

FROM INJUSTICE TO JUSTICE AND BACK AGAIN:

A REVIEW OF ASBESTOS LITIGATION

1929 – 2003

THESIS

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To G. Richard Neal
Friend and Colleague

“...At the present moment there is a suit before the Court which was commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a *friendly suit*; and which is (I am assured) no nearer its termination now than when it was begun. There is another well-known suit in Chancery, not yet decided, which was commenced before the close of the last century, and in which more than double the amount of seventy thousand pounds has been swallowed up in costs...”

Charles Dickens, preface to *Bleak House*, 1853

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INTRODUCTION

Asbestos and products made with asbestos have been in widespread use in this country since the second half of the nineteenth-century.¹ Asbestos consumption was integral to the industrialization of the country, especially as mechanical power sources replaced falling water and animals. Asbestos was found to be useful in so many different products that it was seen as something of a miracle mineral. Widespread and growing use of asbestos eventually insinuated it into nearly every category of consumer goods, and into homes, schools, hospitals, and businesses throughout the country. This growth in consumption occurred even as a growing body of medical literature began to warn of the potential harm caused over time by inhaled asbestos dust. Associated initially only with asbestosis, later research discovered a link between asbestos and lung cancer, and the far more lethal mesothelioma.² Growing public awareness of this danger led to the decline of asbestos consumption and attempts to ban it outright in the late 1980s.

Growing public awareness was due primarily to a series of lawsuits filed on behalf of asbestos workers claiming injuries sustained through years of exposure to asbestos dust in the manufacturing and asbestos insulation industries. The discovery process of these suits led to a growing understanding of the extent to which the asbestos industry

¹ David E. Lilenfeld, "The Silence: The asbestos industry and early occupational cancer research-a case study, *American Journal of Public Health* 81 (June, 1991):6, 791.

² *Ibid.*, 792.

had long been aware of, and had exerted itself to conceal, the dangers of the product.³ The breakthrough success of the litigation led to the payment of billions of dollars to claimants and their attorneys, and to the bankruptcies of some of the defendants. To this point, the early 1980s, the litigation represents a vindication of the American tort system as a means to remedy harm done to innocent victims and to punish and deter corporate actions leading to such harm.⁴

However, the story does not stop there. Continued filings of asbestos damage claims have beset not only companies who wrongfully defrauded their employees and the public, but also companies as innocent as the claimants themselves.⁵ The massive volume of litigation has created congestion in many jurisdictions that may not resolve itself for decades. It has led to procedural techniques, mostly involving mass disposition of claims, that have made a distant chimera of the idealized “day in court”, and has called into question the ability of our civil justice system to deliver justice while still following “due process”.⁶ And the fees earned by asbestos trial lawyers have created a stratum of attorneys whose economic interests are more akin to venture capitalists than to servants of truth and justice, and whose methods now seem more akin to extortion than to the practice of law.⁷

³ See generally, Paul Brodeur, *Outrageous Misconduct. The Asbestos Industry on Trial* (New York. Pantheon Books, 1985).

⁴ Deborah R. Hensler, William L.F. Felstner, Molly Selvin, Patricia A. Ebener, *Asbestos in the Courts, The Challenge of Mass Toxic Torts* (Santa Monica, Calif.: Rand Corporation, Institute for Civil Justice, 1985), 110-12.

⁵ Roger Parloff, “The \$200 billion miscarriage of justice”, *Fortune*, 4 March, 2002.

⁶ Joseph P. Helm, III, “Asbestos litigation and the proposed administrative remedy: Between the values of individualism and distributive justice”, *Emory Law Journal* 50:631, Spring, 2001.

⁷ Parloff, *supra* n. 5.

The objective of this thesis is to present an historical overview of the past thirty years of asbestos litigation in the United States. It will name key actors, mark significant dates, and attempt to explain contemporary issues as they arose. It will examine the development of medical knowledge of the harms now linked to asbestos exposure, and the role of the legal system in bringing that knowledge to light in the courtroom. It will also review the behavior of the corporate entity under attack. It will examine the tension between individual rights and community outcomes when those rights are exercised *en masse*. And, as the American legal tort system is based on English common law, it will note the difference between asbestos litigation in this country and Great Britain during the past seventy years. Finally, it will review the problems specific to the asbestos litigation, as it gradually developed, and as it remains. A key question to be addressed is whether asbestos mass toxic tort litigation is an aberration or a harbinger of the future.

SUMMARY BACKGROUND

The story of asbestos litigation has been ongoing since the early 1930s. Until the mid-1960s, the story was known mostly to industrial medicine specialists, pathologists, and the upper echelons of the asbestos manufacturing and liability insurance industries. Since the 1970s it has been a background noise in the legal and commercial cultures of the nation. Journalists, legal scholars, and of course, the defendant companies, have cause to wonder if it will ever end. Regardless of our awareness of asbestos litigation, all of us are already living with its consequences, in liability insurance rates, building materials availability, or the growing economic and political power of the plaintiff's bar. The issues falling under the heading of "asbestos litigation" are as varied as the duty of employers to their employees, the levels of risk we are willing to assume as a society for the benefits of harmful substances, the distribution of that risk, and the costs (social and financial) that we are willing to bear in minimizing or eliminating the risk.

The scale of asbestos litigation may be understood by citing some recent statistics. Since the early 1960s, approximately 600,000 individuals⁸ have filed claims against more than 1,000 companies⁹ engaged in manufacturing, wholesaling, retailing, or installation

⁸ Michelle J. White, "Understanding the asbestos crisis", May 2003, 2. Accessed 8 August, 2003, available from www.econ.ucsd.edu/~mwhite.

⁹ Parloff, *supra*. n. 5. These numbers change weekly, and vary from source to source. Parloff's article was published in March, 2002. A Wall Street Journal Review and Outlook article dated 17 October, 2003 stated that 8,400 businesses had been sued by asbestos claimants. One possible explanation for the extreme differences cited would be the expanding field of "asbestos" companies in late 2003, as compared to the earlier date.

of products containing asbestos. To date, defendant corporations and their insurers have paid out more than \$32 billion in claim settlements and jury awards¹⁰, with the total expected eventually to reach between \$200 and \$275 billion.¹¹ Thirty years after the initial lawsuits began, and more than twenty years after the virtual end of asbestos manufacturing in this country, the number of suits filed is on the increase. This massive body of litigation has led some observers to consider the phenomenon a “tragedy of the commons”, in which available compensation resources are jeopardized and judicial capacity is congested and degraded by a process of “over-grazing”.¹² In addition to the personal damages lawsuits which are the subject of this review, an entire category of property damage lawsuits has been in progress since the 1970s, when “asbestos abatement” became an urgent issue to the owners of commercial, residential, and public buildings constructed with materials containing asbestos. Other than mentioning its existence here, this thesis will not address this related but separate area of asbestos litigation.

The sheer volume of asbestos litigation reveals the ubiquity, and hence the usefulness, of the products. Indeed, even now, with all the evidence of harm linked to asbestos, it could still be argued that asbestos has saved far more lives than it has ended, and benefited far more people than it has harmed. Though the Environmental Protection Agency banned the import, manufacture, and use of asbestos in 1989, the ban was vacated by the 5th Circuit Court of Appeals in 1991 (947 F.2d 1201) because the EPA had

¹⁰ White, *supra* n. 8, 2.

¹¹ *Ibid.* White cites studies by Angelina and Biggs (2001) and Bhavatula, et al (2001).

¹² Frances E. McGovern, “The tragedy of the asbestos commons”, *Virginia Law Review*, December 2002, 1721

not established a satisfactory causal link to the known potential harms now associated with asbestos, and because such a ban was an obstruction of free trade.¹³ As recently as 2001, a *New York Times* article pondered the question of whether the city's 1971 ban of asbestos may have led to an earlier collapse of the World Trade Center than might otherwise have been the case, had asbestos insulation been used.¹⁴ In spite of the virtual termination of the asbestos industry in this country in the 1970s, at least 27 million Americans are now estimated to have been exposed to asbestos.¹⁵ The Internet site of one plaintiff's attorney lists 94 trades and professions likely to have been exposed to asbestos, through such products as insulation, filters, fire-proofing, automotive parts, construction materials, and metalworking equipment, to name only a few.¹⁶

Such websites are common, and suggest the application of highly effective marketing techniques by the plaintiff's bar. The "mass" nature of asbestos litigation has led the legal profession to adopt economic production models to calculate market values of claims for clients, and profit margin analysis for the attorneys themselves.¹⁷ Mass production is noteworthy for the tradeoff between productivity and quality, and some

¹³ Barry I. Castleman, *Asbestos Medical and Legal Aspects* 4th ed. (Englewood Cliffs, N.J.: Aspen Publishers, Aspen Law & Business, 1996), 792. The suit was brought by the Canadian government on behalf of Canadian asbestos mining operators.

¹⁴ James Glanz and Andrew C. Revkin, "Haunting question: Did the ban on asbestos lead to loss of life?", *New York Times*, September 18, 2001.

¹⁵ White, *supra* n. 8, 2.

¹⁶ Early, Ludwick, Sweeney and Strauss, accessed 6 February 2003, available at www.lungcancer.com/atrisk.html.

¹⁷ McGovern, *supra* n. 12, 1728-35.

observers have noted that current mass litigation techniques may present something of a conflict of interest for plaintiffs' attorneys.¹⁸

The evidence uncovered through years of often repetitive litigation confirms that a grave injustice was perpetrated on asbestos workers over the course of many years in factories, shipyards, and construction sites.¹⁹ The industrial-scale production of asbestos and asbestos-containing products, and their use in many industries, exposed untold numbers to daily hazard. Genuine ignorance of potential harm, where it existed, may serve to excuse some of the actors, including the affected workers themselves. Those who knew of the danger, especially those in a position to mitigate it, have no such excuse. However, the consequences to individuals was not fully known, in most cases, for many years, long after the guilty had left the scene. The American tort system is based on a litigation model where there is a known perpetrator, usually one or two entities, a known harm, relatively recent in occurrence, and a known victim. Transaction costs within this model are relatively low and damages are typically predictable within an acceptable range of certainty. The asbestos model introduced a seemingly infinite and unending stream of victims, a large number of defendants with varying degrees of culpability, and damages which have become virtually unknowable.²⁰

Adding to these elements of uncertainty is the probabilistic nature of the harm. The signature disease, asbestosis, appears to follow a cumulative probability, that is, the longer one is exposed to asbestos dust, even at small levels, the greater one's risk. Both

¹⁸ Hensler, et al, supra n. 4, 112-14.

¹⁹ Castleman, supra n. 13, Chapter 9, "Company Knowledge".

²⁰ Hensler, et al, supra n. 4, 114.

lung cancer and mesothelioma follow no such pattern. Consequently, no “safe” level of exposure, and therefore no recognized level of care, is known for asbestos cancers.²¹

Consequently, the tort system was, and remains at best, an imperfect instrument to find and produce a just remedy for so complex a matter as asbestos diseases.

²¹ Geoffrey Tweedale, *Magic Mineral to Killer Dust: Turner & Newall and the Asbestos Hazard* (New York: Oxford University Press, 2000), 153.

ASBESTOS: MINERALOGY AND APPLICATIONS

Asbestos is a naturally occurring mineral whose beneficial properties have been known since antiquity. The word is Greek, meaning inextinguishable.²² The mineral forms two primary morphological groups, serpentine and amphibole. The most common industrial applications use the serpentine form, known as chrysotile (white asbestos), and two amphibole forms, amosite (brown asbestos) and crocidolite (blue asbestos). The latter two have fallen out of use since the 1980s. The useful properties of the mineral include its flexible, fibrous form, and high tensile strength. It is chemically inert, resistant to heat, acid, and biodegradation, a non-conductor of heat and electricity, and possessing high adsorption capabilities (useful for filtration of air and water).²³ Asbestos may be used in loose fiber form, much like wool or cotton wadding, carded and spun into yarn and fabric, or mixed in a matrix with cements or resins, much as straw is mixed with clay in bricks. Industrial manufacturing of asbestos products began in Italy in the early nineteenth-century and grew continuously until the early 1970s, when health issues could no longer be ignored. Production peaked about 1975, at 4.8 million tons worldwide.²⁴ Though curtailed significantly over the past thirty years, current production centers

²² Brodeur, *supra*. n. 3, 10.

²³ Robert L. Virta, "Asbestos: Geology, Mineralogy, Mining, and Uses", U.S. Department of the Interior, U.S. Geological Survey, Open-File Report 02-149, Prepared in cooperation with Kirk-Othmer Encyclopedia of Chemical Technology, Online edition, Wylie Interscience, John Wiley & Sons, Inc., New York, n.d.

²⁴ *ibid.*

remain active in Russia (39 percent of world production), Canada (18 percent), China (14 percent), and Brazil (9 percent).²⁵ Health concerns have led to diminishing production in all these leading countries except China. In the United States, nearly all current uses of asbestos bind the fibers as reinforcement or friction material in resin or cement.²⁶ In 2000, approximately 5,260 tons of asbestos were consumed in the United States.²⁷

Asbestos was considered something of a miracle fiber for centuries. It was easily workable into yarn, cord or fabric and was used for crematory garments, fireproof paper, candlewicks, and such applications as benefited from its resistance to flame. In more modern times, theater curtains, fire-proof children's nightwear, durable shingle siding for homes, Halloween costumes, ironing board covers, ceiling and wall insulation, automotive brakes and clutch linings, and roofing shingles made use of the same properties. The insulating properties of asbestos were brought to the fore with the growth of steam powered locomotion in the railroads, and the use of steam heat in urban buildings. Asbestos use expanded exponentially during World War II, notably in the shipping industry, as an insulating wrap for steam pipes and boilers. By the middle of the twentieth-century, products made with asbestos were literally everywhere.²⁸

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.* Table 5.

²⁸ Early, et al, *supra*. Aside from the ninety-four "at risk" trades listed on this site, their many consumer products reached virtually every home. See also Parloff, *supra* n. 5, for examples of non-asbestos producing companies now subject to litigation.

MEDICAL HISTORY AND RESEARCH

Barry Castleman, in *Asbestos: Legal and Medical Aspects*, cites the earliest known references to asbestos-related illness in the writings of Pliny the Elder nearly two thousand years ago.²⁹ In his expose, *Outrageous Misconduct*, author Paul Brodeur mentions the demise in 1898 of Henry Ward Johns, one of the founders of the company that would later become Johns-Manville, with symptoms that were later recognized as typical of asbestosis.³⁰ In his book on the British asbestos manufacturer Turner & Newall, *Magic Mineral to Killer Dust*, Geoffrey Tweedale identifies one of the first asbestos casualties of the twentieth-century, an anonymous patient at Charing Cross Hospital in London.³¹

At the turn of the century, lung disease was common in urban and industrial settings. Tuberculosis was common, but not exclusive, to the working classes. The high incidence of pulmonary disease among those working in dusty industrial settings was therefore not associated so much with the trade as with social class. By the 1920s, however, even among the working class, the specific forms of “pneumoconiosis” associated with the grinding of blades and the production of asbestos had assumed notoriety among those who were looking for such distinctions, like insurance companies,

²⁹ Castleman, *supra* n. 13, 1.

³⁰ Brodeur, *supra* n. 3, 12.

³¹ Tweedale, *supra* n. 21, Preface, 1.

who often refused to issue life insurance policies to those engaged in such dangerous trades.³²

Prior to the establishment of workers' compensation, work-related claims were acrimonious and disputatious. Assessment of negligence and fault produced high transaction costs and often left workers with nothing. Turner Brothers Asbestos, in Britain, directed their managers to dispute every claim as follows:

...Doctors' opinions and judgments should be challenged; that the interests of the company, as understood by the board, were paramount; and that the appropriate defensive tactics were denial, a legalistic view of the situation, and litigation.³³

With their interest in risk abatement, insurance companies were among the earliest to pursue systematic research of asbestos-related disease as a distinct class of industrial disease. This was in part because of developing workers' compensation systems in which insurers had a vested interest. As the likelihood of asbestos related claims increased, it was in the interests of insurers and manufacturers to relegate those claims to a scheduled format they could control. The earliest American workers' compensation disability claim for asbestosis was filed in 1927.³⁴

³² *Ibid.*, 14.

³³ Tweedale, *supra* n. 21, 104.

³⁴ Castleman, *supra* n. 13, 199. (Chart of early compensation claims for UK, US, Germany, Finland, Italy, Netherlands, Czechoslovakia, Denmark, Switzerland, and Sweden)

The workers' compensation systems were established to deal efficiently with traumatic worker injuries the occurrence and nature of which were easily ascertained and the medical and earnings costs of which were easily determined. The trade-off was certainty of payment in exchange for a no-fault system. Industrial "disease" was another matter, due as it was to an exposure or to cumulative effects not so easily identifiable. In the case of asbestosis, diagnosis was even more difficult because of its relative novelty. The causal linkage, while perhaps intuited by doctors and workers, was not established through any scientific or statistical method. Research was needed.

