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Asbestos Litigation in the U.S.: A New Look at an Old Issue

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DB-362.0-ICJ

August 2001

Institute for Civil Justice

This report documents preliminary findings of an ongoing study conducted by the RAND Institute for Civil Justice. It has been peer-reviewed but has not been formally edited.

This study was supported by Institute for Civil Justice core funds.

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Published 2001 by RAND

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PREFACE

The RAND Institute for Civil Justice (ICJ) began analyzing asbestos litigation in the early 1980s. That study was the first to examine the costs and compensation paid for asbestos personal injury claims. It was followed by other research that addressed the courts' responses to asbestos litigation and a number of studies of mass tort litigation in general. This briefing documents the first phase of a new study on asbestos litigation, now the longest-running mass tort litigation in U.S. history. In this study, ICJ researchers are looking at some of the same issues raised in the initial RAND study: How well is the litigation serving the injured workers on whose behalf the claims are filed? What is the balance between the compensation paid out and the costs to deliver it? What economic costs does the litigation impose on the country, and who bears them? Are there strategies for resolving asbestos suits that would be more efficient and more equitable?

This briefing, which documents the first phase of the study, was prepared for meetings with the staff of the Senate Judiciary Committee and the House Judiciary Committee of the U.S. Congress on August 13 and 14, 2001. It offers preliminary answers to these questions, based largely on aggregate data available in published sources and on interviews with participants in the litigation, including plaintiff and defense attorneys, insurance-company claims managers, financial analysts, and court-appointed neutrals.

The next two phases of the study, scheduled to be completed by the Spring of 2002, will provide a more detailed analysis of these and other questions based on RAND's own data collection efforts, a review of the epidemiological literature, an analysis of the consequences of resolving asbestos litigation through bankruptcy proceedings, and consideration of the likely magnitude and character of future litigation.

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Asbestos Litigation in the U.S.: A New Look at an Old Issue

***Preliminary Research Results
August 2001***

RAND INSTITUTE FOR CIVIL JUSTICE

Deborah Hensler, Stephen Carroll, Michelle White, and Jennifer Gross

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Asbestos Litigation in a Nutshell (1)

- **Over 500,000 claimants to date**
 - **Injuries include deadly cancers (e.g. mesothelioma) as well as non-malignant diseases**
- **Typical claimant files against several dozen defendants**
 - **At least 5 firms have had 300,000 to 500,000 claims each**
- **Number of claims filed annually has risen sharply in recent years**
 - **Both mesothelioma and non-malignant claims have increased**

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Problems Associated with Determining the Number of Asbestos Claimants

There is no national registry of asbestos claimants. Most of those who file claims seek compensation from multiple defendants, each of which keeps its own records. Some claims are not filed formally in court as lawsuits. Federal courts report the number of asbestos lawsuits filed, but in recent years most lawsuits have been filed in state courts. State courts do not routinely identify and report annual asbestos lawsuit filings.

Our estimate of the number of claimants is therefore derived from multiple sources. Some defendants report the number of claims pending against them in SEC filings. We derived some data from these forms. When corporations attribute filing for Chapter 11 to asbestos litigation, they often report the number of asbestos claims filed against them in their bankruptcy petitions. We obtained these data as well. In addition, we obtained data from some bankruptcy proceedings that have not yet been completed that show the number of claims received by the debtor before the bankruptcy bar date. Asbestos bankruptcy trusts – entities that are formed to pay asbestos claims post-reorganization – typically report the number of claims filed against them to the court that has jurisdiction over the bankruptcy. All of these records are public, although they are not always easy to locate.

How We Estimated the Number of Claimants

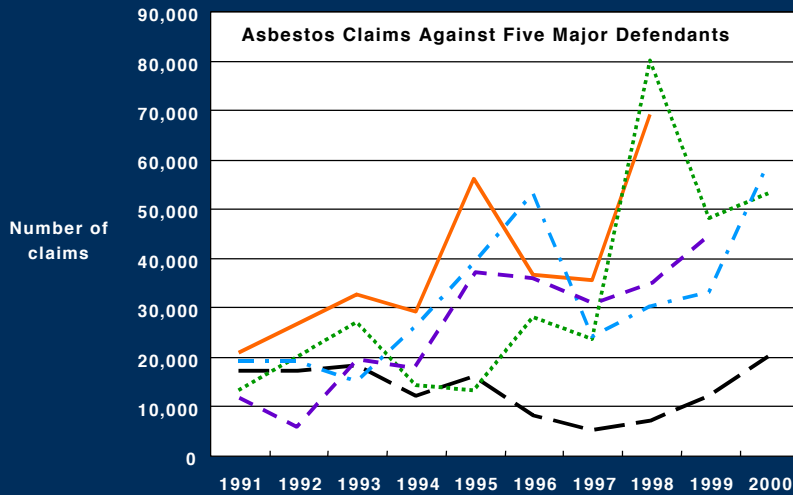
Because claimants typically file claims against multiple defendants, even if one had complete data on the number of claims filed against all defendants (which we do not), one could not simply add all of these claims together to estimate the total number of claimants. Instead, we use the maximum number of claims filed against any one defendant for which we have information as a lower-bound estimate of the number of claimants altogether. It is a lower-bound estimate because all claimants do not file against an identical set of defendants.

We have identified five corporations that reported having more than 300,000 claims at the time they filed for bankruptcy; two of which had more than 400,000, and one more than 500,000. In addition, three bankruptcy trusts that are currently in operation report that they have received, respectively 360,000, 410,000 and 500,000 claims to date.

Although it would be incorrect to add the number of claims against each defendant to arrive at a total number of claimants, it is important to note that because most claimants file claims against multiple defendants the magnitude of asbestos litigation is amplified beyond what it would be in more traditional tort litigation, in which plaintiffs file lawsuits against one or a few defendants.



Annual Claims Filings Have Risen Sharply Since 1990



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Filing Rates over Time

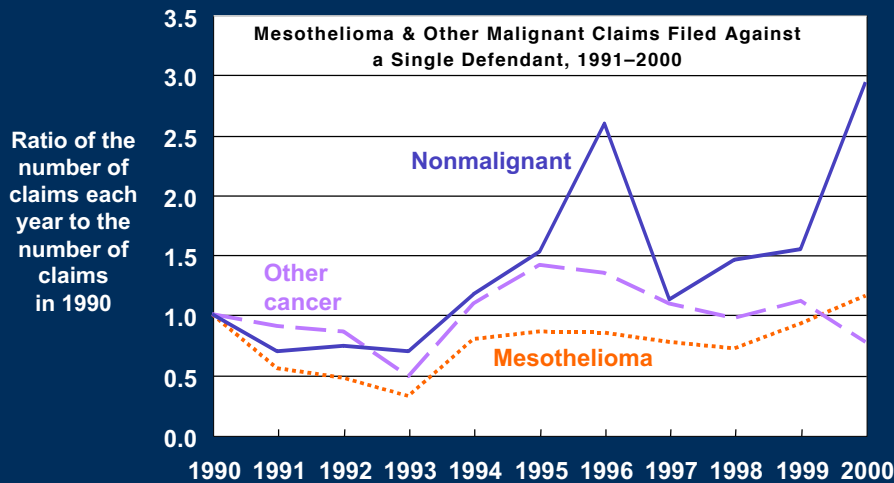
Because there is no national registry of claims or lawsuits and because defendants are differently situated with regard to liability exposure, there is no simple way to calculate longitudinal filing rates. We have located data for five defendants, including a bankruptcy trust, defendants who have entered bankruptcy, and non-bankrupt corporations. We gathered data for three of these defendants from public records. The two other datasets are private but have been shared with other analysts and/or presented elsewhere (see, e.g., Merrill Lynch, 2000). Each of these defendants has a particular posture in the litigation, so we would not expect their experiences to be identical. Nor would we expect their experiences necessarily to precisely represent the experiences of all defendants.

