nov. 25, 1981).

1299. *Id.* The court found that in an amended notice of claim the corporation merely listed the docket number of approximately 1000 pending suits. After filing this amended notice and before oral argument, claimant incurred 5000 additional lawsuits, which it then attempted to include in its single action against the United States. The corporation, however, made no effort to bring these additional claims to the attention of any federal agency. Thus, the court concluded that claimant had not exhausted its potential administrative remedy and the court lacked subject matter jurisdiction over the 5000 additional claims under the FTCA. *Id.*

The government asserted that the amended notice for the initial 1000 claims was defective because it did not state a sum certain for each claim and failed to provide sufficient information for investigation and settlement. The court did not address the applicability of the settlement procedure regulations to the presentation of the claim; but relied instead upon analogous common-law principles to hold that a claim for indeterminate damages does not provide the certainty required by the FTCA. *Id.*, reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4195-96 (Nov. 25, 1981). The court likened the claim to a class action because it aggregated 1000 separate suits. Therefore, as required for class actions, the complaint must give notice of the specific dollar amount of relief for each asbestos suit. The court added that, regulations notwithstanding, the government at least deserves information sufficient "to enable it to evaluate the claim and choose between settlement and litigation." *Id.*, reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4197 (Nov. 25, 1981). Claimant did not respond to a United States Department of Justice request for details of damages sought and of insurance payments recovered in each suit. Because of this failure to respond, the court held that the corporation had not exhausted its administrative remedy and, therefore, could not present its claims before a federal district court. Hence, the complaint was not cognizable under the FTCA. *Id.*

In summary, impleader is the best procedure for a manufacturer who seeks contribution or indemnity from the government for liability for personal injuries resulting from the use of asbestos in government projects. If impleader is unfeasible or impracticable, *Raybestos* and *Keene* clearly demand that, barring extraordinary circumstances, the manufacturer scrupulously must fulfill the administrative filing requirement. The manufacturer carefully must draft the administrative claim and include: (1) any information bearing upon the responsibility or liability of the United States for the injury or damages claimed; (2) the basis of the manufacturer's liability to the original claimant; (3) the dollar amount of indemnity or contribution sought, including an accounting of the items composing the total damages; and, (4) the dollar amount of any insurance or other benefits recovered by the manufacturer on the original liabilities. The manufacturer should provide this information for any liability for which it seeks indemnity or contribution, regardless of whether it subsequently may aggregate the claims.¹³⁰⁰

*b. Statutes of Limitations*¹³⁰¹

The FTCA statute of limitations bars tort claims against the United States if the claimants do not present them to the appropriate federal agency for administrative remedy within two years after the claims accrue and if the claimants do not file suit within six months of final denial by the agency.¹³⁰² If the claimant properly files the claim within the two-year period, the claimant still has six months after the agency denies the claim to bring suit. Conversely, if the agency denies the claim earlier than six months before the end of the two-year period, the claimant has only six months within which to sue, even though the overall elapsed time is less than two years.¹³⁰³ At his option, the claimant may consider the claim denied if the agency fails to make a final disposition of the claim within six months of filing.¹³⁰⁴ Under the FTCA a claim for contribution or indemnity accrues when the claimant's liability

1300. See 28 C.F.R. §§ 14.2, 14.4 (1982); 2 L. JAYSON, *supra* note 1265, § 323.01.

1301. For a discussion of the effect of state statutes of limitation on asbestos-related actions, see *supra* part V.

1302. 28 U.S.C. § 2401(b) (1976). The elapsed time between accrual of the claim and the bringing of suit may exceed two years when the agency does not act on the claim until after the two-year period.

1303. *Claremont Aircraft, Inc. v. United States*, 420 F.2d 896 (9th Cir. 1970); *Childers v. United States*, 316 F. Supp. 539 (S.D. Tex. 1970), *aff'd*, 442 F.2d 1299 (4th Cir.), *cert. denied*, 404 U.S. 857 (1971).

1304. 28 U.S.C. § 2675(a) (1976).

to the injured person becomes fixed.¹³⁰⁵

3. Claims Barred by Sovereign Immunity

a. *Exclusive Liability Provisions of Federal Workers' Compensation Plans*

Although under the FTCA the government has granted its consent to be sued for contribution and indemnity, the existence of a cause of action generally depends upon local law.¹³⁰⁶ Problems arise when local law provides no remedy for a claimant seeking tort contribution or indemnity against a party whom the injured person could not himself have sued. This problem becomes more complex when elements of federal law, or interpretations of federal statutes, are necessary to the resolution of a claim. The exclusive liability provisions of the Federal Employees' Compensation Act (FECA)¹³⁰⁷ and the Longshoremen's and Harbor Workers' Compensation Act¹³⁰⁸ can preserve the government's sovereign immunity and insulate it from liability entirely.

In *Weyerhaeuser Steamship Co. v. United States*,¹³⁰⁹ a landmark case interpreting these exclusive liability provisions, the

1305. *United States Lines, Inc. v. United States*, 470 F.2d 487, 489 (5th Cir. 1972); see *Keleket X-Ray Corp. v. United States*, 275 F.2d 167 (D.C. Cir. 1960); *Chicago, R.I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955); 2 L. JAYSON, *supra* note 1265, § 277.05; Gottlieb, *The Tort Claims Act Revisited*, 49 GEO. L.J. 539, 549-53 (1961). If all the events that fix liability of the defendant have not occurred, the district courts are without jurisdiction to hear an independent suit for contribution or indemnity because no case or controversy exists. See *Forty-Eight Insulations, Inc. v. Johns-Manville Prods. Corp.*, 472 F. Supp. 385 (N.D. Ill. 1979).

1306. See 28 U.S.C. § 1346(b) (1976). For a discussion of state laws and decisions permitting contribution and indemnity, see Gottlieb, *Some Aspects of Contribution and Indemnity in Tort Actions Against the United States*, 9 FED. B.J. 391 (1948); Gottlieb, *supra* note 1305, at 547-49.

1307. 5 U.S.C. § 8116(c) (1976) provides in part:

[T]he liability of the United States or an instrumentality thereof [under the Compensation Act] with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality

1308. 33 U.S.C. § 905(a) (1976). The exclusive liability provision of the Longshoremen and Harborworkers' Compensation Act is nearly identical to that of FECA and courts have construed it similarly. See, e.g., *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978); *White v. Texas Eastern Transmission Corp.*, 512 F.2d 486 (5th Cir. 1975), *cert. denied sub nom. Bettis Corp. v. Charles Wheatley Co.*, 423 U.S. 1049 (1976); *In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106 (D. Conn. 1982); *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313 (D. Me. 1981); *Oman v. Johns-Manville Corp.*, 482 F. Supp. 1060 (E.D. Va. 1980), *aff'd sub nom. White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981).

1309. 372 U.S. 597 (1963).

owner of a ship damaged in a "mutual fault"¹³¹⁰ collision with a government dredge sued the United States under the Public Vessels Act¹³¹¹ to recover damages. A government employee was injured in the collision while aboard the dredge and received compensation for these injuries under the FECA. He later sued Weyerhaeuser for damages, obtained a settlement, and returned to the government the FECA benefits he had received. Because the exclusive liability provision of the FECA protects the United States from tort liability to its employees, the provision forestalls any award of contribution and indemnity.¹³¹² Nevertheless, Weyerhaeuser in effect sought contribution by including the amount of the settlement in computing its recovery from the government. The government asserted that the exclusive liability provision precludes government liability for Weyerhaeuser's payment of the employee's injury claim. Rejecting this argument, the Court concluded that the purpose of the provision "was to establish that, as between the government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive."¹³¹³ The Supreme Court held that the FECA provision does not limit the scope of the divided damages rule in mutual-fault maritime collisions, and the Court permitted Weyerhaeuser to include the settlement costs in its damages computation.¹³¹⁴

The United States Court of Appeals for the Fourth Circuit relied extensively upon *Weyerhaeuser in Wallenius Bremen G.m.b.H. v. United States*¹³¹⁵ to hold that the FECA exclusive liability provision is not a bar to an indemnity claim against the government brought by an unrelated third party.¹³¹⁶ Plaintiff brought an indemnity action under the FTCA and the Suits in Admiralty Act¹³¹⁷ to recover the amount it had paid in settlement to a United States Department of Agriculture inspector injured on plaintiff's

1310. *Id.* at 598. The Court held that the collision occurred through the mutual fault of both vessels; therefore, under the traditional admiralty rules, each party could recover from the other one half of its provable damages.

1311. 46 U.S.C. §§ 781-90 (1976); *see infra* notes 1345-57 and accompanying text.

1312. *See supra* notes 1307-08.

1313. *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. at 601.

1314. *Id.* at 603-04. The Supreme Court determined that, in enacting the exclusive liability provision of the FECA, Congress did not intend to affect the rights of third parties unrelated to the employment relationship or to disturb settled doctrines of admiralty law that fix the rights and liabilities of private shipowners in collision cases. *Id.* at 601.

1315. 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

1316. 409 F.2d at 995, 998.

1317. 46 U.S.C. §§ 741-752 (1976); *see infra* notes 1345-48 and accompanying text.

ship. The company alleged that the government knew that the inspector could not safely perform his duties because of his physical infirmities. The district court granted the government's motion for summary judgment on the grounds that the FECA exclusive liability provision barred the indemnity claim.¹³¹⁸ Reversing the order of summary judgement, the Fourth Circuit reasoned that the exclusion applies only to those persons whose claims derive from a close personal relationship to the injured government employee because the FECA explicitly includes these persons in its compensation scheme.¹³¹⁹ The court concluded that since the provision did not exclude liability to an unrelated third party and since indemnity arises from a violation of a duty to the injured person, the government must indemnify a secondary tortfeasor when the government's breach of duty is more egregious than the indemnitee's.¹³²⁰

In *Glover v. Johns-Manville Corp.*¹³²¹ plaintiff, a civilian employee of a government-owned shipyard, contracted asbestosis allegedly through job-related exposure to asbestos-based materials produced by defendant manufacturers. After receiving FECA benefits, plaintiff sued the manufacturers but settled before the trial ended. Prior to settlement the manufacturers filed a third party noncontractual indemnity claim¹³²² against the United States under the FTCA¹³²³ for any liability that they might incur from the suit. As in *Wallenius Bremen*, the government defended on the ground that payment of FECA benefits satisfied its liability for injury to its employees and that the exclusive liability provision pre-

1318. 409 F.2d at 995.

1319. The FECA expressly excludes from other remedies "the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . on account of such injury or death." 5 U.S.C. § 8116(c) (1976). The court stated that the "catch-all category," "any person otherwise entitled to recover damages," merely relates back to the enumerated beneficiaries. 409 F.2d at 995. These parties are precluded from suing the government under FECA because they more easily can recover under the appropriate statutes. Exclusion of these beneficiaries promotes judicial efficiency in the federal courts. *Id.*

1320. *Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d at 998.

1321. 662 F.2d 225 (4th Cir. 1981).

1322. *Id.* at 227-28. The manufacturers based their claim upon other theories including breach of implied warranty sounding in contract and breach of the government's employment contract with plaintiff, to which the manufacturers claimed to be third party beneficiaries. *Id.* at 228; see *infra* notes 1371-88 and accompanying text. The district court, however, dismissed these contractual issues for lack of jurisdiction. 662 F.2d at 228.

1323. 662 F.2d at 227. The manufacturers also premised jurisdiction upon the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1976), the Public Vessels Act, *id.* §§ 781-790, and the general admiralty and maritime law of the United States, 28 U.S.C. § 1333. See *infra* notes 1345-57 and accompanying text.

cluded further recovery by the manufacturers. The manufacturers asserted that under *Wallenius Bremen* the exclusive liability provision does not bar claims of third party tortfeasors unrelated to the injured government employee.

Distinguishing *Wallenius Bremen*, the district court concluded that the Fourth Circuit must have decided the case under the Suits in Admiralty Act alone and thus the case does not control FTCA actions such as the defendant manufacturers' indemnity claim.¹³²⁴ Applying Virginia law under the FTCA,¹³²⁵ the district court compared the situation of the government to that of private employers in Virginia who are not liable for indemnity claims arising from torts to employees covered by the state's workers' compensation scheme. Therefore, the district court rejected manufacturers' indemnity claims because the right to noncontractual indemnity vests only when the proposed indemnitor may be liable in tort to the original plaintiff.¹³²⁶

On appeal the Fourth Circuit assumed that the FECA exclusivity provision did not bar manufacturers' indemnity claims,¹³²⁷ but nevertheless the court ruled that the claim failed on its merits because the district court's uncontested finding of fact that manufacturers actively had breached their duty to defendant¹³²⁸ precluded assertion of primary fault against the government and therefore barred recovery.¹³²⁹ In deciding whether federal workers' compensation exclusive liability provisions bar noncontractual con-

1324. See *Glover v. Johns-Manville Corp.*, 525 F. Supp. 894, 898-99 (E.D. Va. 1979), *aff'd*, 662 F.2d 225 (4th Cir. 1981). The FTCA and the Suits in Admiralty Act were the bases of jurisdiction in *Wallenius Bremen*. See *Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d 994, 995 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970). The Suits in Admiralty Act, unlike the FTCA, does not rely upon local law to fix the rights and liabilities of litigants. See *infra* notes 1345-57 and accompanying text. Compare 46 U.S.C. §§ 741-752 (1976) (Suits in Admiralty Act) with 28 U.S.C. § 1346(b) (1976) (FTCA). Because the result in *Wallenius Bremen* was clearly contrary to Virginia law, which the United States Court of Appeals for the Fourth Circuit would have had to apply under the FTCA, the district court concluded that the Fourth Circuit must have decided *Wallenius Bremen* under the Suits of Admiralty Act. See *Glover v. Johns-Manville Corp.*, 525 F. Supp. at 898-99.

1325. See *supra* note 1264 and accompanying text.

1326. 525 F. Supp. at 899.

1327. *Glover v. Johns-Manville Corp.*, 662 F.2d 225, 228 (4th Cir. 1981).

1328. *Id.* at 229-30. Manufacturers based their claim for indemnity upon the district court's finding that manufacturers were potentially liable to plaintiff for breach of their duty to warn him of the inherent dangers of their products. *Id.* at 230. The Fourth Circuit ruled as a matter of law that this active fault suffices to defeat a claim for noncontractual indemnity. *Id.*

1329. To gain noncontractual indemnity, the indemnitee must be liable for no more than passive or secondary fault. The indemnitor, in this case the government, must be at primary fault. *Id.* at 229-30.

tribution and indemnity suits against the government, other courts of appeal¹³³⁰ have rejected the *Wallenius Bremen* rationale and have limited *Weyerhaeuser* to its facts.¹³³¹ For example, in *Newport Air Park, Inc. v. United States*¹³³² the United States Court of Appeals for the First Circuit denied a noncontractual indemnity claim against the government for recovery of FECA benefits, that the injured employee had repaid after obtaining damages from claimant. Holding that the FECA exclusive liability provision shields the government from tort liability, the court determined that the government cannot be liable for contribution or indemnity "[e]ven when the person obliged to pay was only secondarily liable, and hence entitled to full indemnity, [because] no right arises against the primary actor if, as the employer, he was statutorily immune from tort liability."¹³³³

Even though the FTCA incorporates local law, courts generally agree that whether the FECA exclusive liability provision has modified the FTCA is a question of federal law, separate from and preceding the question of contribution and indemnity remedies against employers under local law.¹³³⁴ Most courts also agree that while the FECA and similar compensation acts bar noncontractual contribution and indemnity because they eliminate the government's tort liability, these compensation acts do not preclude an action for express or implied contractual indemnity.¹³³⁵

1330. See *id.* at 233 n.1 (Hall, Circuit Judge, concurring). For other cases considering this issue, see *Kudelka v. American Hoist & Derrick Co.*, 541 F.2d 651 (7th Cir. 1976); *Adams v. General Dynamics Corp.*, 535 F.2d 489 (9th Cir. 1976), *cert. denied*, 432 U.S. 905 (1977); *Galimi v. Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975); *Travelers Ins. Co. v. United States*, 493 F.2d 881 (3d Cir. 1974); *Newport Air Park, Inc. v. United States*, 419 F.2d 342 (1st Cir. 1969); *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968). For cases construing the Longshoremen and Harbor Workers' Act, see *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978); *White v. Texas Eastern Transmission Corp.*, 512 F.2d 486 (5th Cir. 1975), *cert. denied sub nom. Bettis Corp. v. Charles Wheatley Co.*, 423 U.S. 1049 (1976); *In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106 (D. Conn. 1982); *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313 (D. Me. 1981); *Oman v. Johns-Manville Corp.*, 482 F. Supp. 1060 (E.D. Va. 1980), *aff'd sub nom. White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981).

1331. See *Travelers Ins. Co. v. United States*, 493 F.2d 881 (3d Cir. 1974).

1332. 419 F.2d 342 (1st Cir. 1975).

1333. *Id.* at 347 (citations omitted).

1334. See, e.g., *Galimi v. Jetco, Inc.*, 514 F.2d 949, 952 (2d Cir. 1975).

1335. See, e.g., *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 722 (2d Cir. 1978); *Santis-Teven v. Dow Chem. Co.*, 506 F.2d 1216, 1218-19 (9th Cir. 1974); *Travelers Ins. Co. v. United States*, 493 F.2d 881, 886 (3d Cir. 1974); *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv., Inc.*, 377 F.2d 511, 512 (5th Cir.), *cert. denied*, 389 U.S. 849 (1967); *In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106, 1109-10 (D. Conn. 1982).

b. *Injuries Incident to Military Service*

Although United States armed forces personnel while on active duty have contracted a major portion of asbestos-related disabilities,¹³³⁶ manufacturers generally cannot obtain contribution or indemnity from the government for damages awarded to persons injured during military service. The Supreme Court held in *Feres v. United States*¹³³⁷ that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."¹³³⁸

Several courts and commentators have questioned the continued validity of the *Feres* rationale,¹³³⁹ but the Supreme Court relied upon it in *Stencel Aero Engineering Corp. v. United States*¹³⁴⁰ and held that the United States is not liable for contribution or indemnity to third parties for damages resulting from claims by persons injured in the course of military service.¹³⁴¹ In

1336. See *infra* part IX.

1337. 340 U.S. 135 (1950). *Feres* concerned a claim against the United States by the executrix of the estate of a soldier burned to death while asleep in his barracks. Plaintiffs alleged that the government negligently maintained the barracks heating system. *Id.* at 137.

1338. *Id.* at 146. The rationale underlying *Feres* should apply regardless of the jurisdictional basis used to seek tort-based relief. See Note, *Recovery for Servicemembers Exposed to Hazardous Substances*, 31 AM. U.L. REV. 1095, 1112-18 (1982). The Court cited several bases for its holding. See 340 U.S. at 141-44. First, because the relationship between the government and the members of the armed forces is federal in character, courts would destabilize this relationship by allowing local law to fix the mutual rights and liabilities of the parties. *Id.* at 143-44 (citing *United States v. Standard Oil Co.*, 332 U.S. 301, 305-06 (1947)). Second, no analogous liability exists for a private individual by which courts may test allowable claims against the government. *Id.* at 141 (citing 28 U.S.C. § 2674 (1976)). Third, tort claims would disrupt severely the unique relationship between the serviceman and his superiors, particularly in the maintenance of discipline. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977); *United States v. Brown*, 348 U.S. 110, 112 (1954). Last, the Veterans' Benefits Act, 38 U.S.C. §§ 321-342 (1976), provides a uniform and comprehensive "no fault" compensation scheme as a substitute for tort liability. 340 U.S. at 144. See *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977); *United States v. Muniz*, 374 U.S. 150 (1963); *United States v. Brown*, 348 U.S. 110 (1954); 1 L. JAYSON, *supra* note 1265, § 155.05; Note, *supra* note 1338, at 1101-02.

1339. See, e.g., *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977) (Marshall, J., dissenting); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Thomason v. Sanchez*, 539 F.2d 955 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072; *Peluso v. United States*, 474 F.2d 605 (3d Cir.), *cert. denied*, 414 U.S. 879 (1973); *Hale v. United States*, 416 F.2d 355 (6th Cir. 1969); *Lee v. United States*, 400 F.2d 558 (9th Cir.), *cert. denied*, 393 U.S. 1053 (1969); *Buckingham v. United States*, 394 F.2d 483 (4th Cir. 1968); *Jacoby, The Feres Doctrine*, 24 HASTINGS L.J. 1281 (1973); Note, *supra* note 1338, at 1102-21; Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U.L. REV. 527, 549-53 (1980).

1340. 431 U.S. 666 (1977).

1341. *Id.* at 673-74.

Stencel claimant, a government ordnance supplier, sought noncontractual indemnity under the FTCA for damages paid to a National Guard pilot injured by the malfunctioning ejection system of his aircraft. Claimant alleged that any malfunction in the system was due to faulty government specifications and components.

The court disallowed contribution and indemnity claims against the United States for service-related injuries, because courts should not predicate government liability on "the fortuity of where the soldier happened to be stationed" and thus destabilize the distinctly federal relationship between the government, members of its armed forces, and defense contractors.¹³⁴² These claims would circumvent the upper limit Congress placed on government liability in the Veterans' Benefits Act.¹³⁴³ In addition, the Court reasoned that when the case concerns liability for an injury sustained in connection with military service, the disruptive effect of the action upon military discipline will be the same whether the injured person or a third party brings the suit.¹³⁴⁴ The Court thus bars third party indemnity actions under the *Feres* rule. Because this bar is absolute, manufacturers seeking contribution or indemnity from the United States for liability to persons injured in the course of military service somehow must remove themselves from the *Feres-Stencel* doctrine. Possible methods for accomplishing this removal include an attack upon one or more of the *Feres* factors and a demonstration that the plaintiff sustained the injuries outside the course of military service.

1342. *Id.* at 672. Determining that the relationship of the government to its contractors is no less federal in character than the relationship of the government to its soldiers, the Court ruled that permitting the situs of the negligence to affect government liability to its contractors for a service-related injury would be just as destabilizing to the military as permitting this situs to affect the liability of the government to a serviceman for the identical injury. *Id.*; *cf. Feres v. United States*, 340 U.S. 135, 143-44 (1950) (applying local law would destabilize the relationship between the government and servicemen).

1343. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. at 673.

1344. *Id.* The court concluded that

the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by (the injured serviceman) is barred by *Feres*. . . . [T]he right of a third party to recover in an indemnity action against the United States recognized in *Yellow Cab*, must be held limited by the rationale of *Feres* where the injured party is a serviceman.

Id. at 673-74; *see United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *supra* notes 1270-75 and accompanying text.

B. Alternative Jurisdictional Bases

1. Admiralty

The FTCA expressly excludes¹³⁴⁵ suits against the United States for which the Suits in Admiralty Act (SAA)¹³⁴⁶ or the Public Vessels Act (PVA)¹³⁴⁷ provide a remedy. The SAA authorizes in personam actions against the government on admiralty principles in any instance in which suit could be brought "if a private person or property were involved."¹³⁴⁸ The PVA authorizes suit against the government for "damages caused by a public vessel of the United States"¹³⁴⁹ and provides that the SAA governs these suits.¹³⁵⁰ Under the SAA and PVA the federal district courts have exclusive admiralty jurisdiction over all maritime tort claims against the United States, and they uniformly subject the United States to admiralty tort jurisdiction to the same extent as a private shipowner.¹³⁵¹

A tort is maritime and thus within the admiralty jurisdiction of the federal courts if the situs of the injury is a maritime locality,¹³⁵² and the alleged wrong bears a significant nexus to traditional maritime activity.¹³⁵³ The Extension of Admiralty Jurisdic-

1345. 28 U.S.C. § 2680(d) (1976); *Kelly v. United States*, 531 F.2d 1144 (2d Cir. 1976); *Orion Shipping & Trading Co. v. United States*, 247 F.2d 755 (9th Cir. 1957). The SAA and the PVA provide the exclusive waiver of sovereign immunity for suits against the United States in admiralty. See *Johnson v. Fleet Corp.* 280 U.S. 320, 325 (1930); Helfrich, *Suits Against the United States Pursuant to the SIAA, PVA, EAA, FTCA, and FECA*, 26 TRIAL LAW GUIDE 121, 126-27 (1982). Therefore, the SAA or the PVA, not the FICA, control all maritime tort suits. See *Roberts v. United States*, 498 F.2d 520 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971); *T.J. Falgout Boats, Inc. v. United States*, 361 F. Supp. 838 (C.D. Cal. 1972), *aff'd*, 508 F.2d 855 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975). Similarly, the SAA or the PVA, rather than the Tucker Act, controls contract disputes that constitute causes of action in admiralty. 46 U.S.C. §§ 742, 782 (1976); *infra* notes 1371-88 and accompanying text.

1346. 46 U.S.C. §§ 741-752 (1976).

1347. *Id.* §§ 781-790.

1348. *Id.* § 742; see Ramsey & Monachino, *Admiralty Claims Against the United States*, 5 MAR. LAW 31, 34 (1980).

1349. 46 U.S.C. § 781 (1976).

1350. *Id.* § 782.

1351. The United States also enjoys "the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels." *Id.* § 746.

1352. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253 (1972).

1353. *Id.* at 268. For a discussion of the nexus requirement, see Note, *Admiralty Jurisdiction: Executive Jet in Historical Perspective*, 34 OHIO ST. L.J. 355 (1973); Note, *The Other Half of Executive Jet: The New Rationality in Admiralty Jurisdiction*, 57 TEX. L. REV. 977 (1979); Recent Development, *Admiralty Tort Jurisdiction—Tort Claims Not Within Admiralty Jurisdiction Unless Requisite Maritime Nexus Exists*, 27 VAND. L. REV.

tion Act (EAJA)¹³⁵⁴ encompasses injuries or damages that occur or are consummated on land, provided that a vessel or its appurtenances on navigable waters cause the injuries or damages.¹³⁵⁵ Once the EAJA establishes jurisdiction, the SAA and PVA determine the rights and liabilities of the parties.¹³⁵⁶ The EAJA does not affect the nexus requirement—the claimant must satisfy both the situs and nexus requirements to invoke the admiralty tort jurisdiction of the district courts. A noncontractual contribution or indemnity claim arising from a maritime tort claim is similarly a maritime claim properly cognizable under the SAA and PVA.¹³⁵⁷

Courts inconsistently have applied these admiralty jurisdiction criteria.¹³⁵⁸ In *White v. Johns-Manville Corp.*¹³⁵⁹ and a companion case¹³⁶⁰ the United States Court of Appeals for the Fourth Circuit readily found admiralty tort jurisdiction over both the claims of shoreside workers allegedly injured by exposure to asbestos against the asbestos manufacturers, and the noncontractual indemnity claims of the manufacturers against the United States. The court concluded that the alleged injuries met the situs requirement because the employees had encountered asbestos insulation materials while aboard vessels located on navigable waters and while working in other shipyard and dry dock areas.¹³⁶¹ The court found that it need only examine the functions of the injured employees to determine the fulfillment of the maritime nexus requirement.¹³⁶² The court concluded that the direct impact of the injured employees'

343 (1974).

1354. 46 U.S.C. § 740 (1976).

1355. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209-12 (1971); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209-10 (1963); 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 114 (3d ed. 1975).

1356. 46 U.S.C. § 740 (1976).

1357. See *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 186 (5th Cir. 1969).

1358. See Note, *Admiralty—In Search of a New Test for Admiralty Tort Jurisdiction: the Aftermath of Executive Jet*, 7 VAND. J. TRANS. L. 459 (1974); Comment, *Admiralty Tort Jurisdiction: Floundering on the Sea of Inconsistency*, 27 U. FLA. L. REV. 805 (1975); *infra* text accompanying note 1366. Compare *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981) (need only consider situs and function of injured party), *cert. denied*, 454 U.S. 1163 (1982) with *Owens-Illinois, Inc. v. United States Dist. Ct.*, 698 F.2d 967 (9th Cir. 1983) (must consider situs as well as multi-factor analysis).

