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Clearing the Air: Resolving the Asbestos Personal Injury Litigation Crisis

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COMMENT

CLEARING THE AIR: RESOLVING THE ASBESTOS PERSONAL INJURY LITIGATION CRISIS

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INTRODUCTION

New York State juries are presently evaluating hundreds of personal injury claims arising from alleged asbestos exposures during construction at the Brooklyn Naval Shipyard, powerhouses, office buildings, prisons, schools, hospitals and other commercial structures. These cases are part of the 130,000 federal and state personal injury actions that comprise the national asbestos litigation crisis.

This comment briefly outlines the evolution of the asbestos litigation, asbestos use during construction and renovation, the biological effects of asbestos exposure, and the exponential increase in case filings over the past twenty years. This comment also examines the procedural and substantive areas in the New York and nationwide asbestos personal injury litigation that impede resolution of these actions. The comment concludes with a discussion of potential solutions to the current crisis.

Asbestos, known since the days of ancient Greece for its fireproofing and indestructible characteristics, is a commercial term for a group of mineral fibers.¹ King Charlemagne owned an asbestos tablecloth that he cleaned by "burning" in his fireplace.² During World War II, asbestos was considered a strategic mineral that was rationed by the government,³ and from the 1940's to the mid-1970's asbestos was widely used in the United States in insulation products. Unfortunately, these microscopic asbestos fibers have sparked tens of thousands of personal injury lawsuits.

The first lawsuits involving asbestos-related pulmonary disease were worker's compensation suits and personal injury suits filed in the 1970's. These cases have been filed in increasing numbers over the past two de-

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1. Asbestos is the only mineral that contains fiber. A fiber is defined as a particle that is long and thin. It generally is accepted that a fiber capable of causing lung disease is three times as long as it is wide.

2. C. FREDERICK KITTLE, MESOTHELIOMA: DIAGNOSIS AND MANAGEMENT at viii (1987) citing Lee & Selikoff, *Historical Background to the Asbestos Problem*, 18 ENVTL. RES. 300 (1979).

3. *Compensation for Occupational Diseases: Hearings on H.R.1626 & H.R.3090 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. (1985) (statement of Frank V. Connolly, former Director, Special Rating Division, War Production Board).

cares. In 1986, the New York State Legislature passed a bill granting a one-year statute of limitations grace period to those tort victims who succumbed to diseases with long latency periods,⁴ resulting in a massive influx of asbestos personal injury actions. The previous statute of limitations barred personal injury actions that were filed three years after the plaintiff's last exposure to asbestos dust. The new law provided that all statutory cases had to be filed within one year of the date of enactment of the new law, activating thousands of previously time-barred asbestos cases.

As more fully discussed below, this rapid filing deadline created chaos within New York's "asbestos legal community." Various personal injury law firms rushed to investigate thousands of potential cases and file those deemed to have meritorious claims. Unfortunately, New York's legislature failed to learn from the problems that had arisen in the twenty years of asbestos litigation in other states. For instance, the legislature opened the floodgates of litigation without providing for the orderly filing and organization of thousands of individual tort cases. Because New York is, in some respects, a microcosm of the nationwide asbestos litigation, New York's recent experiences provide useful illustrations of the complex problems associated with the resolution of large-volume mass tort actions.

The tort system in the United States is incapable of fairly and efficiently processing the 130,000 cases currently comprising the nationwide asbestos personal injury litigation.⁵ In an attempt to reduce the backlog, judges have resorted to class actions and consolidation, combining individual cases into single "mega-trials." These trials have proved unsatisfactory in adequately representing all plaintiffs and have forced dozens of defendants into insolvency. Non-adversarial procedures, with the objective of maximizing dwindling resources, will prove to be superior to the current solutions employed by the courts to cope with this litigation.⁶

I. ASBESTOS USE IN THE WORK ENVIRONMENT

For many years asbestos fibers were integrated into a multitude of insulation products, including cement, cloth, tape, block, board, brakes, pipecovering, tiles, rope, firebrick, stalastics, panels, gloves, paper,

4. See Toxic Torts—Statute of Limitations, 1986 N.Y. CONSOLIDATED LAWS, 682 § 4. See also NEW YORK CIV. PRAC. L. & R. § 214-c (McKinney 1990 & Supp. 1991) ("Certain actions to be commenced within three years of discovery").