Safety was a serious matter to the management of asbestos manufacturers. First and foremost, cheap labor was an issue at all times, and the slightest perception of extraordinary danger in the workplace tended to drive cheap labor out the door. The leaders of the asbestos industry, therefore, wished to avoid the perception that asbestos was a dangerous material or that its manufacture was a dangerous activity. They contrived to control all research and all published material in any venue that dealt with asbestos safety, and suppressed any material that alluded to anything but its benefits.³⁵ This turned out to be a strategic decision and led to all that followed.

Three diseases are now clearly associated with asbestos exposure. The first is asbestosis. Asbestosis was distinguished from other dust-related pulmonary diseases in the 1920s and 1930s. The disease is caused by the body's attempts to neutralize or isolate the asbestos particles taken into the lungs. The body's reaction is to produce a scarring known as fibrosis, in essence encapsulating the irritant fibers in scar tissue. The scar tissue inhibits the flexibility of the lung and retards pulmonary function, eventually

³⁵ Castleman, *supra* n. 13, Chap. 9, "Company Knowledge". See also generally, Brodeur, *supra* n. 3, and Tweedale, *supra* n. 21.

covering the lung with a tough, leathery web that not only diminishes the lung's function, but also makes the pumping action of the heart more difficult. The disease is distinguishable from other lung fibrosis disease on x-ray film because the scarring develops initially in the lower lobes of the lungs. This is accompanied by the presence of "asbestos bodies" within the lung, particles of asbestos coated with protein that are coughed up in sputum in the body's effort to rid itself of the foreign material. Sources refer to a characteristic odor by which experienced asbestos workers were able to diagnose the presence of the disease.³⁶ Asbestosis is the least lethal of the three asbestos-related diseases, only in that it is not 100 percent lethal, depending on its severity. It is painful and disabling. If asbestos may be said to have one "good" characteristic, it is that its incidence correlates with exposure. Thus, the less time a worker was exposed to high concentrations of asbestos dust, the lower the probability of acquiring the disease, and the less severe the case might be. As with all asbestos-related diseases, it is "a progressive disease, with a bad prognosis",³⁷ meaning that no matter how severe a case worker might have, he or she will not get better. In an early study of Johns-Manville employees, performed jointly by Johns-Manville and Metropolitan Life Insurance Company in 1931, 29 percent of Manville's employees showed x-ray evidence of asbestosis. This included employees not working directly in the production of asbestos products.³⁸

Next in order of severity, asbestos was linked with lung cancer in the 1960s and 1970s. Assigning this disease a causal link to asbestos was more problematic, due to

³⁶ Tweedale, *supra* n. 21, 14.

³⁷ *Ibid.*, 59.

³⁸ Castleman, *supra* n. 13, 26.

other causal links that were already known, especially smoking, which was common among asbestos workers. The probability and severity of asbestos-induced cancer is not related to the length or severity of exposure, but rather to unknown disease responses within a worker's own body. A 1947 report by the Factory Inspectorate in England reported a 13 percent incidence of lung cancer in a study of industrial post mortems.³⁹ Studies indicate that the probability of lung cancer is fifty times as high among smoking asbestos workers as among nonsmoking asbestos workers.⁴⁰

Third, and last to demand the attention of the medical and legal communities, is mesothelioma. This disease, extremely rare outside the asbestos context, is virulent, painful, and untreatable. Few survive beyond a year. As with lung cancer, there is no known "trigger dose" of asbestos exposure. Even short exposure to minute amounts of asbestos dust can lead to a chain of body responses many years later resulting in mesothelioma. The latency period explains why the disease is a relative newcomer; it usually lies dormant at least twenty years, with the average nearer to forty years between exposure and the appearance of the disease.⁴¹ Mesothelioma may occur in the abdomen or in the chest cavity, where it develops as a leather-like clamp that progressively constricts the normal expansion of the lungs until the victim asphyxiates. Tweedale documents an increase in annual mesothelioma deaths in Britain from 160 to 1,300 during the thirty-year period ending 1995.⁴² Most of the projected future incidences of

³⁹ Tweedale, *supra* n. 21, 146-47.

⁴⁰ *Ibid*, 141

⁴¹ *Ibid*, 152-53.

⁴² *Ibid*, 273.

mesothelioma in this country and Britain are expected to be so-called “bystanders”.⁴³

Bystanders are those whose contact with asbestos fell outside industrial or work-related activities, i.e., consumers and casual users of asbestos-containing products, or workers in asbestos companies whose jobs kept them away from the production environment, like accounts and sales staff.

Finally, a further physical manifestation unique to asbestos exposure is “digital clubbing”, an unsightly thickening of the fingertips that severely limits manual dexterity.⁴⁴

As these diseases and symptoms came to be associated more closely with asbestos workers, disabled workers and widows of workers began to file claims against employers. In the early days of asbestos litigation, employers denied that asbestos dust was the cause of illness. Later, and up through the early 1980s, the “state of the art” defense was standard. This was the assertion by the defendants that they had no knowledge of the hazard asbestos materials represented to their workers or those who worked with those materials. A significant cost of the early litigation was directed toward the discovery of the early studies and papers that gradually brought to light the falsehood of that professed ignorance.

Among the earliest published articles describing the affects of asbestos on humans was one by the British pathologist W.E. Cooke in 1924. Dr. Cooke’s subject was Nellie Kershaw, who had died at 33, twenty years after being employed by Turner Brothers Asbestos Company. Turner Brothers was one of the largest asbestos manufacturers in

⁴³ Castleman, *supra* n. 13, 786

⁴⁴ Tweedale, *supra* n. 21, 14

Britain at the time. Ms. Kershaw was intermittently disabled from the age of 26, and completely disabled at 31. Though her doctor had referred to her illness as “asbestos poisoning”, and Dr. Cooke referred to it as “pulmonary asbestosis”, Turner Brothers refused to acknowledge responsibility for her early death and refused all pleas for financial assistance, including funeral costs.⁴⁵ At the time asbestosis was not a recognized industrial disease in Great Britain.

Other medical studies followed, associated with the names of Dr. Archibald Haddow, Dr. Ian Grieve, and Professor Matthew Stewart of Leeds University.⁴⁶ Brick by brick, they were building the case against asbestos.

In 1930, Dr. E.R.A. Merewether, Medical Inspector of Factories, and Charles Price, an Engineering Inspector, completed a study of the British asbestos industry for the Factory Inspectorate. They examined 363 workers out of the approximately 2,200 British asbestos workers of the time. They found asbestosis in more than a quarter of them, and early signs of the disease in twenty-one others. Further, they found a correlation between incidence of the disease and the length of time an employee had been in the asbestos trade. Workers with over twenty years experience had an asbestosis incidence of over 80 percent.⁴⁷ Merewether and Price observed that the severity of the disease was related to the “intensity of the exposure”, and hypothesized that dust suppression measures could conceivably eliminate the disease over time.⁴⁸ Merewether and Price published their

⁴⁵ Castleman, *supra* n. 13, 7.

⁴⁶ Tweedale, *supra* n. 21, 17-18.

⁴⁷ *Ibid.*, 20. See also Castleman, *supra* n. 13, 13.

⁴⁸ Castleman, *supra* n. 13, 15.

report in Britain and in the United States. In Britain it led to the establishment of standards for dust suppression by 1931.⁴⁹

In the United States, a 1928 study of asbestos workers by the Saranac Laboratory in Saranac Lake, New York, and a 1930 study of Canadian Johns-Manville asbestos miners, both sponsored by Johns-Manville, were never released for publication.⁵⁰ Another study was conducted in 1932, of the 1,140 employees at the Johns-Manville plant in Manville, New Jersey. The survey was set up with guidance from Dr. Anthony Lanza of Metropolitan Life Insurance, who had been instrumental in the earlier survey of the Canadian mine. As before, the survey was funded by Johns-Manville. The survey consisted of medical exams of each employee, with x-rays films. The study showed an incidence of asbestosis of 29 percent. Aside from the fact that it was not published, the report marked the first time the management of Johns-Manville had scientific evidence of asbestosis among workers whose exposure to the dusty factory environment was officially nil, the so-called bystanders, who worked outside the manufacturing processes.⁵¹

The first case of asbestos-related lung cancer in the United States was reported in 1935.⁵² (It is worth bearing in mind that throughout the first fifty to sixty years of the twentieth-century, a diagnosis of cancer was virtually a death sentence.) In that same year, a German physician published case studies identifying lung cancer as an “occupational cancer” of asbestos workers. Of note was the ages of the victims, which

⁴⁹ Tweedale, *supra* n. 21, 20-24. See also chap. 4, “Compensation for Asbestos Workers”.

⁵⁰ Brodeur, *supra* n. 3, 58.

⁵¹ Castleman, *supra* n. 13, 26.

⁵² *Ibid*, 50.

ware far younger than usual for this variety of cancer. As had been noted previously with asbestosis, the disease began in the lower lobes of the lungs. “Normal” lung cancer more typically developed first in the upper lobes. Consistently, asbestosis-related lung cancer developed fifteen to twenty years after the worker began working in the industry.⁵³

Further case studies and animal experimentation led to the identification, in Germany, in 1943, of asbestosis and lung cancer as compensable occupational diseases of asbestos manufacturing.⁵⁴

In the United States, asbestos-cancer research was under the controlling sponsorship of the principal asbestos manufacturers, as was asbestosis research, so no such research was generally available outside the boardrooms of the sponsors. Dr. Leroy Gardner of the Saranac Laboratory developed a preliminary study of mice in 1943 that showed an 82 percent incidence of tumors. Though he took the position that his study neither proved nor disproved a link between the substance and the disease, he sought funding from Johns-Manville and the other industry sponsors of the Saranac Laboratory, believing they would be interested in more conclusive evidence. Johns-Manville arranged funding for Gardner’s research under the usual conditions, requiring report manuscripts to be submitted to sponsors for approval before publication, an arrangement the company had had with the laboratory since 1936.⁵⁵

Dr. Gardner died suddenly in 1946 without publishing the results of his study, and Dr. Anthony Lanza of Metropolitan Insurance became his replacement on the board of

⁵³ Ibid., 51.

⁵⁴ Ibid , 53.

⁵⁵ Ibid., 60-65.

Saranac Laboratory. Dr. Arthur Vorwald became Director of the Laboratory. After considerable delay, Dr. Gardner's original report was issued to the sponsors of Saranac Laboratory.⁵⁶ In a November, 1948, meeting, the sponsors concluded that all references to "cancer" and "tumors" should be deleted from the published report. With those deletions, the ambiguous nature of the report was seen by the underwriting firms, all of whom were involved in asbestos mining and manufacturing, as a possible counterweight to unfavorable articles being published throughout North America, all of which identified the dangers of asbestos to workers in their industries. All copies of the original report were collected following the meeting. As Chief Counsel Vandiver Brown of Johns-Manville explained, "Everyone felt it would be most unwise to have any copies of the draft report outstanding if the final report is to be different in any substantial respect. The feeling of the representatives of the various companies was very emphatic on this point."⁵⁷ After revision to meet the requirements of the sponsors, Vorwald's completed, edited paper was published in 1951 in the *American Medical Association Archives of Industrial Hygiene and Occupational Medicine*.⁵⁸

In September, 1952, the Saranac Laboratory held its Seventh Symposium, an annual conference of pulmonary specialists and clinical research scientists. The Seventh Symposium came to occupy a near mythical position in the history of asbestos disease research. It was attended by key figures in the field of pulmonary research, including Dr.

⁵⁶ Ibid., 68. Saranac sponsors included: American Brake Shoe and Foundry, Gatke Corporation, Keasbey and Mattison Company (subsidiary of the British firm Turner Brothers Asbestos), Raybestos-Manhattan, Inc., Russell Manufacturing Company, Thermoid Company (Southern Asbestos), Union Asbestos and Rubber Company, United States Gypsum Company, and Johns-Manville met November 11, 1948 at the Johns-Manville Board room.

⁵⁷ Ibid., 70. Vandiver Brown to W.K. Kelly, Executive Vice President of American Brake Shoe.

⁵⁸ Ibid., 72

Anthony Lanza of Metropolitan Insurance, Dr. E.R.A. Merewether of the Factory Directorate in Britain, Dr. A.J. Vorwald, Director of the Saranac Laboratory, Dr. Kenneth Smith, Medical Director of Johns-Manville, Dr. J.F. Knox of Turner Brothers Asbestos in Britain, and representatives of several of the asbestos manufacturing companies who provided funding to the Saranac Laboratory. Most of the presentations dealt with research on asbestosis and asbestos-related cancers, though this information only became available later through incomplete notes preserved by some of the attendees. Though published research worldwide had shifted by that time to acknowledge the linkage between asbestos mining and manufacturing and a distinctive pulmonary cancer, and though several papers were presented to that during the symposium, the symposium had nothing to add to the ongoing understanding of occupational disease. The symposium published nothing.⁵⁹

During the mid-1950s, Dr. John Knox of Turner Brothers collaborated with Richard Doll, a medical statistician, in reviewing lung cancer incidence among asbestos workers in Britain. Their findings showed that asbestos workers were ten times more likely to suffer from lung cancer than the general population. The results of this study were put before the Turner Brothers board which delayed some months before refusing to allow publication. Doll declined to be censored. Having no direct contract with Turner Brothers, and having done his work gratis, he submitted the study to *The British Journal of Industrial Medicine*. Turner Brothers attempted to convince Richard Schilling, editor

⁵⁹ Ibid , 91-94.

of the BJIM, not to publish the report, but the effort was rebuffed, and Doll's research was published in 1955.⁶⁰

Though it was seen as an immensely important study, the timing of this report highlighted one of the problems of asbestos disease and the many studies thereof. Great Britain had instituted strict guidelines on asbestos dust levels in manufacturing facilities, and it was understood by the 1950s that asbestos diseases all had lengthy latency periods. The high levels of lung cancer reported by Doll in the study were mostly among workers who had been in the trade *before* the 1931 standards took effect. Thus it was easily argued by the industry that, since conditions had improved in the interim, it was reasonable to expect that pulmonary cancers and asbestosis would both decline only when the effects of the earlier, unregulated period had receded far enough into the past.⁶¹ In his published report, Doll agreed, concluding that those improved factory conditions would eventually lead to a declining incidence of occupational cancers among asbestos workers. This was a significant departure from an earlier draft in which Doll stated, "Insufficient data are available to determine whether the risk has yet been eliminated by the improved conditions which now exist."⁶² Doll's new position was, in fact, precisely the argument that the asbestos industry continued to make as litigation began in the 1960s and 1970s.

Meanwhile, Dr. E.R.A. Merewether at the Factory Inspectorate had compiled numbers that showed lung cancer incidence rising steadily. He reasoned that declining

⁶⁰ Tweedale, *supra* n. 21, 147-50.

⁶¹ *Ibid.*, 151.

⁶² Castleman, *supra* n. 13, 100.

mortality due to asbestosis, a direct result of improved conditions within the factories, was permitting workers to survive long enough to contract various pulmonary cancers, a sort of dark lining in an otherwise silver cloud.⁶³

By the mid-1950s, the medical profession, throughout the world, generally recognized that asbestos exposure increased the risk of lung cancer, especially among those in the mining and manufacturing industries. A growing bibliography of research existed, which would one day come back to haunt the manufacturers. Yet within the boardrooms of these firms a sort of determined denial had solidified so thoroughly that any connection between the substance and the disease could simply not be accepted privately, let alone admitted publicly.

Dr. Vorwald, the Director of Saranac Laboratory, was replaced in 1953 by Dr. Gerrit Schepers.⁶⁴ Dr. Schepers announced to industry sponsors of the laboratory his belief that the only defense against the increasing weight of medical literature asserting the carcinogenic nature of asbestos was detailed research. He offered to perform a series of pathological analyses toward that end, using autopsy tissue samples from deceased asbestos workers. The sponsors demurred, the consensus view being that the timing for such a study was not propitious due to the growing coverage of occupational cancer in the popular press. Dr. Schepers further annoyed his patrons by his response to a request from Owens-Corning Fiberglas for “favorable statements” about their glass fiber products. In his response, though Dr. Schepers compared fiberglass favorably with asbestos, he alluded to the generally accepted view that asbestos was a recognized

⁶³ Ibid., 102-3.

⁶⁴ Ibid., 110.

carcinogen. Since Owens-Corning marketed both asbestos and fiberglass products, the response was disappointing. Saranac Laboratory was closed soon after.⁶⁵

During 1956 and 1957, three separate lung cancer epidemiological studies were proposed to the Asbestos Textile Institute, whose membership included North America's major asbestos manufacturing and mining companies. All were rejected. The feeling among the membership was that there was not sufficient evidence of an asbestos-cancer link to justify such a study. Further, it was feared that an industry study would subject them to unnecessary suspicion and outside scrutiny.⁶⁶

The South African pathologist J. Christopher Wagner presented an authoritative paper in 1959 linking mesothelioma to asbestos. Of particular note, due to the extraordinarily awful conditions⁶⁷ in the South African asbestos mines, was the reported incidence of mesothelioma brought on by "environmental" exposure. Wagner's research was another early warning that asbestos-related diseases were not simply a threat to those working in the manufacture of asbestos products.