This chart shows filings from 1991-2000 for these five defendants, whose circumstances are quite different from each other. In the 1990s, claims against four of the five defendants increased substantially, with some defendants seeing claims double in a single year. The fifth defendant saw claims drift gradually downward through much of the decade, only to rise again in the last several years.

The sharp year-to-year changes in annual filings illustrate the difficulty of projecting future filings from a few years of data for any one defendant. Over the past decade, the number of claims filed annually against most of these defendants increased substantially. But in some years, the number of filings against one defendant rose sharply, while claims filed against another defendant decreased substantially. Whether the past few years of sharp increases shown in this chart will continue into the future is an open question. Nonetheless, it is clear from our interviews that these recent changes in filing rates have played an important role in shaping attorneys', parties', and business analysts' expectations for the future.



Both Mesothelioma and Non-malignant Claims Have Increased



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Changes in Filings over Time by Injury Category

Obtaining information on the characteristics of asbestos claims over time is even more difficult than obtaining data on annual claims filings. One major defendant shared information with us on the number of claims it received each year from claimants categorized by disease. Although these data are regarded as proprietary by that defendant, they have been shared with other analysts and cited in other presentations as well. Because this defendant has played a very prominent role in the asbestos litigation, it is widely believed that the vast majority of claimants name it among the defendants on their claims. Participants in the litigation whom we interviewed, including plaintiff and defense attorneys and court neutrals, agreed that these are the best data generally available about trends in filings over time by injury category, and that they are generally representative of the distribution of diseases among all asbestos claimants.

To illustrate trends over time by injury category, we computed the ratio of the number of claimants with each disease who filed a claim with this defendant each year to the number of claimants with that disease who filed a claim against this defendant in 1990.

As shown on the chart, in the early 1990s, the number of mesothelioma claims, which most view as the most serious asbestos injury claims, drifted downward. During that period, non-malignant claims continued to rise. Some analysts then inferred that the number of mesothelioma cases would henceforth diminish or remain relatively stable, and attributed the growth in the caseload solely to non-malignant claims, which include claims from people with little or no current disability. But, as the chart shows, the number of mesothelioma claims began to climb again in the mid-1990s. Some of the attorneys we interviewed cited this phenomenon as the most important recent change in the litigation.



Asbestos Litigation in a Nutshell (2)

- **No one knows total amount spent to date to resolve asbestos claims**
 - **U.S. insurers have paid approximately \$21.6B**
 - **Non-U.S. insurers have also paid substantial amounts**
 - **Some major defendants have spent more than \$1B apiece on asbestos litigation to date**
 - **Including covered and uncovered losses**
- **Total ultimate cost is highly uncertain**

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Costs to Date

No one has yet calculated the total amount of money that has been spent to date to resolve asbestos claims. We provide information on some of the cost components on this chart, drawing on publicly available data. We are continuing to investigate costs to date and hope to provide our own estimates of the total costs to date in our final research report.

U.S. Insurers' Costs to Date. Insurance companies are required to list their cumulative net paid losses, including loss adjustment expenses, in their annual statements. A. M. Best, a prominent insurance industry analyst, has collected and collated these data. They report that U. S. insurers have spent about \$21.6B on asbestos claims to date (Altonji et al.,2001).

Projected Distribution of Ultimate Costs. At a meeting of casualty actuaries in May 2001, analysts from Tillinghast-Towers Perrin presented their estimate of the ultimate distribution of costs of asbestos claims (Angelina and Biggs, 2001), which they derived by using a sophisticated model for projecting potential asbestos bodily injury liabilities developed by Cross and Doucette (1997). The Tillinghast analysts estimated that insurers will ultimately bear about 61 percent of the costs of asbestos claims, divided roughly equally between U. S. insurers (about 30 percent) and foreign insurers (about 31 percent). They estimated that the remaining 39 percent will fall to defendant corporations for uninsured losses. Because non-U.S. insurers typically provide excess coverage, we are uncertain whether this projected distribution of ultimate losses would apply to losses to date.

Defendant Corporations' Costs. In their bankruptcy filings and related documents, corporations have reported expenditures (including costs recovered from insurance) ranging from \$450M to \$5B. To date, we have identified five corporations that reported paying more than \$1B in asbestos litigation costs prior to filing for bankruptcy. These data do not always separate covered and uncovered losses.

Total Ultimate Costs

Most analysts would agree that estimating the total ultimate bill for asbestos worker injury claims is very difficult. As indicated above, no one yet has collated comprehensive information on the total amount spent to date to resolve asbestos claims. Nor is there a consensus about the amount of money necessary to pay all claims pending currently or all future claims.

In December 2000, Joseph Cox, a leading asbestos plaintiff attorney, estimated the cost of resolving pending and future asbestos injury claims as \$20-30B (Merrill Lynch, 2000). Mr. Cox's estimates did not include costs to date. In May 2001, Best's analysts estimated the total ultimate cost of resolving asbestos claims to U.S. insurers alone as \$65B (Altonji et al., 2001). In June 2001, Tiillinghast-Towers Perrin analysts estimated the total ultimate costs to U.S. insurers, non-U.S. insurers, and defendant corporations (for uncovered losses) at \$200B (Business Wire, 2001). In November 2000, analysts at Lehman Brothers estimated the asbestos liabilities (including payments for present and future claims) of five major asbestos defendants (both bankrupt and non-bankrupt corporations) to range from \$1.1B to \$9B each (Daley and Castle, 2000).



Asbestos Litigation in a Nutshell (3)

- **At least 41 asbestos defendant corporations have entered bankruptcy**
 - **8 major asbestos defendant bankruptcies since January 1, 2000**
- **Thousands of firms have been sued, including both large and small businesses**
 - **Increasing number of defendants outside the asbestos and building products industry**
 - **Companies in at least half all industries in U.S. have been sued**
 - **Nontraditional defendants now account for over 60% of asbestos expenditures**

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Number of Bankruptcies

Because corporations file petitions for bankruptcy and include their reasons for filing in these petitions, it is possible to determine the number of bankruptcies associated with asbestos litigation from public records. But published counts of the number of companies that have filed for bankruptcy as a result of asbestos litigation vary somewhat. Many corporations include numerous subsidiaries, and some analysts count each subsidiary separately in their total. Our tally counts each corporation once, whatever the number of subsidiaries. Because the litigation has touched so many companies, there are asbestos defendant companies that have filed for bankruptcy for reasons unrelated to asbestos litigation. Some analysts count each of these in totaling the number of “asbestos bankruptcies.” To the best of our knowledge, our tally includes only those companies for which asbestos litigation was the primary reason for filing.

The number of asbestos-related bankruptcies has surged in the last 18 months. Appendix A lists the eight major asbestos defendants that have filed in Chapter 11 since January 1, 2000.