5. In 1989, over 1,500 cases were filed each month. N.Y. Times, Apr. 2, 1989, § C, at 1, col. 4. See also In Re Joint E. & S. Dist. Asbestos Litig., 125 F.R.D. 60 (E.D.N.Y. & S.D.N.Y. 1989). (As of April 1989, there were approximately 2,500 asbestos cases pending in the Southern and Eastern Districts).

6. The tort system is an extremely valuable safeguard protecting victims of serious civil wrongs, and it should never be abolished. However, the nationwide asbestos personal injury litigation can no longer be resolved in an adversarial environment because of its magnitude. As each year passes, the funds available to compensate injured plaintiffs diminish. A new approach to solve this tragic situation is needed now.

sponge, tank jackets, gypsum boards, packing, millboard, textiles, paints, packing, clutch facings, telephone ducts, felt, plaster, gaskets, and spray.⁷ These products were used in fireproofing, heat insulation, and as safety barriers, such as, insulating steam pipes on submarines to prevent sailor-pipe contact. Many people believed that asbestos was a miracle fiber because of its versatility and its indestructibility. Unfortunately, although it was extraordinarily effective for protection from fire, its effects on human beings were far from beneficial.

A. *How Asbestos Fibers Affect the Human Body*

Asbestos fibers are microscopic. Sometimes workers are exposed to asbestos dust in concentrations high enough to override their body's defense mechanisms. Depending on dose, intensity and duration of exposure, and the type or types of asbestos fibers involved, lung damage can occur.

1. Biological Defense Mechanisms

The pulmonary system consists of several biological defense systems designed to repel or reject infiltrates in ambient air. The hairs in the nasal passages comprise the first defense structure. The second defense consists of the cilia lining the bronchial tubes that capture and "beat back" particles of dust into the mucous system, where they are eliminated. In the air sacs, macrophage scavenger cells comprise a third defense structure. The macrophage cells seek out foreign infiltrates, such as bacteria, viruses, and dust, and through the use of enzymes, destroy invading particulates. Sometimes the overproduction of enzymes needed to destroy indestructible asbestos fibers damage the body by scarring lung tissue.

Lung damage can take several different forms: pleural thickening, pleural plaques, scarring (fibrosis) of the lung parenchyma, and, depending on the circumstances, cancer. The cancers associated with asbestos exposure are pleural and peritoneal mesothelioma and bronchogenic carcinoma. Defendants in asbestos litigation generally dispute whether bronchogenic (lung) cancer is caused, in whole or in part, by asbestos exposure because of the role of cigarette smoking. Also disputed is whether mesothelioma, a cancer of the cells lining the lungs (pleural mesothelioma) or abdomen (peritoneal mesothelioma) is caused by certain types of asbestos fibers. Some ex-manufacturer defendants argue that their particular insulation materials contain only chrysotile asbestos fibers, which some experts in the medical community do not believe cause mesothelioma.

7. For a more comprehensive list, see Asbestos; Publication of Identifying Information, 55 Fed. Reg. 5144 (1990).

II. THE NEW YORK LITIGATION EXPERIENCE⁸

The New York asbestos personal injury litigation has been called "Dodge City" by attorneys active in these cases for many reasons. First, several thousand asbestos cases, previously time barred, were revived by an amended statute of limitations and flooded an unprepared judicial system. Second, New York's reputation for large personal injury damage awards, coupled with expensive litigation support costs and large attorney fees, compelled some defendants to take an early aggressive litigation posture hoping to establish low precedential case settlement values in the jurisdiction. Third, congested court calendars resulted in scheduling problems for the attorneys, clients and the judiciary. Fourth, the results of similar trials have been inconsistent. Claims involving plaintiffs of similar ages with comparable medical conditions, smoking and exposure histories have concluded with verdicts ranging from across-the-board defense verdicts to large compensatory awards coupled with punitive damages. Fifth, and most critical, local case law concerning regularly disputed trial issues has developed slowly. For example, evidentiary rules regarding sufficient minimum product exposure evidence took more than two years to evolve.

Most recently, pursuant to an Eastern District Court order dated February 27, 1991, all Federal actions in the Southern and Eastern District of New York involving exposures at electric generating stations were consolidated for trial. The order set an April 1, 1991 trial date, exerting inordinate pressure on plaintiffs' and defendants' counsel. Immediately after the order was executed, one ex-manufacturer defendant implied over 200 third-party defendants into the "powerhouse litigation." In order to streamline and organize the trial, 48 cases were selected as the first group of cases to be tried on April 15. In these 48 individual actions, many files were not "trial ready," and in some instances, no discovery had ever been conducted.