Subject to honest debate throughout the 1950s was whether instances of cancer were caused by exposure to the asbestos dust itself, or were brought on as a complication of asbestosis. Most reported cases of lung cancer were accompanied by severe asbestosis, and the presence of telltale "asbestos bodies" in the lungs. In most of these cases, the cause of death was asbestosis, rather than the cancerous tumors, which were

⁶⁵ Ibid., 111-12.

⁶⁶ Ibid., 112.

⁶⁷ Tweedale, *supra* n. 21, 223-24. Refers to a visitor in the 1940s observing "children in the Transvaal being whipped as they trampled amosite underfoot in bags: they had asbestosis and cor pulmonae before the age of 12." A further reference cites "waste dumps as big as the hills, which covered the whole countryside in white dust." Even Robert H. Turner, of Turner Brothers Asbestos, noted in 1951 in reference to South African operations, that "dust conditions in the mills leave a lot to be desired..."

not sufficiently developed to be fatal. Thus it was noteworthy when, in the early 1960s a study of Belfast shipyard workers found “no relationship between the severity of any pulmonary asbestosis and the occurrence of these [mesothelioma] tumors.”⁶⁸

In 1964, Dr. Irving J. Selikoff of the Mount Sinai Hospital Environmental Sciences Laboratory presented a paper under the authority of the New York Academy of Sciences in which the following was unequivocally stated:

There is evidence of an association between exposure to asbestos and malignant neoplasia. This has been established mainly on information from Germany, Italy, South Africa, the United Kingdom, and the United States of America. The types of tumors which have been shown to be associated with exposure to asbestos dust are:

1. carcinoma of the lung
2. diffuse mesothelioma of the pleura and peritoneum⁶⁹

Dr. Selikoff's watershed research was performed in cooperation with two local chapters of the International Association of Heat and Frost Insulators, New York Local 12 and Newark (N.J.) Local 32, during 1962 and 1963.⁷⁰ His study of more than 1,500 workers revealed that, among asbestos workers with more than twenty years trade experience, over 80 percent showed radiological evidence of asbestosis, and incidence of

⁶⁸ Castleman, *supra* n. 13, 125.

⁶⁹ *Ibid.*, 127, citing The Report and Recommendations of the Working Group on Asbestos and Cancer, *Ann NY Acad Sci* 132:706-721 (1965).

⁷⁰ Brodeur, *supra* n. 3, 29-31.

pulmonary cancer was seven times the rate in the general population.⁷¹ Selikoff's study was one of the first in the United States that was not dependent upon industry records. Though asbestosis had been identified for years as an occupational hazard, the conclusive association with various forms of cancer made the study newsworthy in the popular press. In the litigation that was to follow, virtually all asbestos manufacturers were to claim that they had no knowledge of the risk until the publication of Dr. Selikoff's research.

Further research in Britain, by Dr. Muriel Newhouse, strongly suggested that the risk of mesothelioma existed not only for asbestos workers, but for those "bystanders" in the general population who might come into unknown or unintended environmental contact with asbestos. The Newhouse study examined pathology reports from 1917 to 1964 and found that, in addition to a strong occupational link between asbestos and mesothelioma, a third of non-occupational mesothelioma cases were among people who had lived within half a mile of an asbestos factory.⁷² This research supported the earlier findings of J. Christopher Wagner in South Africa.

On April 26, 1978, Joseph Califano, Secretary of Health, Education, and Welfare, issued an advisory describing the health risks of asbestos and citing the potential exposure among the nation's population. Califano estimated between 8 million and 11 million Americans had been exposed during the period beginning with World War II, and that 4.5 million had experienced significant exposure during the war years. Califano's

⁷¹ Tweedale, *supra* n. 21, 184

⁷² *Ibid*, 185.

message was distributed to approximately 400,000 practicing physicians throughout the country.⁷³

The growing understanding of the medical consequences of asbestos exposure culminated in the mid-1960s. Knowledge had been accumulating slowly since the turn of the century, and the danger could no longer be denied. The burden of proof had shifted perceptibly from sick employees to their employers. The industry had relied on its control of available research, the economic priorities of the 1930s, the wartime priorities of the 1940s, and, throughout, the general public's ignorance of the hazards of its products. It had exerted itself strenuously to maintain that ignorance, and thousands of workers had suffered illness and death. An irreversible public awareness of the hazards of asbestos began with the publication of Dr. Selikoff's report in 1964, though accountability for the industry was still years away and would take place in the courtroom.

⁷³ Brodeur, *supra*. n. 3, 140-41.

PHASES OF ASBESTOS LITIGATION

Litigation over the physical harm caused by asbestos and asbestos products has occurred in several phases, dating back to the early 1930s. The development of workers' compensation systems proceeded rapidly in the United States and other western industrialized nations from about 1910 to the early 1930s. These systems recognized the need to compensate workers for work related injury and illness, and to simplify the compensation process. Workers were able to claim compensation for injury and disability within an administrative venue that minimized costs to employees and employers. Employers had significant influence on the payment schedules used to determine compensation within these systems, on injured employees' access to the courts, and on statutes of limitation for filing claims.⁷⁴ By the 1960s, the inadequacies of the workers' compensation system to handle asbestos disease claims led to an increase in claims filed through common law tort litigation. By the 1970s, a few successful awards brought additional claims, and the cumulative discovery product of these cases established by the late 1970s the culpability and deception of many corporations in the harm that had befallen far too many of their employees. More claims followed and tactical innovations by both plaintiffs and defendants led to the mass toxic tort offense and the bankruptcy defense of the 1980s. The scale of litigation and the high stakes have spurred numerous proposals for administrative and legislative alternatives to litigation,

⁷⁴ Castleman, *supra* n 13, 161-70.

without noticeable success. At one point in the mid-1980s, three state jurisdictions were so far behind that disposition of their pending claims were expected to require several decades.⁷⁵ Currently, over 600,000 claims remain in a pending status in courtrooms around the country, with estimates of the eventual settlement costs ranging from \$100 billion to \$275 billion.⁷⁶

Phase I – Workers’ Compensation

Initial asbestos claims were brought by workers in manufacturing facilities, and were typically handled through workers’ compensation systems. Though workers’ compensation plans covering accidental injury were established through the period 1910-1920, it was not until the mid-1930s that occupational illnesses were generally covered. The establishment of workers’ compensation systems was initiated and influenced by employers in an effort to limit their liability for work-related injury and illness. Proof of negligence was unnecessary in the workers’ compensation context, but recognition of asbestosis as an occupational disease was difficult, because symptoms were similar to many common and non-occupational diseases, such as tuberculosis and chronic bronchitis, and diagnostic technology was not sufficiently precise. Definitive proof was often available only at the autopsy. Under workers’ compensation, the extended latency period of asbestos diseases conflicted with the one-, two- and three-year statutes of

⁷⁵ Hensler, et al, *supra* n 4, 84-85.

⁷⁶ Michelle J. White, “Explaining the flood of asbestos litigation: Consolidation, bifurcation, and bouquet trials”, NBER working paper 9340, December 2002, 2. Accessed 8 August, 2003. Available at www.econ.ucsd.edu/~mjwhite.

limitation imposed by most states' workers' compensation laws, so manifestation of illness often occurred too late to file. Worker mobility presented difficulties in establishing the correct state jurisdiction in which to file. Though some states operated their own insurance programs, others permitted employers to purchase private insurance and these carriers were prone to dispute claims, presenting additional hurdles to injured employees seeking compensation.⁷⁷ While providing manageable costs to employers, compensation levels were typically too low to afford a sufficient living to a disabled worker.

An oddity of the British workers' compensation system was that only "scheduled" jobs were recognized as presenting an asbestos risk, and thereby compensable under the workers' compensation system. The British Medical Review Board failed to entertain the possibility that asbestos could disable workers in other jobs. The British schedule was based on the earliest (early 1930s) research by Dr. E.R.A. Merewether, and remained unchanged for over 30 years. Under the Asbestos Scheme, scheduled jobs were those found by Merewether to have dust concentrations at or above the "dust datum". The dust datum, or baseline, was the average dust concentration associated with the spinning process, considered one of the safer jobs in the industry. Scheduled jobs included crushing, carding, spinning, weaving, and mattress making. All these jobs were notorious for high levels of dust exposure. Only workers who worked regularly in these areas were covered by asbestosis workers compensation benefits. Exemptions to the schedule were established for "occasional" workers who spent eight hours per week or less in scheduled jobs. And even these processes were not considered scheduled unless

⁷⁷ Castleman, *supra* n. 13, 164-65.

they were performed dry, that is, without damping sprays or other dust suppressing techniques. These severe limitations resulted in many employees being ineligible for benefits, even though diagnosed with asbestosis. Cancer was only recognizable as compensable when it was accompanied by asbestosis.⁷⁸

These shortcomings notwithstanding, for the decades between 1930 and 1960, with only very rare exceptions, the workers' compensation system was the only recourse sought by employees harmed by asbestos. In the United States, cases filed outside the compensation system were usually settled before trial, and in one of the earliest, filed in 1929, eleven former Johns-Manville employees filed suit against the company for lung-related disabilities. They were represented by attorney Samuel Greenstone. When the case was finally settled (out of court) in 1933, Greenstone accepted the stipulation that he "would not directly or indirectly participate in the bringing of new actions against the Corporation."⁷⁹

In Great Britain, civil litigation was more risky for plaintiffs, for the chance existed that the losing party would be liable for the court costs of the winner. Discovery rules were (and remain) far less liberal in that country, placing plaintiffs at a distinct disadvantage. Geoffrey Tweedale documents throughout his book, *Magic Mineral to Killer Dust*, the paternalistic practices of Turner Brothers Asbestos. After denying the existence of any asbestos risk, and any corporate liability, the company sometimes voluntarily offered "*ex gratia*" stipends, or unofficial settlements, to supplement the meager benefits available through the national compensation system, essentially buying

⁷⁸ Tweedale, *supra* n. 21, 26-29.

⁷⁹ Castleman, *supra* n. 13, 173. See also Brodeur, *supra* n. 3, 164.

off the claimants, who were often grateful for any relief, sharing as they did the company viewpoint that Turner Brothers owed them nothing. These tiny allowances were usually accompanied by a warning that they were paid out of the goodness of the company's heart and would be subject to periodic review, effectively silencing further protest from that quarter. Turner Brothers was able to hold settlement costs, outside of official benefits, in the low thousands of pounds annually all the way up through the 1960s.⁸⁰

Phase II – Early Tort Litigation and Discovery

Claimants and their attorneys received a major boost with the publication of Dr. Irving Selikoff's 1964 study of asbestos insulation workers. Because of the suppression of most of the statistical research studying the association of asbestos with worker illnesses, Dr. Selikoff's report offered the first opportunity for plaintiffs to charge asbestos manufacturers with negligence in the exposure of asbestos workers. Selikoff's study clearly established the necessary causal link, though obstacles remained. Because of the employer-employee relationship, asbestos manufacturing employees were constrained by the workers' compensation system from suing their employers. Selikoff's study, however, had shown the danger to insulators working outside of the manufacturers facilities.

The seminal lawsuit was filed in 1969 in Beaumont, Texas.⁸¹ The plaintiff was Clarence Borel, an insulation installer for more than thirty years. At issue was what the

⁸⁰ Tweedale, *supra* n. 21, 115-16.

⁸¹ Brodeur, *supra* n. 3, 40. Clarence Borel v. Fiberboard Paper Products, et al. Co-defendants included Combustion Engineering, Inc. of New York, UNARCO, Johns Mansville Products Corporation, Philip

manufacturers knew of the hazards of asbestos, and how they had acquitted their duty of care to their customers, in this case, asbestos installation companies and their workers. While much was known about the hazards of asbestos in the manufacturing environment, before Selikoff's report, little had been known about the dangers specific to the installation of asbestos insulation products. The case was filed as a product liability claim, alleging negligent failure to warn on the part of the eleven defendants. The defendants in *Borel* included Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, Pittsburgh Corning, Owens-Corning, UNARCO, Combustion Engineering, Eagle-Picher, Philip Carey Corporation, Armstrong Contracting and Supply Corporation, Ruberoid Corporation, and Standard Asbestos Manufacturing and Insulating Company.⁸²

This early phase of asbestos litigation was marked by the slow, persistent discovery of documentary evidence to establishing the manufacturers' culpability. As the date of the *Borel* trial approached, some of the defendants found it expedient to avoid trial altogether. Early in 1971, Owens-Corning and Standard Asbestos settled for \$3,000 each. Immediately prior to the commencement of the trial, UNARCO and Eagle-Picher settled for \$5,000 apiece. The trial judge dismissed Combustion Engineering because *Borel* was unable to prove he'd ever been exposed to any of that company's products.⁸³

Carey Corporation of Cincinnati, Armstrong Contracting & Supply Corporation of Lancaster, Pennsylvania, Owens-Corning Fiberglas of Toledo, Ruberoid Company of New York, Pittsburgh Corning Company of Pittsburgh, Eagle-Picher Industries, Inc. of Cincinnati, and Standard Asbestos Manufacturing & Insulating Company of Kansas City. With the death of Clarence Borel in 1970, the final determination of *Borel v. Fibreboard* in 1973 was in his wife, Thelma's, name.

⁸² *Ibid.*, 40-41.

⁸³ *Ibid.*, 43-45.

The remaining defendants in *Borel* adopted what came to be known as the “state of the art” defense. They took the position that prior to Selikoff’s 1964 study they had no reason to believe that asbestos was harmful to anyone outside the most dangerous areas of their own factories. They argued that without such knowledge, they had no duty to warn of any hazard. They further argued that what research had been done prior to Selikoff had dealt with pure asbestos dust, whereas the insulation products used by Borel had been milder blends containing only 12-15 percent asbestos.⁸⁴ The defendants also referred to early published studies that found little evidence of harm, though such studies had overlooked the cumulative effect of a lifetime of exposure.⁸⁵

Plaintiff’s attorney Ward Stephenson countered by producing a massive bibliography of medical literature that had been published prior to 1938, all of which warned of the danger of asbestos to workers’ lungs.⁸⁶ He argued that with so much literature available, the manufacturers had known, or should have known, that their products were potentially harmful, and that they had a duty to warn users and handlers of those products. It was brought out in court that none of the defendant companies had commissioned any study of the potential for harm to workers who worked with asbestos insulation products, and that none of the defendants had placed any sort of hazard

⁸⁴ *Ibid.*, 56. Testimony of Clifford L. Sheckler, Johns-Manville accident prevention manager, regarding British studies of manufacturing employees.

⁸⁵ *Ibid.*, 56. Testimony of Clifford L. Sheckler, referring to a 1946 study of 1,074 World War II shipyard insulators by Fleischer and Drinker. This study had ignored the latency issue by dealing only with workers whose exposure to asbestos had been relatively brief, i.e., less than 10 years.

⁸⁶ *Ibid.*, 43.

warning labels on their products until 1969. Two of them still had not labeled their products at the time of trial.⁸⁷

The jury found for Borel's widow, Borel himself having died of mesothelioma in 1970, the year after the suit was filed. The appeals court upheld the decision in 1973, concluding 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."⁸⁸ The final settlement totaled \$79,436.24. After deductions for attorney's fees and prior settlements, Borel's widow received \$32,222.⁸⁹

Key points in the final determination of *Borel v. Fibreboard* were the establishment of the manufacturer's duty to warn of the known hazard, and the determination that even in the absence of specific proof of how much any given manufacturer had been responsible for the injury to Clarence Borel, all were found to be negligent for failure to warn, and strictly liable for his injuries because of the hazardous nature of the products they manufactured. In the words of Judge John M. Wisdom, of the 5th Circuit Court of Appeals, "Here there was a duty to speak, but the defendants remained silent. The district court's judgment does nothing more than hold the defendants liable for the foreseeable consequences of their own inaction."⁹⁰

Following the Borel decision, the number of asbestos lawsuits increased dramatically. One of them, *Yandle v. Pittsburgh Plate Glass*, illustrates many of the hallmarks of the developing asbestos litigation. The case had its origins in the early

⁸⁷ *Ibid.*, 46.

⁸⁸ Castleman, *supra* n. 13, 387.

⁸⁹ Brodeur, *supra* n. 3, 64.

⁹⁰ *Ibid.*, 74.

1950s, when UNARCO opened an asbestos plant in Tyler, Texas, to meet the demand of a large contract with the United States Navy. The plant was sold to Pittsburgh Corning, a joint venture of Owens-Corning and Pittsburgh Plate Glass, in 1962. Pittsburgh Corning was aware of the asbestos hazard at the time it made the purchase, and in 1963 asked the Industrial Hygiene Foundation of America to conduct environmental measurements to evaluate the hazard. At the time, a concentration of 5 million asbestos particles per cubic foot (5 MPPCF) of air was considered a safe level for workers in daily contact with asbestos dust. The results of this study, and two subsequent surveys in 1964 and 1966, were misinterpreted, with the result that throughout all these years the conditions in the plant remained far outside even the accepted guideline of 5 MPPCF. Further studies were conducted by the United States Public Health Service, beginning in 1967.