The Spread of the Litigation

In the early stages of the asbestos litigation, claims were generally directed toward a few defendants concentrated in a few industries—primarily asbestos mining, the manufacture and distribution of asbestos insulation and related

products, and the installation of asbestos insulation, particularly in shipbuilding—now often referred to as the “traditional” asbestos defendants. The initial RAND study of asbestos costs and compensation (Kakalik, 1983) found the list of defendants named on asbestos claims included approximately 300 firms.

As the litigation has continued, the number of companies sued has grown dramatically. We have begun to build a list of defendants named in asbestos claims. To date, our list includes more than 1000 corporations, but our interviews with participants in the litigation lead us to expect that it will ultimately number several times that. Defendants on the current list include asbestos mining companies, shipbuilders and other maritime concerns, building product manufacturers and distributors, construction contractors, automotive parts manufacturers, refineries and textile mills, retailers and insurers. While many of these are large corporations with billions in revenues, there are some firms with as few as 20 employees and just a few million dollars in annual sales.

We used the U. S. Dept. of Commerce Standard Industrial Classification (SIC) classification system to categorize these corporations by industry. The SIC system is a classification of firms by type of economic activity. The system uses from a one-digit to a four-digit classification depending on how narrowly the industry is defined. The firms on our current list of defendants fall into 44 different SIC categories at the 2-digit level. The SIC system divides the entire U. S. economy into 82 industries at this level. In other words, the incomplete list of firms we have accumulated to date includes firms that span more than half of the industries in the economy.

Although traditional defendants have seen the largest numbers of claims filed against them, there is reason to believe that non-traditional defendants are paying an increasing share of the costs to resolve asbestos injury claims. An unpublished study of asbestos costs reports that, by the late 1990s, nontraditional defendants accounted for about 60 percent of asbestos expenditures. In contrast, according to this report, in the early 1980s, traditional defendants accounted for about three-quarters of expenditures. This study was performed for a private client by a respected analyst who has had extensive experience in the asbestos area, and whose work was cited to us by plaintiff and defense attorneys alike.



Asbestos Litigation in a Nutshell (4)

- **The future course of the litigation is highly uncertain**
 - **Some experienced attorneys believe that we are “in the end-game”**
 - **Others believe litigation will continue for many more years, expanding to other sectors**
- **Experts’ projections of future claims vary dramatically**
- **Whether there will be money left to pay future claimants—and who will pay—remain open questions**

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The history of asbestos litigation has been characterized by failures to accurately estimate its magnitude, scope, and evolution. Among the participants in the litigation whom we have interviewed to date—most of whom have been involved in it for more than a decade—there is no agreement about whether the litigation is approaching its end or will continue to grow or change in character. In presentations to business audiences and in statements to claimants’ attorneys, analysts have given estimates of the number of claims yet to be filed that range from 500,000 (see, e.g., Merrill Lynch, 2000) to 2.5 million (Austern, June 21, 2001).

A brief summary of the history of the litigation against the Johns-Manville Corporation and the Trust that was established as a result of its reorganization illustrates the difficulty that experienced participants in the litigation have had projecting its future course. This history also illustrates starkly why some participants are concerned about whether there will be funds available in the future to pay compensation to asbestos workers and their families who have not yet come forward.

When Manville first filed for bankruptcy in the early 1980s, some parties challenged the filing, arguing that Manville’s claim that its asbestos liabilities would bankrupt it was spurious. Under the bankruptcy reorganization plan approved in 1986 and finally confirmed in 1988 (*Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff’d in part, rev’d in part*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2nd Cir. 1988)), a Trust was established to

pay all future claims against Manville at their full liquidated value (i.e., the value that claimants arguably would have received from Manville if they had litigated outside the bankruptcy process). The number of future claims was variously estimated then to range from 50,000 to 200,000 (Smith, 1990).

By January 1991, the Trust had received more than 171,000 claims (Smith, 1990), the fund intended to pay all claimants that would *ever* appear was depleted, and Manville was back in the bankruptcy court. After extensive expert analyses, a new plan was drawn up under which the Trust was to pay all claims against Manville that would arise thereafter, but at the much reduced rate of 10 cents on the dollar. After considerable litigation, that plan was finalized and claims processing resumed in 1995 (*In re Joint Eastern and Southern Districts Asbestos Litigation*, 878 F. Supp. 473 (E.D.N.Y. 1995, *aff'd in part, vacated in part*, 78 F.3d 764 (1996)).

Claims filed with the Manville Trust soared in the last half of 2000 and into the first half of 2001. The Trust commissioned several different projections of likely future claim filings. Different consultants, each of whom has extensive previous experience in the asbestos arena, examined the trends in claims filings and the available epidemiological models. In a letter to Manville Trust claimants, the Trust's CEO noted that the consultants now predict that the Trust will receive 1.5 million additional claims and could possibly see as many as 2.5 million additional claims (Austern, June 21, 2001).

In July, 2001, after analyses of these recent filing trends, the CEO of the Trust announced that, pending resolution of any controversy concerning the amount of the pro rata share, the Trust would henceforth pay claims at the rate of 5 cents on the dollar (Austern, July 5, 2001).



Key Public Policy Issues

- How did we get here?
- How well is asbestos litigation serving injured parties?
- What is the balance between compensation paid out and the costs to deliver it?
- What are the consequences of the bankruptcies?
- Are there strategies for resolving asbestos claims that would serve asbestos injury victims and the public better?

The goal of the RAND study is to address these issues

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Asbestos litigation poses challenges for plaintiff attorneys seeking compensation for asbestos injury victims, for defendants who must respond to the litigation while protecting shareholders' interests, for insurers who must cover the losses, and for financial institutions attempting to accurately assess the magnitude of current losses and future liabilities. Because of the number of people exposed to asbestos in the U.S., the injuries they have incurred, the financial losses attendant on these injuries and the ensuing litigation, and the potential economic impact of this litigation, asbestos litigation also poses unique challenges for the civil justice system. The RAND Institute for Civil Justice study is intended to provide objective data and analysis to address the key public policy issues identified on this chart.



Answers to These Questions Are Impeded by Disagreements over Facts

- No national registry of asbestos claims or lawsuits
- Most lawsuits involve multiple defendants, each of which keeps its own records
- Claimants receive money from multiple sources over long periods of time
- Many data sources are not public

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How We Are Dealing with These Obstacles

- **Build on RAND's previous asbestos and mass tort research**
- **Use publicly available data from**
 - **Asbestos litigation reporters**
 - **A.M. Best**
 - **SEC filings**
 - **Bankruptcy petitions**
 - **Selected asbestos bankruptcy trusts**
- **Obtain data from presenters to investment and insurance audiences**
- **Acquire confidential data shared by participants in litigation**
- **Conduct interviews with plaintiff and defense attorneys, insurance-company claims managers, investment analysts, and court-appointed neutrals**

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RAND's previous research on asbestos and other mass toxic tort litigation has been widely cited in the public arena (Kakalik et al., 1983; Kakalik et al., 1984; Hensler et al., 1985; Hensler, 1992; Peterson & Selvin, 1992; Hensler & Peterson, 1993; Hensler, 1995; Hensler et al., 2000). In this briefing, we have drawn on the knowledge we acquired in these previous studies to establish historical and interpretative contexts for new information.