These cases have placed an extra burden upon the financial resources of manufacturers who recently have settled hundreds of "Brooklyn Navy Yard" cases in federal and state court. It also has greatly strained the trial bar, which has become discovery, settlement, and trial weary from the breakneck pace upon which cases have been rushed through the system.

The courts have become so fervent in disposing of the New York cases that at times settlement has become impossible. The litigation at this point in time literally has overwhelmed the parties' ability to efficiently

8. There are currently 3,000 active asbestos personal injury actions pending in New York. All of the cases filed in New York Supreme Court in New York City (Manhattan, Brooklyn, Queens, Staten Island and the Bronx) were consolidated for discovery and trial in Manhattan (New York County) pursuant to an order issued by Chief Administrative Judge Milton Williams. All federal actions were consolidated into a master docket known as the "Joint Eastern and Southern District Asbestos Litigation" pursuant to a similar order from Chief Judge Charles L. Brieant.

collect and process basic case information. This federal "powerhouse" consolidation is not the only consolidated asbestos trial being conducted in the jurisdiction. An additional state consolidated trial involving the remaining Brooklyn Navy Yard cases began in late April 1991. After those cases are resolved, a vast number of untried state actions involving alleged asbestos exposures in commercial buildings still remains.

III. IMPEDIMENTS: A COMPARISON OF LOCAL AND NATIONAL ISSUES

Issues such as evaluating compensatory and punitive damages, organizing trials, defining "compensable disease," and settling cases without jeopardizing corporate viability, are important in every jurisdiction. Issues such as reviving thousands of time-barred actions, legislating tort reform and applying multiple tortfeasor liability set-offs are New York problems that in some instances have a national impact.⁹

Whether in New York or in states throughout the nation, many problems have defied common sense and persisted much longer than necessary. For example, the parties have delayed cost containment procedures until financial resources set aside to fund the litigation have reached critically low levels. Other problems, such as docket control, have never been adequately resolved, despite the best efforts of attorneys, parties, and the courts.¹⁰ Past solutions have not worked because the

9. See N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1986).

When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

A defendant is permitted to select the higher set-off from each settling defendant and apply these amounts against the verdict to reduce the liability of the non-settling defendant. *Id.* See *Williams v. Niske*, 147 Misc. 2d 556, 557 N.Y.S.2d 1006 (Sup. Ct. N.Y. 1989). To illustrate, assume the following: (1) A personal injury action is tried to verdict against one defendant; four others settled before verdict; (2) joint and several liability applies; (3) the verdict is \$515,000.00; and (4) the jury allocated the following percentages of liability against four defendants even though all but one settled prior to verdict.

Liability	Settlement	Set-Off (Greater Amount)
3% (\$ 15,450)	\$ 17,500	\$ 17,500
40% (206,000)	81,500	206,000
2% (10,300)	17,500	17,500
15% (77,250)	40,000	77,250
60% (\$309,000)	\$156,500	\$318,250

The non-settling defendant pays 40% of the verdict (\$206,000) or \$196,000 [\$515,000 - \$318,250] whichever is the lesser amount.

10. See, e.g., *In re Nat. Asbestos Litig.*, No. 1-90-CV-11,000 (N.D. Ohio, Aug. 10,

asbestos litigation backlog cannot be resolved easily and fairly in an adversarial context due to its enormous size.

IV. REVIVING TIME-BARRED CLAIMS

The uncontrolled and unorganized revival of thousands of time-barred asbestos personal injury claims triggered the beginning of the asbestos litigation crisis in New York. In 1986, as part of tort reform legislation, the New York State Legislature enacted the Toxic Tort Revival Statute,¹¹ which provides that:

[E]very action for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinyl chloride upon or within the body or upon or within property which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act. . .

This one paragraph opened the floodgates of litigation without providing for any structure of filing cases or placing the matters on a timeline that would dispose of the cases at a pace fair to both sides. For instance, the plaintiff's bar only had one year to research background facts and then prepare and file cases which were previously barred from the New York tort system for decades. Due to the lack of time, counsel for plaintiffs were unable to adequately identify the appropriate defendants in each individual case, resulting in a laundry list that unnecessarily included some and failed to include others as party defendants. Plaintiff's counsel identified and brought into the litigation numerous defendants while others who should have been included escaped the clutches of the liability system. These "revival" cases were analyzed and prepared for trial without the benefit of evidence that died with workers and with corporate, government and medical officials. Many important documents, such as employee and medical records, were also lost or destroyed due to age of these materials, fires, the closing of businesses or because of document retention policies. The courts, along with counsel, have struggled for years to manage the overwhelming volume of basic information associated with thousands of cases coupled with the corresponding lack of detailed information for each revived case.