In spite of findings of high concentrations of asbestos fiber, at no time during any of these environmental surveys was there any notification of Pittsburgh Corning or the local plant management that a health hazard existed. Brodeur makes the point that, prior to the creation of OSHA, the Public Health Service was held to confidentiality for all of its findings. It could measure and evaluate, but the results were to be shared only with management, not with workers or their unions, and there was no authority to enforce any recommendations.⁹¹ The mild and vague recommendations of the Public Health Service for better ventilation and better “housekeeping” were ignored by management.⁹² It was not until the newly created OSHA visited the plant in 1971 that specific and extensive

⁹¹ *Ibid.*, 89.

⁹² *Ibid.*, 77-80.

modifications were ordered to bring the Tyler plant into compliance with environmental asbestos guidelines. The plant was closed in 1972 for extensive reengineering.⁹³

Dallas attorney Frederick Baron initiated the lawsuit in behalf of Herman Yandle and a few other workers from the Tyler factory in January, 1974. In *Yandle*, Baron was breaking new ground because (1) he was filing a class action suit, (2) he was suing the employer, and (3) he was suing the United States government. Each of these aspects of the case represented a major obstacle. The class action had to be certified by a court, the employer should have been immune to civil litigation until the workers first went through the workers' compensation system, and the government had always taken the position that it was immune to liability suits.

Baron was joined soon by attorneys Scott Baldwin and Rex Houston, with the three agreeing to pool their clients into a single lawsuit. To complicate matters, in typical asbestos litigation fashion, Pittsburgh Plate Glass, parent of Pittsburgh Corning, had joined UNARCO, from whom the plant had been purchased in 1962, and the Oil, Chemical, and Atomic Workers Union that represented the Tyler employees. The class action was never certified, however, and Judge William Steger encouraged the litigants to settle out of court, which they eventually did. The parties reached an out-of-court settlement in September, 1977, with the plaintiff's receiving \$20 million in damages, including \$5.7 million from the U.S. government. As part of the settlement, plaintiff's attorneys agreed not to take any further cases from the Tyler asbestos factory, agreed to seal all their trial records and discovery, and agreed not to discuss the case.⁹⁴ This was to

⁹³ *Ibid.*, 89.

⁹⁴ *Ibid.*, 92.

be the only case in which the federal government agreed to pay damages to asbestos litigants. None of the defendants who settled in this case admitted any wrongdoing.⁹⁵

One poignant anecdote must be included in any account of *Yandle v. PPG*. When Dr. Lee Grant, Medical Director of PPG, issued a warning to the Tyler plant manager, J.W. McMillan, in 1968, that conditions in the plant represented “a significant health hazard”, McMillan replied, “I have lived, worked, eaten, and breathed asbestos for years, and I smoke, and I don’t think they know what they’re talking about.”⁹⁶ McMillan died of mesothelioma in 1970.

Aside from the economic results of the lawsuits, the litigation of the 1970s served to unveil, piece by piece, the patterns of concealment and fraudulent behavior that had been adopted by the asbestos industry since the early 1930s. A few examples should serve to illustrate.

Among the most notorious evidence unearthed during the 1970s was a cache of documents known as the Sumner Simpson Papers. Sumner Simpson was the President of Raybestos-Manhattan during the 1930s and 1940s. The papers came to light during the discovery phase of a 1977 suit involving Metropolitan Life insurance and a number of asbestos manufacturers, brought by attorney Karl Asch. The Simpson Papers include correspondence between Mr. Simpson and Dr. Anthony Lanza, Medical Director of Metropolitan Life Insurance during the same period, and with Mr. Vandiver Brown, Chief Counsel of Johns-Manville from 1930 to 1950. They document the successful efforts of Vandiver Brown to influence editorial content of the trade magazine *Asbestos*

⁹⁵ *Ibid.*, 91.

⁹⁶ *Ibid.*, 89.

and to influence the magazine to forego publication of articles and studies unfavorable to the industry.⁹⁷ Brown and Simpson shared the belief that general awareness of the potential hazard of asbestos was not in the interest of the industry. They were concerned that publication of any negative material would have a deleterious impact on their sales and marketing personnel, and would be a potent weapon in the hands of plaintiff attorneys.⁹⁸ Following the publication in 1930 of the Merewether-Price study for the British Inspectorate of Factories, no mention of the asbestos hazard appeared in *Asbestos* magazine until 1969.⁹⁹

The Simpson Papers also reveal Brown and Dr. Anthony Lanza deliberately delaying publication of research, and exercising considerable editorial prerogatives in the published conclusions of research performed under the auspices of Metropolitan Life Insurance Company. The Metropolitan study, which was conducted during 1932 under Lanza's supervision, found levels of asbestosis as high as 53 percent among 126 asbestos factory workers. It was not published until 1935. By that time, with assistance from Vandiver Brown, Dr. Lanza concluded that asbestosis was a milder pulmonary ailment than silicosis, though this conclusion was not supported by the research.¹⁰⁰

Both Vandiver Brown's employer, Johns-Manville, and Sumner Simpson's employer, Raybestos-Manhattan, were key sponsors of the Saranac Laboratory, and were

⁹⁷ Castleman, *supra* n. 13, 584-99.

⁹⁸ *Ibid.*, 183

⁹⁹ *Ibid.*, 184.

¹⁰⁰ *Ibid.*, 181. "Clinically, it is of a type milder than silicosis." In a letter to Lanza, Brown tried to persuade the scientist to state that the conclusion was drawn from the results of his research. Castleman suggests that the timing of the publication of this four-year-old study was due to pending consideration by the Pennsylvania state legislature to make asbestosis a compensable occupational disease

sponsors of much of the asbestos research being done in the United States during the 1930s. The attitude of both companies toward Saranac, and the terms of their support of any asbestos health research, are clearly revealed by this passage in a 1937 letter from Mr. Simpson to Leroy Gardner, Director of Saranac Laboratory until 1943:

It is our further understanding that the results obtained will be considered the property of those who are advancing the required funds, who will determine, whether, 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.¹⁰¹

Brown and Lanza were both instrumental in the watered-down conclusions of Dr. Leroy Gardner's study of mice in 1943. First they managed to prevent further research by Dr. Gardner, and then suppressed publication of the study until it was included in a broader report by Dr. Vorwald in 1951, when the "tumors" discovered by Dr. Gardner were dismissed as non-malignant.¹⁰²

Further disclosures during the 1970s showed that Johns-Manville's Medical Director, Dr. Kenneth Smith, recommended in 1952 that warning labels be applied to asbestos products. As Dr. Smith testified in a deposition in 1976:

¹⁰¹ *Ibid.*, 586-87.

¹⁰² *Ibid.*, 59-72.

The reason why the caution labels were not implemented immediately, it was a business decision as far as I could understand. Here was a recommendation, the corporation is in business to make, to provide jobs for people and make money for stockholders and they had to take into consideration the effects of everything they did and if the application of a caution label identifying a product as hazardous would cut into sales, there would be serious financial implications.¹⁰³

Johns-Manville finally did apply warning labels to their materials beginning in 1964.¹⁰⁴

In a 1984 deposition prepared for *Johns-Manville v. The United States of America*, Charles H. Roemer, former Chairman of the Paterson, New Jersey, Industrial Commission testified to a remark made in the early 1940s by Vandiver Brown. Mr. Roemer had become concerned by a high incidence of lung problems among employees at the UNARCO plant in Paterson, New Jersey, which were presumed to be asbestos related. He arranged a meeting with Johns-Manville because the company was the leader in the asbestos industry and he assumed that it would have an effective program to protect employees from the dangers of asbestos. When he put the question to Vandiver Brown, Johns-Manville's Chief Counsel, he was not prepared for the response:

¹⁰³ Ibid., 666.

¹⁰⁴ Ibid., 386.

I'll never forget, I turned to Mr. Brown, one of the Browns made this crack (that UNARCO managers were a bunch of fools for notifying employees who had asbestosis), and I said, 'Mr. Brown, do you mean to tell me you would let them work until they dropped dead?' He said, 'Yes. We save a lot of money that way.'¹⁰⁵

As litigation proceeded through the 1970s, defendant companies continued to use the "state of the art" defense, claiming that they had had no knowledge before 1964 of the dangers of asbestos materials to customers and users. That defense was gradually debunked, first by production of a considerable pre-1964 published literature on asbestos disease, and second, by the revelation that many of the defendant manufacturers also owned asbestos installation subsidiaries. The workers' compensation records of those contract insulation companies, which showed a number of pre-1964 claims, eventually discredited the state of the art defense for good, since it was clear that the parent companies had access to, and knowledge of, the compensation expenses of their subsidiaries.¹⁰⁶

Owens-Corning Fiberglas sold asbestos insulating products as well as fiberglass insulating products. The company played a double game during the 1940s, collecting data on the hazards of asbestos as a possible negotiating strategy with its labor unions. The strategy was expected to yield a competitive wage advantage over asbestos-producers by exposing the danger of asbestos to the unions. The comparative safety

¹⁰⁵ Ibid., 581.

¹⁰⁶ Ibid., 205-25.

advantage was documented by differences in insurance premiums. Owens-Corning never had to play the asbestos hazard card with its unions, and ten years later, was itself marketing asbestos insulation, along with its trademark fiberglass products.¹⁰⁷

The asbestos product in question was called Kaylo, and had been developed by Owens-Illinois in the late 1930s. Owens-Illinois had asked the Saranac Laboratory to determine whether the product might be hazardous from “the standpoint of the employees working in the plant” and “from the standpoint of applicators and erectors at the point of use.” In the early 1940s Dr. Leroy Gardner found evidence that Kaylo produced asbestosis in laboratory animals. In the late 1940s, his successor, Dr. Vorwald notified Owens-Illinois that long-term exposure to Kaylo dust had indeed produced evidence of asbestosis in animals. Dr. Vorwald’s final report in 1952 included the same assessment, and advised that precautions should be taken in the handling of Kaylo. Owens-Illinois went to market with Kaylo and by the mid-1950s Owens-Corning had become the largest consumer of Owens-Illinois’ Kaylo asbestos insulation. Owens-Corning acquired the entire Kaylo production facility in 1958. The Saranac report on Kaylo was shipped to Owens-Corning as part of the transaction.¹⁰⁸ Owens-Corning continued to produce Kaylo until 1972.

In the mid-1950s, following publication of two articles by Dr. Schepers of Saranac Laboratory suggesting that glass fibers could be harmful, Owens-Corning, as a Saranac sponsor, solicited a statement from Dr. Schepers elaborating on the safety of its glass fiber products. Dr. Schepers disappointed the company. His statement acknowledged the

¹⁰⁷ Brodeur, *supra* n. 3, 148-52. See also Castleman, *supra* n. 13, 195-96.

¹⁰⁸ *Ibid.*, 153.

safety of fiberglass, but only in comparison with the known carcinogenic properties of asbestos.¹⁰⁹ Though it had collected data on the dangers of asbestos from the 1940s forward, Owens-Corning did not apply warning labels to its Kaylo asbestos products until 1970.¹¹⁰

Phase III – Tactical and Strategic Development

Insurance Litigation – Establishment of Liability Triggers

Typically, the asbestos manufacturers were covered in at least two layers of product liability insurance. Primary coverage handled losses up to a specified limit, such as \$1 million or \$3 million. Losses in excess of those amounts were covered by one or more layers of secondary or excess coverage. The insurance companies would sometimes themselves purchase reinsurance from syndicates or wealthy individuals, as a hedge against the unlikely eventuality that a policy proved more risky than anticipated.

Insurance contracts were drawn up for a specific period of time, usually a year or three years, and claims were liabilities to the insurer under contract at the time of the claim. Under ordinary circumstances an injury occurs at a known time and place, followed quickly by a claim, and liability is easily assigned.

When the size of the stakes became evident following the *Yandle* decision, many of the defendants' insurance companies began to have second thoughts about honoring the

¹⁰⁹ Castleman, *supra* n. 13, 111

¹¹⁰ *Ibid.*, 612.

contracts they held with the various defendants.¹¹¹ The latent nature of asbestos diseases meant that assignment of liability was more complex than in the traditional injury claim. Most plaintiffs had been exposed by the materials of many companies, over a period of many years. During those extended periods of time, most of the defendants had been insured by many different insurers, under many different contracts, for amounts that varied from contract to contract. Under the traditional contract, a company's current insurance carrier would be held liable for any claims filed during the period of the contract, even though the injuries had occurred cumulatively over the previous twenty to forty years. It was in the interests of the defendants to interpret their insurance contracts in ways that would maximize coverage. It was in the interests of the insurers to interpret them in ways that would minimize their liability. The interests of the two groups of parties were in as much conflict as were the interests of the defendants and plaintiffs of the original suits.¹¹²

Two theories of liability quickly emerged. One, the "exposure" theory, held that the "injury" took place when an employee was initially exposed to the harmful asbestos dust. All companies to whose products a plaintiff was exposed were liable under the exposure theory, or at least their insurance companies were. The "manifestation" theory held that the injury occurred when the worker first had knowledge of it, typically at the time of first diagnosis, and was similar to the traditional interpretation of insurance contracts. Under this theory, the company for whom a worker was employed at that time,

¹¹¹ Brodeur, *supra* n. 3, 183. "By the end of 1982, the defendant insulation manufacturers and their insurers had paid out some \$600 million in compensation to plaintiffs and in legal fees, in order to close out some 3,800 product lawsuits, and to reach settlements with some of the 20,000 or so plaintiffs whose asbestos product-liability suits were still pending."

¹¹² *Ibid.*, see chap. 7, "Getting Off the Risk".

or its insurer, was solely liable. Due to the nature of the various asbestos diseases, the manifestation theory was hardly realistic. Complications arose for the insurance companies, however, because an insurer might find advantage in one case through the exposure theory, and the manifestation theory in another, depending on timing and coverage levels, and the amounts being claimed. Consistent adherence to one theory was hardly to be expected. In the unseemly intramural litigation between and among insurers and their defendant clients, insurance companies found themselves arguing first one theory, then the other, depending on when they may have covered a particular company, who the defendant companies may have been in a particular suit, and the nature of the coverage they provided. Manufacturers favored the exposure theory because it maximized their coverage, since coverage then became cumulative. Insurance companies embroiled in this cauldron of litigation included Travelers Indemnity of Rhode Island, Liberty Mutual Insurance of Boston, the Insurance Company of North America (INA) of Philadelphia, Lloyd's of London, Commercial Union Insurance Company, also of London, Aetna Life and Casualty of Hartford, CNA Insurance of Chicago, American International Group of New York, and Home Insurance of New York.¹¹³

The first lawsuit to address these conflicting theories of liability was *INA v. Forty-Eight Insulations*. The case arose when INA announced it would not indemnify Forty-Eight for any claims in which manifestation of symptoms on the part of the claimants occurred after October 31, 1972, the last date of the final policy Forty-Eight had bought

¹¹³ *Ibid.*, 187. The initial case was *INA v. Forty Eight Insulations*. Travelers was the lone insurer to support the exposure theory, which essentially exposed insurers to unlimited liability for damages begun well before they ever contracted with a manufacturer. Travelers took this position because most of its policies were written only for primary coverage. Thus Travelers' potential liability was finite and knowable. Most of the insurers had realized by the time of this suit (1977), that potential losses could run into the billions of dollars, and those responsible for excess coverage had no cap on potential liability.

from INA. Liberty Mutual Insurance and Travelers Indemnity were codefendants in this lawsuit. The trial court found for Forty-Eight and its co-defendant insurance companies. The decision was immediately appealed. Liberty Mutual, though on the winning side, supported the appeal, because the company faced massive exposure for primary coverage over extended periods of time for several manufacturers who were defendants in thousands of asbestos lawsuits. The appeals court upheld the trial court and the Supreme Court declined to hear the case.¹¹⁴ A second major suit, *Keene v. INA*, arrived at a similar though somewhat expanded interpretation of the exposure theory. Keene, which had not existed before 1967, alleged that the insurers of its predecessor, Baldwin-Ehret-Hill, Inc., had failed to indemnify it for hundreds of claims based on exposures that had occurred before Keene had entered the asbestos business. The appeals court agreed that Keene had no liability, since under the exposure theory all the damage had been done before Keene had purchased Baldwin-Ehret-Hill. This was good news to Keene, and bad news to the former insurers of B-E-H. Once again the Supreme Court elected not to overturn the appellate court. In a modified form known as the “triple trigger”, the exposure theory became the standard applied to insurance carrier liability.¹¹⁵

¹¹⁴ *Ibid.*, 187-88

¹¹⁵ *Ibid.*, 189. “Under this theory, insurance coverage could be triggered by the initial inhalations of asbestos, by exposure-in-residence to the fibers—meaning the continuing damage inflicted upon lung tissue by asbestos fibers that had already been inhaled—and by the manifestation of asbestos disease.”