The nature of asbestos litigation and the issues it raises for the business community have had the consequence of generating considerable public documentation on the course of the litigation. These data are published in disparate sources, so collating and synthesizing them present considerable challenges. Much of this briefing is based on our review of such data. Where we have found inconsistencies we have either noted them or have not made use of the data.

In addition, many participants in the litigation have made presentations to various audiences and many financial analysts have presented their own analyses of public and proprietary data. We have drawn on some of these data in this briefing as well, noting that we have done so wherever it is relevant. If the analyses were based on confidential data, we asked the analysts to review their procedures and methods with us. Most of the analysts we approached were willing to discuss their analytic approaches and show us how they arrived at their results, even if confidentiality precluded them from sharing their data with us. We only cite the results of studies that appear to us to employ appropriate analytic techniques.

We are also seeking data for this project that have not previously been shared with independent analysts. In each instance, we specify what data we need and conduct sufficient investigation (for example, comparing information from multiple sources) to assure ourselves that the data are reliable. Occasionally, in this briefing we draw on such data. When we do so, we use only data that we have confirmed with other data or with participants in the litigation.

We have conducted several dozen interviews with key participants in the litigation, including plaintiff attorneys, corporate counsel, outside defense counsel, insurance company claims managers, investment analysts, and court-appointed neutrals. All of these interviews lasted at least one hour and several took considerably longer. The picture of the current state of asbestos litigation that emerged from these interviews was remarkably consistent. Where interviewees had sharply different views of the litigation than others, they noted that themselves and discussed why perceptions differ. All of the interviews were conducted under promises of confidentiality to encourage candor, and we explained the purposes of the study and our general approach to all of the interviewees. As the study progresses, we expect to interview more participants in the litigation, including some of the state and federal judges who have been centrally involved.



Outline

- • How did we get here?
- How well is asbestos litigation serving injured parties?
- What is the balance between compensation paid out and the costs to deliver it?
- What are the consequences of the bankruptcies?
- Are there strategies for resolving asbestos claims that would serve asbestos injury victims and the public better?

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How Did We Get Here? (1)

Widespread occupational exposure

- An estimated 27 million people nationwide, from 1940-1979
- Failure to warn
- Inadequate protection

Many injuries

- Mesothelioma, a deadly cancer
- Other forms of cancer
- Non-malignant diseases

Long latency period

- Up to 40 years

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Because of its excellent fire-retardant capability, asbestos was widely used in industrial and other work settings, as well as in residential settings, at least through the early 1970s. As a result, large numbers of people had at least some degree of exposure to the product. Estimating the number of people who worked over time in industries where there was occupational exposure to asbestos is a difficult task as it requires knowledge of the U.S. population's work patterns over more than four decades.

Mesothelioma, a deadly cancer, is a signature disease for asbestos exposure. Asbestos exposure also causes a variety of other cancers, many of which have other causes as well. In addition, asbestos exposure causes asbestosis, a pulmonary disease which in its most severe stage is seriously disabling and ultimately fatal. People exposed to asbestos also may have clinical signs of exposure without currently manifesting serious impairment or disability.

Certain diseases, such as mesothelioma, can occur even when there has been a relatively low level of exposure. For others, such as severe asbestosis, higher levels of exposure appear necessary. The risk of disease may be exacerbated by other factors, most notably smoking. In the blue-collar industries where asbestos exposure was particularly high, there were high rates of smoking.

The groundbreaking work on asbestos exposure-induced disease among U.S. workers was conducted by Dr. Irving Selikoff at the Mt. Sinai School of Medicine in New York (1982). Litigators still use the work of his colleagues William Nicholson et al. as a standard reference on occupational exposure to asbestos, and Nicholson et al.'s projections of occupational disease due to asbestos exposure (1982) were cited by many participants in the litigation whom we interviewed. Some participants noted that analysts had underestimated the number of asbestos legal claims that would be filed not because Nicholson et al.'s estimates were incorrect but rather because the rate of claiming among those with asbestos-related diseases had climbed dramatically over time. However, some interviewees noted that in recent years claimants also have begun to appear from industries that were not included in Nicholson et al.'s analysis—e.g., the textile industry.

Nicholson et al. identified industries with workers at risk as *primary manufacturing* including asbestos products (such as friction products, pipe and sheet, asbestos textiles, floor tiles, roofing, insulating and other building materials), gaskets, packing and sealing devices, and building paper and building board mills; *secondary manufacturing*, including heating equipment, boiler shops, industrial furnaces and ovens, and electric housewares and fans; *shipbuilding and repair*, and *construction*, including general contractors in residential and non-residential building construction and water, sewer, pipeline, communication and power line construction.

They identified occupations at risk as including asbestos and insulation workers, automobile body repairers and mechanics, engine room personnel in the maritime industry, maintenance employees in chemical and petroleum manufacturing and the railroad industry and stationary engineers, stationary firemen and power station operators. This list of industries and occupations explains why asbestos litigation affects a broad range of U.S. industries and corporations.

The leading texts on the asbestos industry's failure to respond adequately to the evolution of medical knowledge about the dangers of asbestos exposure are Brodeur (1985) and Castleman (1996). It was this failure decades ago that set the stage for the current litigation. Brodeur also depicts the challenges faced by plaintiffs and their attorneys during the early stages of asbestos litigation.



How Did We Get Here? (2)

Statutes of limitation

- Required early filing

Case consolidation

- Reduced transaction costs
- Made filing small claims financially viable

Defendant settlement programs

- Encouraged mass filings

Bankruptcy trust procedures

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The Effect of Statutes of Limitation

States have interpreted their statutes of limitation as requiring that latent injury victims file suit within a few years of when they know or should have known that they were injured. Therefore, as publicity about the dangers of asbestos exposure increased, it was arguably unwise for asbestos workers to delay seeking medical examination and legal representation, lest they lose their legal rights to claim compensation. The ultimate effect was to encourage many workers who were not yet disabled to claim compensation for their current injuries, even when these were modest, rather than waiting until their injuries became more serious (Hensler et al., 1985).

Some courts attempted to establish “pleural registries” that would enable plaintiffs to satisfy statutes of limitation by filing their lawsuits, but delay processing and resolving those lawsuits until the plaintiffs’ injuries had progressed further (Schuck, 1992). But by the time such attempts were made, other strategies for litigating the cases had become so entrenched that these efforts were largely unsuccessful.

Streamlining Case Management

Previous research has described formal and informal court efforts to streamline asbestos case management in an effort to reduce private and public transaction costs (Hensler et al., 1985; Hensler, 1995; McGovern 1986, 1989, 1997; Peterson & Selvin, 1991; Willging, 1985). The efforts of innovative judges to handle their asbestos caseloads efficiently were widely admired and imitated by fellow jurists in federal and state courts.

As the litigation progressed, many defendants chose not to aggressively contest liability but instead negotiated settlements of large numbers of cases with leading asbestos firms. These agreements typically called for settling hundreds or thousands of cases per year at amounts specified in administrative “schedules” that reflected differences in injury severity and other characteristics deemed to affect the trial value of cases. Although such strategies made it likely that defendants would pay some claims that would not have succeeded in court, by reducing their transaction costs, these defendants hoped to minimize their total litigation bill (Hensler et al., 1985).

Bankruptcy trust administrators similarly attempted to develop claims processing procedures that would minimize transactions costs incurred by the trust. Such procedures typically call for minimal information necessary to determine a claimant’s eligibility to collect from the trust and to categorize the claim with regard to severity, which determines the amount of money to be paid (Peterson, 1990; Smith, 1990).