The revival statute placed a great burden on the cash flows of the defendants' and their insurance carriers. Parties were forced to hire local counsel, medical and "state-of-the-art" witnesses, and consultants were

1990) *vacated in part*, In re Ohio Asbestos Litig., No. 103 (N.D. Ohio Aug. 28, 1990); PROD. SAFETY & LIAB. REP. (BNA) 909 (August 17, 1990) (case management techniques have been ineffective to handle the numerous asbestos claims).

11. 1986 N.Y. CONSOLIDATED LAWS 214-c.

hired in a relatively short period of time.¹² Furthermore, parties had to purchase case-tracking systems, and a plethora of medical records were used to evaluate these new claims. These new costs were in addition to the millions of unbudgeted dollars needed to settle several of these "new" matters. The majority of the New York "revival" actions involve insulators who worked in shipyards,¹³ electric generating stations, and commercial buildings. A second major group involves workers incidentally exposed to asbestos dust in the same facilities as insulators.¹⁴

A. *The New York Legislature Should Have Created A Filing Period Greater Than One Year*

The medical literature available to the legislators in 1986 indicated that at least 20 years of cases would be unleashed into New York's judicial system once the revival statute was enacted. For instance, in December, 1965 Dr. Irving J. Selikoff of Mt. Sinai Hospital reported in a study of the International Association of Heat and Frost Insulators and Asbestos Workers in New York and New Jersey, the very plaintiffs who filed a majority of the "revival" cases, that pleural calcification (the deposit of calcium salts on the membrane enveloping the lungs and lining the walls of the chest cavity) "rarely occurs in less than 20 years from onset of exposure."¹⁵

The legislature should have created a two-to-three-year filing period

12. State-of-the-art witnesses are akin to historians who explain the levels of knowledge available to various communities, e.g., corporate, medical, industrial and government at given points in time. The term probably comes from the concept of the state-of-the-art of knowledge available.

13. Approximately 70,000 people worked at New York's Brooklyn Navy Yard during the World War II era.

14. These suits are referred to as the "attenuated trade cases." In these cases, it is difficult for the plaintiff to identify the actual source(s) of his or her exposure which results in defense motions for summary judgment. See *Attkiss v. Armstrong World Indust., Inc.*, No. 89-0986 (S.D. Fla. May 15, 1990); but see also *Hoffman v. Allied Corp.*, 912 F.2d 1379 (11th Cir. 1990) (summary judgment granted to defendant manufacturer in an incidental exposure case reversed and remanded since material factual issue existed). In some cases, plaintiffs made to impose a market share theory of liability see, e.g., *Leng v. Celotex Corp.*, 196 Ill. App. 3d 647, 554 N.E.2d 468, *appeal denied*, 555 N.E.2d 377 (1990) (plaintiff's request to impose market share liability denied).

A second battleground involving these cases concerns the admissibility of testimony of asbestos workers employed at these sites to establish evidence that a manufacturer's product was a cause of the plaintiff's illness. Often, the testimony is provided by a witness who has not worked in close physical proximity to the plaintiff. Compare *Eckenrod v. GAF Corp.*, 375 Pa. Super. 187, 192, 544 A.2d 50, 53 ("the mere fact that appellees' asbestos products came into the [steel manufacturing] facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered") *appeal denied* 520 Pa. 605, 553 A.2d 968 (1988) [and] *Odum v. Celotex Corp.*, 764 F.2d 1486, 1488 (11th Cir. 1985) ("[P]laintiff must show. . . that a particular defendant's asbestos-containing product was used at the job site and that the plaintiff was in proximity to that product at the time it was being used.") with *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d. Cir.), *cert. denied* 111 S.Ct. 297 (1990).

15. Selikoff, *The Occurrence of Pleural Calcification Among Asbestos Insulation Workers*, 132 ANNALS OF THE N.Y. ACAD. OF SCI. 351, 364 (1965).

followed by a one- or two-year structured discovery period. These procedures would have avoided, or at least minimized, the scheduling problems now confronted by the litigants and the large caseloads faced by the New York State courts.