1359. 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

1360. *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

1361. *White v. Johns-Manville Corp.*, 662 F.2d 234, 239 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

1362. 662 F.2d at 239.

activities on maritime commerce met the nexus requirement—the vessels upon which the injured employees worked could not perform their maritime function without the fabrication and replacement of the asbestos insulation that is an essential appurtenance of the ships.¹³⁶³

In contrast, the United States Court of Appeals for the Ninth Circuit in *Owens-Illinois, Inc. v. United States District Court*¹³⁶⁴ rejected the cursory analysis of *White*¹³⁶⁵ and relied instead upon the following factors to determine the lack of a sufficient maritime nexus: (1) the traditional role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities engaged; and, (4) the causation and nature of the injury suffered.¹³⁶⁶ The court then determined that plaintiff's job of installing asbestos was not a distinctly maritime role, particularly when contrasted to the navigational function of a ship's crew.¹³⁶⁷ Finally,

1363. *Id.*

1364. 698 F.2d 967 (9th Cir. 1983).

1365. *See id.* at 971. The *Owens-Illinois* court suggested, however, that *White* might be distinguishable because it concerned the *repair* of vessels in commerce as well as those in construction while *Owens-Illinois* concerned only the construction of new vessels. *Id.* The court stated that, this distinction notwithstanding, the Fourth Circuit's analysis was not sufficiently consistent with the situs and nexus jurisdictional test. *Id.*

1366. *Id.* at 970 (citing *T.J. Falgout Boats, Inc. v. United States*, 508 F.2d 855, 857 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975)); *accord* *Edynak v. Atlantic Shipping Inc.*, 562 F.2d 215, 220-21 (3d Cir. 1977), *cert. denied*, 416 U.S. 1034 (1978); *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *Keene Corp. v. United States*, No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 4191, 4199-200 (Nov. 25, 1981); *Otto v. Alper*, 489 F. Supp. 953, 955 (D. Del. 1980); *Montgomery v. Harrold*, 473 F. Supp. 61, 64 (E.D. Mich. 1979); *Kayfetz v. Walker*, 404 F. Supp. 75, 76-77 (D. Conn. 1975).

In examining the role of admiralty law, the court followed cases analyzing whether a particular contract dispute is in admiralty, because admiralty jurisdiction in contract cases requires an assessment of the maritime nature of the contract at issue. *Owens-Illinois, Inc. v. United States Dist. Ct.*, 698 F.2d 967, 970 (9th Cir. 1983) (citing *North Pac. S.S. Co. v. Hall Bros.*, 249 U.S. 119, 125 (1919)). Because admiralty jurisdiction traditionally extends only to matters relating to navigation and shipping and does not include contracts regarding the construction of a new vessel, the court concluded that torts arising from the construction of new vessels lack the "maritime flavor" necessary to invoke admiralty jurisdiction. 698 F.2d at 970 (citing *Hollister v. Luke Constr. Co.*, 517 F.2d 920, 921 (5th Cir. 1975)). *But cf.* *North Pac. S.S. Co. v. Hall Bros.*, 249 U.S. 119, 128 (1919) (contract relating to the repair or navigation of a vessel lies within admiralty jurisdiction). The court distinguished repair of old ships from construction of new ships because repair is "directly and immediately connected with navigation or commerce by water," while construction is not. 698 F.2d at 970 (quoting *Thames Co. v. The "Francis McDonald"*, 254 U.S. 242, 244 (1920)). The Fourth Circuit in *White* also reached this conclusion, which the Ninth Circuit acknowledged as a possible distinction in reconciling the contrary holdings of *White* and *Owens-Illinois*. *See* 698 F.2d at 971.

1367. 698 F.2d at 970-71. The court further noted that unlike the navigational aids or

the court determined that the unprotected inhalation of asbestos fibers and the resultant disease are both "far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters."¹³⁶⁸ Because of these circumstances, the court concluded that the hazards of asbestos do not bear a sufficient nexus to traditional maritime activity to invoke the court's admiralty jurisdiction.¹³⁶⁹ Under this land-based negligence standard, courts generally should find that elements associated with maritime activity more likely include the repair of a vessel temporarily out of service than the construction of a new vessel. This standard, however, emphasizes judicial economy rather than reality. Inconsistencies inherent in the Ninth Circuit's four factor analysis appear when courts distinguish vessels "in service" from those "not yet in service." For example, a worker injured by exposure to the asbestos insulation he installs *while the ship is at sea* is clearly "in" maritime commerce, but the asbestos installation, the instrumentalities employed, and the resulting diseases do not have a sufficient nexus to maritime activity to invoke admiralty jurisdiction. Thus, this analysis excludes from admiralty jurisdiction such shipboard activities as boiler operation and maintenance, carpentry, and engine repair, because these activities are not "distinctively maritime." The majority of cases do not support this result.¹³⁷⁰

safety devices of a vessel, the tools and safety equipment necessary to asbestos installation possess no maritime characteristics. Even though *Owens-Illinois* concerned ships, the court concluded that the instrumentalities related to the injuries did not have a distinctive connection to traditional maritime activity. *Id.* at 971; see *Keene Corp. v. United States*, No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4191, 4199 (Nov. 25, 1981); cf. *Montgomery v. Harrold*, 473 F. Supp. 61, 64 (E.D. Mich. 1979) (exposure to asbestos on ships rather than in refineries or power plants a mere fortuity, particularly because the ships never left the docks until work completed); *Bailey v. Johns-Manville Corp.*, No. 77-1 (E.D. Va. Mar. 30, 1978) (nothing indigenous to maritime law in roles of parties or nature of hazards), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 629 (Aug. 10, 1979).

1368. 698 F.2d at 971; see *Keene Corp. v. United States*, No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4200 (Nov. 25, 1981); see also *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909 (J.P.M.D.L. 1977) (exposure to asbestos is a widespread problem not unique to maritime activity).

1369. 698 F.2d at 971; see *Keene Corp. v. United States*, No. 80 Civ. 401 (GLG) (S.D.N.Y. Sept. 30, 1981), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 4200 (Nov. 25, 1981).

1370. See, e.g., *North Pac. S.S. Co. v. Hall Bros.*, 249 U.S. 119 (1919) (carpentry and metalwork within admiralty jurisdiction whether vessel afloat, in drydock, or hauled up on land); *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981) (installation of asbestos

A suit in admiralty is not the best alternative to obtain federal court jurisdiction. The SAA and PVA restrictions are complicated and cumbersome, and courts are inconsistent in their interpretation of the statutory requirements. Plaintiffs obtain no timing advantage by electing admiralty jurisdiction since the two-year claim limitation period is the same under the SAA, PVA, or FTCA. Because direct actions against the government in admiralty have no administrative filing requirement when the plaintiff does not pre-empt jurisdiction on the EAJA, the savings of filing time and expense may outweigh the disadvantages of suing in admiralty if the claimant seeks contribution and indemnity for a large number of claims. Asbestos-related diseases, however, have long latency periods and workers generally outfit ships with asbestos at shoreside. Thus, plaintiffs will have great difficulty in demonstrating that the injury was not consummated or caused upon land and that the EAJA is inapplicable.

2. United States Claims Court

Contribution and indemnity actions founded upon an express or implied contract with the government¹³⁷¹ are adjudicable exclusively in the United States Claims Court¹³⁷² if the amount in controversy exceeds \$10,000.¹³⁷³ The Claims Court has jurisdiction

products in shipyards within admiralty jurisdiction), *cert. denied*, 454 U.S. 1163 (1982); Sperry Rand Corp. v. Radio Corp. of Am., 618 F.2d 319 (5th Cir. 1980) (products liability claims based upon defective instrument components within admiralty jurisdiction notwithstanding that components generally used in nonmarine instruments); Jones v. Bender Welding & Mach. Works, 581 F.2d 1331 (9th Cir. 1978) (products liability claim based upon defective engine repair within admiralty jurisdiction); Pan-Alaska Fisheries, Inc. v. Marine Constr. Co., 565 F.2d 1129 (9th Cir. 1977) (by implication) (same); JIG The Third Corp. v. Puritan Mar. Ins. Corp., 519 F.2d 171 (5th Cir. 1975) (faulty metalwork during ship construction causing injury while vessel at sea within admiralty jurisdiction), *cert. denied sub nom.* Atlantic Mar., Inc. v. JIG The Third Corp., 424 U.S. 954 (1976).

1371. The Claims Court can hear only suits against the United States. Hopkins v. United States, 513 F.2d 1360 (Ct. Cl. 1975), *aff'd in part and vacated in part on other grounds*, 427 U.S. 123 (1976). In addition, the contract must be of the type that can be satisfied out of appropriated public funds. L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211 (Ct. Cl. 1982); McCloskey & Co. v. United States, 530 F.2d 374 (Ct. Cl. 1976).

1372. 28 U.S.C.S. § 1491(a)(1) (Law. Co-op. Supp. 1982). The United States Claims Court (formerly the Court of Claims) is a court of national jurisdiction. It sits, in effect, in the state where the cause of action arose or where the claim accrued. Great Am. Ins. Co. v. United States, 397 F.2d 289 (Ct. Cl. 1968).

1373. Sea-Land Serv., Inc. v. Brown, 600 F.2d 429 (3d Cir. 1979); South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910 (2d Cir. 1976); International Eng'g Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960); United States v. Tacoma Oriental S.S. Co., 86 F.2d 363 (9th Cir. 1936).

concurrent with the federal district courts for contractual claims of lesser amounts.¹³⁷⁴ Jurisdiction of the Claims Court based upon implied contract¹³⁷⁵ with the United States extends only to contracts implied in fact¹³⁷⁶ and does not include contracts implied in law.¹³⁷⁷ The court lacks jurisdiction to hear any tort claim against the United States,¹³⁷⁸ but plaintiffs may maintain an action that arises primarily from breach of a contractually created duty, even though the damages may have resulted from government negligence.¹³⁷⁹

The Claims Court also lacks jurisdiction over any claim pending in another federal court¹³⁸⁰ if the suit in the other federal court: (1) is against the United States or its agency;¹³⁸¹ (2) concerns the same claimant,¹³⁸² and the same cause of action;¹³⁸³ and, (3) began before the claimant filed suit in the Claims Court.¹³⁸⁴ Con-

1374. 28 U.S.C. § 1346(a)(2); *see* *Glover v. Johns-Manville Corp.*, 662 F.2d 225, 230-33 (4th Cir. 1981).

1375. Implied contract claims raised by manufacturers in contribution and indemnity actions typically include: (1) the asbestos products purchaser impliedly warranted to use the goods only in ways that would not subject the manufacturer to liability; and (2) asbestos-related products injured the employees because the employer breached the employment contract to which the manufacturer claims to be a third party beneficiary. These arguments consistently fail. *See, e.g., Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978); *Dulin v. Circle F. Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977); *Santisteven v. Dow Chem. Co.*, 506 F.2d 1216 (9th Cir. 1974); *In re General Dynamics Asbestos Cases*, 539 F. Supp. 1106 (D. Conn. 1982).

1376. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980). To find a contract implied in fact, a court must establish the parties' tacit understanding by inferring a meeting of the minds from the conduct of the parties. *Somali Dev. Bank v. United States*, 508 F.2d 817 (Ct. Cl. 1974); *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 comment a (1981).

1377. *See, e.g., Goodyear Tire & Rubber Co. v. United States*, 276 U.S. 287 (1928); *Merritt v. United States*, 267 U.S. 338 (1925); *Cleveland Chair Co. v. United States*, 557 F.2d 244 (Ct. Cl. 1977); *United States Steel Corp. v. United States*, 536 F.2d 921 (Ct. Cl. 1976); *Cities Service Gas Co. v. United States*, 500 F.2d 448 (Ct. Cl. 1974); *Porter v. United States*, 496 F.2d 583 (Ct. Cl.), *cert. denied*, 420 U.S. 1004 (1974).

1378. *See* *Harley v. United States*, 198 U.S. 229 (1905); *Somali Dev. Bank v. United States*, 508 F.2d 817 (Ct. Cl. 1974); *Clark v. United States*, 461 F.2d 781 (Ct. Cl.), *cert. denied*, 409 U.S. 1028 (1972); *Marcee v. United States*, 455 F.2d 525 (Ct. Cl. 1972).

1379. *See* *Fountain v. United States*, 427 F.2d 759 (Ct. Cl. 1970), *cert. denied*, 404 U.S. 839 (1971); *Bird & Sons v. United States*, 420 F.2d 1051 (Ct. Cl. 1970); *Burt v. United States*, 176 Ct. Cl. 310 (1966).

1380. 28 U.S.C. § 1500 (1976).

1381. *See* *Oakland Truck Sales, Inc. v. United States*, 149 F. Supp. 902 (Ct. Cl. 1957).

1382. *See* *Universal Fiberglass Corp. v. United States*, 537 F.2d 393 (Ct. Cl. 1976), *later proceeding*, 214 Ct. Cl. 840 (1977).

1383. *See* *Sanhorn v. United States*, 453 F. Supp. 651 (E.D. Cal. 1977); *Meyer v. United States*, 150 F. Supp. 314 (Ct. Cl. 1957); *Pacific Mills v. United States*, 3 F. Supp. 541 (Ct. Cl. 1933).

1384. *See, e.g., Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966).

gress has barred all claims over which the Claims Court has jurisdiction unless the claimant files the petition within six years after the claim first accrued.¹³⁸⁵ A contribution or indemnity claim accrues when all events that fix liability of the United States to the claimant have occurred.¹³⁸⁶ If the claimant pursues an administrative remedy,¹³⁸⁷ the Claims Court loses jurisdiction six years after the agency issues a final denial of relief.¹³⁸⁸ This six-year limitation period gives manufacturers increased flexibility in timing the commencement of their actions and allows them to assert a contract-based cause of action in a claims court proceeding if a tort-based action fails in the district court.

C. Summary

Asbestos products manufacturers may never be able to use judicial means to shift some of the tremendous financial burden of impending tort claims to the federal government. The availability of relief to these manufacturers through contribution and indemnity actions against the United States is largely illusory. No manufacturer yet has succeeded in obtaining tort-based contribution or indemnity from the government, and absent an express contractual provision securing a right to contribution or indemnity, manufacturers probably will not obtain any relief from the government. To defeat claims asserted against it, the United States may use a formidable array of devices; among the most effective is sovereign immunity. In addition, judicial application of the doctrines of contribution and indemnity often denies relief to asbestos product manufacturers.

These barriers are not merely artifices to defeat unmeritorious claims, for they also have important social policy implications when injured persons cannot collect from manufacturers with depleted assets or insurance coverage. No court has indicated that its ruling would differ if manufacturers could show that the injured claimants would not receive compensation without government

1385. 28 U.S.C. § 2501 (1976); see *Japan War Notes Claimants Ass'n of Phillipines, Inc. v. United States*, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967).

1386. *Reliance Motors, Inc. v. United States*, 81 F. Supp. 228 (Ct. Cl. 1948).

1387. The provisions of the Wunderlich Act, 41 U.S.C. §§ 321-322 (1976), the Contract Disputes Act, *id.* §§ 601-613 (Supp. V 1981), or other dispute-settlement statutes or agreements may require the claimant to submit his claim to a stipulated agency for relief prior to instituting suit. See generally Anthony & White, *Contract Suit Practice and Procedure in the United States Court of Claims*, 49 NOTRE DAME LAW. 276 (1973).

1388. See *Johnson v. United States*, 527 F.2d 1209 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 889 (1976).

contribution or indemnity. These result-oriented considerations in awarding contribution and indemnity effectively would enlist manufacturers as conduits for the orderly distribution of federal relief. Yet, realizing their proper constitutional role, courts understandably are loathe to "legislate" in this area. Short of discarding a significant portion of American jurisprudence, however, only Congress can effect a practicable solution.

XI. FEDERAL LEGISLATION

Because of rising asbestos litigation costs and the recent bankruptcy filings of several asbestos products manufacturers,¹³⁸⁹ asbestos companies and other interested parties have pressured Congress to enact legislation to address compensation for asbestos-related disease claimants.¹³⁹⁰ Legislators in the Ninety-seventh Congress proposed three bills that created plans for resolving asbestos injury claims.¹³⁹¹ The three measures differed on which parties would participate in the compensation scheme¹³⁹² and how the legislative scheme would administer the compensation payments. Although the Ninety-seventh Congress failed to enact any of these bills, lawmakers likely will introduce substantially similar legisla-

1389. Estimates of potential asbestos litigation costs have led Manville Corporation, UNR Industries, subsidiaries of Manville and UNR, and Amatex Corporation to seek bankruptcy protection. See, e.g., *Paying Asbestos Damages: Government's Liability Questioned*, N.Y. Times, Sept. 18, 1982, at L35, col. 3 [hereinafter cited as *Paying Asbestos Damages*]; *Manville's Costs*, *supra* note 22, at 4, col. 2. As of January 27, 1983, Manville Corporation was drafting a reorganization plan that would limit the number and size of compensation claims against the company. *Manville Plans to Seek Strict Limit on its Liability for Asbestos Claims*, Wall St. J., Jan. 27, 1983, at 31, col. 4 [hereinafter cited as *Manville Plans*]. Under this proposal, Manville, its insurance carriers, and the federal government would contribute toward payment of successful claims. *Id.* at col. 6. For an in-depth discussion of this reorganization plan, see *infra* part XII.

1390. The Asbestos Compensation Coalition (ACC), an organization consisting of asbestos company representatives, has supported and lobbied extensively for asbestos legislation, particularly Senator Hart's Bill, S. 1643, 97th Cong., 1st Sess., 127 CONG. REC. 10,034-38 (daily ed. Sept. 18, 1981). See ASBESTOS LITIG. REP. (ANDREWS) 4616, 4617 (Feb. 26, 1982). The Asbestos Information Association (AIA), which includes manufacturers, miners, and millers of asbestos, also lobbies actively on Capitol Hill. See *Congress Ready to Examine Asbestos Compensation Issue*, 40 CONG. Q. WEEKLY REP. 204, 205 (1982).

1391. See H.R. 5735, 97th Cong., 2d Sess. (1982); S. 1643, *supra* note 1390; H.R. 5224, 97th Cong., 1st Sess. (1981).

1392. Parties who are responsible for compensation under the asbestos bills include asbestos importers and distributors, see *infra* notes 1504-05, 1513-21, & 1577-86, companies that produce asbestos and asbestos products, companies that import, sell, manufacture, or distribute any product that contains cigarettes or cigarette tobacco, see *infra* notes 1469-509 (discussing H.R. 5224, *supra* note 1391), and the federal government, see *infra* 1510-48 (discussing S. 1643, *supra* note 1390).

tion in the Ninety-eighth Congress.¹³⁹³ Additionally, asbestos companies probably will lobby Congress to adopt an alternative compensation proposal that industry representatives have drafted.¹³⁹⁴ Experts predict that members of the new Congress will focus more attention on asbestos compensation bills than lawmakers have in the past.¹³⁹⁵ Legislative evaluation of future asbestos compensation bills will entail critical examination of both enacted latent and occupational disease compensation legislation, such as the Federal Coal Mine Health and Safety Act of 1969 (Black Lung Act)¹³⁹⁶ and the Veterans' Health Care, Training, and Small Business Loan Act of 1981,¹³⁹⁷ and the latent and occupational disease compensation bills that the Ninety-seventh Congress failed to enact, including the Environmental Poisoning Compensation Act¹³⁹⁸ and the Radia-

1393. An aide to Representative George Miller said that Representative Miller plans to reintroduce in the 98th Congress a "refined" version of H.R. 5735. Telephone interview with legislative assistant to Subcomm. on Labor Standards of the House Comm. on Educ. and Labor (Jan. 6, 1983). A spokesperson for Senator Gary Hart stated that Senator Hart plans to reintroduce legislation identical to or similar to S. 1643 in the 98th Congress. Telephone interview with press assistant to Senator Gary Hart (Jan. 7, 1983).

1394. See ASBESTOS LITIG. REP. (ANDREWS) 5122 (June 25, 1982). The ACC has drafted an Occupational Disease Compensation Improvement Act with an accompanying Implementing Resolution for Asbestos Related Diseases. *Id.* This proposed Act provides for payment of "enhanced" compensation to victims of asbestos-related disease and their survivors. *Id.* at 5141. The Act also establishes an exclusive remedy that supplements present payments which state and federal compensation programs make. *Id.* To provide these "enhanced" payments, the Act establishes a trust fund, which receives financing from the federal government, insurance companies, and businesses that use or produce asbestos. *Id.* at 5142; see *id.* at 5123 (the federal government would pay for 50% of the trust fund under the Act).

1395. See *Action Expected Next Year on System for Compensating Victims of Asbestos Disease*, 40 CONG. Q. WEEKLY REP. 2729 (1982) [hereinafter cited as *Action Expected Next Year*]. Representative Miller attempted in 1981 and 1982 to establish a system for compensating persons occupationally exposed to asbestos, but Congress showed no interest. Because of Manville Corporation's bankruptcy filing, however, Congress is now under more pressure to act. *Id.* at 2729. "The bankruptcy actions [of Manville Corporation] have raised the profile of the asbestos problem." ASBESTOS LITIG. REP. (ANDREWS) 5970 (Dec. 24, 1982) (statement of Mr. John Lawrence, administrative assistant to Representative Miller).

1396. 30 U.S.C. §§ 900-936 (Supp. I 1977), amended by Black Lung Benefits Reform Act of 1977, 30 U.S.C. §§ 901-945 (Supp. II 1978). Congress reformed the system for financing the program in the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (codified in scattered sections of I.R.C. and 30 U.S.C.). "Black Lung Act" hereinafter refers to the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA) and any subsequent legislation that amended the FCMHSA.

1397. Pub. L. No. 97-72, 95 Stat. 1047 (codified as amended in scattered sections of 38 U.S.C.).

1398. The bill was a proposed amendment to scattered sections of H.R. 5203, 97th Cong., 1st Sess. (1981) (Amendment No. 3629). H.R. 5203 proposed amendments to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-36 (1976 & Supp. V 1981).

tion Exposure Compensation Act of 1981.¹³⁹⁹

This section of the Special Project discusses recent developments in federal legislation designed to compensate victims of occupational and latent diseases. It examines present remedies for people who suffer injury from exposure to asbestos and difficulties that accompany those remedies. The section then evaluates three asbestos compensation bills that members of the Ninety-seventh Congress introduced in an attempt to minimize those problems. The section concludes that the Ninety-eighth Congress likely will act to eliminate future occupation-related asbestos litigation by enacting legislation similar to the bill introduced by Representative George Miller, which relies on existing federal agencies to administer benefits and places the burden of compensating asbestos-exposed victims solely on manufacturers and suppliers of asbestos products.

A. *Recent Legislative Developments in Occupational and Latent Disease Compensation*

Members of Congress at times have introduced compensation legislation as litigation resulting from latent and occupational injuries has inundated the courts and threatened the financial stability of industries and insurance companies.¹⁴⁰⁰ Title IV of the Black Lung Act¹⁴⁰¹ represents an unprecedented congressional effort to provide an exclusive compensation system for victims of occupational latent diseases.¹⁴⁰² The Black Lung Act currently provides aid in the form of monthly benefits to coal mine workers and their survivors if occupational pneumoconiosis, commonly known as "black lung disease," kills or disables the worker.¹⁴⁰³ To receive

1399. S. 1483, 97th Cong., 1st Sess., 127 CONG. REC. 7630-31 (daily ed. July 15, 1981).

1400. Podgers, *supra* note 18, at 139.

1401. *See supra* note 1396.

1402. Congress intended the Black Lung Act to provide compensation to recipients because of "the failure of the States to assume compensation responsibilities" for the miners to whom the Act applied. H.R. REP. NO. 563, 91st Cong., 1st Sess. 576, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 2503, 2516. Legislators viewed this occupational disease compensation program as "well-nigh unique in the annals of our National Government." *Id.* at 626, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS at 2566 (minority views of Representatives Ashbrooke, Scherle, Collins, and Landgrebe). Some legislators criticized the Act because it "represents a foot in the door, a possible first step toward the ultimate federalization of the entire system of workmen's compensation." *Id.* at 627, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS at 2567 (Minority views of Representatives Ashbrooke, Scherle, Collins, and Landgrebe).

1403. *See* 30 U.S.C. § 922 (Supp. V 1981) (payment of benefits). Black lung disease is a chronic respiratory ailment that results from inhalation of dust particles over a long pe-

compensation, claimants must file for benefits,¹⁴⁰⁴ and examiners must determine the validity of each claim under prescribed medical standards.¹⁴⁰⁵ Once an examiner affirmatively determines the validity of a worker's claim, the coal mine operator who most recently employed the claimant—the last responsible operator—must provide the compensation payments owed under the Act.¹⁴⁰⁶ Claimants must offset these payments by any benefits that they receive under state occupational disease and workers' compensation laws.¹⁴⁰⁷ Additionally, the Black Lung Act creates a coal industry-funded¹⁴⁰⁸ Black Lung Disability Trust Fund to handle claims when the last responsible operator no longer exists or fails or refuses to make the compensation payments that the Act requires.¹⁴⁰⁹ The Black Lung Act remains controversial despite frequent amendments. The program has exceeded estimated costs¹⁴¹⁰ and has caused administrative problems.¹⁴¹¹ One observer has com-

riod of time. The black lung program costs approximately \$1 billion each year. Kilcullen, *Compensation Benefits for Coal Miners Under the Federal Black Lung Program*, reprinted in NEW YORK PRACTICING LAW INSTITUTE, FEDERAL REGULATIONS OF MINE SAFETY, HEALTH AND RECLAMATION 261, 264 (1978).

1404. 30 U.S.C. § 923 (1976 & Supp. V 1981).

1405. *Id.* § 922. The Act uses medical procedures originally established under § 423 of the Social Security Act. 42 U.S.C. § 423 (1976).

1406. 30 U.S.C. §§ 931-936 (1976 & Supp. II 1978).

1407. *Id.* § 922(b) (Supp. II 1978); *see infra* note 1412.

1408. The trust fund receives money from industry by imposing an excise tax on each ton of mined and sold coal. *Id.*; *see* I.R.C. § 4121 (1978) (establishing the National Disability Trust, which collects money for the Black Lung Disability Trust Fund). The trust fund also receives all fines and penalties paid by operators who fail to comply with the Black Lung Act. 30 U.S.C. § 934a(b)(5) (Supp. II 1978).

1409. *See* Black Lung Benefits Revenue Act of 1977, 30 U.S.C. §§ 934-935a (Supp. II 1978) (establishing trust fund).