Bankruptcy and the Claims Facilities

Johns-Manville declared itself insolvent under Chapter 11 protection on August 26, 1982. Johns-Manville was not the first asbestos defendant to declare bankruptcy, or even the second; that distinction went to Advocate Mines of Canada in 1981, and UNR Industries (UNARCO), in January, 1982, respectively.¹¹⁶ The stated reason for the Manville bankruptcy was the uncertainty of asbestos-related liability. Though it held assets of \$2 billion, in the summer of 1982 the company faced 16,500 unsettled asbestos claims, with 500 new claims filed monthly. The company had spent \$1 billion settling claims, and had legal expenses of \$2 million per month.¹¹⁷ Finally, and perhaps most significantly, jury awards for punitive damages against asbestos defendants, had finally begun in 1981, and had increased at an accelerating rate throughout 1982.¹¹⁸ The immediate practical effect of the filing was to freeze ongoing litigation, along with Manville's asbestos litigation costs, for the duration of the reorganization. The judge assigned to Manville's bankruptcy proceedings was Judge Burton Lifland, presiding over the U.S. Bankruptcy Court for the Southern District of New York.¹¹⁹

The Asbestos Claims Facility grew out of the Manville bankruptcy and became the first operational administrative claims processing entity to handle asbestos claims. The bankruptcies of Manville and UNR had alarmed the corporate and legal communities, underlining the massive threat represented by asbestos product liability claims. The

¹¹⁶ Hensler, et al, supra n. 4, 22. Brodeur, supra n. 3, 279, says UNR filed in July, 1982.

¹¹⁷ Castleman, supra n. 13, 797-98.

¹¹⁸ Brodeur, supra n. 3, 220-22

¹¹⁹ Ibid., 276

Claims Facility marked the first serious effort to find an extra judicial mechanism to settle quickly asbestos claims that would otherwise languish for years in the court system. Negotiations for the facility were organized by Harry Wellington, Dean of Yale Law School, and began in 1982. The agreement that resulted, in June, 1985, was signed by thirty-four manufacturers and sixteen insurance companies. It did not include Johns-Manville, UNR, Amatex, or Forty-Eight Insulations, all of which had by then declared themselves bankrupt, nor Raymark (Raybestos-Manhattan), GAF, Nicolet Industries, Travelers Indemnity, Home Insurance, or CNA.¹²⁰ The Asbestos Claims Facility was funded by manufacturers and their insurance companies, using a formulaic apportionment of liability based on market share held by the manufacturers, and periods and amounts of coverage for insurers. By 1988, the facility had resolved 20,000 claims, but found itself in financial and organizational difficulty, with seven member companies withdrawing from the agreement.¹²¹ At issue was the apportionment of settlement costs. These apportionments had initially been based on the earliest wave of asbestos claims, which came primarily from the shipbuilding, insulation, and asbestos manufacturing industries. As time went on, plaintiff's attorneys had inundated the facility with claims from other industries, and monthly volume of new claims went from 500 to 1,500.¹²² Many of the corporations funding the facility took the position that they had had little or nothing to do with the newer claims, and that the apportionment was no longer equitable.¹²³ With the loss of its key membership, the original Asbestos Claims Facility disbanded in 1988. The

¹²⁰ *Ibid.*, 335-36.

¹²¹ "Asbestos claims facility under threat", *World Insurance Report*, 27 May 1988.

¹²² *Id.*

¹²³ *Id.*

remaining membership of the Claims Facility reorganized in October of that year as the Center for Claims Resolution.¹²⁴

As the leading asbestos manufacturer in the nation, Manville was a codefendant in hundreds of claims. Its bankruptcy threw the problem of its asbestos claims into bankruptcy court, where existing claimants became creditors, along with banks and vendors, frozen, and pending the outcome of the bankruptcy proceedings. Anticipating that outcome, courts around the country suspended trials in which Manville was a defendant for nearly a year. When the courts eventually realized Manville's bankruptcy would take longer than originally expected, the trials resumed without Manville. Because of its position within the industry, Manville had also carried a major part of the compensation burden in settlements and trials. Under the doctrine of joint and several liability, Manville's codefendants in those suits became liable for the full amount of awards, increasing their financial burden significantly. Lawsuits against Manville, filed by the company's erstwhile codefendants for its portion of awards granted in its absence, merely added to the tangle of litigation awaiting the day Manville emerged from bankruptcy.¹²⁵

The 16,500 claims pending in 1982, the hundreds of new ones added monthly, and uncounted future claimants, were represented by a court-appointed Committee of Asbestos Health Related Litigants. Manville's bankruptcy was marked by acrimony and delay. The company was required to submit to the court restructuring plans, which were often long overdue and were invariably rejected by the Litigants' Committee, which sued

¹²⁴ Stacy Adler, "Coping with asbestos claims: New claims facility develops modifications to Wellington", *Business Insurance*, 1 August 1988.

¹²⁵ Brodeur, *supra* n. 3, 288, 297.

to have the case thrown out of bankruptcy court and accused the company of negotiating in bad faith.¹²⁶ It was galling to plaintiff's attorneys to watch the company rack up record profits under the court's protection, while their clients died of asbestos disease.¹²⁷

Eventually the matter of claimants was addressed by the formation of the Manville Personal Injury Settlement Trust in 1988. The Settlement Trust was similar to the Asbestos Claims Facility, but was capitalized solely by Manville and its insurers through a combination of cash, a 22-year bond, and a majority share of Manville stock. The company also agreed to contribute 20 percent of its annual profits, from the fifth year forward, so long as necessary. The Trust placed limits on the funds available for punitive damages, and the profit-generating half of the company was made immune to further litigation, a key negotiating point for the company, and a frustrating concession to plaintiffs' attorneys. Litigation against the Trust was permitted for claimants who could not achieve satisfaction, but all parties to the negotiations hoped that would not occur; any litigation expenses would be paid by the Trust, thereby cutting into the funds available to claimants. The Committee of Asbestos Health Related Litigants approved the Trust plan by a vote of fifteen to four.¹²⁸

The less-than-unanimous vote suggests there were misgivings on the part of some members. Some attorneys had developed a personal animosity toward the company for its dilatory and obstructionist legal tactics, and were concerned that Manville was getting off the hook. Others, more concerned with the long-term welfare of claimants felt that

¹²⁶ Castleman, *supra* n. 13, 799.

¹²⁷ Brodeur, *supra* n. 3, 287.

¹²⁸ Castleman, *supra* n. 13, 798-802.

the funding arrangements would prove inadequate. The claimants' position was articulated well by attorney Shepard Hoffman:

Financial markets will not lend Manville money if they believe the operating company can be attacked. In return for an injunction [against litigation], we're saying, 'Look, you're entitled to that injunction, and to operate profitably serves our interest.' But if at some point in time, it looks like a choice ever has to be made either for the death of future claims or the death of the operating company, I'm in favor of killing the operating company.¹²⁹

To liquidate Manville, regardless of one's personal feelings, would have been shortsighted. Better to let the company work for the claimants as long as possible.

The Manville Personal Injury Settlement Trust went to work in 1988. It was intended that claims would be processed in the order in which they had been filed. By March, 1990, 22,000 claims had been processed at an average settlement of \$42,000.¹³⁰ These amounts were a drain on the Trust's resources, and by the end of 1990 it was delaying agreed-upon payments and issuing only partial payments. Even so, over \$1 billion was paid out by the Trust by the end of 1994. In March, 1995, the Trust was struggling financially and paying only 10 percent of the scheduled value of claims.¹³¹ By

¹²⁹ Ibid., 800-801.

¹³⁰ Ibid., 802.

¹³¹ Ibid., 803.

the end of the 1990s, the Settlement Fund had settled 520,000 claims, but claimants were receiving only five cents on the dollar.¹³²

In 1993 the Center for Claims Resolution, the linear descendent of the Asbestos Claims Facility, reached an agreement with attorneys who had initiated a class action in behalf of future claimants against member companies, including, among others, GAF, Turner & Newall, US Gypsum, National Gypsum, Armstrong, Union Carbide, and Certainteed.¹³³ This agreement was expected to settle an estimated 100,000 future claims without resorting to litigation.¹³⁴ The class action was brought in behalf of claimants who had not as yet filed claims, and was soon challenged on the grounds that certification of a class of people who could not know who they were could not be constitutional. Even trial lawyer Frederick Baron questioned the authority of fellow trial lawyers Gene Locks and Ronald Motley to file in behalf of future claimants.¹³⁵ *Georgine v. Amchem* was certified as a class action by the U.S. District Court for Eastern Pennsylvania, only to be overruled by the Third Circuit Appeals Court in 1996. At issue was the constitutionality of depriving future claimants of their due process rights, by accepting a settlement in their behalf without their consent. Also, the court pointed out that the Rules of Civil Procedure applied to “cases and controversies”, where the settlement in question

¹³² Krysten Crawford, “Fine particles: Bankrupt companies, clogged courts, millions of sick workers. As the asbestos litigation takes its toll, the AFL-CIO GC looks to Congress to ease the pain.”, *Corporate Counsel*, 03:07, 1 July 2003, 78

¹³³ Castleman, *supra* n. 13, 807.

¹³⁴ Tricia Desilets, “Asbestos claims agreement is called ‘historic event’”, *The Legal Intelligencer*, 20 January 1993.

¹³⁵ Castleman, *supra* n. 13, 808.

appeared to be a private agreement.¹³⁶ Indeed, the original class had been certified, and agreed to by the defendants, on the understanding that the case would not be brought to trial. With that understanding, the certification was approved on the basis of standards less stringent than those stipulated in Rule 23 of the Rules of Civil Procedure. The appellate court ruled against the class action, ruling it unconstitutional to certify a class except according to a full and strict interpretation of Rule 23. Strict interpretation of Rule 23 requires members of a class to have a high level of commonality with regard to the cause of action, a circumstance rarely true of any asbestos claim consolidation. In throwing out the class certification, the court stated, "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods share little in common, either with each other or with the presently injured class members."¹³⁷

Defendants in the case were willing to participate in the class action so long as there was no risk of going to trial. Faced with that possibility, they were not willing. Thus the Appeals Court ruling was a serious roadblock to the establishment of asbestos class actions. The following year, the U.S. Supreme Court followed the same logic in decertifying another class action, in *Amchem v. Windsor*, and again in 1999, in *Ortiz v. Fibreboard*, effectively ending attempts to file class action lawsuits for asbestos mass claims.¹³⁸

¹³⁶ *Ibid.*, 807.

¹³⁷ *Georgine v. Amchem Products* 83 F.3d 610

¹³⁸ Michael Bradford, "High court shelves \$1.5B asbestos pact", *Business Insurance*, 28 June 1999.

One company that withdrew from the Asbestos Claims Facility in 1988 was Owens-Corning Fiberglas.¹³⁹ At the time Owens-Corning announced it would be handling all its own claims, and did so in a manner that some considered ruthless.¹⁴⁰ The Owens-Corning National Settlement Program signaled a change in strategy when it was announced in December, 1998. At a cost of \$1.2 billion, the company reached an agreement with fifty law firms representing, 176,000 claims, or 90 percent of Owens-Corning's pending asbestos claims at that time.¹⁴¹ The scheme's compensation schedules were based on severity of illness and extent of exposure to Owens-Corning asbestos products.

While the company had hoped to put the bulk of its asbestos litigation behind it with the National Settlement Plan, claims continued to be filed against the Owens-Corning in growing numbers, and less than two years later, on October 5, 2000, the company filed for Chapter 11 protection. By that time, the Owens-Corning had been the target of 460,000 asbestos claims, with an estimated settlement value of \$5 billion.¹⁴²

As a post-script, a class action suit was filed on behalf of Owens-Corning shareholders, naming the company's high-ranking officers as defendants. The complaint alleges that corporate officers were publicly professing high expectations of the National

¹³⁹ "Asbestos claims facility under threat", *World Insurance Report*, 27 May, 1988, supra, n. 121. Other withdrawals included Fiberbrand, Pittsburgh-Corning, Celotex, Philip Carey-Canada, Owens-Illinois, and Eagle-Picher.

¹⁴⁰ Roberto Ceniceros, "Owens Corning to settle most asbestos lawsuits", *Business Insurance*, 28 December 1998.

¹⁴¹ "Owens Corning announces national settlement program with firms representing 176,000 asbestos cases", *PR Newswire*, 15 December 1998. Accessed 4 October, 2003, available at <http://web.lexis-nexis.com/universe/>, Internet.

¹⁴² Claudia H. Deutsch, "Owens Corning has filed for bankruptcy protection", *New York Times*, 6 October 2000.

Settlement Plan, while privately admitting its problems to a “small, select group of Owens Corning investors” so that they could position themselves for the eventuality of Owens-Corning’s bankruptcy.¹⁴³

Alternatives to Litigation

In the late 1970s and early 1980s, the volume of asbestos litigation first began to be seen as a growing crisis. A series of efforts were made to develop a “legislative solution” to the growing congestion of the judicial system. The first was introduced in August of 1977 by Representative Millicent Fenwick of New Jersey, whose district included the town of Manville, New Jersey, site of a major production facility of Johns-Manville Corporation. Ms. Fenwick’s proposed legislation, the Asbestos Health Hazards Compensation Act, included provisions eliminating further product liability lawsuits against the asbestos industry, and provided for the federal government to pay off existing claims. Future claims were to be funded by contributions from the asbestos industry and the U.S. Treasury. Fenwick’s bill was criticized as a bailout for the asbestos industry.¹⁴⁴

In 1980, a bill was introduced in the Senate by Gary Hart of Colorado. Hart’s bill, which was also called the Asbestos Health Hazards Compensation Act, provided for federal standards for asbestos compensation payouts, to be administered through state workers’ compensation systems. Adherence to the federal guidelines was voluntary,

¹⁴³ “Cauley Geller announces class action lawsuit on behalf of Owens Corning, Inc. investors”, *PR Newswire*, 14 February 2003. Accessed 4 October, 2003, available at <http://web.lexis-nexis.com/universe/>, Internet.

¹⁴⁴ Brodeur, *supra*. n. 3, 141, 194.

claimants were required to prove their claims under adversarial proceedings, and the bill eliminated the rights of claimants to pursue their claims through common law tort litigation. Hart's bill was also labeled a bailout bill by its critics. Though neither Hart's nor Fenwick's bill had made it out of committee on the first attempt, both were reintroduced in 1981 and again failed to attract support.¹⁴⁵ Not least of the reasons for criticism was the appearance that Fenwick and Hart were promoting the welfare of a major corporate constituent at the expense of the American taxpayer. Johns-Manville was a major employer in Fenwick's district, and had moved its headquarters to Hart's home state of Colorado in 1972.¹⁴⁶

During the 1979 congressional session, Congressman George Miller of California introduced a bill proposing the criminalization of the corporate conduct that had led to the asbestos litigation in the first place. Miller had conducted hearings in 1978 that had revealed the deceptive and fraudulent behavior of corporate officials from the 1930s through the 1960s. Miller was harshly critical of the Fenwick and Hart bills.¹⁴⁷ Miller later introduced the Occupational Disease Compensation Act of 1983, which would have established a national compensation pool for worker claims against employers. The pool was to be funded entirely by employers who occupied any stage of the asbestos distribution chain.¹⁴⁸ Yet another bill was submitted by Representative Austin Murphy of Pennsylvania in 1985. This bill also attempted to establish a fund as the exclusive

¹⁴⁵ *Ibid.*, 194-95

¹⁴⁶ *Ibid.*, 192, 195.

¹⁴⁷ *Id.* Also, see Castleman, *supra* n 13, 831.

¹⁴⁸ Hensler, et al, *supra* n. 4, 29-30

remedy for claims against asbestos manufacturers, and it, too, foundered on political shoals.¹⁴⁹

In spite of congressional apathy and resistance, the idea of administratively distributing settlement monies to claimants persisted. The litigation costs to plaintiffs and defendants were a concern to the defendants and even to some outside observers. Even after lengthy litigation, victims of asbestos disease seemed to get only the leftovers. A Rand study in 1983 found that only 37 percent of total litigation costs reached the claimants, even when cases were settled before trial. The contingency basis of virtually all asbestos litigation meant defendants and their insurance companies paid all the costs of litigation. Defense costs were approximately equal to the claimants' net awards, and much higher than in non-asbestos product liability suits and malpractice suits.¹⁵⁰

Plaintiffs' attorney fees represented 41 percent of settlement amounts in 1984, or 26 percent of total costs. In dollar amounts, at the time of the Rand study, settlement costs to defendants averaged \$95,000 per claim, with \$60,000 awarded to the claimant and \$35,000 going to defense costs. Of the \$60,000 settlement, the claimant's attorney received \$25,000, and the claimant received the remaining \$35,000.¹⁵¹

As the 1990s ended, the ineffectiveness of the various claims arrangements established during the 1980s had become apparent, and the Supreme Court was deflating hopes of a global resolution through the tort system. Attention turned once again to a legislative solution. Representative Henry Hyde of Ohio submitted the Fairness in

¹⁴⁹ *Ibid.*, 30.