How Did We Get Here? (3)

Global settlements failed

- Multi-district litigation (MDL)
- Class actions (*Amchem, Ortiz*)

Old understandings unraveled

- New plaintiff law firms
- New defendants
- Values of serious injuries soared

Defendants Reassessed Positions

- Access to capital and share value decreased
- Bankruptcies surged
- Litigation spread

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Efforts to Achieve Global Settlements

Most mass tort litigation in the United States is resolved through large-scale “global” settlements. Settlements of multi-district litigation and class action settlements are two approaches to global resolution that have been used in mass torts (Hensler, in press; Rheingold, 1996; Weinstein, 1995).

The multi-district litigation procedure (MDL) is a statutory mechanism (28 U.S.C. §1407) for collecting federal cases that arise out of the same or similar fact circumstances and transferring them to a single judge for pre-trial purposes. The procedure has been extensively used in mass tort litigation, but it was not applied to asbestos litigation until 1991, more than a decade after the litigation’s inception (Hensler, 2000). Some participants in the litigation anticipated that the judge to whom the cases were transferred would help parties negotiate a global settlement of federal cases that might provide a model for resolving state cases as well. After a number of years, some of the parties negotiated a class action settlement of all *future* claims against them under the aegis of the MDL court. That settlement proved highly controversial (Baron, 1993; Symposium, 1995). When the settlement was rejected by the U.S. Supreme Court, and when the Court subsequently rejected a class settlement of other asbestos claims, most parties adjudged that a global settlement of asbestos claims outside of the bankruptcy courts would not be possible (Cabraser, 1998).

Changes in the Dynamics of the Litigation

One of the distinctive features of mass torts is the concentration of the litigation (Hensler & Peterson, 1993). In asbestos litigation, as in other mass torts, a relatively small number of plaintiff lawyer firms represent a large proportion of the claimants, and hence play a significant role in shaping the litigation. Ten law firms together filed 53 percent of all claims filed against the Manville Trust in 2000 (Manville Personal Injury Settlement Trust, 2000). Over time, these plaintiff firms have negotiated agreements with major asbestos defendants that allowed both plaintiff attorneys and defendants to estimate with some degree of accuracy the flow of litigation, transaction costs, and compensation delivery from year to year.

However, participants in the litigation whom we interviewed told us that in the past few years there have been important changes in the organization of the asbestos plaintiff bar, which have had important consequences for the litigation. Some new firms have appeared (many off-shoots of older, more established firms) that have adopted business models that are different from those that have previously dominated the litigation. For example, it appears that there are now a larger number of firms that represent exclusively claimants with mesothelioma and other malignancies. These firms have pursued strategies that are perceived to have enhanced the settlement value of mesothelioma claims. While most of those we talked to believe that current values of these claims are more appropriate than those that were negotiated in the past, the increased value of serious injury claims has increased the financial burden on defendants. In response, some defendants have adopted more aggressive litigation strategies. Some also attributed the entrance of new firms into the litigation as a source of increased filings. In addition, some interviewees said that new firms are emerging that specialize in filing claims against the bankruptcy trusts. They saw these firms as at least partially responsible for the recent surge of claims against the Manville Trust.

Defendants Reassess Their Financial Situation

As asbestos case filings increased dramatically over the past several years, market analysts' concern about corporate exposure to asbestos liability increased. The investment analysts' reports cited in this briefing (Angelina & Biggs, 2001; Daley & Castle, 2000; Merrill Lynch, 2000) illustrate this concern, which was echoed by financial analysts whom we interviewed. Increasing concern diminished some firms' access to capital and share value, and the combination of increased filings and the financial markets' reactions led some corporations to reassess their ability to withstand continuing litigation.

Many attorneys whom we interviewed attributed heightened concern among market analysts about asbestos liabilities to the decision by Owens-Corning Fiberglass (OCF) to file for Chapter 11 in October 2000. Prior to that decision, OCF had seemed to many analysts to be coping well with its asbestos liabilities while continuing to operate its business successfully. In 1998, OCF announced that it would settle 176,000 claims (90 percent of the claims then pending against it) for a total of \$1.2B under a new National Settlement Program. Two years later, when it filed its bankruptcy petition, it had negotiated settlements of 240,000 claims for a total amount of \$2.2B, of which it had paid \$1.1B.

OCF's bankruptcy filing raised concern about the viability of other traditional asbestos defendants. Each new bankruptcy filing has exacerbated that concern. Several participants in the litigation whom we interviewed, including plaintiff and defense attorneys, said that they expect all of the traditional asbestos defendants to be in bankruptcy within the next two years. Both plaintiff and defense attorneys also told us that as one defendant has followed another into chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants.



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To Assess the Compensation System, Several Questions Must Be Addressed

- Is compensation adequate relative to loss?
- Are equally situated claimants treated equally?
- How long does it take to receive compensation?
- What are the effects of bankruptcy on the delivery of compensation?
- Will there be money left to pay future claimants?

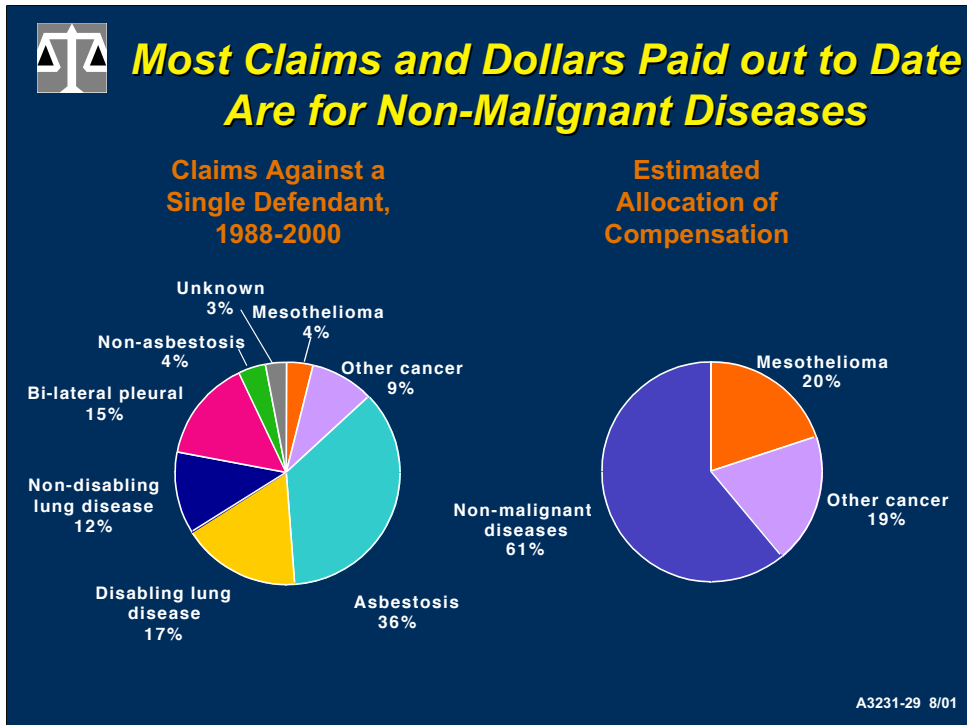
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It Is Difficult To Determine Adequacy of Compensation

- Only plaintiffs and their attorneys know how much individual claimants are receiving (net)
 - Claimants receive money from multiple sources over long time periods
 - Defendants pay different amounts for same injuries
 - There are wide variations by jurisdiction
 - Most of the data required to assess adequacy are not public
- Some aggregate distributional data are available

A3231-28 8/01



Distribution of Claims by Injury

We noted earlier that a major defendant had provided us data that indicated the distribution of diseases among claimants. These data have also been shared with other analysts and cited in other presentations (see notes to chart 4). Because this defendant is named on the vast majority of asbestos claims, the distribution of diseases among those who have claimed against it is widely viewed as generally representative of the distribution of diseases among all asbestos claimants. The pie chart on the left shows the distribution of claims by disease against this defendant.