1410. "Proponents of [black lung] legislation in 1979 estimated that the total cost of the program would be between \$40 [in]million and \$385 million from beginning to end." *Black Lung Benefits and Revenue Amendments of 1981, Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 2 (1981) (opening statement of Senator Nickels) [hereinafter cited as *Black Lung Hearing*]. Congress intended the Act to terminate eventually, but it gradually became a permanent program. *Id.* In 1981 the Black Lung Disability Trust Fund owed "more than \$1.5 billion . . . to the U.S. Treasury." *Id.* at 1. Senator Nickels predicts that this figure gradually will escalate to \$9 billion by 1995. *Id.*

1411. *Action Expected Next Year*, *supra* note 1395, at 2729. According to one critic, the Black Lung Act anticipates an unrealistic result. *See id.* at 2730 (statement of Representative John N. Erlenborn). Representative Erlenborn has blamed the current "less than comprehensive protection of coal miners," Kelly, *Black Lung Benefit Trusts as a Federal Self-Insurance Alternative*, 82 W. VA. L. REV. 847, 860 (1980), on a Congress warped by "the emotion associated with [environmental] diseases . . ." *Action Expected Next Year*, *supra* note 1395, at 2730. According to Representative Erlenborn, the Black Lung Act will not achieve its desired goals because Congress incorporated into the Act a "political" rather

plained that "coal companies have escaped most of their assigned costs by lobbying subsequent amendments through Congress."¹⁴¹² As a result, critics view the bill as a congressional experiment that failed.¹⁴¹³

Congress recently has considered other occupational and latent disease legislation, including Representative Robert Stafford's Environmental Poisoning Compensation Act (Toxic Pollution Act)¹⁴¹⁴ and Senator Orrin G. Hatch's Radiation Exposure Compensation Act of 1981 (Radiation Act).¹⁴¹⁵ The Stafford bill provided industry-funded compensation to persons, such as Love Canal residents,¹⁴¹⁶ who had suffered injury from toxic pollution. Senator Hatch's Radiation Act provided compensation for persons harmed by radiation exposure as a result of employment in uranium mines and atomic bomb testing in Nevada during the 1950's. The Senate Committee on Labor and Human Resources approved the Radiation Act on April 20, 1982. Many legislators, however, criticized the bill for its controversial damage clauses,¹⁴¹⁷ which im-

than a realistic definition of black lung disease, and "the political implications of what [Congress does] . . . bear much more weight than reality." *Id.*

The United States Department of the Treasury's delayed issuance of the required guidelines for implementation of the compensation program, the unexpectedly high number of claims, and other circumstances have caused a judicial backlog of cases. *See S. REP. NO. 743, 92d Cong., 2d Sess. 3; The Black Lung Benefits Reform and Revenue Acts of 1977, 80 W. VA. L. REV. 539, 542 (1978).*

One legislator has asserted that the Black Lung Act has caused "administrative nightmares." *See Black Lung Hearing, supra* note 1410, at 2 (opening statement of Senator Nickels). Senator Nickels complained that many people with bogus claims receive benefits under the Act because of the inadequacy of the Act's standards for evaluating the validity of claims. *Id.*

1412. *See Reutter, Workmen's Compensation Doesn't Work or Compensate*, 35 BUS. & SOC'Y REV. 39, 44 (1980), reprinted in *Occupational Disease Compensation and Social Security: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 97th Cong., 1st Sess. 46, 51 (1981)*. Social security programs, the Veterans Administration, and public welfare now contribute to the black lung disease compensation program. *Id.*

1413. *See, e.g., Fitzhugh, Disheartening Prospects: The Stress of Occupational Disease Cases on the Longshoremen's and Harbor Workers' Compensation Act*, 22 S. TEX. L.J. 471, 486 (1982); ASBESTOS LITIG. REP. (ANDREWS) 4864 (April 23, 1982) (statement of spokesperson for the National Association of Manufacturers); *see generally* Smith & Channon, *The Rising Storm*, 17 FORUM 139 (1982).

1414. *See supra* note 1398 and accompanying text.

1415. *See supra* note 1399.

1416. From 1930 to 1953 Hooker Chemicals and Plastics Corporation dumped 352 million pounds of chemical wastes in an area near Niagara Falls, N.Y. These wastes caused latent injuries such as cancer and birth defects to Love Canal residents. *Victim Compensation Legislation Proposed*, 40 CONG. Q. WEEKLY REP. 2732 (1982).

1417. *Id.* The bill requires public disclosure by the tobacco industry of the pesticides and chemicals in cigarettes, expands industry liability for toxic injury to persons and prop-

posed liability for radiation injuries on the federal government and private industry.¹⁴¹⁸ Although Congress failed to enact either piece of legislation, these bills represent increased legislative concern for occupational and latent disease compensation.¹⁴¹⁹

Despite recent criticism of the Black Lung Act and apparent congressional reluctance to enact legislation granting monetary benefits to victims of occupational and latent diseases,¹⁴²⁰ experts predict changes in this attitude.¹⁴²¹ Lawyers and insurance companies have asserted that if asbestos and other latent disease litigation continues its present course, it will "shake the foundations of U.S. tort laws."¹⁴²² A senior vice president of an insurance company¹⁴²³ has stated that because of the overwhelming number of claims, "[t]he (tort) system could well grind to a halt by 1984; we had better start thinking about alternatives."¹⁴²⁴ Current bankruptcy filings by asbestos companies will contribute greatly to the backlog in the courts, and lobbying organizations will continue pressuring Congress to act.¹⁴²⁵ Congress likely will enact occupational asbestos disease legislation if it finds that current remedies

erty, and requires payment of registration fees by pesticide manufacturers. For a discussion of the Bill, see *Conflicts Threaten Passage of Pesticide Bill*, 40 CONG. Q. WEEKLY REP. 2695 (1982).

1418. *Id.*

1419. The 97th Congress did pass the Veterans' Health Care, Training and Small Business Loan Act of 1981 (Veterans Health Act), see *supra* note 1397, which aids a limited number of radiation victims. The Act extends Veterans Administration medical benefits to servicemen who suffered injury by radiation exposure from nuclear weapons testing or post-World War II occupation of Japan and by exposure to Agent Orange and other defoliant and herbicides. The military used Agent Orange, or dioxin, as an experimental defoliant during the Vietnam War. Podgers, *supra* note 18, at 139. This herbicide allegedly causes cancer. *Id.*

1420. "The history of the Federal black lung law has raised strong reservations about whether, if ever, the Federal Government should interfere with State Workers' Compensation Programs." *Black Lung Hearing*, *supra* note 1410, at 2 (opening statement of Senator Nickels). Of the Toxic Pollution Act, the Radiation Act, and the Veterans' Health Act, the 97th Congress enacted only the latter. Although the Veterans' Health Act imposed liability upon the federal government, the Act compensated only veterans and provided only medical, not employment compensation.

1421. See *supra* note 1395 and accompanying text. The *Congressional Quarterly Weekly Report* and an administrative assistant to Representative Miller have stated that asbestos compensation bills currently receive more attention from Congress than they have in the past. ASBESTOS LITIG. REP. (ANDREWS) 5970 (Dec. 24, 1982).

1422. Podgers, *supra* note 18, at 139.

1423. Mr. William Bailey is senior vice president of Commercial Union Assurance Companies in Boston and chairman of the Task Force on Cumulative Trauma and Latent Injury. *Id.* at 139.

1424. *Id.*

1425. See *supra* note 1395.

for asbestos compensation claimants are inadequate.

B. Existing Statutory Remedies for Occupational Asbestos-Related Disease Claimants

Many workers who are disabled by asbestos exposure currently receive payments through state occupational disability and disease laws such as worker's compensation.¹⁴²⁶ In addition, some disabled employees receive benefits from public welfare,¹⁴²⁷ Medicare and Medicaid,¹⁴²⁸ private disability and health insurance,¹⁴²⁹ and Social Security.¹⁴³⁰ Many workers with occupational asbestos-related diseases receive monies through federal compensation programs¹⁴³¹ such as the Veterans' Benefit Act,¹⁴³² the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act),¹⁴³³ and the Federal Employees' Compensation Act (FECA).¹⁴³⁴ Present compensation programs, however, fail to provide for all employees who suffer occupational injuries from exposure to asbestos. Thus, many dissatisfied recipients of these compensation programs currently bring suits in tort against manufacturers of asbestos and asbestos products.

The Veterans's Benefit Act awards conditional gratuities to veterans injured in the course of military service and some victims of asbestos-related disease receive benefits under it. Because the

1426. ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 19.

1427. *Id.* *Paying Asbestos Damages*, *supra* note 1389, at col. 2; *see* Reutter, *supra* note 1412 (occupational disease victims receive welfare).

1428. ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 19; *Paying Asbestos Damages*, *supra* note 1389, at col. 2; *see* Note, *supra* note 1061, at 928 (occupational disease victims receive benefits under Medicare).

1429. ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 19.

1430. *Id.*; *Paying Asbestos Damages*, *supra* note 1389, at col. 2; *see* Note, *supra* note 1061, at 928 (occupational disease victims receive benefits under Social Security). *See infra* note 1465.

1431. One study has revealed that the federal government exposed approximately 55,000 government workers who worked in naval and private shipyards during the Second World War to asbestos. *Manville's Costs*, *supra* note 22, at col. 3; *see* *Paying Asbestos Damages*, *supra* note 1389, at col. 2. The federal government also exposed servicemen who lived on these ships to damaged and friable asbestos. Shipyard workers whom the federal government allegedly exposed to asbestos during the Second World War have filed one-half of the compensation claims pending against asbestos companies. *Action Expected Next Year*, *supra* note 1395, at 2731. The Department of Health, Education, and Welfare has reported that asbestos exposure occurred to 4.5 million shipyard workers during World War II. NATIONAL CANCER INSTITUTE ESTIMATES, *supra* note 13, at 1-2. For a discussion of governmental liability, *see supra* part X.

1432. 38 U.S.C. §§ 321-362 (1976 & Supp. V 1981).

1433. 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981).

1434. 5 U.S.C. §§ 8101-8150 (1976).

United States Supreme Court has held that servicemen have no cause of action against the government under the Federal Torts Claims Act,¹⁴³⁵ servicemen must file under the Veterans' Benefit Act to receive compensation. Congress intended the Veterans' Benefit Act to enable "a grateful Government to supplement the earning capacity of the veteran in civilian life proportionate to the degree of his disability which has greatly diminished that capacity."¹⁴³⁶ Injured parties forfeit this compensation for reasons that include dishonorable discharge¹⁴³⁷ and conviction for sabotage or treason.¹⁴³⁸ The government also limits the value of awarded compensation to a specific amount that depends upon the class in which the government places the injured party.¹⁴³⁹ The Act thus provides uncertain, limited compensation to injured veterans.¹⁴⁴⁰

The Longshoremen's Act¹⁴⁴¹ provides workers' compensation benefits to employees¹⁴⁴² whom private employers hire to engage in maritime work, such as loading and unloading vessels, in United States navigable waters. The federal government currently compensates some victims of asbestos-related diseases under the Longshoremen's Act¹⁴⁴³ even if the victim's work only slightly aggravated any asbestos injuries or indirectly affected the employee's asbestos exposure.¹⁴⁴⁴ The Benefits Review Board¹⁴⁴⁵ reviews administrative decisions and compensation orders regarding compensation claims filed under the Longshoremen's Act.¹⁴⁴⁶ The Act,

1435. *E.g.*, *Feres v. United States*, 340 U.S. 135 (1950); *see supra* part X.

1436. H.R. REP. NO. 2301, 79th Cong., 2d Sess. 4, *reprinted in* 1946 U.S. CODE CONG. & AD. NEWS 1461, 1464.

1437. 38 U.S.C. §§ 310, 331 (1976).

1438. *Id.* § 3504(a).

1439. Congress intended the Veterans' Benefit Act to place a ceiling on compensation. *Stencel Aero Eng'g Co. v. United States*, 431 U.S. 666, 673 (1977).

1440. For a further discussion of the Act's contingencies, *see Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1107 (1979).

1441. 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981).

1442. The term "employees" does not include seamen, who receive compensation for occupational injuries under the Jones Act. 46 U.S.C. § 688 (1976); *see supra* part X.

1443. *See, e.g.*, *McCahe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59 (3d Cir. 1979); *see also* Fitzhugh, *supra* note 1413, at 474; ASBESTOS LITIG. REP. (ANDREWS) 511 (July 31, 1979). The Veterans' Benefit Act compensates persons who suffer exposure to asbestos in federal shipyards, and the Longshoremen's Act compensates those persons exposed in private shipyards.

1444. *Amos v. Robert C. Herd & Co.*, 13 BEN. REV. BD. SERV. (MB) 1004, 1006 (1981); Fitzhugh, *supra* note 1413, at 474.

1445. The Benefits Review Board, a panel within the Department of Labor, consists of three administrative appeals judges. Fitzhugh, *supra* note 1430, at 475 n.28.

1446. The Benefits Review Board also reviews decisions and orders authorized by the

however, like other workers' compensation laws, limits benefits.

Civilian federal employees with occupational disabilities currently file claims for benefits under the FECA,¹⁴⁴⁷ which contains an exclusive liability provision¹⁴⁴⁸ limiting the total benefits that the government awards an employee who has an occupational disease and has filed for compensation. The benefits may not exceed the benefit ceiling accorded that employee under the FECA.¹⁴⁴⁹ Thus, like other typical federal workers' compensations, the FECA offers only limited compensation.

The benefits available to injured employees under state workers' compensation laws differ from state to state.¹⁴⁵⁰ These laws currently provide both medical and monetary compensation to individuals with occupational asbestos-related diseases.¹⁴⁵¹ Not all victims of occupational asbestos-related diseases, however, qualify for these benefits. Statutory restrictions and rigid proof-of-causation requirements often bar claimants from receiving compensation.¹⁴⁵² Asbestos workers' family members who contract asbestos-related diseases fail to qualify for these benefits.¹⁴⁵³ Moreover, the average worker disabled by asbestos must wait one year from the time of his disability before receiving the first compensation payment.¹⁴⁵⁴ Among the critics of the state programs is Representative Millicent Fenwick, who attacked the programs when she introduced the Asbestos Health Hazards Compensation Act¹⁴⁵⁵ in the House of Representatives.¹⁴⁵⁶ She criticized the inadequacies,¹⁴⁵⁷

Black Lung Act. See *supra* notes 1401-13 and accompanying text.

1447. 5 U.S.C. §§ 8101-8151 (1976); see *Paying Asbestos Damages*, *supra* note 1389, at col. 2. Government employees had filed 6000 asbestos compensation claims under FECA by December 1981. *Id.*

1448. 5 U.S.C. § 8116(c) (1976).

1449. *Id.* §§ 8105-8107.

1450. See *supra* part IX.

1451. ASBESTOS LITIG. REP. (ANDREWS) 4865 (Apr. 23, 1982) (statement of Mr. Robin Obetz, chairman of U.S. Chamber of Commerce's Council on Workers' Compensation).

1452. See *infra* note 1459.

1453. ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 19.

1454. UNITED STATES DEPARTMENT OF LABOR, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES 75 (1980) [hereinafter cited as INTERIM REPORT].

1455. H.R. 5224, *supra* note 1391; see *infra* notes 1469-1508 and accompanying text.

1456. 127 CONG. REC. E5860 (daily ed. Dec. 15, 1981).

1457. One observer has estimated that "over two-thirds of state workers' compensation systems replace less than forty percent of earnings lost due to permanent workplace injuries." Note, *supra* note 1061, at 925. A Department of Labor report estimates that the average workers' compensation benefit for a worker totally disabled by a job-related disease equals only one-eighth of that worker's lost income. INTERIM REPORT, *supra* note 1454, at 74. The report also states that an occupational disease victim's survivors collectively may receive only \$3,500 in cash benefits. *Id.*

inconsistencies, and burdensomeness of the remedies afforded under state laws, and asserted that the laws "fail[ed] to promote a comprehensive, unified approach to the payment of disability benefit."¹⁴⁵⁸ She added that the programs "often fail to provide coverage for the unusually long potency [sic] period of asbestos disease."¹⁴⁵⁹

Many proponents of asbestos compensation legislation have complained that all workers' compensation programs place a "great strain on the judicial system"¹⁴⁶⁰ by encouraging occupational disease victims who are discontented with these programs to flood the courts with time-consuming and expensive litigation.¹⁴⁶¹ Workers' compensation programs, they have argued, drain public medical and welfare systems¹⁴⁶² and fail to provide "prompt, adequate, and equitable compensation."¹⁴⁶³ Dissatisfied claimants who turn to nonadversarial public medical and welfare systems find that these programs, much like workers' compensation programs, often provide inadequate benefits.¹⁴⁶⁴ Some claimants fail to qualify for ben-

1458. 127 CONG. REC., *supra* note 1456, at E5860. Each state workers' compensation law has different procedural requirements and offers different benefits. *See supra* part IX.

1459. 127 CONG. REC., *supra* note 1456, at E5861. Representative Fenwick has indicated the need for greater compensation for the worker and his family an adjustment of benefits when the disease becomes less or more severe, and uniform, comprehensive coverage under federal law to assure future payment of benefits to victims. *Id.* The long latency period of asbestos-related disease causes other problems under present workers' compensation programs. For example, a worker often cannot prove that his job causally relates to his disease. ASBESTOS . . . A Social Problem, *supra* note 888, at 18. Furthermore, statutes of limitation often bar workers' claims. *See INTERIM REPORT, supra* note 1454, at 69; *supra* part IX. One critic has stated that because of the barriers to state workers' compensation programs only one-thirteenth of the persons who suffer from disabling occupational diseases receives benefits under those systems. *See Note, supra* note 1061, at 925.

1460. H.R. 5735, *supra* note 1391, § 1(b)(9).

1461. ASBESTOS LITIG. REP. (ANDREWS) 4861 (Apr. 23, 1982) (manufacturers and ACC members testified in hearings concerning asbestos litigation expenses); *see supra* note 1394 and accompanying text (estimates of the cost of asbestos litigation). Injured parties receive only one-tenth of the asbestos industry's costs for asbestos injury litigation. ASBESTOS LITIG. REP. (ANDREWS) 4861 (Apr. 23, 1982) (statement of Mr. Glenn W. Bailey, chairman of Keene Corporation).

1462. H.R. 5735, *supra* note 1391, § 1(b)(7).

1463. *Id.* § 1(b)(6).

1464. "If an occupational disease case is not compensated by workers' compensation, the person can usually obtain benefits elsewhere, although at considerably lower levels than in workers' compensation." Conley & Halpern, *Programs to Protect Workers with Occupational Diseases*, reprinted in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE & HOUSE EDUC. AND LABOR COMM., 94TH CONG., 2D SESS., PROCEEDINGS OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE CONFERENCE ON OCCUPATIONAL DISEASES AND WORKER'S COMPENSATION, 1976, at 808 (Jt. Comm. Print 1976). One report indicates that "the benefits that these programs currently provide are woefully incapable of offsetting the physical, economic and emotional losses sustained." ASBESTOS . . . A SOCIAL

efits under these programs.¹⁴⁶⁵ Claimants who are discontented with the various compensation programs, therefore, have filed thousands of products liability claims.¹⁴⁶⁶ This litigation has forced Congress to consider appropriate alternative compensation systems.

C. Asbestos Compensation Bills Proposed in the Ninety-seventh Congress

Legislators in the Ninety-seventh Congress introduced three bills that provided compensation systems for individuals who died or suffered disability from occupational exposure to asbestos.¹⁴⁶⁷ By introducing these bills, legislators attempted to solve the inadequacies of the current compensation programs that have caused dissatisfied claimants to flood the courts with expensive litigation.¹⁴⁶⁸ The bills afforded exclusive and arguably equitable compensation to asbestos litigation claimants.

1. Asbestos Health Hazards Compensation Act¹⁴⁶⁹

Representative Fenwick introduced the Asbestos Health Hazards Compensation Act (H.R. 5224) in the House of Representatives on December 15, 1981.¹⁴⁷⁰ She had introduced similar legislation in 1977¹⁴⁷¹ and 1979,¹⁴⁷² but neither these earlier bills nor the 1981 bill received much legislative support.¹⁴⁷³ The Asbestos Health Hazards Compensation Act differed from its predecessors

PROBLEM, *supra* note 888, at 19-20, 188-89. For example, in 1978 claimants received average benefits from Social Security Disability Insurance of \$3900 per year. INTERIM REPORT, *supra* note 1454, at 82.

1465. "Though the Social Security Disability Insurance Program has come to be the most frequently utilized income maintenance program for the long-term totally disabled, as many as 80% of those who are severely disabled from an occupational disease fail to meet basic eligibility requirements." ASBESTOS . . . A SOCIAL PROBLEM, *supra* note 888, at 20 n.27 (citing INTERIM REPORT, *supra* note 1454, at 80-81).

1466. See *supra* part I. Many claimants, however, do not receive adequate or consistent payments through litigation. *Manville Plans*, *supra* note 1389, at col. 5.

1467. For general background of the bills, see *supra* notes 1390 & 1393-95 and accompanying text.

1468. See *supra* notes 1426-66.

1469. H.R. 5224, *supra* note 1391.

1470. 127 CONG. REC., *supra* note 1456, at H9670.

1471. H.R. 8689, 95th Cong., 1st Sess. (1977).

1472. H.R. 27, 96th Cong., 1st Sess. (1979).

1473. ASBESTOS LITIG. REP. (ANDREWS) 4617 (Feb. 26, 1982). The 97th Congress did not hold hearings on H.R. 5224, and on December 15, 1981, Congress referred the bill to the House Committee on Education and Labor. The Committee referred the bill to the Subcommittee on Labor Standards on January 29, 1982.

in several ways. In her introduction of H.R. 5224, Representative Fenwick stated that her new bill scrutinized compensation claims to prevent potential fraud and abuse. Further, it eliminated the federal government as a responsible party¹⁴⁷⁴ and gave plaintiffs who filed lawsuits prior to the bill's enactment the option of either continuing their suits or filing under the Act for benefits.¹⁴⁷⁵

The 1981 Fenwick bill required responsible parties to pay benefits either directly to claimants eligible for compensation under the bill¹⁴⁷⁶ or to a trust fund from which a board of directors would channel benefits to eligible claimants.¹⁴⁷⁷ The Fenwick bill provided exclusive benefits "to affected persons"¹⁴⁷⁸ who become disabled as a result of an asbestos-related disease¹⁴⁷⁹ and "to the dependents"¹⁴⁸⁰ of affected persons who die from any such disease."¹⁴⁸¹ For compensation claims that accrued or arose before January 1, 1983, the bill required responsible parties to pay benefits directly to affected persons and their dependents.¹⁴⁸² To receive compensation from responsible parties eligible claimants would file for benefits "within three years after an initial medical determination of total disability or death due to asbestos-related disease, or within three years after the date of the enactment of this Act, whichever occurs later."¹⁴⁸³

For claims arising after January 1, 1983, the bill required that responsible parties pay all valid claims through the Asbestos Health Hazards Compensation Fund.¹⁴⁸⁴ A board of directors directed the Fund¹⁴⁸⁵ and determined the validity of claims.¹⁴⁸⁶ The

1474. The term "responsible parties" refers to those parties who, pursuant to each bill, fund the compensation program. H.R. 5224, *supra* note 1391, § 102(10); *see infra* notes 1504-05 and accompanying text.

1475. 127 CONG. REC., *supra* note 1456, at E5861.

1476. H.R. 5224, *supra* note 1391, § 202(a)(1).

1477. *Id.* § 203(a).

1478. The term "affected person" under H.R. 5224 refers to a worker whose occupation has exposed him or any member of his household to asbestos. *Id.* § 102(2).

1479. H.R. 5224, *supra* note 1391, § 101(b).

1480. The term "dependent" under H.R. 5224 includes a wife, widow, child, sister, brother, or parent of the affected person. *Id.* § 102(4).

1481. *Id.* § 101(b).

1482. *Id.* § 202(a)(1).

1483. *Id.* § 202(b).

1484. H.R. 5224 establishes the Asbestos Hazards Compensation Fund within the Department of Labor to satisfy all valid claims. *Id.* § 203(a). The bill provided that responsible parties would sustain the Fund with contributions. *Id.* § 204(a).

1485. *Id.* § 203(b)(1).

1486. *Id.* § 203(e). Regulations promulgated by the Secretary of Labor governed the operation of the board of directors. *Id.*

United States Secretary of Labor collected contributions from each responsible party-member of each class.¹⁴⁸⁷ Responsible parties contributed, based on their classifications, to the Fund different percentages of their net domestic sales of asbestos, cigarette tobacco, and cigarettes.¹⁴⁸⁸ If a responsible party did not contribute the payment that the bill required, the Secretary of Labor could assess a civil penalty¹⁴⁸⁹ or bring a civil action¹⁴⁹⁰ against the party. If a responsible party were no longer in its previous form or identity, its successor assumed its H.R. 5224 liability.¹⁴⁹¹ The status of the affected person¹⁴⁹² and the status and number of his dependents¹⁴⁹³ determined the amount of benefits that qualified claimants could receive under the bill. Totally disabled claimants¹⁴⁹⁴ and widows of some claimants¹⁴⁹⁵ received benefits identical to those that the FECA offers.¹⁴⁹⁶ A partially disabled claimant received less compensation, at a rate determined by the Secretary of Labor, than a person totally disabled by exposure to asbestos.¹⁴⁹⁷ A widow or disabled claimant with dependents generally received a percentage increase in benefits according to the number of the claimant's dependents.¹⁴⁹⁸ Disabled persons not eligible for payments for medical care under state workers' compensation laws received these additional monies under the bill.¹⁴⁹⁹ H.R. 5224 bene-

1487. *Id.* § 204(a)(2). For discussion of responsible party classifications, see *infra* note 1504.

1488. H.R. 5224, *supra* note 1391, § 204(b).

1489. *Id.* § 204(f)(2). Responsible parties paid into the Fund a percentage, differing by class, of net domestic sales of asbestos-containing products or cigarettes and cigarette tobacco for the quarter *fifteen years preceding* the year in which payment was made. *Id.* § 204(b) (emphasis added).

1490. *Id.* § 204(f)(1).

1491. *Id.* § 204(g)-(h).

1492. Different benefits are available in the event of the death, total disability, or partial disability. *Id.* § 206(b). See *id.* § 102(6)-(9) for definitions of various classes of disability.

1493. See *supra* note 1480 (status of dependents).

1494. H.R. 5224, *supra* note 1391, § 206(b)(3).

1495. *Id.* § 206(b)(1)-(2). But see *id.* § 206(b)(2) (if affected person had received benefits prior to death, the widow received that amount).

1496. 5 U.S.C. §§ 8101-8151 (1976). For a discussion of the FECA, see *supra* notes 1447-49 and accompanying text. H.R. 5224 benefits equaled "the minimum monthly payment to which a Federal employee in grade GS-5 of the General Schedule who is totally disabled is entitled . . . under [the FECA]." H.R. 5224, *supra* note 1391, § 206(b)(3).

1497. See H.R. 5224, *supra* note 1391, § 206(b)(4). The amount of compensation for partial disability, however, could not exceed the amount awarded for total disability. *Id.*

1498. *Id.* §§ 206(b)(5)-(6). For other situations in which a dependent's benefits increased, see *id.* § 206(b)(7) (benefits for siblings and parents of deceased affected person).

1499. *Id.* § 206(b)(8). Persons receiving state workers' compensation for medical care would have continued to receive those benefits after enactment of H.R. 5224. The Act also allowed the Secretary of Labor to establish in needed locations clinical facilities for asbes-

fits were "exclusive of and in addition to all benefits under [Social Security]." ¹⁵⁰⁰ The bill, however, reduced H.R. 5224 compensation by the amount of benefits that the claimant received under state disability insurance laws, state or federal workers' compensation, or unemployment compensation. ¹⁵⁰¹ Moreover, the Fenwick bill did not allow claimants eligible for H.R. 5224 compensation to recover damages from responsible parties, the federal government, or labor organizations. ¹⁵⁰² Benefits that a claimant received under the Fenwick bill were not taxable income. ¹⁵⁰³

Responsible parties under H.R. 5224 included business entities that import, sell, manufacture, or distribute any product or substance that contains asbestos, cigarettes, or cigarette tobacco. ¹⁵⁰⁴ The Fenwick bill classified the tobacco industry as a responsible party because an employee who both works with asbestos and smokes cigarettes has an increased risk of contracting an asbestos-related disease. ¹⁵⁰⁵

The Fenwick bill thus compensated eligible claimants by requiring the asbestos and tobacco industries to contribute either directly to claimants or to a trust fund that would distribute benefits to claimants. Claimants complained that H.R. 5224 awarded inadequate compensation. ¹⁵⁰⁶ Since the proposed Act awarded benefits identical to the payments offered under the FECA to totally disabled claimants, critics of the FECA benefits likewise were critical of H.R. 5224. ¹⁵⁰⁷ The bill also exposed the tobacco industry to

tos-related disease treatment and care. *See id.* § 306.