¹⁵⁰ Kakalik, James S., Patricia A. Ebener, William L.F. Felstner, Michael G. Shanley, *Variation in Asbestos Litigation Compensation and Expenses* (Santa Monica, Calif.: Rand Corporation, Institute for Civil Justice, 1983), 27, Table 4.2.

¹⁵¹ *Ibid.*, 40, Table 6.2.

Asbestos Compensation Act in May, 1998.¹⁵² The bill failed to make its way out of committee. In March of the following year, Hyde resubmitted his bill as the Fairness in Asbestos Compensation Act of 1999. It received a flurry of attention following the June, 1999 *Ortiz v. Fibreboard* decision of the U.S. Supreme Court. The Court ruled that the case, which had initially been certified a class action, had not met the strict rules for that certification, and that the \$1.5 billion settlement that had been reached by the trial court was void. The frustration of Chief Justice William Rehnquist was expressed when he wrote in a concurring opinion that the “elephantine mass of cases” that asbestos litigation had become “calls for national legislation”.¹⁵³ Hyde’s bill proposed a federal agency funded by asbestos manufacturers and their insurers. Claimants would be required to prove their medical conditions were caused by asbestos. Punitive damages and mass claims were to be barred, and when claimants chose to go to court, plaintiff attorney’s fees would be limited to 25 percent of awards. As might be expected, the bill was not popular with the Association of Trial Lawyers of America, though it was supported by Orrin Hatch of Utah in the Senate,¹⁵⁴ who had also introduced a “Fairness in Asbestos Litigation Act” in 1998. Senator Hatch’s bill was as unsuccessful in gaining support as Congressman Hyde’s bills had been.¹⁵⁵

In 2003, Senator Hatch introduced a revised bill. The Fairness in Asbestos Injury Resolution Act made it through the Senate Judiciary Committee only to run out of gas in

¹⁵² “Asbestos litigation reform bill introduced in U.S. house”, *Asbestos Litigation Reporter*, 20:11, 3 July 1998, 16.

¹⁵³ Michael Bradford, “High court shelves \$1.5B asbestos pact”, *Business Insurance*, 28 June 1999, 1.

¹⁵⁴ Mark A. Hofmann, “Asbestos bill faces struggle in congress”, *Business Insurance*, 5 July 1999.

¹⁵⁵ “Sen. Hatch introduces bill to halt asbestos litigation”, *Asbestos Litigation Reporter*, 20:18, 16 October, 1998, 3.

the full Senate. Hatch's bill provided for scheduled compensation amounts based on the nature and severity of illness, and bypassed litigation with an administrative, procedural claims mechanism, the main advantages of which were speed of settlement and low transaction costs. (Transaction cost is another term for attorney's fees.) Funding was to be provided through a trust, by the asbestos industry and the insurance industry.

Supporters of the Hatch bill cited over sixty corporate bankruptcies (the number has now grown to eighty)¹⁵⁶ and the loss of over 60,000 jobs directly attributable to asbestos litigation (another estimate places this number now at 128,000),¹⁵⁷ and portrayed the backlog of 600,000 pending claims as a crisis. As introduced, the bill established minimum payments in the range of \$40,000 for asbestosis, and a maximum of \$750,000 for mesothelioma victims.¹⁵⁸ These figures were later amended upward in committee.¹⁵⁹

¹⁵⁶ White, *supra*.

¹⁵⁷ *Ibid.* White cites 2002 research by Stiglitz and Carroll, et al. The higher figure reflects jobs lost and not created due to asbestos liabilities.

¹⁵⁸ Jim Day, *Chicago Lawyer*, September 2003, 62.

¹⁵⁹ "Senate may consider bill to settle asbestos litigation", *Asbestos Litigation Reporter*, 25:15, June 5, 2003,, 3. "Senate approves asbestos bill, mostly along party lines", *Asbestos Litigation Reporter*, 25:18, 17 July, 2003, 3.

Phase IV – After Amchem/Ortiz

Asbestos manufacturing ceased to exist in this country in the early 1970s.¹⁶⁰ Asbestos related cancer deaths peaked in 1992.¹⁶¹ But following *Ortiz* in 1999, the volume of new asbestos injury claims increased dramatically. Notably, most of them were filed by unimpaired claimants, that is, people with no symptoms and no disability.¹⁶² The new wave of claims led to a new wave of defendant bankruptcies,¹⁶³ and this, in turn, led to a shrinking pool of defendants against whom the claims could be filed, with each remaining defendant bearing an increasing burden of the eventual award or settlement. Plaintiffs' counsel responded resourcefully by widening the pool of defendants, with many having increasingly tenuous connections to the actions of Johns-Manville, Raybestos-Manhattan, Turner and Newall, and Owens-Corning.¹⁶⁴

Several reasons may explain the increased filings by unimpaired claimants. For one thing, “unimpaired” had been legitimized over the previous two decades as standards of

¹⁶⁰ Michelle J. White, “Resolving the ‘elephantine mass’”, *Regulation*, 26:2 (Summer, 2003), 48.

¹⁶¹ *Id.*

¹⁶² Stephen J. Carroll, Deborah Hensler, Allan Abrahamse, Jennifer Gross, Michelle White, Scott Ashwood, and Elizabeth Sloss, *Asbestos Litigation Costs and Compensation An Interim Report* (Santa Monica, Calif.: Rand Corporation, Institute for Civil Justice, 2002). Refers to “functional impairment” as those affecting a claimant’s ability to perform activities of daily living, including work. Those without a loss of function would be considered unimpaired in spite of clinical evidence of disease. Parloff, *supra*, n. 5. “...in some states nonmalignant case now outnumber cancer cases by a margin as wide as 47 to 1.” Also, White, *supra*, citing Carroll, et al (*Asbestos Litigation in the US A new look at an old issue*, Santa Monica, Calif.: Rand Corporation, Institute of Civil Justice, 2002), refers to a “general decline of malignancy claims from 20% during the 1980s to less than 10% by the mid 1990s.” To understand this statistic properly, the number of cancer claims has remained roughly constant, but the overall number of claims has climbed significantly, decreasing the proportion of malignancy claims. See also White, *supra* n. 160.

¹⁶³ White, *supra* n. 160. Bringing to 80 the total since 1982.

¹⁶⁴ Parloff, *supra*. n. 5.

liability had declined. While asbestos litigation had begun the 1970s with a requirement that claimants demonstrate harm or disability, mass claims had frequently combined serious injuries with mild and non-existent injuries. To cut defense costs, defendants often failed to audit the claims against them carefully, with the result that many unimpaired claimants received settlements. Second, many unimpaired claimants filed in order to have a claim on file before statutes of limitation expired. Trial lawyers have significant economic incentives to recruit claimants, and they encouraged filings with widespread advertising and offers of free x-ray screenings in exchange for a potential claimant's power of attorney.

In short, uninjured people file asbestos claims because the transaction costs to them are low, and the potential payback is high. Parloff cites a notorious 2001 jury award in Mississippi, in which six plaintiffs were awarded \$150 million in compensatory damages. None of the claimants had sustained any medical expenses, and none had lost any time off from work. Four doctors testified that none of them showed any signs of asbestos disease at all.¹⁶⁵

Observers of asbestos litigation over the years have attributed the recent growth spurt in new claims to four causes, all of them favoring plaintiffs. First, many defendants had fallen into the habit of settling claims as quickly as possible. Total defense litigation costs comprise two parts: defense costs and settlement costs. Overall cost savings may be found by minimizing one or both. Early settlements offer savings in defense costs. Though this strategy lowers the short-term defense costs of current claims, it also reduces the claimants' risk and increases the likelihood of a favorable outcome, assuring a steady

¹⁶⁵ Ibid.

stream of new claims, raising the overall costs in the long-term. The quick settlement strategy is now seen by defendants as an error.¹⁶⁶

A second cause for increased claims has been the relaxation of standards of proof over the years, which has created a legal environment in which defendants have little recourse. Most of the concern about “due process” in asbestos litigation has referred to plaintiffs. The defendants in the early years of litigation were found to be guilty of such serious and long-term negligence that their guilt became a given. Fine points of proof, such as whether or not a plaintiff had actually been exposed to a defendant’s products, were neglected. Witness memories of products used twenty and thirty years ago were understandably vague, so market share statistics replaced proof of actual exposure with probabilistic theories of exposure. If a company had a 50 percent market share in a given area, then that company had a 50 percent burden in the eventual settlement. That there would be a settlement, after the first few trials, was never in doubt.

Third, procedural techniques have necessarily developed to handle the high volume of claims in certain jurisdictions. Most common was consolidation of supposedly similar cases so that they might be disposed of as a group, clearing crowded court dockets. Judges were initially cautious about joining claims, due to existing requirements that they be substantially similar. Expedience soon quickly overwhelmed the standards and mass claims became the norm rather than the exception. Recent research shows that mass claims also favor plaintiffs.¹⁶⁷

¹⁶⁶ Ibid.

¹⁶⁷ White, *supra* n. 8, 3.

Finally, mass claims opened the way for one more innovation, widely practiced by plaintiffs' attorneys: venue shopping. In the early 1990s, claims filed in federal courts were consolidated under Multiple District Litigation (MDL) Judge Charles Weiner. Weiner eliminated punitive damages and established medical criteria for claims to go forward, thereby raising the bar and lowering the potential benefits to plaintiffs of filing in federal court. The national scope of asbestos litigation has exposed plaintiffs' attorneys to jurisdictions nationwide, and some, over time, have proven to be more favorable to claimants than others: Mississippi, West Virginia, Madison County, Illinois, Houston, Texas.¹⁶⁸ Prior to 1988, Mississippi, West Virginia, New York, Ohio, and Texas collectively accounted for only 9 percent of all asbestos claims filed. Between 1998 and 2000, these states accounted for 66 percent of all filings.¹⁶⁹

The joinder rules of Mississippi, permitting hundreds or thousands of claims by non-residents against non-resident businesses, have proven to be particularly favorable to mass consolidations. These rules have given Mississippi state courts, in effect, national jurisdiction over asbestos litigation. In particular, the Circuit Court of Judge Lamar Pickard in Jefferson County has proven a favorite of plaintiffs attorneys.¹⁷⁰ Appealing verdicts in Mississippi has proven difficult also; until recently, defendants wishing to dispute an unfavorable award have been required to post an appeal bond costing more than the original award.¹⁷¹

¹⁶⁸ *Ibid*, 6.

¹⁶⁹ Carroll, *supra* n. 162.

¹⁷⁰ Parloff, *supra* n. 5. Also, Carroll, et al, *supra* n 162. According to Carroll, "...close to 20,000 cases, 13 percent of the total filed over that period [1998-2000], were filed in these two [Jefferson and Claiborne Co. MS] counties "

¹⁷¹ *Id*

The period following the *Amchem* and *Ortiz* decisions has seen a revival of asbestos litigation. The 1990s had seen a stabilization of litigation and, generally, a decline in the uncertainty and risk faced by plaintiffs and defendants. There were expectations that global settlements and an equitable resolution would be possible. That period of equilibrium came to an end with *Ortiz*. The new wave of bankruptcies indicates that the “traditional” defendants, primarily in the shipbuilding, manufacturing, and installation industries, have finally concluded that no other alternative remains. The bankruptcies have essentially forced plaintiffs to seek other sources of compensation, with the result that defendants representing most sectors of the economy now face asbestos claims.¹⁷² Where earlier claims named ten to twenty defendants, current trends are toward fifty or more. Trial lawyers appear to be reassessing agreements with many defendants, and mesothelioma claims are now more likely to go to trial than in the past decade. Several states have now adopted a “two disease” rule, permitting claimants to file as unimpaired, and later to file in the event a malignancy is diagnosed.¹⁷³ Plaintiffs’ attorneys in some settlements are no longer agreeing to waive their clients’ right to future claims. None of these trends, coupled with the substantive and procedural advantages to plaintiffs, bode well for an end of asbestos litigation in the foreseeable future.

¹⁷² Carroll, et al, supra n. 162. Cites 6,000 defendants in 75 of 83 SIC codes. The Wall Street Journal, 17 October 2003, (www.wsjonline.com) cites 8,700 defendants. Parloff, supra n 5, in March, 2002, cites involvement of companies in 44 SIC codes.

¹⁷³ *Ibid.*, 24.

PROBLEMS OF ASBESTOS LITIGATION

The asbestos litigation of the past four decades represents an historic phenomenon, not least because it has been going on for four decades with no discernable end in sight. Four problems unique to asbestos injuries and litigation are discussed in this section.

The first characteristic has to do with the extremely long latency of the signature diseases of asbestos. Because the tort system is predicated on an injury whose perpetrator, nature, and time of occurrence are known, the tort system, as well as the workers' compensation system were both challenged by injuries that lay dormant until years later, and whose cause was often cumulative. Difficulties arose in assigning liability, first because asbestos workers were exposed over time to products manufactured by many companies, and second because the insurance coverage, and hence ultimate liability, of those manufacturers was understood to be based on the same "who, what, when" parameters as the tort and workers' comp systems. These variables led to a high degree of uncertainty among all parties regarding where, and if, liability resided. From the beginning, many defendants were joined in every asbestos trial, most of them, in addition to being sued by claimants, were also suing one another for indemnification. Cross litigation among multiple defendants brought about lengthy trials and high litigation costs. With trials lasting an average of three to five years, many claimants died before a verdict or a settlement was reached.

Until the discovery process eventually proved otherwise, latency permitted the extensive and repeated use of the “state of the art” defense by defendants. Because courts were unwilling to permit points of fact or points of law settled in other jurisdictions, plaintiffs had to, in essence, retry the same case over and over again. Within the narrow context of a single trial, defendants could logically declare that they were innocent of negligence, that the problem was fixed as soon as they recognized it, and that all the injuries being litigated had happened before they had known, even though previous juries had found otherwise. Latency created statute of limitations problems under workers’ compensation law, with diseases manifesting themselves after a worker had lost his right to file. Latency provides the logic behind unimpaired claims. For a person with no functional disability to claim that he has been harmed would seem illogical and unjust. But if a reasonable probability of future illness exists, the basis for a claim is established.

Future claims are a second unique characteristic of asbestos. Though a single individual may have a relatively low probability of future illness, it is a certainty that there will be many future illnesses. The rights of the “futures” has been a major obstacle to global settlement, and illustrates sharply the conflict between the procedural guarantees of the constitution, and the need of defendants and claimants alike for procedural efficiency and lowered transaction costs. Asbestos-bearing products are still in use in the American environment, and the thirty to forty year latency of mesothelioma assures that a number of claims, however minimal, will be made at least that far into the future.

A third unique aspect of asbestos litigation has been the enormous dimensions of it. As many as 600,000 individuals have filed claims, and since most claims are filed against

multiple defendants, one researcher estimates as many as 20 million claims have been filed.¹⁷⁴ Estimates made at every juncture have been low, from the earliest assumptions by management that the cost of a few worker claims would be less than avoidance costs, to the more recent original estimates of the Manville Settlement Trust. Current estimates of 8 to 11 million people exposed through the workplace, as many as 27 million in total,¹⁷⁵ 1.3 to 3.1 million claimants,¹⁷⁶ and settlements of more than \$200 billion seem shocking in print, but if history is an indicator, they may seem naïve in 2020.

The courts having to handle this workload have been overwhelmed.¹⁷⁷ Some have introduced innovative consolidation or quasi-administrative techniques to manage the caseload, with mixed results. At one point the East Texas Federal District Court attempted to establish asbestos manufacturer liability as a point of law, but this was overruled by the appellate court. Other courts have encouraged consolidation of cases, and when bringing cases to trial, have permitted “bouquet trials” and “reverse bouquet trials”, two-step processes in which settlement arrangements are determined separately from liability. In a bouquet trial, liability is first determined for a selected “bouquet” of cases, and the results of the bouquet trial are applied to the remaining cases. In a reverse bouquet trial, the settlement phase is determined first, and then a trial is held to determine culpability.

¹⁷⁴ White, *supra* n. 8, 2.

¹⁷⁵ *Id.*

¹⁷⁶ Parloff, *supra* n. 5.

¹⁷⁷ It should be pointed out that the “congestion” seen by some as a breakdown in the tort system, is due mainly to the selection of a relatively few favorable venues by plaintiffs’ counsel. Most of the courts throughout the country are not buried under asbestos litigation.