V. PUNITIVE DAMAGES

Punitive damages have been, and will continue to be, bitterly fought by the litigants. The question American juries must decide is whether the decision by corporate officials to continue manufacturing asbestos-containing insulation products without adequate warning labels despite the identification of asbestos as a health risk warrants punitive damages. For some defendants, repeated punitive damage awards to plaintiffs have led to bankruptcy.¹⁶ For plaintiffs, punitive damages represent vindication. For the courts, punitive damages presents a complex issue best decided by the legislature. Recently, the New York courts have been suggesting to the litigants that plaintiff's counsel should drop their claims for punitive damages if the defendants waive their state-of-the-art defense in order to shorten the length of trials.

Traditionally, defendants have argued that the repeated imposition of punitive damages for the same course of historical conduct is inherently unfair.¹⁷ The defense bar asserts that while punitive damages deter *future* conduct, the imposition of punitive damages serves no purpose in the context of the asbestos litigation because most, if not all, American manufacturers terminated the manufacture of asbestos-containing insulation products at least two decades ago. Defense counsel also contends that punitive damages provide a windfall to the first litigants who prevail on this issue, threatening future claimants chances of recovery. Finally, these advocates fervently argue that some actions should be exempt from punitive liability, such as supplying asbestos containing materials to the United States government during World War II.

Plaintiff's counsel assert that the issue of punitive damages as a matter of law and fairness to individual plaintiffs must be a question for the jury. Punitive damages, or even the threat of punitive damages, expedite settlement because of the adverse consequences defendants have experienced

16. For a complete discussion of this issue, the reader is referred to the Committee on Product Liability, *Multiple Punitive Damages Awards: A Proposal for Meeting the Public Policy Challenge*, 45 *Record of the A. of the B. of the City of N.Y.* 776 (1990). *Reprinted in Toxics Law Rep.* 921 (Dec. 19, 1990).

According to one recently filed brief, "since only September 1, 1988, a phenomenal 213.4 million dollars in punitive damages has been awarded by juries in asbestos cases." (emphasis added). Joint Brief of Certain Defendants In Support Of Their Motion to Sever the Punitive Damages Issues From All Other Issues At Trial at 13, In re Consolidated Brooklyn Navy Yard Cases, No. TS 90-9999 (E.D.N.Y. & S.D.N.Y. 1990). The brief also cites a single \$75 million verdict against Raymark, "which was instrumental in forcing it into bankruptcy." *Id.*

17. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) ("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.")

in the past when they have proceeded to verdict.¹⁸ These attorneys believe that the punitive damage verdicts in the asbestos litigation send a powerful message to other industries that society will not tolerate unsafe products or workplaces.

Evaluating corporate conduct in an age before consumer activism, warning labels, Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) is the most difficult aspect of determining whether to award punitive damages. Asbestos-containing insulation products were developed in the early part of this century and were widely used many decades ago. Occupational safety, however, is a fairly recent concept. As late as the 1940's, it was common for children to work in unsafe factories. Not long ago sun tanning and the consumption of substantial quantities of meat in the United States were considered healthy. Society has become more knowledgeable about health issues, but it is questionable whether it is fair to judge conduct of the 1940's and 1950's by 1991 legal standards.

Some corporate defendants that did not manufacture, distribute, or mine asbestos-containing products, but by operation of law, have assumed the liability of a predecessor who was involved in the manufacture of these products. The successor companies argue for exemption from paying punitive damages to plaintiffs, asserting that it is inherently unfair. Plaintiffs' attorneys counter that the successor company ultimately must be responsible in order to protect the public and our environment.

These dilemmas, coupled with diminishing corporate financial resources, increasing litigation costs, and overflowing court dockets, have made the issue of punitive damages the focus of many time-consuming court battles.

VI. COMPENSATORY DAMAGES

Compensatory damages, like punitive damages, are extremely difficult to evaluate. There is no "correct" answer to the question asked of every jury: "What is *fair* compensation to an individual exposed in sufficient quantities to an asbestos-containing product that is a substantial contributing cause of his or her illness?" Juries find this question one of the most troublesome aspects of their decision-making responsibilities. Some attorneys argue that compensation can never remedy a wrongful death or a disabling injury. Since there is no correct way to evaluate asbestos personal injury cases, settlement in an adversarial system continues to be difficult to achieve. Furthermore, corporate cash flows and financial reserves become threatened if too many immediate settlements are made without regard to long-term corporate viability.