1500. *Id.* § 206(c).

1501. *Id.* § 206(d).

1502. *Id.* § 301.

1503. *Id.* § 206(e).

1504. *Id.* § 102(10). H.R. 5224 separated responsible parties—whether corporations, partnerships, individuals, joint enterprises, or other entities—into three classifications. Class I encompassed those parties whose handling, use, or application of asbestos likely produces asbestos dust. Class II included those parties whose handling of the mineral creates little likelihood of exposure. Class III consisted of the cigarette manufacturers. *Id.* § 102(11)(A).

1505. 127 CONG. REC., *supra* note 1456, at E5861. "[T]he combined risk for dying of lung cancer of an asbestos worker who smokes is 92 times that of an individual who neither smokes nor works with asbestos." Nicholson, *Case Study 1: Asbestos—The TLV Approach*, 271 ANNALS N.Y. ACAD. SCI., 152, 164 (1976).

1506. *See, e.g., Hazards of Asbestos Exposure: Hearings Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 58 (1982) (statement of Mr. Kowalski, employee of Johns-Manville Corporation for 19 years) [hereinafter cited as *Hazards*]. Mr. Kowalski complained that "a person has to be 100-percent disabled with three other dependents to receive \$10,000 a year." *Id.* at 61. This type of legislation, Mr. Kowalski asserted, "will not do the job or will not suit the evils caused by industry." *Id.*

1507. *See supra* notes 1447-49 & 1460-63 and accompanying text.

enormous potential liability for asbestos disease and possibly allowed other cancer victims to receive compensation from the tobacco industry. The bill, therefore, could harm the financial status of this currently sound American industry. The Fenwick bill also failed to provide for governmental liability, even though the federal government exposed many military and civilian workers to asbestos during World War II.¹⁵⁰⁸ This omission, however, probably aided rather than hindered support for the the bill.¹⁵⁰⁹

2. Asbestos Health Hazards Compensation Act of 1981¹⁵¹⁰

The Asbestos Health Hazards Compensation Act of 1981 (S. 1643) submitted by Senator Gary Hart contained provisions similar to Representative Fenwick's legislation but created more controversy.¹⁵¹¹ The proposed Hart bill established minimum standards for state and federal workers' compensation asbestos-related death or disability benefits.¹⁵¹² The bill required "responsible parties" to provide claimants with supplemental payments when the claimants' awarded benefits fell below these minimum standards.¹⁵¹³ The supplemental payments increased a claimant's total award to the level of compensation that the bill dictated.¹⁵¹⁴ Responsible parties¹⁵¹⁵ under S. 1643 included: (1) employers who expose their workers to asbestos,¹⁵¹⁶ (2) miners, manufacturers, sellers, and importers of asbestos,¹⁵¹⁷ and (3) any entity that a worker's compensation agency¹⁵¹⁸ designates as a responsible party.¹⁵¹⁹ Additionally, responsible parties could include, among

1508. See *supra* note 1431.

1509. See *infra* notes 1597-99 and accompanying text.

1510. S. 1643, *supra* note 1390.

1511. Senator Hart introduced S. 1643 on September 18, 1981. See 127 CONG. REC. S10033 (daily ed. Sept. 18, 1981) (statement of Senator Hart). He previously sponsored a similar bill in the 96th Congress. See S. 2847, 96th Cong., 2d Sess., 125 CONG. REC. S7295-99 (daily ed. June 18, 1980). The Senate referred S. 1643 to the Senate Committee on Labor and Human Resources on September 18, 1981. Ten days later the Committee referred the bill to its Subcommittee on Labor.

1512. S. 1643, *supra* note 1390, § 4(a).

1513. *Id.* § 5(b).

1514. *Id.* The other asbestos-related bills established a trust fund rather than providing for supplemental payments. See *supra* notes 1484-88 and accompanying text (discussion of H.R. 5224); *infra* notes 1583-86 and accompanying text (discussion of H.R. 5735).

1515. For a general definition of a responsible party, see *supra* note 1474.

1516. S. 1643, *supra* note 1390, § 2(10)(A)(i).

1517. *Id.* § 2(10)(A)(ii).

1518. A workers' compensation agency administers and enforces workers' compensation law. *Id.* §§ 2(12)-(13).

1519. *Id.* § 2(10)(B).

other entities,¹⁵²⁰ “the Federal Government, any State, or any public agency or a political subdivision of such Federal or State government.”¹⁵²¹ By imposing federal liability, S. 1643 drastically differed from the two other asbestos compensation bills introduced in the Ninety-seventh Congress.¹⁵²² The Hart bill imposed a three-year statute of limitations on benefit filings by claimants.¹⁵²³ Like the Fenwick legislation,¹⁵²⁴ S. 1643 allowed a party who filed suit prior to Congress’ enactment of the bill either to continue his suit or to file for S. 1643 compensation.¹⁵²⁵ If settlement or resolution of a claim occurred prior to the bill’s enactment, the claimant would receive his S. 1643 benefits less the award he received in the finalized lawsuit.¹⁵²⁶

The “minimum standards for State and Federal workers’ compensation” that the bill established¹⁵²⁷ provided an exclusive remedy¹⁵²⁸ for affected persons,¹⁵²⁹ their survivors, and dependents.¹⁵³⁰ The benefits for partially or totally disabled persons and the surviving spouses of affected persons would not be “less than [two-thirds] of the average gross weekly wage of the affected person for the highest three of the five years immediately preceding . . . disa-

1520. *Id.* § 2(10). The bill required every possible responsible party to acquire insurance. *Id.* § 11(b). The bill thereby characterized insurance companies as responsible for providing S. 1643 benefits. *Id.* § 11(c).

1521. *Id.* § 2(10)(B).

1522. For background regarding the government’s role in asbestos exposure, see *supra* note 1431. The Government Contractors’ Product Liability Act of 1981 also would have established governmental liability. See H.R. 1504, 97th Cong., 1st Sess., 127 CONG. REG. H275 (daily ed. Jan. 29, 1981). This proposed Act permitted indemnification of the government by parties who had supplied asbestos or asbestos products to the government for any liability resulting from the use of the contracted-for products. See *id.*

1523. S. 1643, *supra* note 1390, § 4(15). The bill required claimants to file for benefits “within three years after death or an initial medical determination of total disability due to the asbestos-related disease, whichever occurs first: *Provided, however,* That every claimant shall have three years after the date of enactment of this Act, within which to file a claim for benefits hereunder.” *Id.*

1524. See *supra* notes 1470-1509 and accompanying text.

1525. S. 1643, *supra* note 1390, § 16(b).

1526. *Id.* § 16(c).

1527. *Id.* § 4(a).

1528. *Id.* § 10(a). A person entitled to file for S. 1643 compensation could not subsequently file suit against a responsible party. *Id.* § 10(b).

1529. S. 1643 defined the term “affected person” as any person killed or disabled as a result of exposure to asbestos who either suffered asbestos exposure as a result of his employment or lived as a member of an asbestos-exposed worker’s household. S. 1643, *supra* note 1390, § 2(4). The bill required the Secretary of Labor to prescribe a uniform standard for determination of causation and degree of disability. *Id.* § 4(17).

1530. The term “dependent” under S. 1643 referred to the wife or child of the affected person. *Id.* § 2(7).

bility [or death]."¹⁵³¹ The Hart bill resembled the Fenwick bill¹⁵³² in that each claimant with dependents received a certain percentage increase in benefits depending upon the number of the claimant's dependents.¹⁵³³ In addition, affected persons received reasonable and necessary compensation for medical and rehabilitation expenses.¹⁵³⁴ A person who was eligible to file S. 1643 compensation could not recover damages from a responsible party.¹⁵³⁵ Additionally, benefits that S. 1643 provided did not constitute taxable income,¹⁵³⁶ and other benefits that claimants received did not reduce S. 1643 benefits.¹⁵³⁷

The bill provided that the Secretary of Labor would determine whether each state and federal workers' compensation law met the bill's minimum standards for benefit programs.¹⁵³⁸ If the Secretary found that a workers' compensation law offered compensation lower than the bill's minimum benefit standards, the Secretary "certif[ied] the law only to the extent that it [met] such standards"¹⁵³⁹ Individual parties who claimed that a specific order or award of compensation from a workers' compensation agency¹⁵⁴⁰ had fallen below the Act's minimum standards could "file a [timely] petition for review of the . . . order or award . . . with the Benefits Review Board."¹⁵⁴¹ If the Board decided that the claimant's benefits were deficient, the Board then would order the responsible party to pay directly to the claimant the supplemental payments necessary to reach the minimum level of compensation dictated by the bill plus all reasonable costs of the litigation.¹⁵⁴² The bill also provided that any responsible party paying S. 1643

1531. *Id.* §§ 4(a)(3)-(4). A claimant received benefits until either he died or the disability ended, whichever occurred first. *Id.* § 4(a)(8). A surviving spouse received benefits until he died or remarried, whichever occurred first; dependents, however, collected benefits after these events occurred. *Id.* § 4(a)(11).

1532. *See supra* note 1498 and accompanying text.

1533. S. 1643, *supra* note 1390, § 4(a)(5).

1534. *Id.* § 4(a)(9). The bill expressly did not place a limitation on the amount or duration of these benefits. *Id.*

1535. *Id.* § 10(b).

1536. *Id.* § 4(a)(19).

1537. *Id.* *But see supra* notes 119-20 and accompanying text (different rules apply when claimant files or finalizes his lawsuit prior to the enactment of the bill).

1538. For a discussion of the minimum benefits standards of S. 1643, see *supra* notes 1518-39 and accompanying text.

1539. S. 1643, *supra* note 1390, § 5(b).

1540. *See supra* note 1518 and accompanying text.

1541. S. 1643, *supra* note 1390, § 6(a). For more information on the Benefits Review Board, see *supra* notes 1445-46 and accompanying text.

1542. S. 1643, *supra* note 1390, § 6(c)(3).

compensation could petition to divide the cost between that party and other responsible parties.¹⁵⁴³

The Hart bill, therefore, compensated asbestos victims and their dependents by establishing minimum compensation standards and requiring responsible parties to supplement substandard workers' compensation awards of claimants. Unlike the Miller and Fenwick bills, S. 1643 would force the federal government to provide some of this supplemental compensation. One observer described the controversial Hart bill as "[t]he most talked-about asbestos bill now before the Congress"¹⁵⁴⁴ and as the "bill that the [asbestos industry] is pushing hard on Capitol Hill."¹⁵⁴⁵ Another observer, doubtful that the Hart bill would pass, stated that many members of Congress perceived the bill as "too much of an effort to bail out Johns-Manville."¹⁵⁴⁶ Aides to Hart stated that the Senator viewed his bill merely as a "starting point" for securing a compensation system rather than as a strict, unyielding proposal.¹⁵⁴⁷ At least one Washington official, however, believed that Congress never seriously would view an asbestos compensation bill imposing federal liability as a viable "starting point" for compensating asbestos-disease claimants.¹⁵⁴⁸

3. Occupational Health Hazards Compensation Act of 1982¹⁵⁴⁹

The Occupational Health Hazards Compensation Act of 1982 (H.R. 5735), unlike the Fenwick and Hart bills, focused on occupational exposure to both uranium ore and asbestos.¹⁵⁵⁰ Representa-

1543. *Id.* § 7(1); see *id.* § 7(2)(a) (specific rules pertaining to apportionment). The proposed Act established an Apportionment Criteria Commission to develop standards for determining apportionment proceedings. *Id.* §§ 8(a)-(b). For further information regarding the Commission and its criteria, see *id.* §§ 8(c)-(e).

1544. ASBESTOS LITIG. REP. (ANDREWS) 4617 (Feb. 26, 1982).

1545. *Id.*

1546. Podgers, *supra* note 18, at 142 (statement of Mr. William Bailey, chairman of the Task Force on Cumulative Trauma and Latent Injury, a New York City division of the American Insurance Association). Manville Corporation, successor to Johns-Manville Corporation, maintains its headquarters in Colorado. Senator Hart represents Colorado as its senior senator.

1547. ASBESTOS LITIG. REP. (ANDREWS) 4617 (Feb. 26, 1982).

1548. *Id.* at 5970 (Dec. 24, 1982) (Mr. John Lawrence, administrative assistant to Representative Miller, has asserted Congress will not enact asbestos bill that concerns federal contributions to asbestos fund).

1549. H.R. 5735, *supra* note 1391.

1550. This part of the Special Project discusses only the asbestos provisions of H.R. 5735. Congress could have expanded this bill to cover other occupational diseases. See *id.* § 17.

tive Miller introduced the bill on March 4, 1982.¹⁵⁵¹ Unlike the Hart and Fenwick proposals, the bill received considerable legislative action during the Ninety-seventh Congress and during 1982 acquired twenty-eight cosponsors.¹⁵⁵² Observers predicted that although H.R. 5735 resembled the Fenwick bill, Congress would devote more attention to the asbestos compensation scheme that Representative Miller introduced.¹⁵⁵³ The Miller proposal contained provisions that directed employers to pay benefits directly to eligible employees¹⁵⁵⁴ and, alternatively, provided persuasive incentives for employers to contribute to a trust fund from which a federal Office of Workers' Compensation Programs (OWCP) directed benefits to eligible claimants.¹⁵⁵⁵

To qualify for H.R. 5735 compensation, an employee or survivor would have to file a claim¹⁵⁵⁶ for death or disability compensation with the district OWCP within two years after the occurrence of the death or disability or within two years after the bill's enactment, whichever was later.¹⁵⁵⁷ After an investigation, the OWCP would decide whether the employee was eligible for benefits under the proposed Act and whether a last responsible employer existed.¹⁵⁵⁸ The OWCP would direct the last responsible employer to provide benefits to the claimant if the OWCP affirmatively determined eligibility.¹⁵⁵⁹ If the OWCP concluded that no last responsible employer existed, the OWCP would assign responsibility for the employee's compensation payments to the state Asbestos Compensation Excess Liability Fund, which the bill also established.¹⁵⁶⁰

The Miller bill provided exclusive benefits to employees permanently disabled¹⁵⁶¹ as the result of job-related exposure to asbestos¹⁵⁶² and to surviving spouses and children of employees who

1551. See 128 CONG. REC. E772 (daily ed. Mar. 4, 1982) (statement of Representative Miller). On the same day Congress referred the bill to the House Committee on Education and Labor, which referred it to the Subcommittee on Labor Standards.

1552. The Subcommittee on Labor Standards held hearings regarding H.R. 5735 on March 4, April 21, and April 22, of 1982. As of January 7, 1983, Congress had not printed or indexed these hearings. One cosponsor was Representative Fenwick.

1553. See, e.g., ASBESTOS LITIG. REP. (ANDREWS) 4617 (Feb. 26, 1982).

1554. H.R. 5735, *supra* note 1391, § 11(b).

1555. *Id.* §§ 12-13.

1556. The bill also encourages, but does not require, claimants to file a claim notice. *Id.* § 6(a).

1557. *Id.* § 6(b).

1558. *Id.* § 7.

1559. *Id.* § 11(b).

1560. *Id.*

1561. Permanent disability can be total or partial. *Id.* § 4(a).

1562. *Id.* § 5(a). The bill presumed that an asbestos worker's asbestos-related disease

died from exposure to asbestos.¹⁵⁶³ The bill did not provide compensation for any asbestos employee's family member whom an asbestos-related disease had disabled or killed.¹⁵⁶⁴ Claimants could receive both monetary and medical benefits under the Act.¹⁵⁶⁵ The bill provided compensation for all necessary and reasonable medical expenses and for treatment of an eligible employee's asbestos-related disease.¹⁵⁶⁶ Benefits for a partially disabled worker equalled two-thirds of his lost weekly earnings.¹⁵⁶⁷ A totally disabled worker,¹⁵⁶⁸ an employee's surviving spouse,¹⁵⁶⁹ and—if no spouse survived the employee¹⁵⁷⁰—surviving children received a monetary benefit that was “[two-thirds] of the employee's average weekly wage for the highest three of the five years immediately preceding the death or the onset of the disability.”¹⁵⁷¹ If a spouse survived, surviving children would share benefits equal to fifty percent of the H.R. 5735 benefits that the surviving spouse received.¹⁵⁷²

If prior to the bill's enactment a claimant received compensation for an asbestos-related disability under either a state workers' compensation law or the Longshoremen's Act, the claimant did not qualify for H.R. 5735 benefits.¹⁵⁷³ If a claimant had filed a compensatory lawsuit prior to the bill's enactment, any compensation that he received under the bill reduced the amount of his post-enactment judicial recovery.¹⁵⁷⁴ After enactment, the bill provided an exclusive remedy and barred victims eligible for H.R. 5735 compensation from seeking damages against their employers or against certain asbestos importers and manufacturers.¹⁵⁷⁵ Under H.R. 5735 monetary benefits awarded to persons who also received compensa-

directly resulted from occupational exposure. *Id.* § 5(b)(2).

1563. *Id.* § 4(c).

1564. *Id.* § 5(a).

1565. *Id.* §§ 4(a), 2(3)(A)-(B).

1566. *Id.* § 4(e). The bill also established a program for further research and surveillance of asbestos and other occupational diseases. *Id.* § 16.

1567. *Id.* § 4(d)(1).

1568. *Id.* § 4(b).

1569. *Id.* § 4(c).

1570. *Id.* § 4(c)(4).

1571. *Id.* § 4(b). The benefits that the claimant received during the first four years nevertheless could exceed 200% of the average salary in the United States, *id.* § 4(b)(1), or fall below 50% of the average national wage or the claimant's actual wage, *id.* § 4(b)(2).

1572. *Id.* § 4(c)(1); see *supra* note 1570 and accompanying text.

1573. H.R. 5735, *supra* note 1391, § 5(a)(3).

1574. *Id.* § 9(b)(3).

1575. See *id.* § 9(c). But see *id.* § 12(b)(6) (only importers and manufacturers who contributed to the Bill's Compensation Excess Liability Fund would have § 9 immunity from third party liability).

tion from Social Security constituted income.¹⁵⁷⁶

Prior to sponsoring H.R. 5735, Representative Miller stated that he refused to protect asbestos corporations¹⁵⁷⁷ and did not want taxpayers to "bail out" the asbestos industry.¹⁵⁷⁸ Representative Miller alleged that members of major asbestos corporations knew over fifty years ago that exposure to asbestos caused lung disease¹⁵⁷⁹ and, nonetheless, engaged in a massive cover-up of the ill effects of asbestos exposure. He concluded, therefore, that asbestos manufacturers, not the federal government, should be responsible for compensation of asbestos victims.¹⁵⁸⁰ Predictably, H.R. 5735 created no liability for federal or state government.¹⁵⁸¹ Under the bill the worker's last employer was "responsible" for compensation *only if* for a minimum of two years the employee had worked for the last employer *and* the last employer had exposed that worker to asbestos.¹⁵⁸² If a court could not find the last employer "responsible" for compensation the proposed Act assigned liability for the payments to the Asbestos Compensation Excess Liability Fund.¹⁵⁸³ Annual contributions from manufacturers and importers of asbestos and asbestos products¹⁵⁸⁴ and from employers who exposed their workers to asbestos fibers¹⁵⁸⁵ sustained the Fund.¹⁵⁸⁶

1576. H.R. 5735 *supra* note 1391, § 4(g)(1).

1577. ASBESTOS LITIG. REP. (ANDREWS) 282 (May 15, 1979).

1578. *Id.*

1579. *Id.* See *Hazards, supra* note 1506, at 6; I. SELIKOFF & D. LEE, *supra* note 10, 20, 21 n.16.

1580. ASBESTOS LITIG. REP. (ANDREWS) 278-81 (May 15, 1979). Representative Miller stated that the corporations recklessly and unnecessarily exposed their workers to asbestos when "the hazards were well known to industry." *Id.* at 282. "[T]he state of medical . . . and industry knowledge . . . of the hazards of asbestos fibers may be contended to be sufficient to impute a 'duty to warn' and a 'duty to test' to the manufacturers of asbestos products . . ." ATTORNEY GENERAL'S REPORT, *supra* note 31, at 46. Even in the 1970's industry took "relatively few precautions" to prevent asbestos exposure. *Hazards, supra* note 1506, at 6.

1581. See H.R. 5735, *supra* note 1391, §§ 11(b) & 2(5).

1582. *Id.* § 11(b).

1583. *Id.* For specific provisions regarding the Fund, see *id.* § 12.

1584. H.R. 5735, *supra* note 1391, § 12(b)(2)(A)(i). The amount of contributions from each manufacturer or importer depended on its overall market share of asbestos and asbestos product sales during the previous 15 years. *Id.* § 12(3)(A).

1585. *Id.* § 12(b)(2)(A)(ii). The state insurance commissioner determined the appropriate amount for each employer to contribute, based on size, type, and other characteristics of the employer's enterprise. *Id.* § 12(b)(4).

1586. If the manufacturer, importer—or its successor—refused to contribute, the Secretary of Labor could bring a civil action or assess a civil penalty against that party. H.R. 5735, *supra* note 1391, § 12(b)(3)(C). Refusal to contribute also might subject that party to third party liability. See *supra* note 1575 and accompanying text.

The bill required all responsible employers to maintain sufficient insurance to secure any H.R. 5735 compensation payments.¹⁵⁸⁷ If an employer failed to compensate a successful claimant, the OWCP would order the employer to resume paying the compensation and to pay, subject to a twenty percent rate of interest, all benefits that the employer previously had withheld from that claimant.¹⁵⁸⁸ In addition, a court could levy civil penalties against an employer.¹⁵⁸⁹ If an employer or a manufacturer or importer of asbestos or asbestos products were to refuse to contribute to the H.R. 5735 trust fund, that party did not receive H.R. 5735 immunity from third party liability.¹⁵⁹⁰

The Miller bill, therefore, compensated asbestos-disease victims by requiring that last responsible employers compensate victims and that employers and the asbestos industry contribute to a trust fund created to disburse payments to successful claimants. The asbestos industry, insurance companies, and others have criticized the Miller bill for containing inaccurate medical presumptions and for placing a heavy monetary burden on the asbestos industry.¹⁵⁹¹ Nevertheless, the Ninety-seventh Congress showed more

1587. See H.R. 5735, *supra* note 1391, § 10(a)(1)

1588. *Id.* § 13(c)(1).

1589. *Id.* § 12(b)(3)(C)(ii).

1590. *Id.* § 12(b)(6).

1591. Mr. G. Earle Parker, senior vice president of Manville Corporation and a representative of the Asbestos Compensation Coalition, criticized the presumption of the drafters of H.R. 5735 that asbestos exposure causes all lung cancer of claimants. Mr. Parker stated, "It seems unfair to place total responsibility on asbestos, when other causes may be equally or even more responsible." *ASBESTOS LITIG. REP. (ANDREWS)* 4862 (Apr. 23, 1982). Mr. Glenn W. Bailey, chairman of Keene Corporation, had other objections to the bill. He said that contrary to provisions in H.R. 5735, his corporation wanted (1) contributions to a compensation fund by the federal government and the tobacco industry; (2) firm and detailed medical standards and guidelines to establish compensation eligibility of claimants; and (3) no uranium ore coverage. *Id.* at 4863.

Mr. J. Howard Bunn, Jr., vice president of the National Association of Independent Insurers, criticized the Miller bill on the ground that its enactment would result in "federal usurpation of the existing state compensation systems for occupational diseases." *Id.* at 4864. Mr. Bunn also asserted that the bill "would interfere with the state regulation of insurance," and emphasized that the bill would be expensive. *Id.*

The National Association of Manufacturers (NAM) and the United States Chamber of Commerce also opposed Representative Miller's bill. NAM spokesmen stated that an asbestos-producing corporation could not possibly give warning to every actual asbestos user. They stated that H.R. 5735 presumed false facts and relied on outdated medical and scientific knowledge. *Id.* Mr. Robin Obetz, chairman of the Chamber of Commerce's Council on Worker's Compensation, criticized the bill as unnecessary because the state workers' compensation system "already provides cash benefits and medical assistance to individuals with job-related disabilities." *Id.* at 4865. Mr. Obetz added that "[t]he provision for an exclusive remedy against product manufacturers raises constitutional questions, as does the provision

interest in this bill than in the proposals that Representative Fenwick and Senator Hart sponsored.

D. Analysis

Previous legislation regarding occupational and latent disease compensation will serve as a model for future asbestos-related measures. Although Congress has not enacted most of the legislation that likely will resemble the asbestos-related bills,¹⁵⁹² it did develop a black lung disease compensation program for coal miners. Legislators have used this measure in drafting asbestos disease compensation bills. The controversial aspects of the Black Lung Act, including high costs for both industry and the federal government, unrealistic legislative goals, inadequate benefits to miners, administrative problems, and a backlog of claims,¹⁵⁹³ however, could deter Congress from passing any similar legislation.¹⁵⁹⁴

The three asbestos compensation bills that Representative Fenwick, Senator Hart, and Representative Miller proposed in the Ninety-seventh Congress likely also will serve as models for any future legislative solutions. Two major differences existed among these bills: which parties would make payments based on their liability for asbestos disease compensation and how the legislative scheme would administer the compensation payments. Parties liable for compensation under the Fenwick bill included businesses that import, sell, manufacture, or distribute products which contain asbestos, cigarette tobacco, or cigarettes. The bill required these business entities to contribute either directly to claimants or to a trust fund that a board of directors and the Secretary of Labor then would use to compensate victims. Congressmen may oppose the Fenwick bill because it gave claimants awards that were identical to the payments which the government provides under federal workers' compensation and, thus, did not solve the problem of inadequate federal workers' compensation. The Fenwick bill also required controversial payments from the tobacco and cigarette industries. The controversy centers around arguments that smoking merely increases the chances of contracting an asbestos-related

requiring officials in state governments to set up and operate excess liability funds." *Id.*; see H.R. 5735, *supra* note 1391, §§ 9(a) (exclusivity provision), 12 (excess liability fund section).

1592. Congress did pass the Veterans' Health Act. See *supra* note 1397 and accompanying text.

1593. See *supra* notes 1411-13 and accompanying text (criticism of Black Lung Act).

1594. But see *supra* notes 1395 & 1421 and accompanying text (Congress may enact future asbestos legislation).

disease and that claimants, therefore, could not meet proof-of-causation requirements in cases against members of the tobacco and cigarette industries. These industries argue that asbestos exposure alone can cause the disease, whereas use of tobacco products alone cannot. The Fenwick bill, however, presumed that if an employer exposes a smoking worker to asbestos, both asbestos and tobacco caused the disease. Injured victims of asbestos disease typically have sought recovery only against the asbestos industry, not against the tobacco and cigarette industries. If legislation deems the tobacco and cigarette industries liable, some critics would attack the proposed Act for partially bailing out the asbestos industry. Others argue that if the tobacco industry is liable, the bill also should have rendered liable other entities that have contributed to the development of asbestos-related diseases, including employers who exposed their employees to asbestos but who are not liable under the bill and the federal government. The bill's trust fund also could cause problems: creating the board of directors to direct the fund would be expensive; the Secretary of Labor probably would lack the necessary expertise to process asbestos claims; and the administrative problems inherent in the Black Lung Act's trust fund likewise could plague the asbestos trust fund. Consequently, Congress likely will refuse to pass future legislation modeled after the Fenwick bill. Indeed, because Representative Fenwick no longer serves as a member of the House of Representatives, she will not have the opportunity to introduce a similar bill in the Ninety-eighth Congress.