Distribution of Dollars Paid as Compensation

Most defendants have negotiated settlements that pay specified amounts for different diseases. Generally, mesothelioma claims are paid the most, other malignancy claims an intermediate amount, asbestosis somewhat less than these, and non-disabling lung disease the least. For example, a defendant might pay five times as much for a mesothelioma claim as for an asbestosis claim, and four times as much for mesothelioma as for other lung cancers. The ratio of claim values by disease apparently reflects perceptions of the relative trial values of such cases. The exact value paid for a particular case may also reflect considerations related to the plaintiff attorney (e.g., perceived litigation competence, risk aversion), to the defendant (e.g., insurance availability, cash flow limits), and to the jurisdiction in which the case was brought. (Juries in

California, Mississippi, and New York were cited by interviewees as prone to award high verdicts in asbestos cases.) Even though different defendants will value their liability for claims differently, it appears that many defendants apply similar ratios to claims for mesothelioma, other cancers, asbestosis and other diseases.

The Tillinghast-Towers Perrin results noted earlier (see notes to chart 5) included their estimates of the relative average compensation provided claimants across the country for three disease categories—mesothelioma, other cancer, and all non-malignant diseases combined—which they based on confidential data from selected defendants. We applied their estimates of the relative compensation provided claimants with different diseases to the distribution of claimants by disease category shown in the lefthand pie chart to estimate how the total amount provided to asbestos claimants to date has been divided among the disease categories. The results of these calculations are shown in the pie chart on the right.

A number of the participants in the litigation whom we interviewed, including plaintiff and defense attorneys, told us that the ratio between mesothelioma and other injury claims for non-bankrupt defendants has widened considerably in the past few years. Moreover, some interviewees said that settlement values have increased substantially in particular jurisdictions, and they suggested that filing patterns have shifted over time, in part because of this. Taken together, these comments suggest that over time the relative sizes of different portions of the pie chart shown on the right could change substantially.



There Are Many Sources of Delay

- Payments from non-bankrupt defendants are delayed by cash flow problems and court schedules
- The MDL court has not allowed federal cases to be resolved in district courts
- Payments from bankrupt firms are delayed until a reorganization plan is approved—sometimes takes years
- The most serious cases, however, are now being tried expeditiously

A3231-31 8/01

Much of our information about sources of delay in the system is qualitative and derived from our interviews with litigators and neutrals. These interview data echo concerns that we heard when we conducted asbestos litigation research in the mid-1980s (Hensler et al., 1985). However, there are now new sources of delay in the system as well as some significant successes in speeding case disposition.

MDL Delay

Data from litigation reporters confirm the relative infrequency of remands by the MDL court to the district courts where cases were originally filed. Since the MDL court is prohibited by law from trying cases (*Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes and Lerach*, 423 U.S. 26 (1998)), failure to remand precludes trial of MDL cases.

Bankruptcy Time to Disposition

To date, we have collected information on the length of time from bankruptcy petition to confirmation of the reorganization plan for 11 major asbestos defendant bankruptcies. The average length of time from petition to confirmation for these 11 bankruptcies is six years, but three (National Gypsum, Keene, Rock Wool) took only three years and one (48 Insulations) took 10 years. But these numbers do not accurately portray the length of time it has taken some corporations to move from bankruptcy petition to *paying claimants*. Johns-Manville filed its petition in 1982, which was finally approved six years later, in 1988. (*Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part, Kane v.*

Johns-Manville Corp., 843 F.2d 636 (2nd Cir. 1988)). Payments commenced then but were suspended in 1990 (Smith, 1990) and did not resume again until 1995, 13 years after Manville's initial filing (*In re Joint Eastern and Southern Districts Asbestos Litigation*, 878 F. Supp. 473 (E.D.N.Y. 1995, *aff'd in part, vacated in part*, 78 F.3d 764 (1996))). The Amatex reorganization plan was confirmed eight years after filing of the petition, but the Amatex Trust did not become operational until six years after that, or 14 years from the time the petition was first filed.

Trial Times

Both plaintiff and defense attorneys told us that mesothelioma and other serious injury cases are now moving expeditiously to trial in many jurisdictions. For example, of 146 "extremis" cases that have been set for trial in November 2001 in the New York City Supreme Court (that state's district court), 74 of which were mesothelioma claims, three-quarters were filed in 2001 and most of the remainder were filed in 2000.



Bankruptcies Affect Patterns of Compensation

- **Current claimants lose**
 - Many get tiny fraction of agreed-upon losses
 - May take years for them to receive payments
- **Future claimants may gain**
 - Bankruptcy trusts have fiduciary responsibility to pay future claimants
- **Non-bankrupt firms become target of more litigation**

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Effects on Claimants

The costs of bankruptcy for current claimants can be easily inferred from bankruptcy reorganization plans that establish the “full liquidated value” of claims of varying injury severity and then agree to pay some fraction of that value. Typically, claimants receive a tiny fraction of the estimated claim value. For example, the Manville Trust announced in July 2001 that in order to preserve the trust’s resources to pay future claims, it would reduce the fraction of liquidated claim value it pays to 5 percent (Austern, 2001). Previously, the Trust had been paying claims at 10 percent of their liquidated value. Trusts typically pay lower than liquidated value on current claims in order to preserve funds for paying future claims.

Effects on Non-bankrupt Defendants

Bankruptcy stays litigation against the bankrupt corporation. Hence, as a consequence of the recent wave of bankruptcies, a considerable sum of money for paying current asbestos claims has been “taken off the table”. In response, plaintiff attorneys told us that they are asking non-bankrupt defendants to pay more money on claims filed against them than previously negotiated. In addition, some plaintiff attorneys are identifying new defendants in industries where workers have not previously come forward in great numbers to claim compensation for asbestos injuries. Some plaintiff attorneys are also developing new legal theories on which to base claims against defendants who may not have been sued previously for asbestos injuries. Defense counsel told us that their clients were faced with higher costs to resolve asbestos claims than they had anticipated. As a result, they said, some defendants would abandon previous settlement practices intended to avoid litigation costs and pursue more aggressive—and more expensive—litigation strategies.



Will There Be Enough Money for Future Claimants?

Example of Johns-Manville raises doubts		Compensation as percent of liquidated value
1988	Trust payments began	100%
1990	Payments suspended	(Only exigent cases paid)
1995	Payments resumed	10%
2001	Payment plan revised	5%

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Increases in claim filings and the recent surge of bankruptcies, combined with the failure of efforts to attain “global” settlements in the courts, have heightened some plaintiff attorneys’ concerns about the compensation prospects for future asbestos injury victims. In our interviews, attorneys who represent mesothelioma and other cancer victims were most prone to raise these concerns.