The overwhelming majority of cases are settled outside of the courtroom,¹⁷⁸ though settlement amounts have been found to be correlated to the publicized results of trials.¹⁷⁹ The threat of trial hangs over every settlement agreement, legitimizing a form of extortion. The mass nature of the settlements also means that individual evaluation of harm becomes impossible, by the defendants, by the court, or by a jury. It is accepted by most analysts that mildly injured and unimpaired claimants are overcompensated as a result of the aggregate nature of consolidated claims.¹⁸⁰

Once it began, the development of mass claims evolved quickly. The first tentative step toward consolidation of claims took place in 1985, in a case in which all four of the claimants had served on the same work crew, and two were brothers.¹⁸¹ Standards of similarity for consolidation were strict. Within a short while thousands of cases were routinely consolidated in an effort to clear court dockets. While courts and trial lawyers both proclaim the primacy of due process, in practice they both have incentives to wrap up as many cases as possible as efficiently as possible. There is irony in this, first noted by Hensler in a 1985 Rand Corporation study.¹⁸² Judges want to clear their dockets, and the advantages of mass settlements to trial lawyers has been well documented.¹⁸³ In spite

¹⁷⁸ White, *supra* n. 8, 4. "... less than 1 percent of asbestos claims are tried in court."

¹⁷⁹ *Ibid.*, 21.

¹⁸⁰ Deborah R. Hensler, Symposium: "What we know and do not know about the impact of civil justice on the American economy and policy: As time goes by: Asbestos litigation after *Amchem* and *Ortiz*," *Texas Law Review* 80 (June 2002): 1912.

¹⁸¹ Parloff, *supra* n. 5.

¹⁸² Hensler, et al, *supra* n. 4, 108.

¹⁸³ White, *supra*., n. 76, generally. White, an economics professor at the University of California at San Diego, goes so far as to quantify the expected additional return for mass consolidations, and to quantify the additional expected return for specific jurisdictions favored by plaintiffs' attorneys in three separate papers.

of the rejection by plaintiffs' attorneys of administrative claims settlement mechanisms, settlements negotiated by counsel are often calculated, de facto, on tables of injury and exposure criteria similar to those proposed in all the unsuccessful attempts at a legislated plan of compensation. One of the stated objectives to a scheduled compensation system that it lays waste to due process, though the methodology of such a system is essentially the same as that given an individual claim in a mass settlement.

The fourth unique characteristic of asbestos litigation concerns the challenges to plaintiffs and other defendants brought on by the many bankruptcies of primary defendants. There was outrage among plaintiffs' counsel when the bankruptcy strategy emerged in 1982. It somehow was not sporting of the defendants, just when the lawyers finally had them treed, to duck their responsibility to grievously injured claimants. The outrage was shared by co-defendants who were left holding the bag, as their portion of liability increased with each bankruptcy. With virtually all the original manufacturer defendants now out of the reach of the claimants, the second and third tier defendants being called before the courts today have some justification for wondering why they are being sued. The plaintiffs' bar offers this explanation:

“The concept is picking low-hanging fruit,” explains Steven Kazan, an Oakland, California plaintiffs lawyer who represents almost exclusively mesothelioma victims. “In the early days of the litigation, you had Manville. Manville goes away. Next in line are the regional distributors. If they go away, next in line are the contractors who bought from them. If

See “Explaining the flood of asbestos litigation: Consolidation, bifurcation, and bouquet trials”, “Understanding the asbestos crisis”, and “Resolving the elephantine mass”.

those guys disappear, there are cases where we very legitimately are suing the neighborhood hardware store, because that's where the guy bought asbestos joint compound, or the lumberyard where he bought asbestos shingles, or the floor company where he bought floor tiles. They say 'All of a sudden, why me?' One answer is: 'Consider yourself lucky that we left you alone for twenty years.' We're now higher in the tree." Defense lawyers see it differently. "It's the search for the solvent bystander," says John Aldock, chairman of Shea & Gardner.¹⁸⁴

The result of the viewpoint expressed by Mr. Kazan is that asbestos defendants, once numbering fewer than 300, now number in excess of 6,000, and represent more than half of the industrial codes in the U.S economy.¹⁸⁵ While none can doubt the justice of compensation for those injured by corporate malfeasance during the 1920s through the 1950s, many doubt the justice of claims against companies who never manufactured, installed, or sold asbestos products. Parloff cites the example of one of the two companies that were ordered to pay \$150 million to six unimpaired claimants in Mississippi:

...AC and S, Inc., [was] a tiny Lancaster, Pa., insulation contractor that never had offices in Mississippi, never performed contracts at any of the sites where the plaintiffs worked, and sold few asbestos-containing

¹⁸⁴ Parloff, *supra*. n. 5.

¹⁸⁵ Carroll, et al, *supra* n. 162.

products anywhere. For all six plaintiffs in the case, AC and S's liability came to \$83.75 million, which was more than ten times the company's net asset or equity value, and more than the firm's total cumulative earnings in its forty-three years of existence.¹⁸⁶

The reader should note that the award in this trial was for *compensatory damages only*, that the claimants were laborers and railroad workers, and that none of them claimed any disability, medical costs, or lost wages due to illness. Compensatory damages are meant to reimburse an injured party for measurable losses, pain and suffering, loss of consortium, and otherwise make whole the victim of a tort.

Bankruptcy has seemingly become the only way a company can escape an indefinite liability stretching into the unknown future. And though plaintiffs' attorneys may gnash their teeth at companies placing themselves out of reach of the courts, the company declaring bankruptcy in 2003 is not the same company whose officers deceived their workers and the general public sixty years ago. Nor is bankruptcy without its costs to the company, its shareholders, and its employees. The Manville model is commonly followed, with a claim settlement trust being an integral part of the restructured company. Establishment of the trust requires over half a company's assets, forces losses on stockholders, many of whom today are employees of the company.¹⁸⁷ Those employees also face the risk of layoff in the restructured company, and typically some portion of

¹⁸⁶ Parloff, *supra*. n. 5.

¹⁸⁷ *Ibid.* Parloff cites the examples of Federal Mogul, a major auto parts manufacturer, and Owens-Corning Fiberglas. Employees of Federal Mogul owned 16 percent of the company, and lost 99 percent of their stock value between January, 1999 and March, 2002. Owens-Corning employees owned 14 percent of the company, and lost 97 percent of their share value in the two years leading up to the bankruptcy.

future earnings may also be committed to the trust. With each bankruptcy, the burden of remaining claims, and newly filed claims falls more heavily on the survivors. Yet with each bankruptcy, the pool of resources available to pay compensation to claimants grows smaller, with potentially serious consequences to legitimate victims, current and future.

CORPORATE RESPONSE TO THE ASBESTOS HEALTH HAZARD

Throughout the litigation under discussion, various observers and writers have thoroughly documented the indefensible behavior of asbestos manufacturing companies, first as they suppressed knowledge of the asbestos hazard from their employees and from the public, then later as they fought literally tooth and nail the resultant lawsuits. Castleman and Brodeur were among the earliest to inform the general public in the United States, and later Tweedale in the United Kingdom, based on discovery obtained through a property damage claim filed in the U.S.¹⁸⁸ This section will examine the perceptions and behaviors of the defendant as the asbestos “problem” developed over the years.

What, exactly, did the leadership of Johns-Manville, Raybestos, Turner and Newall, et al, do? First, they denied in the face of gathering evidence that they were producing a dangerous product. They denied it to themselves, then to their workers, and then to the public. They successfully suppressed publication of much of the evidence, willfully misinterpreted it as it came to light, tried to control anyone who pursued more evidence, and vigorously contended with independent research that painted a picture different than their own. They made a deliberate choice to conceal evidence of harm from their own

¹⁸⁸ Tweedale, supra n. 21, Preface, ix, referring to *Chase Bank v Turner and Newall*. It is significant that American common law is based on British common law, yet British discovery rules are far less liberal than those in the United States. The “silence” surrounding the hazards of asbestos, that was so thoroughly breached by tort litigation in this country, remained substantially intact in the United Kingdom until a plaintiff’s attorney for Chase Bank saw to it that Turner and Newall records were made widely available

employees, even after the link between the working conditions and disease was recognized. They successfully established standards they could live with in an economic sense, even though the efficacy of the standards was in dispute, so they could essentially shift the blame to the standards, rather than their own decisions. When they could no longer shift the cost of asbestos disease to the employees alone, they consciously shifted asbestos disease costs to a manageable workers' compensation system so as to keep it out of the court system. When tort litigation eventually began in earnest, they used every tactic they could to delay trials and increase plaintiffs' transaction costs, and they denied knowledge, and then responsibility, until juries eventually decided otherwise. Finally, when culpability was thoroughly and irrevocably established, they cut their losses and slipped out through the bankruptcy courts, leaving claimants with dwindling resources and limited recourse.

Why did they do this?

There was a period, from perhaps the turn of the twentieth-century to the early to mid-1930s, when asbestos manufacturers were honestly ignorant of the true hazard of their products. The earliest literature mentioned, Pliny the Elder, was probably not bedside reading material for the men who built the industry from the 1860s forward. The earliest relevant revelations of the danger were in medical literature, also not normal fare to those with aspirations in the field of commerce.

Even within the scientific community, theories are subject to debate for years before they are gradually accepted. Urban and industrial conditions in general were appalling throughout the industrializing West, and pulmonary diseases were common, particularly among the lower socioeconomic populations from which asbestos workers were drawn.

Diagnostic technology had not advanced far enough to establish the links that would still be a necessary part of the eventual establishment of the asbestos hazard, nor to distinguish between tuberculosis, silicosis, asbestosis, or even chronic bronchitis brought on by filthy urban air. Life expectancy in general was shorter, and many in the asbestos industry did not live long enough to manifest the symptoms of such long-latency diseases. Health care was not a term of common usage, let alone available to factory workers. And, from the point of view of comparative power, workers had none. Complainers were easily replaced by someone more willing to accept even a risky job.

During this same period, asbestos was lauded as a miracle product. Its resistance to heat made it a necessity in an age powered by coal and steam, and its resistance to flame undoubtedly saved lives in an age where coal oil was still a source of heat and often a source of light after sundown, and where use of wood-fired cooking stoves was common.

The public relations image of the industry was favorable and those building the industry were justifiably proud of their contribution to an improving standard of living. It was an age that faced the future with confidence in the ability of science to bring only improvement to society. People had not yet learned to watch for unintended consequences. The nation's resources were still seen as boundless and industry, in general, instinctively externalized all costs that could be externalized. The only duty recognized by a captain of industry was to his stockholders.

The medical profession, mostly coroners and pathologists, were among the first to suspect asbestos might carry with it a serious risk, with a few published articles in the 1920s, growing in volume during the 1930s. But by the 1930s, there were bigger problems than a few sick workers. The Great Depression established priorities in the

working world until the outbreak of the Second World War. To the men in charge of Johns-Manville or Turner Brothers, the medical studies and the incidence of sickness among workers were a public relations problem that threatened to become an economic problem. It was not seen as a health problem or a moral issue. Consequently they addressed the public relations problem by attempting to control the relevant information, and they addressed the economic problem by successfully externalizing the costs to an easily controlled workers' compensation system.

Johns-Manville is probably the most notorious of the asbestos manufacturers, because of its industry leadership, and because of the well-documented body of evidence revealing the company's efforts at concealment and suppression of any evidence of the asbestos hazard. In hindsight, one might view the company's first step down the wrong path as being the lawsuit of eleven sick employees, filed in 1929, that was settled in 1933 on the condition that the plaintiffs' attorney, Greenstone, not pursue further litigation, and that the court records be sealed. The next step, basically contemporaneous, was the influence exerted by Manville on the 1932 Metropolitan Insurance study by Dr. Lanza. With those two decisions, the management of Johns-Manville established a pattern that would continue for sixty years and sealed the fates of hundreds of workers.

It is unrealistic to believe that Vandiver Brown and Lewis H. Brown saw these decisions as anything other than efforts to minimize damage, or that they were prescient enough to foresee the scale of harm they were setting in motion. It is also impossible to condone their decision to conceal, rather than explore further, the evidence of danger. Their strategy of deliberate, plausible deniability has become familiar in recent years through its use by others in both business and politics. At the time of the decisions, their

evaluation of risk and reward was realistic. Similar decisions were being made throughout the asbestos industry, in this country, in Canada, and overseas, and none were being held accountable. There was little reason to believe they ever would.

The failure to warn employees of the risk, and especially, after routine annual exams began, is consistent with management's perception of the health hazard as a public relations problem. Had employees been notified of the harm done to them when it first manifested itself, word would have spread quickly, labor unrest would have resulted, labor costs would have escalated disastrously, and the industry would have faced a larger problem than it already had. An industry that sold itself on the premise of safety could not permit that. Attention turned instead to a way to externalize not only the costs, but also the responsibility.

The pursuit of a scapegoat was behind the industry's acceptance of the threshold limit values (TLVs). Once the industry accepted that there might be a link between asbestos exposure and asbestos disease, it sought a "safe" (and economically feasible) level of exposure that would minimize or eliminate the risk. Establishment of this level was hampered by the industry's own efforts to doctor any research that came to light, and eventually the 5 MPPCF (5 million particles per cubic foot) standard was adopted, influenced significantly by research conducted in Great Britain. Compliance with technically feasible industry standards was seen as a way of meeting one's duty, thus providing a defense against charges of negligence. Maintaining the working environment at the "safe" level of exposure obviated any need to warn of harm, since no harm existed at or below that level.

From a public relations standpoint, this, too, was a rational approach, and the continual appearance of new cases of worker illness into the 1950s and 1960s was attributed to the latency of illnesses brought on by exposure that had occurred before the standards were applied. The same logic would be applied later in an effort to shift responsibility to the government for specifying asbestos in wartime contracts.

This “rational” approach eventually exposed another level of ignorance, comparable to that existing at the turn of the century. This time the ignorance concerned the mechanisms that brought on cancer. Asbestos related cancers were not reported in significant numbers until after the 5 MPPCF standards were in place. Researchers attributed that to the fact that few of the earlier cases survived long enough to contract cancer, dying instead of acute asbestosis. Another error was the assumption, which conveniently fit the interests of the industry, that lung cancer was not caused by asbestos, the substance, but rather by asbestosis, the disease.

But decades into the new standard, cases of cancer appeared, unaccompanied by asbestosis. This, of course, was a disastrous revelation, and was bitterly fought by the industry, though still on the public relations front. It is easy to understand why; cancer was far more fearsome in the middle of the twentieth-century than it is today. A diagnosis of cancer was usually a death sentence, and a link to asbestos represented a death sentence to the very profitable industry (as, indeed, it eventually was).

The final assumption that remained, and that was eventually challenged and defeated by asbestos-related cancer, was that there existed a “safe” level of exposure. To admit otherwise was to admit finally that the industry could not survive. The industry

response throughout was to fight a public relations war motivated by economic interests, instead of recognizing a health crisis or a moral duty.

Without excusing their moral blindness, one can perhaps understand the need of industry leaders not to believe that they were producing a poison. (At one point, when warning labels were still being discussed, they argued the technicality that asbestos was not “toxic” because it was not known to produce vascular or neurological responses commonly associated with poisons.)¹⁸⁹ Their products were filtering food, carrying water, clothing babies, and in households throughout the country. It simply could not be. Their “failure to warn” was consistent with their beliefs, as was the incidence of asbestos-related illness among those defending the industry and its practices. But because of the power they held over the exposure faced by the employees and consumers, and by the power they exerted over the public knowledge of the very real dangers of asbestos, the unintended consequences were horrific, on a personal level for those who succumbed to avoidable disease, and economically for the companies, their insurers, and the general economy.

Even assuming the very worst, that the leadership of the asbestos industry was indeed rubbing their hands in glee and cackling over their unsavory successes, they were fallible in two ways. One was their inability to foresee the magnitude of harm that would eventually befall their companies, let alone the suffering employees, when the bill finally came due. No cost benefit analysis would have supported the decision, had the true numbers been known. (The partial numbers defy 1930s scale imagination, the final numbers are still unknown.) And second, the standards of corporate responsibility have

¹⁸⁹ Castleman, *supra* n. 13, 598.

in fact shifted over the years, which could not have been anticipated during the depression and war years of 1929 – 1945. The emphasis on workplace safety was not given current levels of official sanction until 1971, when OSHA assumed its regulatory and enforcement responsibilities. In one sense, the nation was experiencing a sort of Maslovian hierarchy of needs, and next to the depression and the war, which were legitimate threats to national survival, worker safety was too high up the pyramid. Only later did it assume more prominent public concern. Then the more modern standards were applied retroactively, to the detriment of asbestos companies. The immortality of the corporate entity exposed it to the higher standards, years after the actual perpetrators were no longer available to face justice.

The perceptions and actions of the asbestos industry were wrong, each in a different sense of the word. Their perceptions were mistaken, from the moment they began addressing a public relations problem, rather than a public health problem. By their actions, they committed a devastating wrong affecting thousands of workers over at least a seventy-year period. The way in which they chose to litigate the claims wronged victims further by delaying just compensation. A further wrong has been done to our civil justice system. Distorted by a volume of litigation it was never intended to handle, many have lost faith in its ability to deliver justice.