The Hart bill compensated asbestos victims and their dependents by establishing minimum compensation standards and requiring employers, the asbestos industry, the federal government, and other parties which workers' compensation agencies designate to supplement claimants' workers' compensation awards that fall below those standards. The Secretary of Labor would determine whether each workers' compensation law met the bill's minimum benefit level, would certify the laws only to that extent, and would demand that responsible parties supplement the workers' compensation of individual claimants. Although the bill did not create any new agencies, critics may observe that the Secretary of Labor probably lacks the expertise to administer asbestos claims. The bill's imposition of federal liability, however, promised to be its most controversial aspect. The government exposed thousands of workers to asbestos during the Second World War. Currently, the doctrine of sovereign immunity shields the government from liability.

The Hart bill forced taxpayers to assume part of the financial burden borne, until now, by the asbestos industry. Critics argue that liability should rest solely on the asbestos industry, which knew for over fifty years about the ill effects of asbestos exposure but continued to manufacture and market asbestos without publicly releasing the information. In view of these considerations, a budget-minded Ninety-eighth Congress likely will not pass legislation that provides for governmental liability.¹⁵⁹⁵

Representative Miller's Occupational Health Hazards Compensation Act of 1982, although not as popular with the asbestos industry as the Hart bill, received more legislative action and co-sponsor support in the Ninety-seventh Congress than did the Hart and Fenwick bills. The Miller bill compensated asbestos victims and their survivors¹⁵⁹⁶ by requiring that victims' last responsible employers pay benefits, and that other employers and the asbestos industry contribute to a trust fund designed to disburse compensation to victims. The bill avoided the problems of the Black Lung Act's trust fund by mandating that the OWCP direct the fund and channel payments to claimants. The Act thus created no new federal agencies.

The Miller bill, however, placed a heavy burden on the asbestos industry because it did not impose liability on the federal government or on the cigarette and tobacco industries. Placing the entire burden on the asbestos industry may be inappropriate. Of the thirteen million workers exposed to asbestos since the 1940's, over one-third worked in government-owned or -controlled shipyards.¹⁵⁹⁷ A compensation program must include federal government contribution if it is to reflect the government's substantial role in the asbestos problem. Federal government contribution should be limited, however, to those situations in which the government is directly responsible for the disability. For example, gov-

1595. Congress similarly would oppose the Asbestos Compensation Coalition's proposed Occupational Disease Compensation Act, *see supra* note 1394 and accompanying text, because the proposed Act required the federal government to finance 50% of the Act's trust fund, *see id.*

1596. Some legislators have criticized the Miller proposal for failing to provide compensation for workers' family members who contract the disease themselves. Arguably, however, the family members would not be suffering from an "occupational" disease within the meaning of the statute.

1597. *H.R. 5735 Hearings, supra* note 13, at 132 (statement of Mr. Harry Martens, executive vice president, Commercial Union Insurance Companies, Inc.). Keene Corporation estimates that employees of the United States government shipyards account for 40% of the claims brought against it. *Id.* at 98 (statement of Mr. Glenn W. Bailey, chairman, Keene Corporation).

ernment liability would be appropriate when the government procured the asbestos products or services, the asbestos industry manufactured the products pursuant to government contract specifications, the government resold stockpiled asbestos or asbestos-containing products, or the government controlled or supervised the workplace.¹⁵⁹⁸ Although Congress must be careful to avoid the pitfalls of legislation like the Black Lung Act, a failure to include government contribution in a compensation program arguably would be an abdication of responsibility for the government's part in the asbestos problem. The tobacco industry also should contribute to a legislative compensation program. Studies reveal that an asbestos worker who smokes is fifty-three times more likely to contract lung cancer than a nonsmoking worker.¹⁵⁹⁹ Although identifying the proper extent of cigarette manufacturer participation in a compensation plan will be difficult, failure to include the tobacco industry would disregard its share of responsibility for asbestos-related illness. Even though the asbestos industry must contribute the largest portion to any compensation program to shoulder its proper share of the burden, Congress should consider enacting an asbestos compensation program that requires contribution of the federal government, the insurance industry, and the tobacco industry.

Representative Miller plans to continue campaigning for his proposal. Of the three asbestos bills that legislators introduced in the Ninety-seventh Congress, Representative Miller's legislation has the greatest chance for success. Since the bill's compensation program creates no new federal agencies, it would be inexpensive and create few administrative problems. The bill imposed liability on the same parties that the courts usually find liable for asbestos-disease compensation—members of the asbestos industry. Congress is not likely to pass legislation that forces taxpayers to compensate victims of asbestos exposure. Unless members of the Ninety-eighth Congress propose alternative legislation that is more favorable to claimants, the federal government, and industry, or the courts establish a universal remedy,¹⁶⁰⁰ Representative Miller's asbestos bill probably will control future asbestos-related disease

1598. *See id.* at 274 (letter from Mr. William C. McLaughlin, president, Asbestos Compensation Coalition).

1599. *Id.* at 133 (statement of Mr. Harry Martens, executive vice president, Commercial Union Insurance Companies, Inc.). For an analysis of the relationship among smoking, asbestos, and lung cancer, see I. SELIKOFF & D. LEE, *supra* note 10, at 324-29.

1600. *See supra* part I.

compensation claims.

E. Summary

Justice Frankfurter stated over thirty years ago that "[l]egislation is needed which will effectively meet the social obligations which underlie the incidence of occupational disease."¹⁶⁰¹ Sponsors of the asbestos compensation bills in the Ninety-seventh Congress attempted to fulfill this need by pioneering legislative solutions to the current judicial nightmare of occupational and latent disease lawsuits. Despite current congressional reluctance to provide legislative assistance to victims of occupational and latent diseases and strong criticism of the Black Lung Act, the Ninety-eighth Congress may well enact asbestos compensation legislation similar to Representative Miller's Occupational Health Hazards Compensation Act of 1982.

XII. BUSINESS ALTERNATIVES

The decision of the United States Court of Appeals for the Fifth Circuit in *Borel v. Fibreboard Paper Products Corp.*¹⁶⁰² has had an extraordinary effect on asbestos-related litigation. In *Borel* the Fifth Circuit ruled that courts may hold manufacturers of asbestos products jointly and severally liable for failure to provide warnings regarding the dangers of asbestos use and exposure.¹⁶⁰³ The numerous sufferers of asbestos-related health problems enthusiastically have embraced this expanded liability¹⁶⁰⁴—thousands have already filed suit against manufacturers of asbestos products,¹⁶⁰⁵ and because of the latent nature of asbestos-related dis-

1601. *Urie v. Thompson*, 337 U.S. 163, 197 (1949) (Frankfurter, J., concurring in part).

1602. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *see supra* part II.

1603. Lanzone, *Asbestos Litigation: Common Sense or Common Disaster*, 54 N.Y. ST. B.J. 24 (1982).

1604. Professors Selikoff and Hammond have linked ingested asbestos fibers to numerous asbestos-related diseases, including mesothelioma, asbestosis, and cancer of the lung, esophagus, colon, rectum, larynx, kidney and stomach. I. SELIKOFF & E. HAMMOND, *supra* note 10, at 114.

1605. The major corporations engaged in the asbestos industry are the defendants in thousands of asbestos-related health lawsuits: Manville Corporation, as of August 1982, approximately 16,500 suits, *Oversight Hearing, supra* note 16, at 19, 20 (statement of Mr. G. Earle Parker, senior vice president, Manville Corporation); UNR Industries, as of April 1982, approximately 12,000 suits, ASBESTOS LITIG. REP. (ANDREWS) 5261 (JULY 23, 1982); Amatex Corporation, as of November 1982, approximately 10,000 suits, *id.* at 5765 (Nov. 12, 1982); Forty-Eight Insulations, Inc., approximately 13,000 suits, Sorenson, *A Small Firm's Answer to Suits Over Asbestos*, Wall St. J., Sept. 24, 1982, at 23, col. 3. Smaller companies

eases,¹⁶⁰⁶ the number of future lawsuits likely will soar.¹⁶⁰⁷ Regardless of the exact number, however, the suits have resulted in a substantial investment of time and money by injured workers, manufacturers and distributors of asbestos products, insurance companies, and the court system in an array of counter-claims, cross-claims, and third party claims.

The immense cost of litigation and the spectre of the effect on the financial statements from actual and contingent judgments for the plaintiffs have led the asbestos industry to seek business alternatives to improve its financial situation. The common goal of the manufacturers and distributors of asbestos and related products is to emerge from the legal and moral controversies surrounding the asbestos litigation as viable, profit-producing entities. This part of the Special Project presents and analyzes the mechanisms and strategies used by these companies in their struggle to overcome the mounting costs and burdens of asbestos litigation. Section A discusses Chapter 11 reorganization¹⁶⁰⁸ and analyzes particular problems that arise when asbestos companies file under Chapter 11. Section B considers the relationship of the successor liability doctrine to other creative corporate reorganizations and analyzes the doctrine's possible application to asbestos cases.¹⁶⁰⁹ Finally, section C examines and analyzes various defensive strategies implemented by asbestos manufacturers.¹⁶¹⁰

A. Chapter 11 Reorganization

The Bankruptcy Reform Act of 1978¹⁶¹¹ (Bankruptcy Code) provides two options to debtors who cannot meet their obligations:

such as Pacor, Inc. estimate total pending or settled lawsuits at 2500. *The Tennessean*, Nov. 29, 1982, at 5, col. 6.

1606. *See supra* part VIII.

1607. The study upon which Manville Corporation based its bankruptcy filing indicates that future asbestos-related lawsuits will number approximately 45,000; the corporation estimates at least 30,000 suits and at most 120,000 suits. A. M. WALKER, PROJECTIONS OF ASBESTOS-RELATED DISEASE, 1980-2009 (Epidemiology Resources, Inc. 1982), reprinted in *Oversight Hearing*, *supra* note 16, at 50. Another source estimates the number of new asbestos-disease victims at 8000-10,000 per year for the rest of the century. *See* Editorial, *The Asbestos Mess*, *Wash. Post*, Apr. 27, 1982, at A18, col. 1. The Asbestos Committee, appointed on October 8, 1982, pursuant to order of the Bankruptcy Court for the Southern District of New York, sharply disagrees with Manville's numbers because Manville has based its projections on possibilities under certain unguaranteed circumstances. ASBESTOS LITIG. REP. (ANDREWS) 5786 (Nov. 12, 1982).

1608. 11 U.S.C. §§ 1101-1174 (1976 & Supp. V 1981).

1609. *See infra* notes 1778-1834 and accompanying text.

1610. *See infra* notes 1835-53 and accompanying text.

1611. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

Chapter 7¹⁶¹² liquidation proceedings or Chapter 11¹⁶¹³ reorganization proceedings. Chapter 7 liquidation generally requires that a debtor relinquish all his assets to his creditors in exchange for a discharge of his debts; as a result, the debtor's business ceases. Alternatively, Chapter 11 reorganization allows a debtor to discharge his debts based on a plan of reorganization in which creditors, either by consent or through the operation of protective provisions,¹⁶¹⁴ accept less than the full amount of their debts. In reorganization, the debtor's business continues in a modified form, and the creditors receive payments from the future earnings of the reorganized business.¹⁶¹⁵

Currently, three asbestos manufacturers—Unarco, Manville Corporation, and Amatex Corporation—have filed for Chapter 11 reorganization.¹⁶¹⁶ The following analysis of Chapter 11 procedures¹⁶¹⁷ presents a synopsis of the statutory provisions, discusses the reasoning behind the decision to pursue a Chapter 11 reorganization, and addresses the controversy surrounding the unprecedented use of Chapter 11 reorganization by companies that arguably remain financially sound.

1. The Statutory Process of Chapter 11

A debtor may invoke the provisions of Chapter 11 by filing a voluntary petition for reorganization.¹⁶¹⁸ Much controversy, how-

1612. 11 U.S.C. §§ 701-766 (1976 & Supp. V 1981).

1613. *Id.* §§ 1101-1174.

1614. *See id.* § 1129.

1615. Elfin, *Business Reorganization Under the New Bankruptcy Code*, 12 PAC. L.J. 163, 164 (1980).

1616. All three manufacturers filed for Chapter 11 reorganization during the latter half of 1982: UNR Industries and several subsidiaries, including Unarco, on July 29, 1982, in the Bankruptcy Court for the Northern District of Illinois, *see* ASBESTOS LITIG. REP. (ANDREWS) 5321 (N.D. Ill. Aug. 13, 1982) (letter from Mr. Malcolm Gaynor, Counsel for Unarco, to asbestos plaintiff attorneys); Manville Corporation and many of its subsidiaries on Aug. 26, 1982, in the Bankruptcy Court for the Southern District of New York, *In re Johns-Manville Corp.*, No. 82 B 11656, *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 5397 (Bankr. S.D.N.Y. Aug. 27, 1982); Amatex Corporation on Nov. 1, 1982, in the Bankruptcy Court for Philadelphia, Pennsylvania, *In re Amatex Corp.*, No. 82-05220, *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) 5812 (Bankr. E.D. Pa. Nov. 12, 1982).

1617. This part of the Special Project does not discuss the Chapter 11 provisions applicable to individual debtors.

1618. *See* 11 U.S.C. § 301 (1976 & Supp. V 1981). Creditors also may commence Chapter 11 reorganizations by involuntary petitions. *See id.* § 303(a)-(b). Involuntary petitions are beyond the scope of this part of the Special Project. This part discusses only those Chapter 11 provisions pertinent to asbestos manufacturers—the automatic stay, creditors committees, management of the debtor's business, and the reorganization plan. For a detailed discussion of involuntary Chapter 11 reorganizations, *see* Elfin, *supra* note 1615;

ever, has developed concerning the financial conditions and circumstances that properly should entitle a debtor to voluntary reorganization.¹⁶¹⁹ The controversy also extends to the legal consequences of a voluntary petition under Chapter 11, which include a stay of all creditors' actions against the debtor, the appointment by the court of committees of creditors, the management of the business during the reorganization period, and the court's determination of a suitable plan for reorganization.

a. Stay of Actions

The filing of a petition for reorganization immediately stays¹⁶²⁰ almost all actions¹⁶²¹ against the debtor. To allow time for the debtor to create and implement a repayment or reorganization plan, the stay halts all collection efforts, harrassment, and foreclosure actions by creditors.¹⁶²² The automatic stay also protects creditors from a race for the debtor's assets: those creditors who act fastest cannot obtain payment of claims in preference to and to the detriment of others.¹⁶²³ The stay automatically enjoins the commencement or continuation of judicial proceedings,¹⁶²⁴ efforts to enforce judgments,¹⁶²⁵ or efforts to create, perfect, or enforce liens.¹⁶²⁶ The stay, however, is not permanent: it continues until the court closes or dismisses the case or until the court grants or denies a discharge.¹⁶²⁷ In addition, a party in interest may institute a proceeding in the bankruptcy court to obtain relief from the stay.¹⁶²⁸ One of the most controversial aspects of the automatic

Moller, *Chapter 11 of the 1978 Bankruptcy Code or Whatever Happened to Good Old Chapter XI?*, 11 ST. MARY'S L.J. 437 (1979); Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy Code*, 34 BUS. LAW. 1309 (1979).

1619. See *infra* notes 1700-42 and accompanying text.

1620. 11 U.S.C. § 362(a) (1976 & Supp. V 1981).

1621. Actions excepted from the stay include criminal proceedings against the debtor, *id.* § 362(b)(1), actions for alimony, *id.* § 362(b)(2), governmental proceedings to enforce a police or regulatory power, *id.* § 362(b)(4), and the issuance to the debtor of a notice of tax deficiency, *id.* § 362(b)(8).

1622. H.R. REP. No. 595, 95th Cong., 2d Sess. 340, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6296-97.

1623. *Id.*, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6296-97.

1624. 11 U.S.C. § 362(a)(1) (1976 & Supp. V 1981).

1625. *Id.* § 362(a)(2).

1626. *Id.* § 362(a)(4)-(5).

1627. *Id.* § 362(c). Actions against property of the estate continue until the property is no longer property of the estate. *Id.*

1628. *Id.* § 362(d). A creditor may seek termination, annulment, modification, or conditioning of the stay for cause, including lack of adequate protection of the interest of a secured creditor. A court also may grant relief if the debtor does not have an equity interest

stay provision concerns whether the stay affects only those portions of cases relating to the debtor, or whether it halts entire cases associated with the debtor.¹⁶²⁹

b. Appointment of Committees

The Bankruptcy Code authorizes courts to appoint committees representing the various types and categories of creditors; for example, the court must appoint a committee of unsecured creditors as soon as practicable after the filing of a reorganization petition.¹⁶³⁰ The membership of the committees ordinarily is voluntary and includes the creditors who hold the seven largest claims against the debtor in a particular category.¹⁶³¹ The Bankruptcy Code authorizes these committees to take many of the actions necessary to effect a reorganization, including the right to participate in the formulation of a reorganization plan,¹⁶³² to request the appointment of a trustee if the court has not already appointed one,¹⁶³³ and to employ attorneys, accountants, or other agents to represent or perform services for the committee.¹⁶³⁴ A committee also may "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."¹⁶³⁵

in the property and if the property is not necessary for an effective reorganization. *Id.* The party requesting relief has the burden of proof on the issue of the debtor's equity in the property, while the trustee or debtor has the burden of proof on all other issues. *Id.* § 362(g)(1)-(2). A preliminary hearing on the request for relief from the stay must be commenced within 30 days after the request, or the stay automatically will cease for the party making the request. *Id.* § 362(e). If a reasonable likelihood exists that the party opposing relief from the stay will prevail at the final hearing, which must begin within 30 days after the preliminary hearing, *id.* § 362(e)(2), then the court must order the stay continued, *id.* § 362(e)(1). If the final hearing does not begin within the specified time, *id.* § 362(e)(2), then the automatic stay will cease for the party requesting relief. Elfin, *supra* note 1615, at 174.

1629. See *infra* notes 1743-62 and accompanying text.

1630. 11 U.S.C. § 1102(a)(1) (1976). As a result, a reorganization proceeding will have at least one committee. The court may appoint additional committees of creditors or of equity security holders at the request of a party in interest. *Id.* § 1102(a)(2). The United States trustee also may appoint these committees. *Id.* § 1102(a).

1631. *Id.* § 1102(b)(1)-(2). If the membership of a committee is not representative of the different kinds of claims appropriate to the committee, the court may change the committee's membership or size upon the request of a party in interest. *Id.* § 1102(c).

1632. *Id.* § 1103(c)(3).

1633. *Id.* § 1103(c)(4).

1634. *Id.* § 1103(a).

1635. *Id.* § 1103(c)(2).

c. Management of Business

Since a business entity must continue to function during the reorganization process, the Code presumes that the old management will carry on the business¹⁶³⁶ as the "debtor in possession" of the property.¹⁶³⁷ Otherwise, the court may appoint a United States trustee¹⁶³⁸ to manage the business,¹⁶³⁹ but only for cause, upon request of a party in interest, and after notice and a hearing.¹⁶⁴⁰ If the court does not appoint a trustee upon the request of a party in interest, then it must order the appointment of an examiner for investigatory purposes.¹⁶⁴¹

In Chapter 11 reorganizations, the automatic stay protections alone do not ensure the survival of an insolvent corporation, for it must obtain funds for ongoing operations. The court rarely intercedes in the operation of the business and leaves this authority to the creditors' committees, the United States trustee, and the creditors themselves.¹⁶⁴² The debtor's need to obtain funds and the concomitant lack of direct court supervision has led at least one commentator¹⁶⁴³ to warn parties in interest to be very watchful for abuses of these privileges to avoid dissipation of assets.¹⁶⁴⁴

1636. Moller, *supra* note 1618, at 460.

1637. Elfin, *supra* note 1615, at 171; see 11 U.S.C. § 1107 (1976) (debtor in possession has all the rights and powers of a trustee serving under Chapter 11).

1638. See 11 U.S.C. §§ 321 (eligibility to serve as trustee), 322 (qualification of trustee), 323 (role and capacity of trustee) (1976 & Supp. V 1981).

1639. See *id.* § 1108. The court may appoint a trustee if the appointment is in the interest of the creditors, any equity security holders, and other interests of the estate. *Id.* § 1104(a)(2).

1640. *Id.* § 1104(a). Cause includes fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after commencement of the case. *Id.* § 1104(a)(1).

1641. "Investigatory purposes" include "investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor." *Id.* § 1104(b).

1642. See Moller, *supra* note 1618, at 447.

1643. *Id.*

1644. For example, under the old Chapters X and XI of the Bankruptcy Act, a debtor could not incur any secured or unsecured credit without court approval. Under the Bankruptcy Code, however, a debtor or trustee may obtain unsecured credit *in the ordinary course of business* without court approval, and these debts automatically may become a first priority as an administrative claim. 11 U.S.C. § 364(a) (Supp. V 1981). To protect current lienholders, the Bankruptcy Code stipulates that the debtor may obtain secured credit only with court approval. See *id.* § 364(c). After notice and a hearing, the court may authorize credit secured by a senior or equal lien, but only if the court provides adequate protection for the affected lienholder. *Id.* § 364(d)(1).

Obtaining credit through the use of a secured party's collateral is beyond the scope of this part of the Special Project. For discussions of this subject, see Elfin, *supra* note 1615, at

d. Plan of Reorganization

The most crucial part of a Chapter 11 proceeding is the plan by which the debtor will implement the reorganization. For 120 days after the date of the order for relief, the debtor in possession has the exclusive right to file a plan of reorganization.¹⁶⁴⁵ If the debtor files a plan within the 120-day period, no one else may file a plan during an additional sixty-day period and the debtor may seek the acceptances of each class of creditors affected by the plan.¹⁶⁴⁶ If the court appoints a trustee to carry on the business operations, then any party in interest, including the debtor, may file a plan of reorganization.¹⁶⁴⁷

To permit a smooth process of reorganization without adversely affecting important creditor interests, the Bankruptcy Code provides that the reorganization plan must classify claims¹⁶⁴⁸ and may group together substantially similar claims.¹⁶⁴⁹ The plan must treat all claims within each class equally, unless a particular creditor agrees to different treatment.¹⁶⁵⁰ Although the plan must accommodate priority claims,¹⁶⁵¹ it may impair any class of secured or unsecured claims or interests,¹⁶⁵² even by providing for a total or partial liquidation of the debtor's assets.¹⁶⁵³ Before the debtor solicits postpetition acceptance of the plan from creditors, the debtor must submit a disclosure statement for court approval.¹⁶⁵⁴ The disclosure statement must contain "adequate information," which the

174-76; Moller, *supra* note 1618, at 448-54.

1645. 11 U.S.C. § 1121(b) (1976).

1646. *Id.* § 1121(c)(3). Upon a showing of cause, the court may reduce or increase these periods, but only upon request of a party in interest and after notice and a hearing. *Id.* § 1121(d).

1647. *Id.* § 1121(c)(1). When submitting a plan, parties in interest always should remember that the debtor in a voluntary case has the option to convert to liquidation under Chapter 7. *Id.* § 1112(a). Although the creditors may petition to convert back to Chapter 11, *id.* § 706(b), they will not necessarily elicit the debtor's cooperation. Elfin, *supra* note 1615, at 177-78; Moller, *supra* note 1618, at 465.

1648. *Id.* § 1123(a)(1). The plan must specify any classes that it will not impair, *id.* § 1123(a)(2), and specify the treatment these classes will receive, *id.* § 1123(a)(3).

1649. 11 U.S.C. § 1122(a) (1976). Small, dissimilar unsecured claims may compose a class if the court approves this treatment as reasonable and necessary for administrative convenience. *Id.* § 1122(b).

1650. *Id.* § 1123(a)(4).

1651. *Id.* § 1129(a)(9). For a more detailed discussion of this requirement, see Moller, *supra* note 1618, at 466-67. *But cf.* Elfin, *supra* note 1615, at 178-79 (the plan "may" accommodate priority claims).

1652. 11 U.S.C. § 1123(b)(1) (Supp. V 1981).

1653. *Id.* § 1123(b)(4). This section overrules the decision of *In re Pure Penn Petroleum Co.*, 188 F.2d 851 (2d Cir. 1951).

1654. 11 U.S.C. § 1125(b) (Supp. V 1981).

court determines on a case-by-case basis.¹⁶⁵⁵

After the debtor discloses adequate information regarding the plan, the Bankruptcy Code requires that each impaired class¹⁶⁵⁶ of creditors vote to accept the plan.¹⁶⁵⁷ A majority in number and at least two-thirds in amount of the creditors in a particular class¹⁶⁵⁸ must vote to accept the plan.¹⁶⁵⁹ Thus, a majority of the creditors can force the nonconsenting minority to accept less than full payment of their claims. If an impaired class refuses to accept the plan, authors of the reorganization plan can use the "cram down" provisions of the Bankruptcy Code provided that the plan is "fair and equitable" with respect to any impaired class.¹⁶⁶⁰ Additionally, a court will deem an unimpaired class to have accepted the plan,¹⁶⁶¹ but it will deem a class not receiving any payment or compensation under the plan to have rejected the plan.¹⁶⁶²

In addition to a vote on the plan by the creditors, the Bankruptcy Code requires a final confirmation of the plan by the court after a formal hearing that allows all parties in interest to contest confirmation.¹⁶⁶³ The Bankruptcy Code enumerates specific criteria that the plan must meet before the court will grant confirmation.¹⁶⁶⁴ For example, the court must find that liquidation or further reorganization of the debtor will not follow confirmation¹⁶⁶⁵ and that at least one class of claims accepts the plan, excluding

1655. See H.R. REP. No. 595, *supra* note 1622, at 301.

1656. 11 U.S.C. § 1124(1)-(3) (Supp. V 1981). Impairment of the class occurs unless the plan "leaves unaltered the legal, equitable, and contractual rights" of the class of claims or interests, cures any default that occurred before commencement of the case, or provides for payment of the claim in cash.

1657. 11 U.S.C. § 1129(a)(8) (Supp. V 1981).

1658. A class of equity security holders has accepted the plan when two-thirds in amount of the equity security holders actually voting accept the plan. *Id.* § 1126(d).

1659. *Id.* § 1126(c). Since a nonvote is no longer counted as a rejection of the plan, acceptance is easier to obtain than under the old Bankruptcy Act of 1938. See Elfin, *supra* note 1615, at 181; Moller, *supra* note 1618, at 468.

1660. 11 U.S.C. § 1129(b) (Supp. V 1981). For a critical evaluation of this inordinately complex provision, see Moller, *supra* note 1618, at 471. For brief attempts at explanation of "cram down" provisions, see Elfin, *supra* note 1615, at 185-87; Trost, *supra* note 1618, at 1328-32. For an exhaustive analysis of "cram down," see Klee, *All You Ever Wanted to Know about Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).

1661. 11 U.S.C. § 1126(f) (Supp. V 1981).

1662. *Id.* § 1126(g).

1663. See 11 U.S.C. § 1128 (1976).

1664. Section 1129(a) contains eleven requirements for confirmation. See *id.* § 1129(a)(1)-(11); Elfin, *supra* note 1615, at 183; Moller, *supra* note 1618, at 469-70.

1665. 11 U.S.C. § 1129(a)(11) (1976). The plan itself, however, expressly may provide for such liquidation. *Id.*; see *id.* § 1123(b)(4).

any acceptances by insiders.¹⁶⁶⁶ Importantly, even if each class has accepted the plan,¹⁶⁶⁷ the court must confirm that each member of each class has accepted the plan or will receive under the plan property of a value not less than the amount that the member would receive under liquidation.¹⁶⁶⁸

In confirming the plan, the court discharges all former obligations owed to creditors by the debtor, notwithstanding whether the plan addressed those obligations or whether all the creditors participated in the reorganization.¹⁶⁶⁹ Confirmation by the court also vests all the property of the estate in the debtor, except as otherwise provided in the plan or in the confirmation order.¹⁶⁷⁰

2. Asbestos Manufacturers and Chapter 11 Reorganization

Several features of Chapter 11 reorganization might be attractive to asbestos manufacturers beset with thousands of asbestos-related health suits. These attractions include temporary relief from creditors, continued ordinary operation of the business by the debtor, and attainment of public attention to encourage congressional enactment of asbestos-related legislation.