The Manville Trust’s experience reveals the difficulty of assuring that adequate compensation will be available for future claimants. Johns-Manville filed for Chapter 11 in 1982. Its reorganization plan created a trust that would pay future claimants the compensation due them from the Johns-Manville Corporation (*Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff’d in part, rev’d in part, Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2nd Cir. 1988)). The amount due a claimant (in bankruptcy parlance, the “liquidated value of the claim”) was determined by an administrative schedule (termed a “matrix”) established when the bankruptcy reorganization plan was approved. Under the reorganization plan, the Trust was to compensate all future claimants for 100 percent of the liquidated value of their claims against Johns-Manville.

The Trust began to pay claims in 1988. Within two years the Trust’s had paid out so much money that there were serious doubts regarding its future solvency (Smith, 1990). In 1990, Judge Jack Weinstein ordered the Trust to cease payments to all but exigent cases, pending a review of its financial prospects.

In 1995, a new reorganization plan was approved by Judge Weinstein (*In re Joint Eastern and Southern Districts Asbestos Litigation*, 878 F. Supp. 473 (E.D.N.Y. 1995, *aff'd in part, vacated in part*, 78 F.3d 764 (1996)). Although appeals were pending, the Trust resumed payments to claimants at a rate of 10 percent of the liquidated value of the claims. Payments continued at this rate for six years.

The number of claims filed with the Trust grew substantially in 2000 and continued to grow into the 2001. As a result, demands on the Trust exceeded expectations and again threatened its long-term fiscal prospects. The Trust revised its payment plan, cutting the pro rata share of the liquidated value of claims filed with it. It will now pay 5 percent of the liquidated value of the claims filed with it (Austern, July 5, 2001).



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In the 1980s, Transaction Costs Were High

- **Plaintiff lawyers aggressively litigated cases in the face of stiff opposition from defendants**
- **Defendants pursued separate courses, resulting in duplicative costs**
- **Defendants and insurers battled over insurance coverage**
- **As a result, plaintiffs received only 37% of every dollar spent on compensating them**

A3231-37 8/01

Kakalik et al. (1983 and 1984) provide the basis for the widely cited transaction cost figure presented here. Hensler et al. (1985) documents the reasons for the high transaction costs that prevailed during the early phase of asbestos litigation.



By the 1990s, Agreements May Have Lowered Transaction Costs

- Insurance coverage issues seemed to be decided
- Many defendants pursued cooperative strategies, reducing duplicative efforts
- Many plaintiff attorneys negotiated settlement schedules with defendants, reducing litigation
- Defense transaction costs probably decreased
- Plaintiff contingent fees may have remained the same for litigated cases
 - But were reduced for claims filed against bankruptcy trusts

A3231-38 8/01

Since the early 1980s, no independent research organization has measured transaction costs associated with asbestos litigation. We are currently collecting data that we hope will enable us to update RAND's measure of transaction costs to reflect changes in asbestos litigation over time.

The resolution of the insurance coverage battles that characterized the first phase of asbestos litigation, and the strategies for streamlining case management and claims resolution that we described earlier, seem likely to have reduced total transaction costs in the 1990s. By the late 1980s, a group of major asbestos defendants had established the Center for Claims Resolution (CCR) to handle all asbestos-related personal injury claims filed against them (Fitzpatrick, 1990). One of the primary goals of the CCR was to reduce litigation costs. Some of the attorneys we interviewed, including plaintiff as well as defense attorneys, believe that defendants' transaction costs were reduced in the 1990s, but no one shared cost data with us that would enable us to confirm that perception. To date, we have not obtained any data on plaintiffs' transaction costs, although some interviewees believe that contingent fee agreements have not changed significantly. Interviewees told us that the Manville Trust expects attorneys representing people who file claims against the Trust to charge no more than a 25 percent fee.



Recent Developments Are Likely To Drive Transaction Costs up Again

- **Defendants' agreements have dissolved**
- **Non-bankrupt defendants are adopting more aggressive litigation stance**
- **New plaintiff law firms pursuing more aggressive litigation strategies**
- **New insurance coverage battles looming**

A3231-39 8/01

Virtually all of our interview respondents discussed what they see as the recent instability in asbestos litigation. Regardless of their own posture in the litigation, they perceived the changes listed on this chart. Many interviewees noted that the Center for Claims Resolution (CCR), the leading example of asbestos defendant cooperation, has dissolved. At the same time, interviewees told us, many defendants' agreements with plaintiff law firms were under reconsideration or being renegotiated. Plaintiff firms were said to be pursuing more adversarial strategies. And a number of those we interviewed believe that in response to the changing dynamics of the litigation there will be new insurance coverage battles.

No one we have interviewed to date offered us qualitative or quantitative information about changes in transaction costs resulting from these new sources of instability. But all of these factors have significant potential to influence transaction costs, and it seems likely to us that transaction costs will increase, at least temporarily, as a result. Because some of the issues that are now in play may take several years to resolve, such a period of higher costs could be relatively lengthy.



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Direct Costs of Bankruptcy Reorganization Can Be Substantial

- **Transaction costs of bankruptcy reorganization are generally about 3% of firm value**
- **Transaction costs of asbestos bankruptcy reorganization have not yet been investigated and may be higher**

A3231-41 8/01

There has been considerable previous research on the costs of bankruptcy reorganization (Franks and Touros, 1989; Weiss, 1990; White, 1996) but to date no one has studied the costs of asbestos bankruptcy reorganization. The bankruptcies that have been studied involved large publicly traded corporations comparable in size to large asbestos defendant corporations. But reorganization costs for asbestos defendants may be higher than the 3 percent of firm value (defined as book value of debt plus market value of equity) reported in these earlier studies, because none of the studied bankruptcies included massive numbers of tort creditors.

We hope to collect information on the transaction costs of asbestos bankruptcy later in our study.



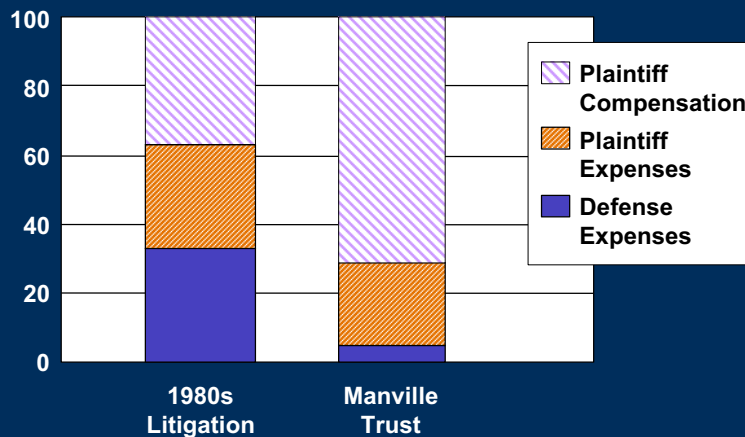
Bankruptcy Also Produces Significant Indirect Costs

- Though it saves firms from involuntary liquidation, reorganization imposes great costs
 - Disrupts relationships with suppliers and customers
 - Impairs (or eliminates) access to credit
 - Distracts managers' attention from corporate operations
- After reorganization, the bankruptcy trust may hold all or most of the firm's equity
- Smaller corporations may shut down, if they cannot afford the costs of reorganization