18. See, e.g., *Toxics Law Rep.* 852 (Dec. 5, 1990). See also, *Dunn v. Owens-Corning Fiberglas Corp.*, No. 1987-238 (D.C.V.I. 1990) (\$25 million in punitive damages awarded against one defendant in a single plaintiff action).

VII. BANKRUPTCY

The financial pressure of the asbestos litigation is staggering to those who choose to weather the storm. Punitive and compensatory damages over the past two decades have led some defendants in the litigation to choose bankruptcy as a means of coping with the asbestos litigation.¹⁹ Johns-Manville, Raymark, Amatex, UNARCO, The Celotex Corporation, Carey-Canada, National Gypsum, Eagle-Picher Industries, Inc., and, most recently, H.K. Porter have filed for Chapter 7 or Chapter 11 bankruptcy during the last ten years. Eagle-Picher Industries, Inc., an ex-manufacturer/defendant, filed a 23(b)(1)(B) class action proceeding to avoid bankruptcy.²⁰ In a statement in support of class certification, the company stated that in 1989 litigation costs were \$119 million, and, in 1990, it anticipated costs connected with asbestos-related personal injury litigation to exceed \$110 million.²¹ The crushing weight of the asbestos litigation eventually forced Eagle-Picher to seek bankruptcy protection on January 7, 1991.²²

Bankruptcy filings clearly demonstrate that the present asbestos litigation crisis has to be resolved with compromise and compassion for all parties in a non-adversarial medium legislated by the Congress.

VIII. DIFFICULT TRIAL ISSUES

Evaluating asbestos personal injury cases is difficult. Defining compensable asbestos-related diseases presents an even greater challenge. If the parties could reach agreement as to which diseases are compensable, settlements would be expedited because qualification for compensability is a great area of dispute in this litigation. Defendants traditionally argue that gastrointestinal cancers and colon cancers are not asbestos related, while cases involving pleural plaques (discrete, elevated opaque lesions) or pleural thickening are non-dysfunctional, and are merely markers of exposure. Therefore, compensation should not be granted unless a plaintiff with these pleural diseases develops "asbestosis."²³

Asbestosis is defined differently by the litigants. Defense counsel con-

19. It should be noted that mass torts actions have triggered Chapter 11 filings in other industries. See, e.g., *In Re A.H. Robins, Inc.*, 880 F.2d 694 (4th Cir. 1989) (*Dalkon Shield*), cert. denied sub nom. *Menard-Sanford v. A.H. Robins Co., Inc.*, 110 S.Ct. 376 (1989).

20. See 18 PROD. SAFETY & LIAB. REP. (BNA) 879 (August 10, 1990).

21. *Id.*

22. *Id.*

23. Plaintiff's counsel in these circumstances will rely heavily upon "the fear of cancer case." Some parties have suggested that the best way to administer these cases is to place them on a suspended docket (called a pleural registry or "a green card") to toll the statute of limitations.

There are mixed reactions to the suspended docket. Courts seem to favor it because cases are removed, at least temporarily, from the court system. Some plaintiffs would prefer to receive some compensation immediately even if it is minimal. Some defendants worry that any group of cases with an aging population, some of whom smoke cigarettes, can only create problems for the future. A pleural registry is only a temporary solution.

sistently define asbestosis by citing the criteria announced by the American Thoracic Society (ATS).²⁴ On the other hand, the plaintiff's bar has not uniformly defined asbestosis but argues that pleural disease deserves compensation especially for the emotional damages that accompany pleural diseases, (such as the fear of developing cancer.) Even if the litigants accept a precise definition of "asbestosis", the medical data would still be subject to disputed medical reviews in many cases. Court-appointed medical evaluations are one solution, but these medical reviews would be more efficiently used in a non-adversarial environment because trials by their very nature compel the litigants to take unyieldingly adversarial postures.

IX. JUDICIAL SOLUTIONS TO THE CURRENT LITIGATION CRISIS

Courts have experimented with different procedures to solve the litigation backlog. One solution, used with ever-increasing regularity is to consolidate a large number of cases into one supertrial. Consolidation is a judicial reaction to the staggering number of pending asbestos personal injury cases,²⁵ however, very few people seem to be satisfied by this approach. Defense counsel assert that corporate financial reserves could be eradicated by one or two large verdicts.²⁶ Furthermore, a trial consisting of a thousand dissimilar cases is confusing to a jury and otherwise un-

The problems created by the nationwide asbestos litigation require long-term, non-adversarial solutions.