The temporary relief from current creditors available through the automatic stay provisions¹⁶⁷¹ is the primary reason that an asbestos manufacturer attempting to survive as a viable, profit-producing entity would file for Chapter 11 reorganization. Since the *Borel*¹⁶⁷² decision, asbestos-related litigation costs have escalated.¹⁶⁷³ By complying with Chapter 11, an asbestos manufacturer

1666. *Id.* § 1129(a)(10). This requirement is met if there is a class that is not impaired under the plan. See *supra* note 1659 and accompanying text.

1667. 11 U.S.C. § 1129(a)(8)(A) (Supp. V. 1981).

1668. *Id.* § 1129(a)(7).

1669. *Id.* § 1141.

1670. *Id.* § 1141(b).

1671. See *supra* notes 1620-29 and accompanying text.

1672. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); see *supra* part

II.

1673. Manville Corporation estimates that it presently faces approximately 16,500 asbestos-health lawsuits at an average disposition cost of \$40,000 each. Manville also estimates that it will face another 32,000 cases in the future, for a total disposition cost of approximately \$2 billion. See *Oversight Hearing*, *supra* note 16, at 53 (Summary of Asbestos-Related Litigation Projection). Unarco estimates that it spent \$7.5 million on asbestos litigation in 1980, and \$14 million in 1981. ASBESTOS LITIG. REP. (ANDREWS) 4861, 5261 (July 23, 1982) (testimony of Mr. William C. McLaughlin, general counsel for Unarco, before the Labor Standards Subcomm. of the House Comm. on Educ. and Labor). Amatex Corporation estimates its asbestos litigation costs at \$400,000 in 1980, \$799,000 in 1981, and \$487,000 in 1982. ASBESTOS LITIG. REP. (ANDREWS) 5765 (Nov. 12, 1982) (statement of Mr. Victor Drexel, general counsel for Amatex Corporation).

not only would relieve itself of these costs at least temporarily,¹⁶⁷⁴ but also it would curtail all collection efforts by successful asbestos claimants and other creditors.¹⁶⁷⁵ Arguably, this automatic stay also would protect the rights of creditors by preventing a rush for the assets of the manufacturer and the consequent inequitable distribution of its limited assets.¹⁶⁷⁶ Moreover, any court-approved reorganization plan will protect creditors because, unless they agree otherwise, the plan at least must provide them the liquidation value of their claims.¹⁶⁷⁷ Ostensibly, if the debtor spends less on litigation expenses, more assets will be available to distribute to creditors under a plan of reorganization.¹⁶⁷⁸

Additionally, an asbestos manufacturer may choose reorganization because generally it may continue the ordinary operation of its businesses.¹⁶⁷⁹ Besides obtaining relief from creditors, a manufacturer in reorganization may continue increasing assets and strengthening its enterprises. The debtor-manufacturer must not dissipate his assets or fail to operate responsibly.¹⁶⁸⁰ The reorganization plan also may protect the manufacturer's assets directly since a court cannot grant confirmation unless each creditor receives at least liquidation value of his claims or accepts less.¹⁶⁸¹ The possibility exists, therefore, that some unsophisticated creditors might accept less under the plan than they would acquire under liquidation. Nevertheless, the financial standards of confir-

1674. The filing of the petition would halt all proceedings that claimants had brought or could have brought against the manufacturer before the commencement of the case in bankruptcy. H.R. REP. NO. 595, *supra* note 1622, at 340. Thus, the courts must decide whether the reorganization plan governs claimants suffering from asbestos-related disabilities at the time of the filing and thereby limits their claims to the plan's provisions, or whether the claimants directly may sue asbestos manufacturers after the reorganization.

1675. *Id.*

1676. In fact, several asbestos manufacturers have advanced this argument. *See id.*; *see also* ASBESTOS LITIG. REP. (ANDREWS) 5522 (Sept. 10, 1982) (Manville Corporation stated that it must mortgage its assets if litigation continues unchecked; asbestos claimants consequently would be subordinate to company creditors).

1677. 11 U.S.C. § 1129(a)(7) (Supp. V 1981).

1678. This argument might have the support of the plaintiffs who have suits pending against asbestos manufacturers at the time the manufacturers filed their reorganization petitions. Those plaintiffs who already have received large judgments, however, conceivably could receive much less under a reorganization plan and, therefore, probably would not support this argument.

1679. *See supra* notes 1636-37 and accompanying text. Manville Corporation has told its suppliers that it hopes to continue ordinary operations during its reorganization. ASBESTOS LITIG. REP. (ANDREWS) 5560-61 (Sept. 10, 1982) (letter from Mr. John A. McKinney, chairman and president of Manville Corporation, to Manville Suppliers (Aug. 27, 1982)).

1680. *See supra* note 1644 and accompanying text.

1681. *See supra* note 1668 and accompanying text.

mation are extremely complex, and determining any distribution under a hypothetical liquidation is very difficult.¹⁶⁸² The chances of confusion are real, and unsophisticated creditors must evaluate carefully any plan before accepting it. Additionally, a court probably would not permit the intentional use of a reorganization plan by a debtor to force a creditor to accept less than the amount he deserves.¹⁶⁸³

A final, compelling reason for asbestos manufacturers to pursue reorganization is to draw public attention to the vast problems associated with asbestos litigation. Currently, many insurance companies refuse to indemnify asbestos manufacturers for asbestos litigation costs,¹⁶⁸⁴ while the federal government protects itself from asbestos litigation through sovereign immunity.¹⁶⁸⁵ Increased public awareness creates enough public pressure on Congress to compel enactment of federal compensation legislation requiring the participation of insurance companies and the federal government. In lobbying for federal compensation legislation, asbestos manufacturers emphasize the expense and delays inherent in judicially supervised compensation of asbestos claims.¹⁶⁸⁶ At least two manufacturers have proposed the creation of a "superfund" to compensate asbestos claimants.¹⁶⁸⁷ Another proposal advocates a

1682. See Moller, *supra* note 1618, at 470.

1683. See *In re Lake in the Woods*, 10 Bankr. 338 (Bankr. E.D. Mich. 1981). "The sponsors of the new Code made it clear that under Chapter 11 a debtor would no longer be permitted to force its creditors to accept its plan or face liquidation. . . . [The court holds that 11 U.S.C. § 1121(d) extensions] are impermissible if they are for the purpose of allowing the debtor to prolong reorganization while pressuring a creditor to accede to its point of view on an issue in dispute." 10 Bankr. at 345-46. See *infra* notes 1728-42.

1684. Courts have articulated two theories of insurance coverage regarding asbestos-related disease: the "exposure" theory and the "manifestation" theory. For a discussion of these theories of coverage and other issues concerning the insurance industry in asbestos litigation, see *supra* part VIII.

1685. A government spokesman recently stated that the federal government will continue to deny all tort liability. See ASBESTOS LITIG. REP. (ANDREWS) 5523 (Sept. 10, 1982) (testimony of Asst. Atty. Gen. J. Paul McGrath before the House Subcomm. on Labor Standards). If an asbestos claimant was a government employee when exposed, the government contends that his exclusive remedy is under the Federal Employees Compensation Act. If the claimant was not a government employee when exposed, then the government will continue to assert its sovereign immunity. See *id.* For a discussion of United States liability, see *supra* part X.

1686. ASBESTOS LITIG. REP. (ANDREWS) 5766 (Nov. 12, 1982) (summary of Asbestos Litigation Group's testimony before Senate Judiciary Subcomm. on the Courts).

1687. *Id.* Raymark Corporation and Keene Corporation recently proposed to the Senate Judiciary Subcommittee on the Courts that Congress create a "superfund-type of pool". This system would be no-fault in nature and operate as a claimant's exclusive remedy, but the fund allegedly would assure swift and certain payments. *Id.*

compensation trust funded by monies from all potentially liable insurers, who contribute proportionately based on relevant criteria such as the amount of premiums collected on issued insurance policies.¹⁶⁸⁸ Even some plaintiffs' groups have expressed an interest in some type of compensation trust.¹⁶⁸⁹ Several Congressmen have introduced dissimilar bills that attempt to address this problem.¹⁶⁹⁰ The proposed legislative solutions entail consideration of several factors. The primary issues concern the extent of participation and contribution of asbestos manufacturers,¹⁶⁹¹ insurance companies,¹⁶⁹² cigarette manufacturers,¹⁶⁹³ and the federal government¹⁶⁹⁴

1688. Lanzone, *supra* note 1603, at 26.

1689. The Asbestos Litigation Group (ALG), an association of plaintiffs' attorneys, supports a reasonable system for handling asbestos litigation if it is voluntary, provides full and adequate compensation on an individual basis, provides for speedy resolution of claims, and does not require taxpayer funding. ASBESTOS LITIG. REP. (ANDREWS) 5766 (Nov. 12, 1982) (summary of ALG's testimony before Senate Judiciary Subcomm. on the Courts). Other plaintiffs' attorneys vehemently have opposed any federal legislation because they believe that asbestos manufacturers seek a "government bail-out bill." Transcript from MacNeil-Lehrer Report, *reprinted in* ASBESTOS LITIG. REP. (ANDREWS) at 5556 (Sept. 10, 1982).

1690. For a discussion of the various bills presented to the 97th Congress, see *supra* part XI.

1691. Asbestos manufacturers generally admit some responsibility but understandably insist that they are not solely liable. A Manville Corporation senior vice president best expressed the desire of manufacturers to enlist the federal government in a legislative solution to the asbestos problem because of the government's sponsorship of shipbuilding during the Second World War, when many of today's claimants became exposed to asbestos.

The government has established generous benefit programs for veterans and their families. Its obligation should be no less to the workers who gave their lives or their health in the shipyards to support the national defense, simply because their injuries appeared 20 years later. . . . [I]mplementation of a legislative solution that deals fairly with the tort claims should not be impeded by Manville's Chapter 11 proceeding. . . . If Congress would enact a program to compensate victims of long-latent occupational diseases including asbestos diseases, there is no impediment of which I am aware to embodying Manville's participation in such programs in the reorganization plan to be proposed by Manville, acceptance by its creditors and to the Court. *Oversight Hearing, supra* note 16, at 21-22 (statement of Mr. G. Earle Parker, senior vice president, Manville Corporation).

1692. At this time participation of insurance companies in asbestos compensation programs is problematic because these companies did not anticipate the huge manufacturer liabilities that have materialized and, therefore, claim that the insurance policies issued during the early years of asbestos exposure do not cover present liabilities. "It is certainly true that insurance underwriters, in years past, did not foresee the magnitude of the asbestos problem, but it is also true that they had no means of foreseeing the changes that have taken place in American tort laws or in the judicial development of strict liability laws." Lanzone, *supra* note 1603, at 25-26; see *supra* note 1684. Insurance companies also vigorously debate whether insurance companies insuring the manufacturers at the time the claimant was exposed or at the time the claimant discovered his injury were "at risk," and therefore liable. Lanzone, *supra* note 1603, at 24-25. For a discussion of insurance issues, see *supra* part VIII.

in the proposed legislation.¹⁶⁹⁵ Manville Corporation's filing for reorganization drew widespread media attention¹⁶⁹⁶ and spurred congressional action concerning not only federal compensation legislation but also investigation of Chapter 11 procedures.¹⁶⁹⁷

Asbestos manufacturers also should recognize the shortcomings of reorganization. The corporation will acquire the stigma of resorting to the bankruptcy courts,¹⁶⁹⁸ and by filing for reorganization, manufacturers effectively must open their financial records to the public.¹⁶⁹⁹ The advantages associated with reorganization are great, however, and if Unarco, Manville Corporation, and Amatex Corporation successfully reorganize, more companies likely will choose this alternative in the future.

3. Controversies Concerning Recent Chapter 11 Proceedings

a. *Insolvency and Good Faith Requirements*

The recent filings of voluntary petitions for reorganization by Unarco, Manville Corporation, and Amatex Corporation has stirred a major controversy centering on (1) whether a voluntary petitioner must be insolvent to qualify as a debtor under Chapter 11, and (2) whether these corporations have filed their petitions in good faith.

(1) Insolvency Requirement

The Bankruptcy Code defines a debtor as a "person or munici-

1693. See *supra* part XI.

1694. The defendant manufacturers argue that federal government participation in some type of compensation program is necessary. The proposed Miller bill, however, does not include the federal government. For a discussion of proposed legislation, see *supra* part XI.

1695. See *id.*

1696. See, e.g., *An Asbestos Bankruptcy*, NEWSWEEK, Sept. 6, 1982, at 54; AMERICAN LABORATORY, Oct. 1982, at 6; *Manville 'Bankruptcy' Is a Perversion of Justice*, The Tennessean, Sept. 5, 1982, at 5-B; *Two Tales of Poison: How to End the Asbestos Nightmare*, N.Y. Times, Aug. 27, 1982, at D4.

1697. Senator Robert Dole, who labelled Manville Corporation's Chapter 11 filing "dubious and unusual at best," heads the subcommittee of the Committee on the Judiciary that contemplates, among other bankruptcy law issues, a change in the current law to ensure that other companies do not file Chapter 11 reorganization proceedings when faced with products liability lawsuits. Wall St. J. Sept. 15, 1982, at 7, cols. 2-3.

1698. The stock market demonstrated the stigma of bankruptcy when the price of Manville Corporation stock decreased 35% the day after Manville filed the voluntary petition for reorganization, and when Manville lost its 52-year-old position as a component of the Dow Jones industrial average. *An Asbestos Bankruptcy*, *supra* note 1696, at 55.

1699. See *supra* notes 1654-56 and accompanying text.

pality concerning which a case" has commenced under the Bankruptcy Code;¹⁷⁰⁰ a corporation is a "person" under the Code.¹⁷⁰¹ Chapter 11 adopts practically the same standard for a debtor as Chapter 7¹⁷⁰²—since no exception excludes Unarco, Manville Corporation, and Amatex Corporation, they arguably fall within Chapter 11 debtor status. None of these definitions, however, require insolvency.¹⁷⁰³ In fact, the only mention of insolvency in the Bankruptcy Code is in relation to Chapter 9, which requires a debtor to be insolvent or unable to meet its debts as they mature.¹⁷⁰⁴

No court yet has ruled on the insolvency issue regarding voluntary reorganization petitions. Some cases under the Bankruptcy Act of 1898¹⁷⁰⁵ indicate that insolvency was not a requirement for filing a voluntary petition,¹⁷⁰⁶ but these cases are distinguishable from the asbestos-related cases because they were simple voluntary bankruptcy proceedings and did not concern Chapter 11-type reorganizations. For any reorganization, however, the 1898 Act required a showing "that the corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization."¹⁷⁰⁷ In *In re Cook*¹⁷⁰⁸ the court dismissed a proceeding for reorganization under section 77B of the 1898 Act because the evidence was insufficient to support a finding that the

1700. 11 U.S.C. § 101(12) (1976).

1701. *Id.* § 101(30) (" 'person' includes individual, partnership, and corporation, but does not include governmental unit").

1702. *Id.* § 109(d). The Bankruptcy Code defines a Chapter 7 debtor negatively: a person may be a debtor only if the person is *not* "a railroad, a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union;" or any such *foreign* institution engaged in these activities in the United States. *Id.* § 109(b) (Supp. V 1981). Chapter 11 additionally permits stockbrokers, commodity brokers, and railroads to be debtors under its provisions. *Id.* § 109(d).

1703. *But cf. id.* § 303 (1976) (in involuntary proceedings a court may order relief only if the debtor generally cannot pay his debts as they become due).

1704. *Id.* § 109(c)(3).

1705. Ch. 541, 30 Stat. 544 (1898) (current version at 11 U.S.C. §§ 1 to 1326 (1976 & Supp. V 1981)).

1706. *See, e.g., In re Pyatt*, 257 F. 362, 363 (D. Nev. 1918) ("The act does not require that the bankrupt should be insolvent. A solvent person may have his property distributed among his creditors in the manner provided by the statute, if he so desires."); *In re Ann Arbor Mach. Co.*, 278 F. 749, 753 (E.D. Mich. 1922) ("[A] voluntary adjudication in its very nature is not dependent upon, and does not even tend to show, such insolvency, either at the time of such adjudication or at any time prior thereto.").

1707. Bankruptcy Act of 1898 § 77B, 48 Stat. 911, 912 (formerly codified at 11 U.S.C. § 205(b)); *see Manati Sugar Co. v. Mock*, 75 F.2d 284 (2d Cir. 1935) (creditors hoped involuntary reorganization proceeding would force debtor to file voluntary plan).

1708. 104 F.2d 981 (7th Cir. 1939).

debtor was insolvent or unable to pay its debts as they became due.¹⁷⁰⁹ Because the present Bankruptcy Code no longer explicitly requires insolvency for voluntary reorganization, the cases under the 1898 Act are not strong precedent, but they contrast the old standard to the reformed Chapter 11 standard. Removal of the insolvency requirement indicates that Congress no longer intended insolvency to be a prerequisite for voluntary reorganization.

Although the asbestos manufacturers presently seeking Chapter 11 protection contend that insolvency is not a requirement for reorganization,¹⁷¹⁰ if courts imply an insolvency requirement into the Code, the three voluntary petitioners nonetheless would argue that they are insolvent.¹⁷¹¹ The Bankruptcy Code defines "insolvent" in Chapter 1 as a financial condition in which the sum of the corporation's debts exceeds the fair valuation of all the corporation's property.¹⁷¹² The definition reflects a balance sheet concept that comports with the layman's understanding of insolvency—the entity's liabilities exceed the value of its assets. For involuntary petitions, however, the Code adopts an equitable meaning of insolvency: "the debtor is generally not paying such debtor's debts as such debts become due."¹⁷¹³ Although all asbestos manufacturers and distributors have borne heavy financial burdens because of asbestos litigation costs, not one manufacturer has yet had its liabilities completely exceed its assets. Instead, Unarco, Manville Corporation, and Amatex Corporation seek the temporary haven of reorganization to forestall the possibility of insolvency from contingent liabilities.

Unarco's financial position is closest to the balance sheet meaning of insolvency. Overwhelmed with approximately 12,000 asbestos-related lawsuits filed by 15,000 plaintiffs, Unarco filed for reorganization in 1982.¹⁷¹⁴ Spokesmen testified before a congressional committee that Unarco's annual sales in 1980 were \$316 million, but Unarco nonetheless suffered a loss of \$8.4 million while

1709. *Id.* at 984-85.

1710. *See supra* notes 1700-09 and accompanying text.

1711. Several commentators have disputed this insolvency argument and contend that the corporations are solvent. *See, e.g.,* Rowan, *Manville 'Bankruptcy' Is a Perversion of Justice*, *The Tennessean*, Sept. 5, 1982, at 5-B, col. 1 ("Manville's lawyers have come up with the slick idea that the 1978 federal law does not require that a company be insolvent to declare bankruptcy"; labels Manville Corporation's filing a fraud).

1712. 11 U.S.C. § 101(26) (1976).

1713. *Id.* § 303(h)(1).

1714. ASBESTOS LITIG. REP. (ANDREWS) 5261 (July 23, 1982).

incurring \$7.5 million in asbestos litigation costs.¹⁷¹⁵ In 1981, Unarco's annual sales increased to \$346 million, but its asbestos litigation costs increased to \$14 million.¹⁷¹⁶ A Unarco spokesman stated that the company simply could not meet its obligations as they accrued.¹⁷¹⁷ If the courts imply a requirement of insolvency into the Bankruptcy Code, they may not accept Unarco's equitable concept of insolvency.¹⁷¹⁸

Manville Corporation also has characterized its financial problems as equitable insolvency.¹⁷¹⁹ Manville Corporation argues that under generally accepted accounting principles it must quantify and reserve capital for its potential liability in asbestos litigation,¹⁷²⁰ and that the establishment of these large reserves substantially will eliminate the corporation's net worth.¹⁷²¹ As a result, Manville Corporation maintains that it will be unable to obtain credit, must liquidate assets, and must defer normal maintenance and capital expenditures.¹⁷²² This "cannibalization" allegedly would destroy the company.¹⁷²³ Opponents of the corporation's position, however, assert that when the corporation filed for reorganization its financial condition was sound,¹⁷²⁴ and by the corporation's own admission it was not insolvent in a balance sheet sense.¹⁷²⁵ Further, the opponents state that the epidemiological

1715. *Id.*

1716. *Id.*

1717. *Id.*

1718. If courts use 11 U.S.C. § 101(26) (1976) to define an insolvency requirement in voluntary petitions, the legislative history apparently forecloses a claim of equitable insolvency because it states that the definition of "insolvent" in that paragraph "is the traditional bankruptcy balance sheet test of insolvency." S. REP. NO. 989, 95th Cong., 2d Sess. 25. If courts use 11 U.S.C. § 303(h)(1) (1976), however, the legislative history indicates that the first two tests for insolvency under that section—that the debtor generally cannot pay his debts as they mature or that the debtor has failed to pay a major portion of his debts as they become due—are variations of the equitable insolvency test. S. REP. NO. 989, *supra*, at 34.

1719. ASBESTOS LITIG. REP. (ANDREWS) 5767 (Nov. 12, 1982). Amatex Corporation also faces the issue of insolvency, because its annual sales for the fiscal year ending October 31, 1982, were \$11 million, and its net profit was \$82,000 even after spending \$487,000 on legal fees. *See id.* at 5765 (Nov. 12, 1982).

1720. Manville Corporation estimates this potential liability will be \$2 billion. *See supra* note 1673.

1721. *Oversight Hearing, supra* note 16.

1722. *Id.*

1723. ASBESTOS LITIG. REP. (ANDREWS) 5561 (SEPT. 10, 1982).

1724. *Id.* at 5761 (Nov. 12, 1982). The ALG and M.J. Whitman & Co., a broker-dealer and holder of \$457,000 worth of Manville Corporation notes, have filed motions to dismiss Manville Corporation's reorganization proceeding. *Id.*

1725. The ALG's motion to dismiss states that Manville Corporation optimistically has predicted that after resolution of pending litigation with its insurers, it will have ap-

study upon which Manville Corporation bases its asbestos caseload projections should disqualify Manville from claiming equitable insolvency because the study represents "not a present inability to pay debt, but a future speculative inability over the next two decades based upon what might happen."¹⁷²⁶

The legislative history offers no solution to the insolvency issue. Because the Bankruptcy Code offers the privilege of reorganizing to financially troubled businesses, however, the courts should maintain stringent qualifications for debtor status. If a court reads an insolvency requirement for voluntary reorganization proceedings into the Code, the court likely would use the balance sheet definition contained in Chapter 1. Such a reading narrowly would restrict those businesses eligible for reorganization protection, an appropriate result given the extraordinary protections the legislature has offered through reorganization proceedings.

In summary, the Bankruptcy Code does not require insolvency as a prerequisite for Chapter 11 reorganizations. As a result of Manville Corporation's bankruptcy petition, however, Congress has commenced an investigation concerning the bankruptcy filings.¹⁷²⁷ The charges that the asbestos manufacturers—Manville Corporation in particular—have misused Chapter 11 since they were not insolvent in a balance sheet sense at the time of their filings may induce Congress to add an insolvency requirement to the Code. To prevent financially viable corporations faced with large potential liabilities from seeking refuge in Chapter 11, however, Congress must define narrowly any insolvency requirement. Without a narrow definition, corporations will argue that they will be unable to meet projected liabilities, and therefore will be insolvent. A balance sheet definition of insolvency will obviate these "equitable" insolvency arguments and will prevent financially sound corpora-

proximately \$500 million in assets, and that the corporation recently reported a net income of \$24.4 million for the third quarter ending September 30, 1982, an increase of 94% over the comparable period in 1981. Application for Dismissal of Cases or Abstention of the Committee of Asbestos-Related Litigants and/or Creditors, *In re Johns-Manville, Corp.*, Nos. 82 B 11656 BL - 82 B 11676 BL (Bankr. S.D.N.Y. filed Nov. 8, 1982) [hereinafter cited as Application for Dismissal], reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5785, 5789 (Nov. 12, 1982).

1726. ASBESTOS LITIG. REP. (ANDREWS) 5767 (Nov. 12, 1982). An indication that litigation expenses are not necessarily uniform over time is the history of Amatex Corporation, whose legal costs dropped dramatically in 1982. The corporation's legal expenses were: \$400,000 in 1980, \$799,000 in 1981, and \$487,000 in 1982. *Id.* Thus, courts may not allow asbestos manufacturers seeking Chapter 11 reorganization to ignore the possibility that their future operating and financial condition will improve. *Id.* at 5791-92.

1727. See *Oversight Hearing*, *supra* note 16.

tions from using Chapter 11 protection. Concerning the Chapter 11 petitions of Unarco, Manville Corporation, and Amatex Corporation, however, the Code does not require expressly or implicitly that liabilities of these corporations exceed their assets before filing. It appears, therefore, that because of the potential liabilities the asbestos manufacturers face, the courts will not dismiss the Chapter 11 petitions based on arguments that the corporations were not insolvent.

(2) Good Faith Requirement

Attacking Manville Corporation's Chapter 11 petition on the basis of lack of good faith, opponents not only charge that Manville is solvent, but also allege that Manville intentionally concealed knowledge of the danger of asbestos, that it tried to insulate assets of the nonasbestos divisions from future judgments with an internal corporate reorganization in 1981,¹⁷²⁸ and that it has attempted to prevent asbestos plaintiffs from obtaining full compensation by filing for Chapter 11 reorganization.¹⁷²⁹ To evaluate these allegations, the courts first must determine whether the Bankruptcy Code requires good faith as a prerequisite to the filing of a voluntary petition for reorganization. The Code does not state specifically that a debtor must file a voluntary petition in good faith.¹⁷³⁰ The only statutory reference to good faith is that a debtor must file a reorganization *plan* in good faith.¹⁷³¹ The Code, however, provides that the court after notice and a hearing may dis-

1728. During the summer of 1981, Johns-Manville Corporation reorganized into Manville Corporation with various divisions or subsidiaries of Johns-Manville Corporation, Manville Building Products Corporation, Manville Forest Products Corporation, Manville Products Corporation, and Manville International Corporation. Application for Dismissal, *supra* note 1725, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5789 (Nov. 12, 1982).

1729. ASBESTOS LITIG. REP. (ANDREWS) 5785-86 (Nov. 12, 1982).

1730. The Bankruptcy Code states only that a "voluntary case . . . is commenced by the filing with the bankruptcy court of a petition under [the appropriate] chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301 (1976). *But cf. In re Victory Const. Co.*, 9 Bankr. 549, 558 (Bankr. C.D. Cal. 1981); *In re Northwest Recreational Activities, Inc.*, 4 Bankr. 36, 38-39 (Bankr. N.D. Ga. 1980) (The Bankruptcy Code provides protection equal to a good faith requirement in § 1112, which allows a court to dismiss for cause.). The *Victory Construction* court stated,

It would be more than anomalous to conclude that . . . Congress intended to do away with a safeguard against abuse and misuse of process which had been . . . accepted as part of bankruptcy philosophy . . . for almost a century. "Good faith" must therefore be viewed as an implicit prerequisite to the filing or continuation of a proceeding under Chapter 11 of the Code.