A3231-42 8/01



But Transaction Costs To Deliver Compensation Through Bankruptcy Trusts May Be Low



A3231-43 8/01

Once an asbestos defendant corporation is reorganized and the Trust assumes its liabilities, claims processing procedures are largely administrative, rather than adversarial. This should lead to dramatically lower transaction costs, and the Manville Trust experience confirms this intuition. From 1994-2000, the Manville Trust has reported annual average operating expenses (not including special expenses associated with tobacco litigation) of about \$10 million, about 5 percent of the total dollars paid out to asbestos claimants plus expenses during this period. This compares favorably with the transactions costs measured by RAND analysts in the early 1980s: At that time, the dollars spent by defendants for fees and expenses were about 37 percent of the total amount paid out to plaintiffs plus expenses (Kakalik et al., 1983). The Manville Trust reports that attorneys representing claimants who file claims against it charge no more than 25 percent, which compares favorably to the 41 percent cost to plaintiffs reported by RAND in the early 1980s. Assuming these expense ratios are correct, people who file claims against the Trust are receiving about 70 percent of the total dollars spent by the Trust to compensate them, compared to the 37 percent RAND reported in the early 1980s. But, of course, the actual amount of compensation delivered is a small fraction of the amount claimants would have received if they had been able to resolve their claims outside of the bankruptcy process.



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Tort Principles Provide Standards for Assessing Compensation System

- **Key principles**
 - **Compensate all individuals who can prove defendants are liable—without regard to severity of injury**
 - **Require defendants who are held culpable to make victims “whole”**
 - **Provide individualized justice**

We pay high transaction costs to satisfy these principles

A3231-45 8/01

Traditionally, the tort system in the U.S. has been viewed as having three objectives: compensation, deterrence and what is often termed “corrective justice” (e.g., Schwartz, 1997; Keating, 2000). In theory, by adhering to the principles on the chart, plaintiffs’ suffering is minimized, defendant incentives to avoid injuring others are properly calibrated, and the sense of aggrievement that results from incurring losses through no fault of one’s own is mitigated. To achieve all these ends, the system relies on individualized procedures. Empirical research suggests that individualized treatment satisfies individuals’ desires for procedural fairness (Hensler, 1998; Tyler, 1990), which, in turn, leads to trust in the justice system.



In Reality, Tort Litigation May Fall Short of These Standards

- **It's too expensive for some individuals with meritorious claims but minor injuries to use**
- **It compensates some seriously injured plaintiffs for less than their full loss**
- **It uses other factors in addition to culpability to determine whether defendants should pay**
- **It only accords individualized treatment to a few**

A3231-46 8/01

Empirical studies conducted by RAND and others over the past several decades have documented the patterns summarized on this chart (e.g., Hensler et al., 1991; Kakalik & Pace, 1986; Shanley & Peterson, 1983). In automobile accident cases, those with minor injuries who are able to find legal representation may receive more than their losses. But when their injuries are product-related or a result of medical malpractice, it is difficult for individuals with minor injuries to find representation because their cases require a significant investment of legal time and expenses and the potential damages do not justify most lawyers making that investment. Those with substantial injuries and viable claims are likely to find legal representation, but their compensation may be limited by a variety of factors, including the defendant's ability to pay and the plaintiff attorney's and their own risk aversion. When cases are pursued to trial, juries may award damages that reflect their perceptions of defendants' resources in addition to their assessment of defendants' culpability or they may make judgments about causation that are scientifically questionable (Chin & Peterson, 1985; Ostrom et al., 1992 and 1996; Diamond, Saks & Landsman, 1998). And most litigants find little in the way of individualized treatment or procedure (Hensler, 1998).



How Does Asbestos Compensation System Measure up? (1)

- **Provides access to all who were injured by asbestos, without regard to severity**
- **But**
 - **Dilutes resources available to pay the most seriously injured**
 - **Jeopardizes compensation of those who discover their injuries in the future**

A3231-47 8/01

Questions about the equity of the allocation of damages to different categories of injured asbestos workers abound. It is widely asserted the plaintiff attorneys who represent plaintiffs with different levels of injury negotiate settlement agreements that “discount” the value of the most serious injury claims in exchange for receiving modest payments for large numbers of non-impaired plaintiffs (Hensler et al., 1985). These practices were sharply criticized in the course of controversy over the proposed class settlements of future claims (*Amchem v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.* 527 U.S. 815 (1999) (Symposium, 1995)). Many of the attorneys whom we interviewed recently reported that the values of the most serious injury claims have risen dramatically in the past few years, suggesting that the allocation of resources among injury categories may be shifting. As a practical matter, however, in a world of limited resources, when there are more claimants seeking funds, the funds are likely to be spread more thinly among them.

How to deal with future claimants has challenged litigators and jurists alike (Cole, 1999). Some analysts and litigators believe that provisions should be made for those who will come forward in the future with very serious asbestos injury claims, even at the price of limiting payment to current claimants with less serious claims. Others argue, conversely, that asbestos compensation should be paid out on a “first in, first out” basis as is generally true of tort compensation and has characterized trust operation. The bankruptcy statute now provides for payment of future claimants under bankruptcy reorganization plans (11 U.S.C. § 524(g)), and the allocation of funds between current and future claimants is hotly negotiated during the bankruptcy reorganization process. Outside of bankruptcy, the question remains controversial.



How Does Asbestos Compensation System Measure up? (2)

- **Forces culpable companies to pay large damages to injured workers**
- **But**
 - **As litigation spreads, less and less culpable companies are being drawn into the process**

A3231-48 8/01

The historical case against asbestos manufacturers has been widely discussed in articles and books about the inception of the litigation (Brodeur, 1985; Castleman, 1996). Companies like Johns-Manville were central to this history, as were several other “traditional” asbestos defendants – that is, those that were sued most frequently through the 1980s. But as the litigation spreads to companies outside the asbestos and building products industries, the culpability of the defendants who are being called upon to pay asbestos victims is more in dispute. In this context, the issue is not *whether* asbestos victims should be able to receive compensation from some entity, but rather *what entity* should fairly be called upon to shoulder the financial burden.



How Does Asbestos Compensation System Measure up? (3)

- In theory, provides individualized process through the tort system
- *But*
 - In practice, only way to resolve claims is through mass processing that allows little or no individual treatment
 - Both in court processes and in bankruptcy claims processes

A3231-49 8/01

Notwithstanding tort theory, in practice tort litigation often offers little individualized treatment in ordinary or mass litigation (Hensler, 1995 and 1998).



Policy Implications

- How to resolve asbestos claims fairly and efficiently is still a significant policy question
- We may have seen *less than half* of all claims that will ultimately come forward
- All of the major asbestos defendants are likely to be in bankruptcy within 24 months
- Current bankruptcies provide a window of opportunity for reviewing and rethinking our strategy

A3231-50 8/01

APPENDIX A: MAJOR ASBESTOS BANKRUPTCY FILINGS

2000 - 2001

<u>Company</u>	<u>Petition Date</u>
Babcock & Wilcox	February, 2000
Pittsburgh Corning	April, 2000
Owens Corning	October, 2000
Armstrong World Industries	December, 2000
G-I Holdings	January, 2001
W. R. Grace	April, 2001
U.S. Gypsum	June, 2001
United States Mineral Products	July, 2001

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