It should be noted that in 1990 the Third Circuit Court of Appeals ruled that the issue of whether pleural thickening is compensable is a jury question. *Howell v. Celotex*, 904 F.2d 3 (3d Cir. 1990).

24. These criteria are:

- 1- A reliable history of asbestos exposure;
- 2- An appropriate time interval between exposure and detection;
- 3- X-ray evidence of small irregular opacities (i.e. non-transparent) of a profusion of 1/1 (an X-ray interpretation on a scale from 0/0 to 3/4) or greater;
- 4- A restrictive pattern of lung impairment with a forced vital capacity (the volume of air expired during rapid exhalation) below the lower limit of normal;
- 5- A diffusing capacity below the lower limit of normal; and,
- 6- Bilateral late or pan inspiratory crackles at the posterior lung bases not cleared by cough. American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 Am. Rev. Resp. Dis. 363, 367 (1986).

25. Mass consolidation has been used by the courts to resolve other mass tort actions. In March 1990 Justice James B. Kane, Jr., the Administrative Judge of the New York Supreme Court in Buffalo ordered the apportionment of damages in the DES litigation against 30 manufacturers. It should be noted that market share liability as discussed in DES cases such as *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied, sub nom. E.R. Squibb & Sons, Inc. v. Sindell*, 449 U.S. 912 (1980) has not been applied to the New York asbestos litigation. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989). See also *Leng v. Celotex Corp.*, 196 Ill. App. 3d 647, 554 N.E.2d 468 (1990), *appeal denied*, 132 Ill. 2d 546, 555 N.E.2d 377 (1990).

26. See, e.g., *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990) (No. B-86-0456) (\$122.8 million verdict in 147 cases assessed against three defendants, one of which filed for Chapter 11 reorganization during trial) 18 PROD. SAFETY & LIAB. REP. (BNA) 1168.

fairly prejudicial because weak cases are bolstered by wrongful death actions or those involving terminal or seriously ill plaintiffs. Moreover, defendants invariably will be found liable due to the sheer volume of cases involving individuals against corporations.

Plaintiffs' counsel oppose consolidation because their clients' cases become lost in the litigation process — evidence germane to their clients' cases are diluted by dozens or hundreds of other cases. Consolidation deprives their clients of a day in court because some courts use summary evidence and representative cases in lieu of case-specific evidence. On the other hand, other plaintiff's attorneys have argued that mass trials promote rapid settlement and allow their clients to receive immediate compensation while they are still alive to benefit from it.

Courts have used consolidation of cases and class action to resolve non-asbestos mass tort actions.²⁷ The use of these procedural devices is still evolving in the asbestos litigation. At present, the federal courts are evaluating whether to consolidate all pending district court asbestos personal injury actions without firm trial dates into a mass multidistrict litigation. While some federal and state courts have used consolidation to solve the asbestos backlog, others have changed the way trials are organized to expedite resolution of these cases.

X. TRIAL ORGANIZATION: BIFURCATION OF TRIAL ISSUES

Some counsel have argued that litigating the contested issues in a particular action first, (e.g., amount of compensatory damages, whether an asbestos-related disease exists) expedites the resolution of an action. Advocates of bifurcation claim that trials are more focused, and achieve rapid yet fair results. For example, "reverse bifurcation" (i.e., trying medical issues and damages first) avoids the introduction of highly prejudicial and potentially confusing evidence, such as corporate conduct proofs. Since only one or two issues are litigated instead of many technical, voluminous, and overlapping issues, this approach has been very successful at times. Those in opposition assert that bifurcation has led to disastrous results because this procedure does not allow the jury to have a complete overview of the facts and does not substantially shorten the length of trial.

If a vigorously disputed issue can be tried in one or two days, it is worth the effort to bifurcate. Whether the courts use consolidation or bifurcation to expedite trials, the ultimate objective of the courts is to see these cases settle before trial.

XI. POTENTIAL SOLUTIONS

In 1990, an Ad Hoc Committee of Federal Judges appointed by Chief

27. See, e.g., *In re A.H. Robins Co. Inc.*, 880 F.2d 709 (4th Cir. 1989) (class certification and settlement of Dalkon Shield cases affirmed), *cert. denied, sub nom. Anderson v. Aetna Casualty & Surety Co.*, 110 S.Ct. 377 (1989).