9 Bankr. at 558.

1731. 11 U.S.C. § 1129(a)(3) (1976).

miss or suspend all proceedings in a Chapter 11 case at any time if the halt to the proceedings would advance the creditors' and the debtor's interests.¹⁷³² The court also may dismiss a Chapter 11 petition for cause, including a continuing loss to the estate, an inability to effect a plan of reorganization, and an unreasonable delay by the debtor that prejudices creditors.¹⁷³³ The court may use its power to dismiss sua sponte or upon motion of a party in interest and it may "use its equitable powers to reach an appropriate result in individual cases."¹⁷³⁴ Courts recently have interpreted this power to dismiss as creating an obligation to inquire into the debtor's good faith at the time of filing.¹⁷³⁵ In *In re G-2 Realty Trust*¹⁷³⁶ plaintiff alleged that defendant changed from a nominee trust to a business trust to become eligible as a Chapter 11 debtor and that this nonbusiness purpose evidenced defendant's bad faith. Although the court did not find bad faith, it recognized that the power to dismiss a Chapter 11 proceeding for cause grants the court wide discretion and concluded that "despite the absence of any specific statutory language . . . requiring an examination of the debtor's good faith at the time of filing, this Court has the inherent power and duty to make such an inquiry."¹⁷³⁷ In *In re Northwest Recreational Activities, Inc.*¹⁷³⁸ plaintiff claimed that defendant had attempted in bad faith to invoke the court's jurisdiction by transferring property to a corporation that on the same day filed for Chapter 11 reorganization relief. The court did not find bad faith but, like the court in *In re G-2 Realty Trust*, recognized that "[g]ood faith, in the sense perceived by this court to have continued relevance, is merged into the power of the court to protect its jurisdictional integrity from schemes of improper petitioners seeking to circumvent jurisdictional restrictions and from petitioners with demonstrable frivolous purposes absent any economic reality."¹⁷³⁹ Bankruptcy courts, then, probably will investi-

1732. *Id.* § 305(a)(1). The debtor may not appeal an order under this subsection. *Id.* § 305(c).

1733. *Id.* § 1112(b). The list of causes in the Bankruptcy Code is not exhaustive. See S. REP. No. 989, *supra* note 1718, at 117.

1734. S. REP. No. 989, *supra* note 1718, at 117, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5903.

1735. See, e.g., *In re G-2 Realty Trust*, 6 Bankr. 549 (Bankr. D. Mass. 1980); *In re Northwest Recreational Activities, Inc.*, 4 Bankr. 36 (Bankr. N.D. Ga. 1980).

1736. 6 Bankr. 549 (Bankr. D. Mass. 1980).

1737. *Id.* at 552 (footnote omitted).

1738. 4 Bankr. 36 (Bankr. N.D. Ga. 1980).

1739. *Id.* at 39.

gate the good faith of asbestos manufacturers that file voluntary reorganization petitions.

To seek dismissal of Manville Corporation's Chapter 11 petition, opponents have presented numerous allegations of bad faith including: (1) that Manville Corporation is financially sound and thus lacks the financial instability for Chapter 11 reorganization; (2) that it intentionally concealed from its employees knowledge of the dangers of asbestos; (3) that it reorganized its corporate structure to insulate the assets of nonasbestos divisions from future asbestos-related judgments; and (4) that it intended by filing to prevent deserving asbestos claimants from obtaining full compensation.¹⁷⁴⁰ Other plaintiffs¹⁷⁴¹ have alleged that Manville Corporation's Chapter 11 petition perverts the purposes of the bankruptcy laws and that the legislative history and purposes of the Bankruptcy Code do not authorize its use to protect against hypothetical claims.¹⁷⁴²

Thus, courts have recognized good faith as an implicit prerequisite for Chapter 11 reorganizations, although it is not expressly required by the Bankruptcy Code. This good faith requirement is the most appropriate method for courts to reject asbestos manufacturer's reorganization filings. Although the courts have wide discretion to dismiss bankruptcy petitions, *G-2 Realty Trust* and *Northwest Recreational Activities* reflect a reluctance to invoke this authority except in the most obvious instances of bad faith. Given that the allegations against Manville Corporation are speculative in nature and that the Code does not expressly require insolvency, the courts probably will not dismiss the Chapter 11 filings of Unarco, Manville Corporation, or Amatex Corporation on the

1740. The ALG has filed for dismissal of Manville Corporation's petition and has used these allegations for part of the basis of its motion. See Application for Dismissal, *supra* note 1725, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5785 (Nov. 12, 1982).

1741. M.J. Whitman & Co., a broker-dealer holding \$457,000 worth of Manville notes, has filed a motion seeking dismissal of Manville Corporation's petition. In addition, Whitman's clients hold \$5 million worth of Manville notes. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5761 (Nov. 12, 1982).

1742. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5763 (Nov. 12, 1982). In an affidavit supporting Whitman's motion to dismissal, Mr. Seymour H. Knox, a professor of mathematical institutional economics at Yale University, stated three reasons supporting the claim that Manville Corporation's filing was inappropriate: (1) the difficulties inherent in projecting and forecasting claims and liabilities, and the need to exercise extreme caution when using the projections; (2) the need to consider not only the potential risk of future payments to claimants, but also the potential impact of the payments on expected earnings and cash flow; and (3) economic purposes underlying bankruptcy relief. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5763 (Nov. 12, 1982).

basis of bad faith.

b. Scope of the Automatic Stay

Attracted by the prospect of at least a temporary cessation of asbestos litigation,¹⁷⁴³ codefendant asbestos manufacturers who have not filed under Chapter 11 argue that the automatic stay provision of Chapter 11 applies to all defendants when any defendant has filed for reorganization. These codefendants rely on the Bankruptcy Code provision that describes the automatic stay as "applicable to all entities"¹⁷⁴⁴ and argue that because of the numerous parties, claims, cross-claims, and claims for indemnity and contribution entailed in asbestos cases, the courts should stay the entire proceedings until resolution of the reorganizations. Codefendants also emphasize that liability depends upon determinations of relative fault among the codefendants, because the reorganizing debtor and its codefendants often are jointly and severally liable for damages. They conclude, therefore, that courts should apply the automatic stay liberally. Some jurisdictions have accepted these arguments.¹⁷⁴⁵ The court in *Clutter v. Johns-Manville Sales Corp.*¹⁷⁴⁶ stated that the term "all entities" is "pervasive, universally thoroughly exhaustive of all possible parties who may be involved in the litigation on file"¹⁷⁴⁷ and granted a motion for a blanket stay.¹⁷⁴⁸ In *In re White Motor Credit Corp.*¹⁷⁴⁹ the court stated that "the stay operates as a windfall benefit to codefendants and insurance companies who, along with the debtor, enjoy many of the benefits of the moratorium."¹⁷⁵⁰ The court held that plaintiffs could not move to dismiss a reorganizing debtor and continue the action against the codefendants only.¹⁷⁵¹

1743. See *supra* notes 1620-26 & 1671-75 and accompanying text.

1744. 11 U.S.C. § 362(a) (1976).

1745. See, e.g., *Wedgeworth v. Fibreboard Corp.*, No. 80-203-B (M.D. La. order issued Sept. 28, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5816 (Nov. 12, 1982); *In re White Motor Credit Corp.*, 11 Bankr. 294 (Bankr. N.D. Ohio 1981), *rev'd on other grounds*, 23 Bankr. 276 (N.D. Ohio 1982); *Federal Life Ins. Co. v. First Fin. Group of Texas, Inc.*, 3 Bankr. 375 (S.D. Tex. 1980); ASBESTOS LITIG. REP. (ANDREWS) 5320 (Aug. 13, 1982) (summarizing *Clutter v. Johns-Manville Sales Corp.*, No. C 78-229 (E.D. Ohio Aug. 2, 1982)).

1746. ASBESTOS LITIG. REP. (ANDREWS) 5320 (Aug. 13, 1982) (summarizing, No. C 78-229 (E.D. Ohio Aug. 2, 1982)).

1747. *Id.* at 5426 (Aug. 27, 1982).

1748. *Id.* at 5320 (Aug. 13, 1982).

1749. 11 Bankr. 294 (Bankr. N.D. Ohio 1981), *rev'd on other grounds*, 23 Bankr. 276 (N.D. Ohio 1982).

1750. 11 Bankr. at 295.

1751. *Id.*

A majority of courts considering the extent of the application of the stay however, have reached the opposite conclusion.¹⁷⁵² The legislative history regarding the automatic stay provisions in part supports this conclusion. One congressional report states that the purpose of the stay is to give "the *debtor* a breathing spell from his creditors," and that the "commencement or continuation . . . of a judicial . . . proceeding against the *debtor* . . . is stayed."¹⁷⁵³ In *Royal Truck & Trailer, Inc. v. Armadora Maritima Salvadoreana, S.A.*,¹⁷⁵⁴ the court stated that "the language of the Code makes it quite clear that, in Chapter 11, the protections afforded the bankrupt are designed for the debtor-bankrupt only."¹⁷⁵⁵ The court in *In re Rhode Island Asbestos Cases*¹⁷⁵⁶ expressed the policy behind this interpretation of the Code.

[This court] does wish to stress the importance of not letting the complexity of these suits obscure the tragic nature of the claims that the plaintiffs seek to vindicate. Whatever the ultimate result of these lawsuits, let it not be said that the plaintiffs, many of whom are suffering severe financial hardship and some of whom are dying, have also been victimized by being denied their day in court.¹⁷⁵⁷

Therefore, these courts will overlook any difficulties arising from the continuation of the action without the presence of the Chapter 11 debtors. The objective of these courts is to avoid further prejudice to plaintiffs in their efforts to win fair compensation for their injuries.

The bankruptcy court for the Southern District of New York in *In re Johns-Manville Corp.*¹⁷⁵⁸ ruled that the stay of pending litigation against Manville Corporation does not apply automati-

1752. See, e.g., *In re Rhode Island Asbestos Cases*, RIML No. 1 P (D.R.I. Oct. 12, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5748 (Oct. 22, 1982); *In re Massachusetts Asbestos Litig.* M.B.L. Nos. 1 & 2 (D. Mass. Sept. 28, 1982); *Fontenot v. Fibreboard Corp.*, No. 79-0738, slip op. (W.D. La. Sept. 14, 1982); *Kindle v. Fibreboard Corp.*, No. TY-79-35-CA (E.D. Tex. Aug. 12, 1982); *Oman v. Johns-Manville*, 482 F. Supp. 1060 (E.D. Va. 1980); *In re Smith*, 14 Bankr. 956 (Bankr. D. Conn. 1981); *In re Aboussie Bros. Constr. Co.*, 8 Bankr. 302 (E.D. Mo. 1981); *In re Larmar Estates, Inc.*, 5 Bankr. 328 (Bankr. E.D.N.Y. 1980); *Dellamo v. Keene Indus. Insulation*, No. 100(1) (Pa. C.P. Philadelphia stay granted Sept. 24, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5654 (Sept. 10, 1982).

1753. H.R. REP. No. 595, *supra* note 1622, at 340 (emphasis added).

1754. 10 Bankr. 488 (N.D. Ill. 1981).

1755. *Id.* at 490.

1756. RIML 1 P (D.R.I. Oct. 12, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5748 (Oct. 22, 1982).

1757. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5749 (Oct. 22, 1982).

1758. Nos. 82 B 11656 BL - 82 B 11676 BL (Bankr. S.D.N.Y. Jan. 10, 1983), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 6093 (Jan. 14, 1983). The Manville Corporation reorganization presently is before this court.

cally to Manville's codefendants. Stating that the automatic stay language of the Bankruptcy Code "clearly refers only to actions against the debtor,"¹⁷⁵⁹ the court rejected codefendant's contentions that Manville is an indispensable party, whose absence requires the court to stay all actions against all codefendants.¹⁷⁶⁰ The court recognized that it conceivably could extend the stay "as part of an eventual reorganization plan,"¹⁷⁶¹ but stated that rulings of indispensability must be a case-by-case determination.¹⁷⁶²

c. *Manville Corporation's Reorganization Plan*

Although Manville Corporation has not yet submitted its reorganization plan to the court, the corporation has disclosed some aspects of a working plan. Perhaps the most controversial provision of this working plan is that Manville proposes to limit the size and number of asbestos-health claims the company must pay.¹⁷⁶³ Manville considers this liability limit a crucial element of the plan, not only because the company allegedly no longer can withstand asbestos-related expenses,¹⁷⁶⁴ but also because the company proposes to use retroactive insurance funds partially to pay the claims.¹⁷⁶⁵ Manville's other creditors, specifically its lenders and suppliers, probably will accept the provisions of the working plan because it ensures the payment of most of their millions of dollars in claims.¹⁷⁶⁶ Many plaintiffs doubtlessly will oppose a limitation on liability. Those plaintiffs who already have won judgments against Manville possibly could receive much less than their judgments, while those who have begun suits against the corporation also will be subject to the limitations when the courts remove the stay on their actions. Reportedly, the reorganization plan calls for

1759. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 6096 (Jan. 14, 1983).

1760. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 6100 (Jan. 14, 1983). The court reasoned that the only relationship demonstrated between the codefendants and Manville Corporation is that of joint tortfeasors, and that federal law does not consider joint tortfeasors indispensable parties. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 6100 (Jan. 14, 1983).

1761. *Id.*, reprinted in Asbestos Litig. Rep. (Andreas) 6096 (Jan. 14, 1983).

1762. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 6101 (Jan. 14, 1983).

1763. *Manville Plans*, *supra* note 1389, at 31, col. 4.

1764. *Id.*

1765. *Id.* at col. 6. Retroactive insurance would require payment by Manville Corporation of premiums equal to the amount of anticipated claims. Manville would not save money on the claims but would gain tax benefits. Manville contends that for it to get such insurance, the court must set an absolute ceiling on the number and size of total asbestos-related claims for which Manville would be liable. *Id.*

1766. *Id.* at col. 4.

Manville to pay approximately \$500 million to satisfy present and future asbestos plaintiffs.¹⁷⁶⁷ Some plaintiffs have expressed an interest in this proposal because it might loosen the legal logjam of claims against those manufacturers protected by Chapter 11.¹⁷⁶⁸ Although the plan limits liability, another attractive element for plaintiffs is that Manville has proposed binding arbitration.¹⁷⁶⁹ This provision would allow Manville to challenge undeserving claimants and would allow dissatisfied claimants to seek larger recoveries.¹⁷⁷⁰ The working plan also indicates Manville's desire to continue its efforts toward indemnification and contribution from insurance carriers and the federal government. Manville has indicated that it may seek to consolidate its insurance suits "under the aegis of the bankruptcy court" to put pressure on the insurers "to begin serious settlement negotiations," and Manville also envisions government agreement to compensate those victims exposed to asbestos while working in government-related jobs.¹⁷⁷¹

Two-thirds of the creditors in each class must accept Manville's reorganization plan for it to become effective.¹⁷⁷² If Manville could not gain enough support from creditor acceptances, then it could resort to the use of the Bankruptcy Code's "cram down" provisions.¹⁷⁷³ The bankruptcy court, however, must deem the plan "fair and equitable" to any impaired class.¹⁷⁷⁴ Furthermore, if each member of each class has not accepted the plan, the court must determine that the plan will provide each creditor with property worth not less than the distribution to each creditor at liquidation.¹⁷⁷⁵ This determination would be extremely complicated and requires much more information than is currently available.

Perhaps the most important issue, however, concerns plaintiffs beginning their actions against Manville when earlier plaintiffs

1767. *Id.* at col. 5.

1768. *Id.* at col. 4.

1769. *Id.* at col. 5.

1770. *Id.* One plaintiff's attorney has stated that he opposes any type of workers' compensation program that would pay only a specified sum, but he might support a defined benefits plan that would allow a certain amount of negotiation and arbitration. *Id.*

1771. *Id.* at col. 6.

1772. *See supra* notes 1657-58 and accompanying text.

1773. *See supra* note 1663 and accompanying text.

1774. For a thorough analysis of the "fair and equitable" element, see Blum, *The "Fair and Equitable" Standard for Confirming Reorganizations Under the New Bankruptcy Code*, 54 AM. BANKR. L.J. 165 (1980).

1775. *See supra* notes 1667-68 and accompanying text.

have exhausted the limited amount of funds. Obviously, if the \$500 million Manville proposes to pay is sufficient to satisfy all claims, then this issue will never arise. Courts, however, rightly are circumspect regarding aspects of bankruptcy proceedings that may deny asbestos victims, whose illness alone creates much hardship, "their day in court."¹⁷⁷⁶ Indeed, courts probably would find any plan impermissible that would use reorganization to force a creditor to accept less than the amount due him.¹⁷⁷⁷ Thus, if Manville's working plan fails to provide for *all* future plaintiffs, or the courts determine it is merely a ploy to force current plaintiffs to accept less than they deserve, the courts will reject the plan.

B. Successor Liability

The rule of successor liability, an important consideration in tort law, states that a corporation acquiring all or substantially all of another corporation's assets, may "inherit" tort liability from the selling corporation. Several courts have applied this rule to asbestos cases.¹⁷⁷⁸ As more asbestos manufacturers go out of business or sell their production facilities, plaintiffs increasingly will rely upon successor liability to attempt to recover for their damages. This section examines the creation of the rule, discusses its various applications in current asbestos litigation, and attempts to predict its possible application in future situations.

1. Creation of Successor Liability

The seminal case in the creation of the successor liability doctrine is *Knapp v. North American Rockwell Corp.*,¹⁷⁷⁹ in which the United States Court of Appeals for the Third Circuit awarded damages to plaintiff who had injured his hand in a machine. Plaintiff sued North American Rockwell Corporation on the theory that Rockwell had acquired substantially all the assets of the company

1776. See, e.g., *In re Rhode Island Asbestos Cases*, RIML No. 1 P (D.R.I. Oct. 12, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5748 (Oct. 22, 1982); see *supra* note 1756 and accompanying text.

1777. See *supra* note 1683 and accompanying text.

1778. See, e.g., *Amader v. Pittsburgh-Corning Corp.*, Civ. Action No. 79-4546 (E.D. Pa. July 26, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5484 (Aug. 27, 1982); *Davis v. Johns-Manville Corp.*, Civ. Action No. 80 041 153 NP (Mich. Cir. Ct. July 21, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5360 (Aug. 13, 1982); ASBESTOS LITIG. REP. (ANDREWS) 5711 (Oct. 22, 1982) (summarizing *Marano v. Johns-Manville Corp.*, No. 108 (Pa. C.P. Philadelphia Sept. 15, 1982)); ASBESTOS LITIG. REP. (ANDREWS) 5336 (Aug. 13, 1982) (summarizing *Coyle v. Johns-Manville Corp.*, No. 92 (Pa. C.P. Philadelphia Sept. 10, 1978)).

1779. 506 F.2d 361 (3d Cir. 1974).

that negligently had designed and manufactured the machine and was, therefore liable for those injuries.¹⁷⁸⁰ Rockwell had purchased the assets of the machine manufacturer, which dissolved eighteen months later.¹⁷⁸¹ The *Knapp* court recognized that “ ‘a mere sale of corporate property by one company to another does not make the purchaser liable for the liabilities of the seller not assumed by it.’ ”¹⁷⁸² The court also recognized, however, several exceptions to this rule. These exceptions, which constitute the successor liability rule, impose liability upon a purchasing corporation for the obligations of a selling corporation if: (1) the purchaser expressly or implicitly assumes the obligations; (2) the selling corporation and the purchasing corporation consolidate or merge; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is a fraudulent attempt to escape liability for the obligations.¹⁷⁸³

To determine if a merger, consolidation, or continuation has occurred, the *Knapp* court stated that it must look past the form of the transaction to see if “the selling corporation continued to exist as a corporate entity and whether, after the transaction, the selling corporation possessed substantial assets with which to satisfy the demands of its creditors.”¹⁷⁸⁴ Although Rockwell continued to manufacture the machines, the court did not find a continuation because the seller did not dissolve immediately—Rockwell merely absorbed “ ‘the nature of the manufacturing operations previously engaged in . . . , not the corporate entity itself.’ ”¹⁷⁸⁵ The *Knapp* court, however, acknowledged that courts have found mergers when the transaction leaves the selling corporation without appre-

1780. *Id.* at 363. Plaintiff's suit against seller was barred by either Pennsylvania's two-year statute of limitations on personal injury actions or the statute requiring that suits against a dissolved corporation be commenced within two years of the date of dissolution. *Id.* at n.3.

1781. The seller had entered into an agreement with Rockwell whereby it would exchange substantially all its assets for stock in Rockwell. Under the agreement, the seller would change its name on the closing date, distribute the Rockwell stock to its shareholders, and dissolve as soon as practicable after the last of these distributions. The closing took place on August 29, 1968. The machine injured plaintiff on October 6, 1969. The seller dissolved on February 20, 1970, almost 18 months after it exchanged the bulk of its assets for Rockwell stock. *Id.* at 363. Rockwell expressly had denied any assumption of the seller's liability in the sale agreement, but the court never considered a charge of fraudulent avoidance of liability.

1782. *Id.* at 363 (quoting *Sbane v. Hoban, Inc.*, 332 F. Supp. 526, 527 (E.D. Pa. 1971)).

1783. 506 F.2d at 363-64.

1784. *Id.*

1785. *Id.* at 366 (quoting *McKee v. Harris-Seabold Co.*, 109 N.J. Super. 555, 566, 264 A.2d 98, 104 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972)).

cial assets to satisfy the claims of its creditors.¹⁷⁸⁶ The court also stated that it would follow "public policy considerations" rather than "a mere procrustean application of formalities," and thus look to the provisions of the agreement between the seller and the purchaser, the consequences of the transaction, and the purposes of the applicable corporation law.¹⁷⁸⁷ Because plaintiff had no remedy if he could not recover from Rockwell, Rockwell could absorb the damages better than plaintiff, and the seller only nominally existed as a corporation after its transaction with Rockwell, the court held that it would deem the transaction a merger.¹⁷⁸⁸

2. Asbestos Cases Concerning Successor Liability

Courts have reached varying results in applying the successor liability doctrine to asbestos-related suits. The earliest decision, *Coyle v. Johns-Manville Corp.*,¹⁷⁸⁹ concerned a plaintiff exposed to asbestos prior to 1947.¹⁷⁹⁰ The court held that a defendant, Pittsburgh-Corning Corporation, could not be liable for plaintiff's diseases because it did not produce asbestos products until 1962 when it acquired many of the assets of Unarco. The court reasoned that Pittsburgh-Corning did not acquire "all or substantially all" of Unarco's assets in the transaction and "the substantial injustice which Courts have sought to avoid in holding successor corporations liable would be avoided in this instance because Unarco is named a defendant in this action."¹⁷⁹¹

The court in *Marano v. Johns-Manville Corp.*¹⁷⁹² followed *Coyle* despite Unarco's filing for Chapter 11 reorganization by the time of the suit. In *Marano* plaintiff alleged that her husband died because of his exposure to asbestos during his employment at the Philadelphia Naval Shipyard from 1940-1943. Plaintiff added that she feared she would contract an asbestos-related disease from her

1786. 506 F. Supp. at 367. See, e.g., *Hoche Prods. v. Jayark Films Corp.*, 256 F. Supp. 291 (S.D.N.Y. 1966); *Jackson v. Diamond T. Trucking Co.*, 100 N.J. Super. 186, 241 A.2d 471 (1968); *Ruedy v. Toledo Factories*, 61 Ohio App. 21, 22 N.E.2d 293 (1939).

1787. 506 F.2d at 369.

1788. *Id.* at 368-70. Other considerations included the intact preservation of the seller's business organization for the benefit of Rockwell, the availability of the offices and employees of the seller to Rockwell, and the maintenance of the seller's customer and supplier relationships. *Id.* at 369.

1789. ASBESTOS LITIG. REP. (ANDREWS) 5336 (Aug. 13, 1982) (summarizing Case No. 92 (Pa. C.P. Philadelphia Sept. 10, 1978)).

1790. *Id.*

1791. *Id.*

1792. *Id.* at 5711 (Oct. 22, 1982) (summarizing Case No. 108 (Pa. C.P. Philadelphia Sept. 15, 1982)). The same judge sat in both the *Marano* and *Loyle* cases.

exposure to asbestos on her husband's work clothes. Plaintiff argued that Pittsburgh-Corning should be liable as the successor owner of Unarco's Unibestos product line, but Pittsburgh-Corning moved for summary judgment because it did not manufacture asbestos products until 1962, when it acquired the Unibestos product line, and therefore could not be liable for the deceased's earlier exposure. The court dismissed the case and stated that plaintiff's product line successor arguments were "without substance."¹⁷⁹³

In *Amader v. Pittsburgh-Corning Corp.*,¹⁷⁹⁴ concerning a practically identical set of facts as *Marano*, the United States District Court for the Eastern District of Pennsylvania applied successor liability. The *Amader* court granted recovery against Pittsburgh-Corning based on its 1962 acquisition of Unarco's Unibestos product line.¹⁷⁹⁵ Applying Pennsylvania law, the court reasoned that because Pittsburgh-Corning maintained the same product, name, personnel, property, and many of the same clients of the purchased entity, successor liability was appropriate.¹⁷⁹⁶

The *Amader* court included an important aside regarding the possibility of Unarco's contemplated bankruptcy. Defendant argued that since it did not purchase all assets of Unarco and since Unarco still existed, the corporate acquisition had not extinguished plaintiff's cause of action against Unarco.¹⁷⁹⁷ Plaintiff contended that Unarco's possible bankruptcy might extinguish his rights against Unarco.¹⁷⁹⁸ The court, however, ignored these arguments

1793. *Id.*

1794. Civ. Action No. 79-4546 (E.D. Pa. July 26, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5484 (Aug. 27, 1982).

1795. The court noted that although Unarco did not dissolve, it ceased to manufacture Unibestos. Civ. Action No. 79-4546 (E.D. Pa. July 26, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5487 (Aug. 27, 1982).

1796. *Amader v. Pittsburgh-Corning Corp.*, Civ. Action No. 79-4546 (E.D. Pa. July 26, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5487 (Aug. 27, 1982). The court noted that the "product line exception" had been adopted in New Jersey in *Ramirez v. Amsted Indus. Inc.*, 86 N.J. 332, 431 A.2d 811 (1981), in which the court stated:

[W]here one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor. *Id.* at 358, 431 A.2d at 825. The *Amader* court also noted that an intermediate Pennsylvania appellate court in *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106, 110-12 (1981), recently adopted successor liability and the *Amader* court assumed that the Pennsylvania Supreme Court soon would adopt a similar stance.

1797. Civ. Action No. 79-4546 (E.D. Pa. July 26, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5487 (Aug. 27, 1982).

1798. *Id.*

and stated that the contemplated bankruptcy did not form the basis for its decision to apply successor liability; in fact, the court noted that defendant's interpretation inaccurately would restrict the successor liability doctrine under Pennsylvania law.¹⁷⁹⁹

The court in *Davis v. Johns-Manville Sales Corp.*¹⁸⁰⁰ also adopted successor liability. Defendant had purchased certain assets of the Industrial Products Division of Keasby & Mattison Company, including: (1) buildings, fixtures, machinery, and equipment; (2) records and equipment related to the seller's industrial products business; (3) patents, tradenames, trademarks, and related goodwill; and (4) raw material, supplies, work in progress, and finished goods inventories related to the seller's industrial products business.¹⁸⁰¹ The seller dissolved approximately five years after this transaction.¹⁸⁰² The court applied successor liability and denied defendant's motion for summary judgment because it felt that the transfer demonstrated "a basic continuity of the enterprise" between the Industrial Products Division of Keasby & Mattison and defendant.¹⁸⁰³ Courts have reached different results in successor liability cases because they emphasize or disregard competing considerations, including the plaintiff's right to hold an entity accountable for his injury and the defendant's right not to answer for injuries in which he played no part.

3. Future Application of Successor Liability

a. Situation One

The divergent applications of the successor liability doctrine have raised the issue of how courts will apply the doctrine to situations arising out of the business alternatives chosen by asbestos manufacturers as a result of the inundation of asbestos cases.

In 1981, Johns-Manville Corporation internally reorganized into Manville Corporation¹⁸⁰⁴ and five wholly owned subsidiaries, one of which continued under the name Johns-Manville Corpora-

1799. *Id.*

1800. No. 80 041 153 NP (Mich. Cir. Ct. July 21, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5360 (Aug. 13, 1982).