CONCLUSION

Asbestos litigation has been described as a tragedy of the commons.¹⁹⁰ It is an example of unintended consequences, as scarce resources, once seen as more than adequate, now prove not to be. Estimates of the costs of asbestos damages have historically been low, though economists now consistently expect the eventual costs to exceed \$200 billion, with about two-thirds of the cost borne by insurance companies and the remainder by asbestos defendants.¹⁹¹ Growing out of the issue of scarcity is an awareness that a line has been crossed, that more harm is now being done than good. Companies now being sued are only tenuously related to the misdeeds of asbestos manufacturers. Though injured claimants remain, they are in a decreasing minority. Asbestos use in America peaked nearly thirty years ago and serious asbestosis is in decline; a 1994 medical textbook describes it as a “disappearing disease”.¹⁹² Cancer deaths linked to asbestos peaked in the early 1990s.¹⁹³ Yet asbestos claims continue to be

¹⁹⁰ McGovern, *supra* n. 12. The metaphor as applied in economics refers to a good being overused by consumers with insufficient interest in maintaining it. The “commons” is overgrazed by herdsmen because none of them own it and therefore none have an interest in preserving its productivity. Another familiar and similar metaphor is the goose that laid golden eggs. The “lesson” is the need to preserve productive capacity to maximize long-term production of the good.

¹⁹¹ Parloff, *supra* n. 5.

¹⁹² *Ibid.*

¹⁹³ Castleman, *supra* n. 13, 785.

filed, in ever greater numbers, and more claims are now pending than have been settled in 40 years of litigation.¹⁹⁴

The reasons for the latest explosion in asbestos claims are discussed previously in the section, “After Amchem/Ortiz”. Virtually all the procedural changes that asbestos litigation has brought about favor plaintiffs, as regard both the likelihood and the amount of a favorable settlement.¹⁹⁵ Many of the strategies employed by asbestos defendants, adopted to clear asbestos liabilities quickly and inexpensively, have served only to encourage further claims.¹⁹⁶ Transaction costs for claimants have gone down dramatically, and jury awards and settlement amounts have risen. Massive settlements through the past three decades have provided plaintiffs attorneys with enough capital to finance additional claims well into the future.

With history and all the incentives lined up against defendants, the likelihood that the matter will disappear on its own is small. McGovern points out that only “coercive” alternatives will resolve a “commons” problem, meaning that cooperation between two of the contending parties in concert against the third will be required, or a legislated solution.¹⁹⁷ The various bills introduced over the years have evolved from blatant bailouts to more serious attempts to meet the fundamental requirements of the principal parties. Yet the political will to reach a compromise remains elusive. Defendants, with perhaps the most to lose, want closure without self-immolation. The uncertainty of future claims is the single largest threat they hope to eliminate. Claimants have become like the

¹⁹⁴ White, *supra* n. 8, 3.

¹⁹⁵ *Id.*

¹⁹⁶ Parloff, *supra* n. 5.

¹⁹⁷ McGovern, *supra* n. 12

brooms in the Sorcerer's Apprentice, beyond the control of the plaintiffs' bar that brought them to life. Bringing them back under control will require a more powerful Sorcerer. Federal courts have global authority, but jurisdiction over only a small fraction of claims. State courts now carry most asbestos litigation on their dockets, but none of them have global authority. The only power the defendants have is that they are the commons, as many plaintiffs' attorneys have belatedly come to realize.

A non-legislated resolution to the asbestos tragedy will come only when the plaintiffs and their attorneys realize that the long-term economic health of the defendants is in their best interests, and when unimpaired claimants realize that their best interests in the future may depend on postponement of their current claims. The resources of the asbestos defendants are finite. Yet they must be applied to the requirements of current claims and to the future growth the companies, if there is to be any future compensation. By filing claims now, unimpaired claimants are diminishing the defendants' ability to pay legitimate current and future claims. Today's unimpaired claimants may find themselves one day disabled, but with seriously depleted compensation available, or none. Restraint today would increase the odds of sufficient future compensation. Yet it is an axiom of economics that a dollar today is worth more than a possible dollar tomorrow. The tragedy of the asbestos commons is that each claimant considers his claim as his due, while collectively the claims all but guarantee that the compensation available will not be sufficient.

A schism has developed within the trial lawyers' ranks over this matter, with attorneys for current mesothelioma victims siding with the defendants over the harm done

to legitimate claims by the “unimpaireds”.¹⁹⁸ A consolidation of those two interests may be the first hopeful sign in years that a resolution could be arranged among the contenders themselves. But another recent trend does not bode so well: some attorneys negotiating mass settlements are now refusing to agree to sign away their clients’ rights to future claims.¹⁹⁹ This suggests that they still see corporate compensation as boundless. Their expansion of the defendant pool to companies with little or no tie to asbestos also suggests that, from the standpoint of many attorneys, responsibility no longer has any bearing on liability.

Recent years have shown that human frailty exists even in the executive suite. Some would argue that it exists especially in that venue. Such weakness is particularly alarming in an age of mass marketing. Poor ethical judgment in a large global business can have a devastating effect on hundreds of thousands of workers and consumers around the world. Spread over decades, as the asbestos saga has been, the potential for harm is incalculable. This paper has discussed only the American experience of asbestos tort litigation, with brief reference to the British, as a health matter with moral roots and economic consequences. Unmentioned are the human costs brought on by British and American companies in the mines and factories of South Africa, and the conditions in the mines and factories still operating in Russia, China, Brazil, and other nations not known for their attention to environmental and health issues. Almost alone among writers on the subject of asbestos, Barry Castleman, throughout his “magisterial”²⁰⁰ book, *Asbestos*:

¹⁹⁸ Ibid

¹⁹⁹ Hensler, *supra* n 180, 1914.

²⁰⁰ Tweedale, *supra* n. 21 In his forward, and very apt

Medical and Legal Aspects, sees asbestos as an ongoing environmental threat, and reflects on our institutional inability to respond to it as such. Once again, the latency of asbestos illness is crucial. Because the risk, at the time of exposure, is so distant, and because the cause, at the time of manifestation, is so distant, mobilizing the collective will for remedial action is easily postponed.

The point was made in an earlier section that the early twentieth-century was not a time that looked for unintended consequences. A century later we are no longer so ingenuous. We recognize the possibility of the unforeseen, and we tacitly agree to accept the annoyances and risks along with the benefits.

Asbestos permitted the industrialization of the western world by controlling the raw heat of the power sources. It protected from fire, insulated from heat, electrical shock, and unwanted sound, and provided the friction necessary to drive and stop trains, airplanes, and automobiles. Lives were prolonged and the quality of life was improved. Though an effort was made in the late 1980s to ban asbestos completely from the United States, the attempt was undermined by, of all things, the politics of free trade.²⁰¹ Americans face daily news reports on newly discovered threats from our food, our beverages, our environment, our lifestyles, and the actions of our fellow citizens. It is small wonder that we are content to coexist with the marginal threat of asbestos in our midst, so long as any unpleasantness is far in the future and its likelihood low. It helps that the producers and their workers are in foreign countries. And it helps that we have an unlimited right to recoup our own losses, with a chance for a jackpot, through the legal system. The crime of the asbestos manufacturers was their attempt to externalize the

²⁰¹ Castleman, *supra* n. 13, 860

costs of asbestos production. Though we are unaccustomed to thinking collectively, we have collectively become as guilty of externalizing the costs of our lifestyle as Vandiver Brown.

The impulse to “punish” Johns-Manville and its codefendants is understandable, though misguided. In 1979, Representative George Miller of California submitted a bill criminalizing the behaviors of upper management in the asbestos industry that had come to light during congressional hearings. Mr. Miller rightly recognized that a corporation is a fiction, and that a corporation, in spite of popular usage, does not do anything except the bidding of those controlling its resources. Indeed, the very purpose of the corporate entity is to concentrate resources for some worthy purpose. The responsibility for the corporation’s actions rests with people, usually identifiable. Castleman discusses criminal sanctions in the concluding chapter of his book.²⁰² There, he goes so far as to suggest that the threat of criminal punishment might have prevented the enormous suffering and costs brought on the by asbestos hazard conspiracy. This paper will take the position that the fraud and deceit of corporate officers was already subject to criminal sanction, and further, that the failing was not legal, but moral.

Deborah Hensler, in the 1985 Rand Corporation study recognized the heroic role played by plaintiffs’ attorneys in bringing the initial claims against Johns-Manville and its codefendants. The risks they took, and the resultant discovery of misdeeds was

²⁰² *Ibid.*, 827-33.

recognized as a “positive side of litigation” in the concluding section of that study.²⁰³

Thirty years after those initial trials, asbestos litigation has become a quagmire in which plaintiffs’ attorneys too often mistake their own interests for those of their clients, much as the corporate officers of asbestos manufacturing companies did in the 1930s, when they concealed clinical evidence from injured employees. The management taken to court is not the management who made the wrongful decisions, the stockholders of the company are not the stockholders who owned that company, and the employees who are laid off due to the restructuring of the bankrupt company are as innocent as the original victims. We seem to have come full circle. The cure, in its way, is as bad as the disease. Because lives were ruined in the past, we are now redressing that injustice by ruining lives in the present. This should not be mistaken for justice.

The question remains whether the example of asbestos injury litigation is an aberration or a harbinger. Without question, well-financed, ambitious trial lawyers will be with us for the foreseeable future. They will continue to pursue their own best interests, and perhaps even the interests of their clients, pursuing those able to pay, regardless of negligence or breach of duty. Asbestos, and tobacco, have enriched some law firms beyond their wildest dreams of avarice. Duty now requires those firms to find other dragons to slay, doing well by doing good. But the asbestos litigation of the past forty years, and the next twenty or thirty years, was and remains truly historic. Of primary importance was the latency of the diseases, affecting assessment of liability and transaction costs. The massive scale of the litigation led to procedural and substantive

²⁰³ Hensler, et al, supra n. 4, 110-12.

expedience that some now criticize as an erosion of standards. The critics have yet to suggest alternatives that will process 600,000 or more claims within the lifetime of anyone now living without sacrificing some elements of due process. The historic period in which the drama unfolded is also relevant to the question, as more fundamental questions of economic viability and national security overshadowed matters of occupational safety.

The latency of asbestos diseases remains the most salient issue, because it influenced all others. Because of long latency, the accumulation of damage was made possible; victims were often unaware of their injury until it had become severe. Because of latency, a general ignorance of the harm of asbestos was sustainable longer than might otherwise have been the case, permitting more people to be unwittingly exposed. Because of latency, identification of the products to which victims were exposed became highly problematic. Because of latency, the eventual manifestation did not force itself as dramatically into the public consciousness as the Great Depression and World War II.

Yet we humans are not accustomed to thinking of unintended consequences thirty to forty years distant. By definition, unintended consequences are not planned and must be handled as they reveal themselves. The asbestos crisis grew slowly, and even those who recognized its threat early on underestimated its scale by orders of magnitude. Consequently, for all the institutional learning that has occurred, we will not be prepared for the “next asbestos” until we understand that we simply cannot remedy all harms. We Americans, especially, have made strenuous efforts to externalize risk through the courts, by making others responsible, and liable, for any misfortune that may befall us. Because we are human, our institutions are imperfect, including our system of justice. We must

eventually recognize that some injustices cannot be remedied and must stand, not as wrongs to be redressed, but as examples not to be repeated.

APPENDIX A

AVERAGE EXPENSES AND COMPENSATION PAID PER CLAIM CLOSED PRIOR TO AUGUST 26, 1982

Item	Dollar Per Closed Claim	As Percent of Total Compensation Paid by Defendants and Insurers	As Percent of Net Compensation Received by Plaintiff	As Percent of Total Expenses Plus Compensation Paid by Defendants and Insurers
Total compensation paid by defendants and insurers	\$60,000	100%	171%	63%
Total defense litigation expense	\$35,000	58%	100%	37%
Total expenses and compensation paid by defendants and their insurers	\$95,000	158%	271%	100%
Plaintiff's legal fees and other litigation expenses	\$25,000	41%	71%	26%
Net compensation plaintiff received after deduction of litigation expenses	\$35,000	59%	100%	37%

Source James S. Kakalik, Patricia A. Ebener, William L. F. Felstner, Michael G. Shanley 1983 *Cost of Asbestos Litigation*
Santa Monica, Calif. Rand Corporation, Institute for Civil Justice

APPENDIX B

Projected Annual Excess Deaths From All Asbestos-Related Cancer in Selected Occupations and Industries, 1967-2027

Industry or occupation	1967	1972	1977	1982	1987	1992	1997	2002	2007	2012	2017	2022	2027
Primary asbestos manufacturing	237	312	385	445	494	51	491	445	367	278	187	114	60
Secondary manufacturing	236	304	403	507	610	659	674	649	584	489	367	252	149
Insulation work	266	374	497	612	705	742	723	652	578	392	279	173	94
Shipbuilding and repair	1,452	1,865	2,337	2,493	2,710	2,451	1,076	1,659	1,256	919	628	401	219
Construction trades	778	1,135	1,641	2,143	2,593	3,004	3,308	3,390	3,191	2,697	1,996	1,243	669
Railroad engine repair	129	146	162	167	147	130	91	54	28	10	2	0	0
Utility services	149	187	230	267	299	312	310	290	254	207	152	102	59
Stationary engineers and firemen	434	527	631	721	816	865	875	819	728	602	449	304	179
Chemical plant and refinery maintenance	205	269	337	404	457	482	472	437	375	301	217	142	82
Automobile maintenance	176	236	304	384	470	524	578	586	576	538	458	346	222
Marine engine room personnel	39	47	56	63	64	60	55	46	38	27	1,912	6	
Totals	4,101	5,402	6,983	8,206	9,365	9,739	9,653	9,027	7,975	6,460	4,754	3,089	1,739

Source: Castleman, 785 (from Nicholson, Perkel, and Selikoff, "Occupational exposure to asbestos Population at risk and projected mortality-1980-2030," Amer J Indust Med 3 259-311, 1982

APPENDIX C

Asbestos-Related Defendant Bankruptcies 1982-2002

UNR Industries	1982	Brunswick Fabricators	1998
Johns Manville	1982	Harnischfeger Corporation	1999
Amatex Corporation	1982	Rutland Fire Clay	1999
Waterman Steamship	1983	Babcock and Wilcox Company	2000
Wallace and Gale Company	1984	Pittsburgh Corning	2000
Forty-Eight Insulations, Inc.	1985	Owens-Corning Corp./Fibreboard	2000
Philadelphia Asbestos Corp.	1986	Armstrong World Industries	2000
Standard Insulations, Inc.	1986	Burns and Roe, Inc.	2001
Prudential Lines, Inc.	1986	G-I Holdings	2001
McLean Industries	1986	Skinner Engine Company	2001
Gatke Corporation	1987	W.R. Grace	2001
Nicolet, Inc.	1987	USG Corporation	2001
Todd Shipyards	1987	E.J. Bartells	2001
Raytech Corporation	1989	United States Mineral Products	2001
Delaware Insulations	1989	Federal Mogul	2001
Hillsborough Holding Company	1989	Swan Transportation Company	2001
Celotex Corporation	1990	North American Refractories	2002
Carey Canada, Inc.	1990	Kaiser Aluminum	2002
Ancor Holdings/National	1990	Harbison-Walker Refractories	2002
Eagle-Picher Industries	1991	A.P. Green Industries Inc.	2002
H.K. Porter Company	1991	Global Industrial Technologies	2002
Cassiar Mines	1992	Plibrico Company	2002
Kentile Floors	1992	Shook & Fletcher	2002
American Shipbuilding, Inc.	1993	Porter-Hayden	2002
Keene Corporation	1993	Artra Group Inc.	2002
Lykes Brothers Steamship	1995	Asbestos Claims Management	2002
Rock Wool Manufacturing	1996	AC and S	2002
M.H. Detrick	1998	JT Thorpe Company	2002
Fuller Austin	1998	A-Best Products	2002

** Note – This list does not include corporations that are asbestos defendants but have filed for bankruptcy primarily for other reasons*

Source Mealey's Litigation Report Asbestos, 17 20, 15 November, 2002

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VITA

Rick Bell was born in Salinas, California, in 1950, before the freeways and while orange groves still flourished. After a side trip to Oregon, he arrived on schedule in Midland, Texas, in January, 1955. A collapsing oil industry made another side trip necessary in 1960, this time to Southern California, where he was witness to the bulldozing of the orange groves and daily concealment of Mt. Baldy by the freeway-induced smog of nearby Los Angeles. It was during these years that Rick realized he did not have a future in professional baseball. He returned to Midland in 1964 and called that city home until he realized, some time in the late 1990s that he hadn't lived there for thirty-five years.

After several false starts, once at Michigan State University and twice at the University of Texas, Rick secured his Bachelor's degree in Photography from Sam Houston State University in 1977. After a brief sojourn in Dallas, Rick and his young wife and child moved to Brownwood, Texas, where Rick soon realized he did not have a future in professional photography, either. Through various twists of fate he and his growing family settled in San Marcos, where Rick is employed in the accounting department of McCoy Corporation, a regional building materials retailer. Change comes slowly to Rick, but having lived in San Marcos since 1981, he's just about ready, in the absence of Midland, to call it home.

Rick's interest in graduate school was inspired by a friend and colleague who pointed out one afternoon that he might actually enjoy returning to school. That prediction has proven correct, mostly.