Justice William Rehnquist analyzed the problems associated with the nationwide asbestos litigation.²⁸ Some of the solutions proposed by this group involve amending class action rules to accommodate asbestos actions, eliminating or limiting punitive damages and convincing Congress to legislate new liability rules for asbestos cases.

Any proposal to legislate new laws to "accommodate" asbestos cases will not be as effective as completely removing these matters from an overburdened tort system. Mass trials, however organized, will only create more litigation and more lobbying for relief. Tort litigation will not prevent remaining defendants who have not filed for bankruptcy to consider Chapter 7 or Chapter 11 protection as a means of escaping crushing litigation costs. Until Congress legislates a national asbestos compensation scheme, the courts will continue to consolidate cases and try their best to streamline issues.

Proposed solutions to the asbestos litigation have been, and will continue to be, subject to a barrage of criticism. The nationwide asbestos litigation is now two decades old. Various participants and critics should have developed novel, creative solutions by now. Unfortunately, no solutions have made sweeping changes to this very complex and tragic situation.

The proposals briefly outlined below are merely suggestions that need to be refined through extensive negotiation and planning. A quick summary of rough ideas cannot solve a serious societal problem that has grown worse each year. While litigation is not the best way to approach this enormous task, one recommended solution involves a non-adversarial approach which is briefly outlined below. Undoubtedly, any policy battles over how to resolve the 130,000 pending asbestos cases will be as bitterly fought as the litigation itself.

A. *A Litigation-Style Approach*

An all-issues asbestos personal injury trial should be replaced by a one-day administrative hearing similar to a worker's compensation hearing. A panel of decision-makers consisting of impartial physicians and actuaries would evaluate the merits of each case. If a panel finds compensation appropriate, it would award financial compensation drawn from a fund provided by the defendants, their insurers, unions, employers, and state, local, and federal governments. The benefits of this system would: (1) reduce attorney's fees, expert fees, and associated transaction costs; (2) eliminate the cost of jurors;²⁹ (3) streamline the litigation so that the only issues determined are medical diagnosis and damage calculation; (4)

28. See *Taming the Asbestos Monster*, A.B.A. J. 23 (Jan. 1991).

29. To reduce the current New York State deficit, the Office of Court Administration has proposed eliminating juror fee payments for the first three days of trial in order to save \$4.2 million in four months. Spencer, *OCA Proposes Budget Cuts of \$17 million*, N. Y.L.J., Nov. 29, 1990, at 1. In 1990 the State of Vermont sought to eliminate budget deficits by postponing civil jury trials for six months. See *In re Vermont Supreme Court*

eliminate punitive damages; and (5) eliminate expensive case work-ups since this system is based on a no-fault, quasi-market share compensation scheme. Thus, it eliminates time-consuming trial issues such as "product identification" or "liability determination."

B. *The Better Solution: Eliminate Litigation*

Congress, not the courts, must impose a drastic solution, given the hundreds of thousands of present and future cases. Congress should create a nationwide administrative claims system for asbestos-related actions.

This system would take all available financial resources and allocate them in a fund to cover: (1) medical monitoring by all those with exposure levels that have resulted in pleural plaques, thickening or calcification, restrictive disease or carcinomas of the lung; (2) payment for various medical procedures, medicine, and treatment with some set-off for factors related to cigarettes or other non-asbestos causes; (3) an allocation of a small percentage of funds to conduct further scientific research regarding asbestos-related health issues; and (4) payment of supplemental income to families whose principal wage-earner has died from a confirmed asbestos-related disease before retirement.

This type of system is in essence a streamlined specialized worker's compensation plan. It achieves the important goal of removing 130,000 cases from the state and federal courts. The strength of this approach is simplicity, speed and fairness. Like any new compensation scheme, it will suffer growing pains. Creating guidelines will present the greatest challenge. Yet, employing the expertise of litigation specialists will help Congress to develop a successful system.

CONCLUSION

Fair and efficient administration of the asbestos personal injury litigation in New York, or in any other jurisdiction, remains a great challenge despite the best efforts of counsel and the judiciary. The modern adversarial tort system is not designed to process mass tort actions expeditiously and fairly. Because of the complexity of the asbestos litigation problem, whatever solution the courts implement undoubtedly will be confronted with numerous appeals by dissatisfied parties. This article is by no means meant to be all-inclusive. The issues outlined above are suitable for entire books. Creativity, practicality, reason, and persistence are desperately needed in ending this tragic toxic tort crisis.

Administrative Directive No. 17, 576 A.2d 127 (1990) related reference 579 A.2d 1036 (1990).