1801. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5361 (Aug. 13, 1982).

1802. *Id.*

1803. *Id.*, reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5364 (Aug. 13, 1982).

1804. See *supra* note 1728 and accompanying text. Although Manville Corporation's Chapter 11 proceedings could render this discussion moot regarding Manville, the principles may apply to other internal corporate reorganizations, or even to Manville if the courts disallow its proposed Chapter 11 reorganization.

tion and included the asbestos-related division of Manville Corporation.¹⁸⁰⁵ Under *Knapp*,¹⁸⁰⁶ Manville's action arguably may not qualify as a "mere sale of corporate property"¹⁸⁰⁷ to which the exceptions of successor liability can apply. If courts do not consider the internal reorganization a "sale," then two possibilities arise. First, the court may characterize Manville's internal reorganization as an attempt to shield assets if the court views these newly created, supposedly separate legal entities as mere pretenses unrecognized for purposes of tort law. On the other hand, a court may characterize the reorganization as a clear legal split among the divisions of the corporation to effect a separation of income that could protect any future assets acquired by the nonasbestos-producing divisions.

If the court deems the technicality of whether Manville's action was a "sale" to be irrelevant and therefore applies successor liability, the court must consider the additional question of whether the internal reorganization qualifies as a merger, consolidation, or continuation. If the court applies a strictly form-oriented analysis as the courts used in *Coyle*¹⁸⁰⁸ and *Marano*,¹⁸⁰⁹ it could conclude that none of these three transactions had occurred. Neither merger nor consolidation is applicable because Manville divided one large corporation into several lesser and separate corporate entities. A continuation, as defined in *Knapp*,¹⁸¹⁰ however, would be more difficult for a form-oriented analysis to discount. Nonetheless, this analysis likely would find that, although the reorganization created a new asbestos division, the same parent company still existed under a changed name, in this instance, from Johns-Manville Corporation to Manville Corporation. Thus, the court would find that no transaction had occurred and, therefore, that successor liability would apply to impose liability upon the parent company. Ironically, the same conclusion that absolved the defendant from liability in *Coyle* and *Marano* would result in the

1805. *Id.*

1806. *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974); *see supra* notes 1779-88 and accompanying text.

1807. *See supra* note 1782 and accompanying text.

1808. ASBESTOS LITIG. REP. (ANDREWS) 5336 (Aug. 13, 1982) (summarizing *Coyle v. Johns-Manville Corp.*, Case No. 92 (Pa. C.P. Philadelphia Sept. 10, 1978)); *see supra* notes 1789-91 and accompanying text.

1809. ASBESTOS LITIG. REP. (ANDREWS) 5711 (Oct. 22, 1982) (summarizing *Marano v. Johns-Manville Corp.*, Case No. 108 (Pa. C.P. Philadelphia Sept. 15, 1982)); *see supra* notes 1792-93 and accompanying text.

1810. *See supra* notes 1784-88.

imposition of liability in Manville's internal reorganization.

If the court applies successor liability notwithstanding whether the internal reorganization was a "sale," and if it follows *Amader* and *Davis*,¹⁸¹¹ the court may find a continuation of the former asbestos business in the new asbestos division. Neither the *Amader* nor the *Davis* court attached any significance to continuation of the old business.¹⁸¹² Moreover, the new asbestos division of Johns-Manville generally has maintained the same product, name, personnel, property, and clientele as the old corporation; although the parent corporation still exists, it has ceased production of any asbestos products.¹⁸¹³ This situation is remarkably similar to the facts of *Amader*,¹⁸¹⁴ and arguably would qualify as "a basic continuity of the enterprise" under *Davis*.¹⁸¹⁵

A defendant in Manville's situation should advocate either a substance-oriented analysis in hope that a merger, consolidation, or continuation would be found, or carefully should structure an internal reorganization to lead even a form-oriented court to find that one of these transactions had occurred. Because the doctrine of successor liability developed in *Knapp* requires a court not only to look at the consequences of the transaction but also to weigh public policy considerations as opposed to a "mere procrustean application of formalities,"¹⁸¹⁶ a substance-oriented court, therefore, may look to the intent of an internal reorganization. If it concludes that the purpose of the transaction is to protect corporate assets, it would impose successor liability on the parent corporation. This conclusion, and the conclusion that a form-oriented court would reach,¹⁸¹⁷ effectively would obviate the asset protection purpose of an internal corporate reorganization such as Manville's. *Knapp*

1811. See *supra* notes 1794 and 1800.

1812. In *Davis v. Johns-Manville Sales Corp.*, No. 80 041 153 NP (Mich. Cir. Ct. July 21, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5360 (Aug. 13, 1982), the selling corporation did not dissolve until approximately five years after the transaction had occurred. See *supra* note 1802 and accompanying text. In *Amader v. Pittshurgh-Corning Corp.*, No. 79-4546 (E.D. Pa. July 26, 1982), reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5484 (Aug. 27, 1982), the selling corporation continued to exist despite a contemplated bankruptcy, and the court expressly stated that the possible extinction of a claim against the corporation if it did file for bankruptcy had nothing to do with the court's decision to find a continuation. See *supra* notes 1797-99 and accompanying text.

1813. See *Application for Dismissal*, *supra* note 1725, reprinted in *ASBESTOS LITIG. REP. (ANDREWS)* 5785 (Nov. 12, 1982).

1814. See *supra* notes 1795-96 and accompanying text.

1815. See *supra* note 1803 and accompanying text.

1816. See *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361, 369 (3d Cir. 1974).

1817. See *supra* notes 1808-10 and accompanying text.

also imposes liability upon a purchasing corporation for the obligations of the seller if the transaction is a fraudulent attempt to escape liability for the obligations.¹⁸¹⁸ If the plaintiff cannot prove fraud, each purchasing corporation, whether representing asbestos or nonasbestos facets of the selling corporation, arguably could be liable and thus fail to protect its assets.

b. Situation Two

Forty-Eight Insulations, Inc.¹⁸¹⁹ has developed another novel attempt to survive asbestos litigation costs. Forty-Eight had been a small producer of industrial insulation products, only a few of which contained asbestos, since 1923.¹⁸²⁰ Although it ceased asbestos use in 1970, plaintiffs nevertheless have sued Forty-Eight as a co-defendant in 13,000 asbestos actions and, as a result, the corporation could not acquire credit essential for continued operation and expansion.¹⁸²¹ Rather than undergo Chapter 11 reorganization, Forty-Eight decided to cease its production business and suspend most of its workers. Forty-Eight now maintains only four employees and its insurance company has hired it to act as its own claims service center.¹⁸²² Fibrex, Inc., a new, closely held company formed by private investors, has rented Forty-Eight's former factories and offices and has rehired the former employees of Forty-Eight to operate the same factories and offices for the production of asbestos-free insulation.¹⁸²³ Technically, Forty-Eight's income now consists of only the compensation from its insurance company for Forty-Eight's services and the rent paid to Forty-Eight by Fibrex.

This business alternative raises two issues: first, whether asbestos plaintiffs can recover against the assets of Forty-Eight, and second, whether Fibrex is hable for judgments against Forty-Eight under the successor liability doctrine. Clearly, plaintiffs can recover against payments Forty-Eight receives from its insurance company for services rendered and rent it receives from Fibrex because these payments obviously are Forty-Eight's assets. The company works for its insurance company in order to pay out insur-

1818. See *supra* note 1783 and accompanying text.

1819. *A Small Firm's Answer to Suits Over Asbestos*, Wall St. J., Sept. 24, 1982, at 37, col. 3. Forty-Eight has settled 1000 cases at a cost of \$9000 each, *id.* at 52, col. 4, and is being sued at a rate of 200 times per month, *id.* at 37, col. 3.

1820. *Id.*

1821. *Id.*

1822. *Id.*

1823. *Id.*

ance claims and defend against the 13,000 pending lawsuits,¹⁸²⁴ and the company hopes that its insurance will cover all these costs.¹⁸²⁵ Because Forty-Eight did not have insurance coverage before 1955,¹⁸²⁶ if workers exposed to asbestos before 1955 sue and recover in sufficient amounts to exhaust Forty-Eight's income, they could attempt to extract their judgments by means of liens against the factories and equipment still owned by Forty-Eight.

The most important question is the applicability of successor liability to Fibrex. Plaintiffs would argue that Fibrex is liable as the successor of the obligations of Forty-Eight, but no court has yet applied the successor liability doctrine to this situation. One problem with the application of successor liability to Fibrex is that Fibrex technically is not a purchasing corporation, because it rents the factories and offices of Forty-Eight for use in its own production instead of having bought them. Since *Knapp* evidently contemplated only situations concerning a sale of assets, a successful application of the successor liability doctrine against Fibrex may extend the theory beyond its intended limits.¹⁸²⁷ Fibrex has not in any way absorbed Forty-Eight, which still exists to pay claims.¹⁸²⁸ Alternatively, the court in *Knapp* recognized that courts had applied successor liability when the selling corporation had insufficient assets to satisfy the claims of creditors.¹⁸²⁹ A court may decide, therefore, that the limited assets available from Forty-Eight's insurance salary and rental money are insufficient and allow recovery against the profits of Fibrex.

If a court considers allowing a recovery against Fibrex because Forty-Eight's assets are insufficient to pay the claims, the court still may find successor liability inapplicable since Forty-Eight ceased production of asbestos products in 1970,¹⁸³⁰ and Fibrex has produced only asbestos-free products.¹⁸³¹ Under a *Coyle* or

1824. *Id.*

1825. *Id.* at 52, col. 4.

1826. *Id.* The company admits it fears that it will not survive if enough plaintiffs from the pre-1955 period sue, but the president of Forty-Eight is content that even if the company does not survive it has done its best to do so. *See id.*; *supra* part VIII.

1827. *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974).

1828. "Still, [the president of Forty-Eight] believes the company should pay in some cases. 'You see somebody thin, pale, finding it hard to breathe and using an oxygen mask,' he says. 'These people have been hurt. We should meet the financial obligation the court decrees.'" *A Small Firm's Answer to Suits Over Asbestos*, *supra* note 1819, at 23.

1829. *See supra* note 1786 and accompanying text.

1830. *See supra* note 1821 and accompanying text.

1831. *See supra* note 1823 and accompanying text.

*Marano*¹⁸³² form-oriented analysis, a court would not find the necessary continuation of production to hold Fibrex liable as a successor. Consequently, the court would not hold Fibrex liable for any asbestos-related disease arising from pre-1970 exposure, and, in addition, Fibrex would have no post-1970 exposure liability because it never produced any asbestos products. Under an *Amader* or *Davis*¹⁸³³ substantive analysis, however, the court may find the requisite continuity because Fibrex has maintained the same personnel, property, and clientele as Forty-Eight. The elements of maintaining the same product and name are missing, however, and since the transaction also is rental in nature, the continuity may be too tenuous even for an *Amader* or *Davis* analysis.

Any attempts to resolve these issues must balance the policy considerations of applying the successor liability doctrine against a corporation such as Fibrex that entered into a rental agreement with an admittedly liable corporation, and the legitimacy of disabled asbestos worker's claim against a defendant that, had it continued its production, undoubtedly would have had to pay any judgments out of its profits. Imposing successor liability upon lessees such as Fibrex encourages disabled asbestos workers to bring more suits and further taxes the judicial system with claims, cross-claims, and counter-claims. Applying the doctrine also may subject innocent lessees to liability of which they had no knowledge and in which they did not participate. If the courts refuse to apply the doctrine to Fibrex, they would encourage many admittedly liable defendants to protect future assets from legitimate claimants by contrived rental agreements. *Knapp* provides a logical place for a court to begin an analytical resolution of these issues. In *Knapp* the court emphasized that a court should determine the nature of complicated corporate transactions by examining the provisions of the parties' agreement and the consequences of their actions.¹⁸³⁴ If the courts apply successor liability to the Forty-Eight/Fibrex situation or to similar circumstances, the courts may have to enlist an intent standard to distinguish cases on an ad hoc basis—if the parties entered into the transaction solely to escape liability and had little or no other business purpose, the courts should impose successor liability.

1832. See *supra* notes 1789 & 1792.

1833. See *supra* notes 1794 & 1800.

1834. See *supra* note 1787 and accompanying text.

C. Defensive Strategies

Several commentators have suggested defensive strategies to help asbestos manufacturers and other defendants more efficiently to bear rising litigation costs.¹⁸³⁵ These strategies have two goals—reducing the costs inherent to asbestos litigation and absolving, to some degree, the defendants from liability for asbestos-related injuries.

One cost-reducing strategy most favorable to plaintiffs is an admission by defendants that asbestos is a hazardous product; the admission eliminates litigation of this threshold issue. Defendants, however, concede that some of the exposed workers have developed asbestos-related illnesses, but they refuse to admit any blanket liability for all of the claimed illnesses.¹⁸³⁶ Defendants also have argued that plaintiffs' smoking tobacco products contributes to and perhaps causes or exacerbates some diseases that plaintiffs advance as asbestos induced.¹⁸³⁷ Therefore, both sides will continue to litigate the threshold issue of the hazardous nature of asbestos in individual cases.

Another strategy for cost reduction more acceptable to defendants consists of consolidating defense efforts. Five manufacturers formed an alliance in an effort to provide a more unified defense and to reduce the risk of any defendant "settling out" on the others.¹⁸³⁸ Such an agreement specifies that no signer "shall independently settle any case," and that each signatory agrees to pay a predetermined percentage of any settlement or judgment.¹⁸³⁹ Manufacturers hope that each signer will be more willing to proceed to court and thereby force illegitimate plaintiffs either to withdraw their complaints or lose in court.¹⁸⁴⁰ Manufacturers also can avoid the expense of duplicative discovery, settlement, and other legal fees by this consolidation of procedures. Plaintiffs' attorneys have criticized these alliances as ploys to slow litigation and reduce severe cash flow problems. Some manufacturers, however, refuse to sign such an agreement because they view it as a waste of money

1835. *E.g.*, Winter, *Defendant Asbestos Firms Form an Alliance*, 68 A.B.A. J. 137 (Feb. 1982); Wall St. J., Jan. 27, 1983, at 31, col. 6.

1836. Wall St. J., Jan. 27, 1983, at 31, col. 5.

1837. Denver Post, Sept. 13, 1982.

1838. Winter, *supra* note 1835. The five companies were Celotex Corp., Eagle-Picher Industries, Keene Corp., Pittsburg-Corning Corp., and Unarco Industries. *Id.*

1839. *Id.*

1840. *Id.*

and a possible violation of antitrust laws.¹⁸⁴¹ Depending upon the percentage of judgments or settlements that they must pay, smaller companies that have incurred excessive asbestos litigation expenses may benefit from these alliances by relying upon the discovery procedures of the larger companies.¹⁸⁴² Pursuing insurance companies in court results in higher current costs but may indemnify defendants at a later date. The liability of the insurance companies,¹⁸⁴³ however, is unclear and asbestos manufacturers have met with mixed results. To determine the practicality of pursuing such a course, each asbestos manufacturer must weigh the total costs of this litigation against the likelihood of substantial recoveries.¹⁸⁴⁴

Potentially the most remunerative defensive strategy for manufacturers, and therefore the one most eagerly sought by them, is the participation of the federal government. Governmental participation may take two forms—government payments to asbestos plaintiffs employed in government-related work during their exposure to asbestos¹⁸⁴⁵ and the assertion by manufacturers of the government specifications defense. Since the government continues to assert sovereign immunity as its defense in suits by asbestos plaintiffs,¹⁸⁴⁶ manufacturers probably will gain more protection with the

1841. *Id.* Johns-Manville Corporation, which drafted this particular agreement, excluded itself from the alliance because it wanted to lower its percentage of any verdicts or settlements from 19% to 15%. *Id.*

1842. The president of Pacor, Inc., a small company that formerly purchased asbestos products it custom-fitted and resold, stated that manufacturers such as Manville Corporation should carry part of the burden of suits against companies like Pacor that handled, but never manufactured, asbestos products. *See* *The Tennessean*, Nov. 29, 1982, at 5-B, col. 2.

1843. *See supra* note 1684; *supra* part VIII.

1844. Johns-Manville Corporation has filed suit in the San Francisco Superior Court asking \$5 billion in punitive damages from its insurance carriers. *Wall St. J.*, Jan. 27, 1983, at 31, col. 6. Because of the large sums of money concerned, Manville Corporation likely will incur the extra expense to litigate against the insurance companies.

1845. *See supra* notes 1685 & 1689-97 and accompanying text; *supra* part X. Manville Corporation's working plan for reorganization envisions agreement by the federal government to compensate victims of asbestos diseases exposed while working in federally controlled shipyards during the Second World War, and Manville Corporation recently requested permission from the bankruptcy court to hire additional lawyers to study the possibility of further litigation against the government. *Wall St. J.*, Jan. 27, 1983, at 32, col. 6. Manville Corporation also notes that the government already has settled one case by agreeing to pay \$5.7 million of a \$20 million settlement that benefits 445 workers at an asbestos plant in Tyler, Texas. *See* Letter from Mr. Edward W. Warren of Kirkland & Ellis to Mr. Earle Parker, senior vice president of Manville Corp., Sept. 8, 1982, at 9 (copy on file with *Vanderbilt Law Review*) (citing *BUSINESS WEEK*, Dec. 26, 1977, at 42) [hereinafter cited as Warren Letter].

1846. *See supra* note 1685.

government specifications defense. This defense first arose in *In re Agent Orange Product Liability Litigation*,¹⁸⁴⁷ in which the court recognized that "a manufacturer who supplies equipment to the United States Army in a time of war pursuant to government specifications may not be held liable for any inadequacy in the plans" because the supplier has the right to rely on the government specifications and need not withhold from the armed forces materials that the supplier believes are imprudent or even dangerous.¹⁸⁴⁸ To assert a government specifications defense successfully, the manufacturers must prove that they supplied the product to the government pursuant to a contract, that the government promulgated specifications for the product, that the manufacturer met those specifications, and that the government knew as much as the manufacturer about the hazards of the product.¹⁸⁴⁹ The defense, if recognized, is a "complete defense to any action based on design, whether faulty or not."¹⁸⁵⁰ Plaintiffs distinguish the government specifications defense in asbestos cases because the Agent Orange contractors supplied the material as a weapon during wartime, while asbestos manufacturers supplied insulation for ships used in the war effort, and because recognition of this defense in asbestos cases could result in every manufacturer of any component part used to build the most routine government property arguing for immunity.¹⁸⁵¹ The great level of participation by the federal government in Second World War shipyard activities¹⁸⁵² presents a strong argument for recognition of this defense for asbestos manufacturers, but even with this defense, asbestos victims still may be unable to sue the federal government successfully.¹⁸⁵³ Therefore,

1847. 506 F. Supp. 762 (E.D.N.Y. 1980).

1848. *Id.* at 794 (citing *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980)).

1849. Winter, *U.S. Contracts Asserted in Asbestos Defense*, 68 A.B.A. J. 790 (1982).

1850. *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 794 (E.D.N.Y. 1980) (quoting *Casabianca v. Casabianca*, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980)).

1851. Winter, *supra* note 1849. The United States Department of Defense requires compliance with detailed specifications for almost everything it buys: "Twenty-four pages are required to list the specs for T shirts, 15 pages for chewing gum, and 17 for Worcester-shire sauce." *High Specs*, TIME, Mar. 7, 1983, at 23.

1852. Manville Corporation asserts that the government directed all aspects of the sale and use of asbestos in wartime shipbuilding, that the government knew as much as the asbestos industry about the health hazards of asbestos but lagged in providing protection to workers, and that, therefore, technical legal defenses should not insulate the government from bearing its fair share of the responsibility for diseased shipyard workers. *See generally* Warren Letter, *supra* note 1845.

1853. Winter, *supra* note 1849.

courts probably will be slow to recognize the government specifications defense, and manufacturers consequently will have no recovery.

D. Summary

The Chapter 11 reorganization filings of Unarco, Manville Corporation, and Amatex Corporation reflect an innovative use of the Bankruptcy Code by asbestos manufacturers faced with enormous future liabilities. The election of Chapter 11 reorganization is highly controversial—critics have labeled Manville's filing a perversion of justice and a patent fraud.¹⁸⁵⁴ Opponents of reorganization note the financial status of the manufacturers and conclude that none of the filing corporations require Chapter 11 protection to satisfy their present liabilities. Clearly, the three asbestos manufacturers were not insolvent when they filed for reorganization.¹⁸⁵⁵

The Bankruptcy Code, however, does not explicitly require insolvency for voluntary Chapter 11 reorganization proceedings. Requiring asbestos manufacturers to continue business-as-usual without Chapter 11 protection would slowly, yet substantially, deteriorate their financial condition.¹⁸⁵⁶ Eventually, with dwindling resources used to pay the judgments of numerous projected lawsuits,¹⁸⁵⁷ creditors and lenders would intervene to demand payment before all assets become exhausted. Liquidation likely would result.¹⁸⁵⁸ Alternatively, if courts allow manufacturers to utilize Chapter 11 protection, the corporations could continue their operations, strengthen their financial position, and avoid future bankruptcy. The study commissioned by Manville projects that future claims and liabilities will exceed the corporation's assets.¹⁸⁵⁹ Although critics challenge Manville's projections,¹⁸⁶⁰ other studies indicate that numerous victims of asbestos-related disease will emerge before the end of the century.¹⁸⁶¹ Without some type of

1854. *E.g.*, The Tennessean, Sept. 5, 1982, at 5-B, col. 1.

1855. *See supra* notes 1710-26 and accompanying text.

1856. *See, e.g.*, Statement of G. Earle Parker, senior vice president, Manville Corporation, before the Senate Subcomm. on Courts (Nov. 10, 1982), reprinted in ASBESTOS LITIG. REP. (ANDREWS) 5799, 5804 (Nov. 12, 1982); Bulow, Jackson, & Mnookin, *Winners and Losers in the Manville Bankruptcy*, Wall St. J., Nov. 4, 1982, at 30, col. 3 [hereinafter cited as *Winners and Losers*].

1857. *Winners and Losers, supra* note 1856, at 30, col. 3.

1858. *Id.*

1859. *See supra* notes 1605, 1673, & 1719-23 and accompanying text.

1860. *See supra* notes 1724-26 and accompanying text.

1861. *See supra* part XI.

comprehensive protection from large judgements in products liability lawsuits, asbestos manufacturers face eventual bankruptcy.

Moreover, the protection provided by Chapter 11 reorganization can benefit future claimants as well as the manufacturers. The cost to the manufacturers of the bankruptcy proceedings likely will be less than the costs of defending the asbestos claims.¹⁸⁶² Further, some of the inevitable losses will shift to classes of creditors other than victims of asbestos-related disease.¹⁸⁶³ The result is that more resources can be available for distribution to future claimants as compensation. Reorganization, therefore, likely will benefit future claimants and the economy by preventing the demise of these asbestos manufacturers. The use of Chapter 11 constitutes not a fraud or abuse of the system, but an effective means of averting a potential financial disaster. The unfortunate side-effect of Chapter 11, however, is that existing claimants once again become the victims.

The inequities of the Chapter 11 filings fall squarely upon the claimants who have either judgments against the manufacturers or suits pending at the time of the reorganization filings. An asbestos victim with a judgment against Unarco, Manville Corporation, or Amatex Corporation probably will collect only a fraction of his judgment. A deserving claimant with a suit pending against asbestos manufacturers must sever the claims against the manufacturers protected by reorganization before proceeding against nonbankrupt asbestos manufacturers. To proceed against a manufacturer protected by Chapter 11, a claimant must await a court-approved reorganization plan. The result in either situation is that the reorganizations delay even further the slow-moving judicial process. Thus, the potential advantages to future claimants provided by Chapter 11 come, at least partially, at the expense of the present asbestos victims.

The gravest danger associated with Chapter 11 reorganizations concerns the reorganization plan. Absolute liability limits for manufacturers in a court-approved reorganization plan could deny future claimants adequate compensation. The proposed Manville reorganization plan limiting its liability to \$500 million presents this danger of inadequate compensation. Courts facing proposed reorganization plans placing an absolute limit on asbestos manufacturers liability should exercise their power to reject such plans to en-

1862. See *Winners and Losers*, *supra* note 1856, at 3, col. 3.

1863. *Id.*

sure that all deserving claimants receive adequate compensation in the future.

Clearly, the only effective long-term solution to the asbestos problem is federal legislation. Given the judicial system's ponderosity, an alteration of the system to accommodate the burdens placed upon it by asbestos litigation is unlikely. The furor surrounding the Chapter 11 reorganization filings combined with the associated disadvantages to existing claimants and the difficulties inherent in creating a fair and effective reorganization plan further buttress the need for a legislative solution. Procuring an equitable legislative alternative, however, may not be possible in the current political climate.

XIII. CONCLUSION

The issues and controversies surrounding the asbestos litigation and Chapter 11 filings of three asbestos manufacturers emphasize the need for a legislative compensation program for victims of asbestos-related disease. One theme recurring throughout this Special Project is the inability of the judicial system adequately to cope with the volume and complexity of asbestos-related lawsuits. Even if courts could restructure current products liability law to resolve many of the problems presented by mass tort litigation, external factors such as Chapter 11 reorganizations and potential bankruptcies would prevent the changes from becoming effective. Maintaining the present system of victim compensation, however, only benefits the attorneys.¹⁸⁶⁴ Congress, therefore, immediately must enact a legislative program removing asbestos victim compensation from the judicial system to ensure a more equitable distribution of resources. Unfortunately, Congress has spent over eight years "looking into this problem" without enacting a practical, equitable solution.¹⁸⁶⁵ Although observers predict that the bill

1864. Mr. Victor E. Schwartz, a partner in the Washington D.C. law firm of Crowell and Moring, has estimated that "for every six cents . . . paid to an asbestos victim seven cents is paid to an attorney involved in the litigation." ASBESTOS LITIG. REP. (ANDREWS) 4679 (Mar. 12, 1982). Keene Corporation estimates that 75 cents of every one dollar paid out goes to lawyers (including defense attorneys) while only 10 cents actually goes to claimants. The remaining 15 cents goes to insurance companies. *H.R. 5735 Hearings, supra* note 13, at 95 (statement of Mr. Glenn W. Bailey, chairman, Keene Corporation). Commercial Union Insurance Companies believes that for every one dollar actually paid to a claimant, it pays up to \$3.40 in legal fees. *Id.* at 129 (statement of Mr. Harry Martens, executive vice president, Commercial Union Insurance Companies, Inc.).

1865. *H.R. 5735 Hearings, supra* note 13, at 1 (introductory comments of Representative Miller).

introduced by Representative Miller in the Ninety-eighth Congress has a good chance of passing, the bill does not appropriately distribute the burden of compensating the victims. Congress must include the federal government in any compensation program to reflect its substantial role in the asbestos problem, particularly its commissioning the construction of warships during the Second World War. Congress also must include the tobacco industry in a compensation plan to reflect the relationship between cigarette smoking and lung cancer in asbestos workers.

This Special Project critically has examined the most important issues concerning the asbestos problem. It has considered the complex legal, legislative, and social questions that society must confront in order to resolve this predicament. Only swift action by Congress in the form of a fair and comprehensive compensation scheme for victims of asbestos-related disabilities will initiate a solution to this difficult and pervasive problem.

JOHN P. BURNS
G. EDWARD CASSADY, III
KENNETH B. COLE, JR.
TIMOTHY R. DODSON
PHILIP E. HOLLADAY, JR.
PAUL C. NEY, JR.
DREW T. PAROBEK
KIMBERLY PAYNE
D. BLAINE SANDERS
L. D. SIMMONS, II
CHARLES D. MAGUIRE, JR.
Special Project Editor
LAURIN BLUMBNTAL
Associate Special Project Editor